

CHIEF JUSTICE'S COURT
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE B.R. GAVAI
HON'BLE MR. JUSTICE VIKRAM NATH
HON'BLE MR. JUSTICE BELA M. TRIVEDI
HON'BLE MR. JUSTICE PANKAJ MITHAL
HON'BLE MR. JUSTICE MANOJ MISRA
HON'BLE MR. JUSTICE SATISH CHANDRA SHARMA

COURT NO.1
SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS

Civil Appeal No. 2317/2011

THE STATE OF PUNJAB & ORS

Petitioner(s)

VERSUS

DAVINDER SINGH & ORS

Respondent(s)

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1 **TUSHAR MEHTA:** Only for the sequencing, my name and learned AG's name is not there.
2 Because they were not aware which side of the... May we, subject to Your Lordship's
3 permission, My Lord, address Your Lordship for a very brief after Mr. Sibal's conclusion. I
4 won't take more than 10 to 15 minutes.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** Certainly, not an issue. Perfect. I guess the AG
7 will take the same amount, probably.

8

9 **TUSHAR MEHTA:** I think so. Because learned Advocate General has substantially, very
10 ably, assisted Your Lordships...

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** Fair. So, Mr. Sibal, then, I think, Mr. attorney or
13

14

15 **TUSHAR MEHTA:** Yes, yes. The learned attorney is online.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** And then we will hear Mr. Venugopal.

18

19 **K.K. VENUGOPAL:** I will take half an hour, My Lords.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** Certainly.

22

23 **MR. LUTHRA:** Just one request from Telangana, My Lord. I'll just take two minutes.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** Certainly, Mr Luthra. Just make sure, Mr.
26 Luthra, between your other work, just make sure you are here at the right time, though.

27

28 **MR. LUTHRA:** I will not, My Lord... I have very little work.

29

30 **TUSHAR MEHTA:** I have already raised the issue of estoppel against him, My Lord. I did it
31 yesterday....

32

33 **JUSTICE B.R. GAVAI:** That you will have to learn from Mr. Singhvi.

34

1 **MR. LUTHRA:** My Lord, I have told Mr. Mehta that he and I, yin and yang, we have to be
2 together with the same zest to same [UNCLEAR]

3

4 **SHRADDHA DESHMUKH:** My Lord, on a lighter note, as senior counsels are arguing on
5 the vein of affirmative action, may I request for...

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, yes Shraddha. And be prepared for a volley
8 of questions as well.

9

10 **PETITIONER'S COUNSEL:** Your Lordships, I have similar request for the State of
11 Haryana, also.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, ma'am. Of course. A minute - two minutes,
14 we will give everybody. But something new. Okay? Not whatever people have already... Yeah.

15

16 **JUSTICE B.R. GAVAI:** Already, the learned AG and Mr. Farasat has already argued for you.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** What we'll suggest is... honestly, what we'll
19 suggest is, after the main arguments are over, the interveners may give us just a page of
20 submissions. Give the page of the submissions to the Nodal Counsel. Nodal Counsel will put it
21 together and email it to us. So that they remain on the record. So, I think that's the way we
22 should....

23

24 **TUSHAR MEHTA:** I think the other side also would get some time.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** They will get some time. All right now.

27

28 **RESPONDENT'S COUNSEL:** My Lord, [UNCLEAR] I may be permitted to address Your
29 Lordship on a short issue.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** I just said that therefore, you give us on a page,
32 your submissions and give it to the Nodal Counsel.

33

34 **RESPONDENT'S COUNSEL:** I'll address Your Lordship for 5 minutes.

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** Give us on a page. Then it's a matter of record.
37 That's the reason I'm saying.

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RESPONDENT'S COUNSEL: I will do that.

CHIEF JUSTICE DY CHANDRACHUD: Yes. Now, if everybody mentions their appearances, you will be cutting down the time available for concluding the matter. So we'll hear everybody, don't worry. You be here, Mr. Counsel. You be here. We'll hear you. You said you are for the original petitioner. No problem. In *Chinnaiah*.

KAPIL SIBAL: At the outset, I'm not going to repeat any of the submissions that my colleagues have made. I look at it from....

CHIEF JUSTICE DY CHANDRACHUD: Yes.

KAPIL SIBAL: In the 21st century, My Lords, we are looking at issues of equality, inequality, issues relating to how we ameliorate the conditions of those who have been sidelined for centuries. Who have been humiliating for centuries. Who have been ostracized for centuries. I don't think we can ever imagine how they were dealt with in the context of the caste structure that prevailed. So, My Lord, I think that the Constitution makers in 1950 realized this. That is why the notification was issued in 1950 and they also realized that this is not going to stop because they gave the power to Parliament. But this is an evolving situation. They gave power to Parliament to deal with the matter and it's unlikely that this is going to end very soon. It is in that context, My Lord, that we must look at this matter and what we can do quite apart from reservation. The two basic assumptions that *Chinnaiah* made which were wrong is - number one, they considered the Scheduled Castes in the order as a homogeneous group. They assumed that this represents a homogeneous group and I will demonstrate Your Lordships that that assumption is based on no factual data. That assumption is based on no analysis of that data.

JUSTICE B.R. GAVAI: What they hold is that once they find the place in that particular group, then they are all part.

KAPIL SIBAL: Homogeneous... what's the basis of that? In fact, heterogeneity is inherent in that.

CHIEF JUSTICE DY CHANDRACHUD: Actually, the homogeneous nature of all the Entries is for the purpose of designation. That's all.

1 **KAPIL SIBAL:** Absolutely.

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** They are homogenous. In the sense that each one
4 of them is a Scheduled Caste, but your argument is that there is no homogeneity either in terms
5 of the sociological profile, economic development, social advancement, education
6 advancement.

7

8 **KAPIL SIBAL:** Absolutely. So, that assumption in *Chinnaiah* was wrong.

9

10 **JUSTICE B.R. GAVAI:** Common factor is that social backwardness, social and economic
11 backwardness. But the degree is [UNCLEAR] to another?

12

13 **KAPIL SIBAL:** Absolutely. So the assumption of homogeneity in *Chinnaiah* itself is
14 constitutionally flawed. That's the first mistake *Chinnaiah* made. The second mistake
15 *Chinnaiah* made what that it correlated the Presidential Order with reservation. These are
16 the two assumptions on the basis of which *Chinnaiah* was rendered. Neither of these
17 assumptions is valid.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** Because the designation is for the purposes of
20 the Constitution.

21

22 **KAPIL SIBAL:** That's correct.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** It's not only for reservation. Nor is it co terminus
25 with reservation.

26

27 **KAPIL SIBAL:** I'll go a step further. It has nothing to do with reservation. The designation
28 of this class has nothing to do with reservation. Reservation emanates from the plenary power
29 of Parliament, which is in 16(4) for the purposes of employment.

30

31 **JUSTICE B.R. GAVAI:** Because *Indra Sawhney* says is that it can be done even by
32 executive instructions.

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34 **KAPIL SIBAL:** But now, not any more, My Lord, because now its Parliament has to make a
35 law.

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37 **JUSTICE B.R. GAVAI:** What?

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KAPIL SIBAL: Now, Parliament has to make a law to change this Schedule.

JUSTICE B.R. GAVAI: Reservation, *Indra Sawhney* go on to say that it is not necessary that there has to be a Legislation, it can be done even by executive instructions.

KAPIL SIBAL: Maybe so, but that is not part of the notification. That's nothing to do with reservation. My point is, My Lord, you are assuming...

JUSTICE B.R. GAVAI: That may not be correct, because if there is a reservation for Scheduled Caste. So, unless that particular Entry finds in the place in the Presidential Order, that Entry is not entitled.

KAPIL SIBAL: I'll just demonstrate that Your Lordships, wherever they wanted to give reservations, they have given it. My Lord and reservation is part of 16 (4) itself as far as employment is concerned.

CHIEF JUSTICE DY CHANDRACHUD: It's a necessary but not a sufficient condition. Designation under Article 341 is a necessary condition for reservation, but it is not sufficient in itself because having been designated, there is still an enabling power which is conferred upon the Parliament for that matter as Brother says on the executive.

KAPIL SIBAL: Yes, but it's the Union or the Parliament, but the order itself has no reference to reservation, and I'll show that from the chapter itself. But first of all, let me go to the first point, and then I'll come to the second point. These are two assumptions I want to deal with immediately. Now kindly come to PDF. This is Volume IV, PDF page 1386, running page is 1381, Volume IV. I'll quickly demonstrate that Your Lordships. Sorry. 1386, Volume IV. My Lord has it? Your Ladyship has it? Just IV My Lords, Volume IV. Volume IV, page 1386. My Lord, PDF 1386. Looking at Punjab....

CHIEF JUSTICE DY CHANDRACHUD: Mr. Sibal, give me just a second.

KAPIL SIBAL: Your Lordship has that?

CHIEF JUSTICE DY CHANDRACHUD: Yes. Volume IV right?

KAPIL SIBAL: Yes. PDF 1386. You have that chart now, My Lord?

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CHIEF JUSTICE DY CHANDRACHUD: Yes.

KAPIL SIBAL: Now, kindly look at item 38 on the right hand side. *Mochi* we all know My Lord.

JUSTICE B.R. GAVAI: Yes.

KAPIL SIBAL: Now look at 34. *Sapera* means snakes.

JUSTICE B.R. GAVAI: Snake charmers.

KAPIL SIBAL: Nothing to do with the other. Look at My Lords, *Baazigar*. He indulges in acrobatic feats. Then *Batwal*, My Lords. Actually belongs to the *Rajput* caste. He is normally a watchman. So, what you have in a agglomeration of various castes which are put together, who have been humiliated for centuries. The heterogeneity is clear from the table itself. I can go on My Lords. There is one *Gagara*, which has only 268 families in Jagraon, in Ludhiana. There is a *Nat* which is an unskilled labour. The *Koli* is the hunter and a butcher. The *Sansis* My Lords, is a criminal, comes from that class.

JUSTICE B.R. GAVAI: *Koli* would be a fisherman.

KAPIL SIBAL: No, My Lord, originally came as hunters and butchers. That is item, My Lords, 21.

CHIEF JUSTICE DY CHANDRACHUD: So, there is heterogeneity in terms of the preexisting occupation.

KAPIL SIBAL: That's right.

CHIEF JUSTICE DY CHANDRACHUD: In terms of the resources or lack of resources...

KAPIL SIBAL: Exactly.

CHIEF JUSTICE DY CHANDRACHUD: In terms, therefore, of all the indicators of backwardness or development..

1 **KAPIL SIBAL:** Exactly. So, therefore, they are put in the one class.

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** In terms of social status. The status of every caste
4 may not be the same in the social hierarchy as well.

5

6 **KAPIL SIBAL:** Exactly. So, that...

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8 **CHIEF JUSTICE DY CHANDRACHUD:** Between them, some may be a little more
9 advanced, some may be a little less advanced, some may... people may be particularly
10 underprivileged.

11

12 **KAPIL SIBAL:** Correct. Absolutely.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** In terms of other indicators like infant mortality,
15 maternal mortality, fertility rates, which sort of define, broadly speaking, whether there has
16 been progress in the social indicator.

17

18 **KAPIL SIBAL:** Absolutely. Now, that assumption was made by an observation of Justice
19 Krishna Iyer in *Thomas* and that's at page 135. Sorry. Para 135. But let me give you the page.
20 Volume V, page 84. PDF 84. Yes.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** Did Justice Krishna Iyer use the word
23 homogeneity? Or...

24

25 **KAPIL SIBAL:** No, he doesn't use the word homogeneity at all, My Lord. I'll tell Your
26 Lordships what he said. Just have a look at it at Volume V, PDF 84. And this is My Lords, in
27 fact quoted by Justice Hegde and then he comes to the conclusion that 'they are one class.'
28 Now, just see, My Lords, that.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

31

32 **KAPIL SIBAL:** May I read it, My Lord?

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34 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

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36 **KAPIL SIBAL:** 'We may clear the clog of Article 16 (2) as it stems from a confusion about
37 caste in the terminology of Scheduled Castes and Scheduled Tribes. This latter expression has

1 been defined in 341 and 342. A bare reading brings out the quintessential concept that they
2 (their) are no castes in the Hindu fold, but an amalgamation of caste, races, groups, tribes,
3 communities or past thereof, found on investigation to be the lowliest and in the need of
4 massive State Aid and notified as such by the President. To confuse this backwardness,
5 backward most social composition with castes is to commit a Constitutional error, misled by
6 a compendious appellation, so that to protect *Harijans* is not to produce prejudice any caste,
7 but to promote citizen solidarity.'

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** In fact, by using the expression, 'this mixed bag,'
10 the learned judge is really underscoring the heterogeneity of the...

11

12 **KAPIL SIBAL:** Exactly.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** In the latter part, he says -'But as a large
15 backward group, deserving of societal compassion.'

16

17 **KAPIL SIBAL:** That's correct. Now, this is quoted by Justice Hegde and can come to the
18 conclusion that it forms a class. Now, kindly have a look at that. PDF 796, Volume V.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Page 796?

21

22 **KAPIL SIBAL:** Yes. Volume V.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** Para?

25

26 **KAPIL SIBAL:** Para 23. This is where the judgment also is erroneous.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** The way of doing it is that, not to deny they form
29 a class, but they form a class for the purpose of Article 341.

30

31 **KAPIL SIBAL:** That's right. Absolutely.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** So, there may be a class for certain purposes.
34 There may not be a class for all purposes.

35

36 **KAPIL SIBAL:** There is a level of... What should I say, discrimination, which runs through
37 this entire list. But their vocations may be different, their historical... the way they were treated

1 may be different, their.... there may be so many differences. The numbers may be different.
2 The extent of discrimination also may be different. Level of discrimination may be different.
3 For example, My Lords, what we are dealing with are Mazhabi Sikhs and Dalit Sikhs. Now, do
4 you know what the origin of this is? The origin of this? What is the origin of Mazhabi Sikhs?
5 Guru Teg Bahadur, My Lords. His body was mutilated and he brought that body to Guru
6 Gobind Singh. And he was a *Chamar*. The person who brought that body was a *Chamar*. So,
7 Guru Gobind Singh took him in his fold, and therefore, the *Chamars* became part of the Sikh
8 community. Now, what has that got to do with this list? That's the historical context. Mazhabi
9 means faithful.

10

11 **JUSTICE B.R. GAVAI:** There's also an Entry with regard to *Chamars*?

12

13 **KAPIL SIBAL:** Yes.

14

15 **JUSTICE B.R. GAVAI:** In Punjab?

16

17 **KAPIL SIBAL:** That's right. And that's why My Lord, Your Lordships find that the 32% of
18 the population of Punjab, 32% of the population is the list. More than any other state in this
19 Country. Pardon me, *Chuhra*, who was a sweeper.

20

21 **TUSHAR MEHTA:** Bishti.

22

23 **KAPIL SIBAL:** Whatever.

24

25 **TUSHAR MEHTA:** He was a Bishti. [UNCLEAR] Yes. Whatever.

26

27 **KAPIL SIBAL:** There are others also. Within the list also, there are lots of... Anyway.

28

29 **TUSHAR MEHTA:** That happened, My Lord, near Chandni Chowk, that incident.

30

31 **KAPIL SIBAL:** Yes, of course. I'm quite familiar with it. So, now My Lord, just come to this
32 Volume. PDF 796 is the same Volume. Paragraph 23, where he quotes My Lords. The learned
33 Judge quotes... Justice Krishna Iyer. That's the 135 that I read to Your Lordship. Para 23 which
34 I have read to Your Lordships. And then he says in para. 24, the learned Judge - 'According to
35 Justice Krishna Iyer though there are no caste, races, groups, tribes, communities are passed
36 thereof in Hinduism, the President on investigation, having found some of the communities
37 within the amalgam as being lowly as they're in need of massive State Aid including them in

1 one class called the Scheduled Castes. The Secretary, thereof, is that the Scheduled Caste are
2 one class for the purpose of the Constitution.' One is nothing that inclusion is *ex facie*. So I've
3 demonstrated heterogeneity. I've demonstrated that the basis of the judgment is the
4 homogeneity. That assumption is wrong. And on that ground alone, My Lord, the judgments
5 must be... Now... Sorry.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

8

9 **KAPIL SIBAL:** So My Lord, therefore, now if you read 341, now with me, Your Lordships
10 will realize My Lord that, in fact, what Justice Krishna Iyer is saying is consistent with 341
11 itself. Kindly read 341.

12

13 **JUSTICE B.R. GAVAI:** Obviously, that observation that amounts to tinkering with
14 Presidential list in the Presidential Order that doesn't appear to be, because they don't say that
15 if you remove comma, comma or...

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17 **KAPIL SIBAL:** Absolutely.

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19 **CHIEF JUSTICE DY CHANDRACHUD:** Nor are they saying that this particular caste is
20 synonym of whatever the designated caste, include therefore this caste, nor is the State of
21 Punjab, arguing it, that those castes have been designated. These particular castes are
22 synonyms or belong to the same... That you can't do. That even we can't do that. We don't have
23 the power.

24

25 **KAPIL SIBAL:** Exactly. Now, if you read 341 with me, My Lords.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** 341.

28

29 **KAPIL SIBAL:** 'The President may with respect to any State or Union Territory and where it
30 is a State after consultation with the Governor thereof, by public notifications, specify the
31 castes, races or tribes or parts of or groups within castes, races or tribes which shall, for the
32 purposes of the Constitution be deemed to be Scheduled caste in relation to that state or union
33 territory, as the case may be'. Heterogeneity is writ large in 341 itself.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** Anything else on the first point?

36

1 **KAPIL SIBAL:** Just one point. Your Lordship asked the question - 'Why the word 'deemed'
2 is there?'

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Right.

5

6 **KAPIL SIBAL:** I just wanted to answer that because... that is there because...

7

8 **JUSTICE B.R. GAVAI:** That's what learned AG wanted to know.

9

10 **KAPIL SIBAL:** Because My Lord, it can't be changed till Parliament changes it. It's deemed
11 to be. Nobody can tinker with it. That's the reason why 'deemed' is there. Because two says,
12 Parliament may by law include or exclude. Till such time as Parliament passed, it's 'deemed to
13 be'. No State Government, no Central Government can tinker with it after the Presidential
14 Order. So that just to answer that question that arose. Now, My Lords, come to the second
15 point that I was arguing namely, that this has nothing to do with reservation. Now kindly come,
16 with the greatest respect, kindly come to the chapter. How it starts. Special provisions relating
17 to certain classes. That's chapter... part 16. Now, Your Lordships will find in this chapter,
18 wherever the Constitution wanted to provide reservations, it said so. I'm not saying that the
19 Union Government cannot ensure that there are.... That's not the point My Lord. The power
20 the union has, that power the Parliament has. That's not an issue.

21

22 **JUSTICE B.R. GAVAI:** 16(4) doesn't refer to reservation.

23

24 **KAPIL SIBAL:** 16(4) does. I'll show My Lords. That also is a misreading of 16(4). I'll show
25 that presently, My Lords. Just allow me to take this forward.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** 330 expressly says reservation.

28

29 **KAPIL SIBAL:** Yes. Reservation of seats for Scheduled Castes, Scheduled Tribes in the House
30 of the People. Kindly come to 331 or 333, or 2, 'Reservation of seats for Scheduled... in the
31 Legislative Assembly.' Then come, My Lords, to 334, 'Reservation of seats and special
32 representation to cease after certain period.' 335, 'Claims of Scheduled Castes and Scheduled...
33 to services and post.' And then, Your Lordship comes to the 'National Commission for
34 Scheduled Caste,' which is 338, which does this exercise. Because that recommendation is sent
35 to Parliament. Parliament then decides whether to exclude or include. That applies thereafter
36 to National Commission for Scheduled Tribes. And then Your Lordships will see for the
37 backward classes, see, 38... 38(d). And then you come to Scheduled Caste 341. So, the scheme

1 of the Constitution is clear. 341 is meant to identify the heterogeneity of those communities
2 and castes and tribes, who have been dehumanized over centuries. The power of reservation,
3 Your Lordships will find in 16 (4).

4

5 **JUSTICE VIKRAM NATH:** Mr. Sibal, in any State, is there any reservation under 6...
6 Article 330, specifying the communities which have been included in Scheduled Castes, based
7 upon their population ratio or something like that?

8

9 **KAPIL SIBAL:** No. I don't think so.

10

11 **JUSTICE VIKRAM NATH:** Like, Valmiki has 5 seats out of total of 100 seats, supposing
12 coming from Scheduled Castes?

13

14 **JUSTICE B.R. GAVAI:** [UNCLEAR] is only for either Scheduled Castes or Scheduled Tribes.

15

16 **KAPIL SIBAL:** That's all.

17

18 **JUSTICE VIKRAM NATH:** But then, there can also be a quest of classification...

19

20 **JUSTICE B.R. GAVAI:** That also.

21

22 **KAPIL SIBAL:** There is none. There should not be either, My Lord.

23

24 **JUSTICE VIKRAM NATH:** Why?

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26 **KAPIL SIBAL:** For the simple reason, My Lord. The representation of the caste to take
27 forward as...

28

29 **JUSTICE B.R. GAVAI:** But, I think, as a matter of fact, so far as parliamentary elicitation
30 are concerned, even a Scheduled Caste from Punjab can contest in Maharashtra, against the
31 Scheduled Caste...

32

33 **KAPIL SIBAL:** That's correct. Because when we're talking of reservations, we are talking
34 about education and employment. Not representation. No. No. *qua* classes, *qua* different.
35 Your Lordship is right, but the problem there is... they can contest. Each one of them...

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37 **JUSTICE VIKRAM NATH:** Reservation for appointment is...

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KAPIL SIBAL: No. They can contest. They're not prevented from contesting. So that's what the privilege is, only to contest. That's the reason why?

JUSTICE VIKRAM NATH: Higher population will always succeed.

KAPIL SIBAL: That's true. That may be true.

JUSTICE VIKRAM NATH: General, open community, which has a very ...

KAPIL SIBAL: Hopefully, My Lord, that situation will not arise, actually.

JUSTICE B.R. GAVAI: Therefore, there was a debate. Possibly, because Dr. Ambedkar, prior to Poona Pact, he wanted reserved seats, specifically.

KAPIL SIBAL: That's right.

JUSTICE B.R. GAVAI: Ultimately, Gandhiji went on a hunger strike and...

KAPIL SIBAL: Therefore, it was reversed.

CHIEF JUSTICE DY CHANDRACHUD: Reserved [UNCLEAR] and electorate.

KAPIL SIBAL: Yes, it was reversed. So if you look at 16, My Lords, something very interesting emerges. First of all My Lords, let me tell Your Lordships, the difference between 15(4) and 16. Kindly read 15 (4) with me. You will find no mention of reservation.

CHIEF JUSTICE DY CHANDRACHUD: Reservation. It's a special measure.

KAPIL SIBAL: 'Special measures for advancement'. This is important. Nothing in Article.... Let me read the whole. 'The state shall not discriminate against any citizen on grounds of religion, caste, sex, et cetera. No citizenship on grounds of religion, caste, race, caste, sex, place of birth [UNCLEAR] have with regard to access to shops, public restaurants, hotels, places of public entertainment, or the use of wells, tanks, bathing guards. roads, places of...' Now, My Lords, these special provisions under 341 can relate to this.

1 **JUSTICE B.R. GAVAI:** That's what the learned AG argued that... and Mr. Farasat also, that
2 **Chinnaiah** just failed to consider interplay between 341 and 16 (4).

3
4 **KAPIL SIBAL:** I'm not on 16(4). In fact, I'm going to make a distinction between 15(4) and
5 16.

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7 **CHIEF JUSTICE DY CHANDRACHUD:** But 15(4) may also comprehend reservations as
8 well.

9
10 **KAPIL SIBAL:** It does My Lord.

11
12 **CHIEF JUSTICE DY CHANDRACHUD:** But the concept of the special provision for
13 advancement is broader than just the reservation.

14
15 **KAPIL SIBAL:** I agree, but I am only saying advancement...

16
17 **CHIEF JUSTICE DY CHANDRACHUD:** Actually, it's a quota by a special provision, may
18 be quota plus... it could be relaxation, scholarships anything.

19
20 **KAPIL SIBAL:** That's right. The reason why I am saying this...

21
22 **JUSTICE B.R. GAVAI:** 15(4) has got because it was held by this Court that there can't be a
23 reservation.

24
25 **CHIEF JUSTICE DY CHANDRACHUD:** They struck down community based reservation.
26 **Champakam Dorairajan.**

27
28 **KAPIL SIBAL:** There's a reason why I'm making this submission for Your Lordships to
29 consider My Lords, that is there is a symbiotic relationship between 15 and 16. You reach 16
30 only when you are empowered under 15. If you're not educated, you can't get employment, as
31 simple as that.

32
33 **JUSTICE B.R. GAVAI:** For a Member of Parliament, there is no qualification.

34
35 **KAPIL SIBAL:** I'm talking about in the larger context. We're talking about 21st century My
36 Lord. We're talking about the 21st century... because some of them can... because some of us
37 can hold the highest positions in the country without being... So, that's another matter. Some

1 of us have reached corporations, and manage cooperations without necessarily being fully
2 educated. That's not the point. The point is, My Lord, when you're talking about this section
3 of society there's a symbiotic relationship.

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** We must recognize that the Constitution not
6 describing qualifications, just property, education, gender. This was an Article of faith and it
7 was a very visionary provision, because ours was one of the first Constitutions. We did not
8 make your Right to contest an election or to hold electoral conditional on...

9

10 **KAPIL SIBAL:** I agree entirely.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** Gender, a property or educational qualification.

13

14 **KAPIL SIBAL:** I'm with you on that. I'm arguing something different. What I'm saying is, if
15 this class of people that you call a class, if you don't empower them under 15, you're not going
16 to get representation under 16.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** In that sense, 15 as you said, they share a
19 symbiotic relationship because unless you create the foundation for employment, you don't
20 get employment. You need a qualified workforce to be...

21

22 **KAPIL SIBAL:** It's only in that... it's in that limited sense then I'm talking about. That's
23 nothing more than that. Nothing more than that. Now, if you look at 16 (4). Now, in this
24 context it doesn't also talk about Scheduled Caste/ Scheduled Tribes. But if you go to 16 (4)
25 (a), it talks of Scheduled Castes/ Scheduled Tribe. That's right. So, if you are not included in
26 16(4), how do you get reservation and promotions? 16(4) has to include Scheduled Caste/
27 Scheduled Tribes because they are backward, they come within the genus of backwardness.
28 So, 16(4) is an answer, 4 (a) is an answer that 16 (4) includes. In the Volume IV(a) that I have
29 uploaded. IV(c). Just see My Lords. I've given to Your Lordships in Volume IV(c) page 13, PDF
30 13. There are various Acts that have been passed which is why 341 and 15(4) allows for
31 advancement through various legislative or executive measures.

32

33 **JUSTICE B.R. GAVAI:** The reservation could be one of them.

34

35 **KAPIL SIBAL:** Yes, reservation is one of them, and it's integral. I am not saying...

36

37 **CHIEF JUSTICE DY CHANDRACHUD:** The universe is much wider,

1
2 **KAPIL SIBAL:** Much wider. So therefore, I've given some of the... My Lords, you have the
3 Karnataka Scheduled Caste/Scheduled Tribes, Prohibition of Transfer of Certain Lands
4 Amendment Act. We have Scheduled Castes/ Scheduled Tribes, Prevention of Atrocities Act.
5 There are all kinds of. You have the Protection Of Civil Rights Act of 1955. All kinds. Therefore,
6 I just wanted to... and when we look at reservations this will never end. This is an unending
7 exercise, that we are going through as a Nation. The reason is very simple, My Lords, that
8 unless 15(4), unless you advance under 15(4), you'll not go to 16(4). So if you look at My Lords,
9 Punjab and I'm not going to the numerical of it, but the fact of the matter is that the total
10 population of these is about 2 lakh 80 thousand. Government posts is 2 lakh 80 thousand
11 approximately. I'm just giving Your Lordships.

12
13 **JUSTICE B.R. GAVAI:** Of Mazhabi Sikhs?

14
15 **KAPIL SIBAL:** No, total Government posts. The Mazhabi Sikhs and Dalits are about 32
16 Lakhs. Total number of posts 2,80,000. Out of that My Lords, 25,000 goes to Scheduled. 25%
17 goes to these classes, backward classes. Of the 25%, 50% comes to Mazhabi and Dalits.

18
19 **JUSTICE B.R. GAVAI:** Mazhabi and Valmikis.

20
21 **KAPIL SIBAL:** And Valmikis. 50% come to Valmikis, and I am told My Lords, how many
22 seats have been actually... most of them are not occupied.

23
24 **CHIEF JUSTICE DY CHANDRACHUD:** And it's preferential and so it goes to anybody
25 else.

26
27 **KAPIL SIBAL:** Yes, it goes to anybody else. Most of them are not even occupied. What does
28 that tell you? What does that tell you? And that's very important. I want Your Lordships to
29 actually mention it.

30
31 **JUSTICE B.R. GAVAI:** That the posts are not unoccupied.

32
33 **KAPIL SIBAL:** They will give you the data. They have asked the State.

34
35 **JUSTICE B.R. GAVAI:** Maybe there is no adequate representation insofar as Mazhabi Sikhs
36 and Valmikis are concerned.

37

1 **KAPIL SIBAL:** No, the others also. In fact, I've got some data, but I've asked the State.
2 They'll give you the data. I've asked. By this evening, we'll get that data.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Therefore, your point that unless there is
5 educational advancement under 15 and social advancement.

6

7 **KAPIL SIBAL:** That's right.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** 16 remains a teasing...

10

11 **KAPIL SIBAL:** There better. There'll be cases after cases on the same issue for times to come
12 and if you have... you can have Kasturba Gandhi schools for girls, why can't you have schools
13 for Mazhabi Sikhs or these communities, not just for everybody, that's the way forward for the
14 nation. You don't empower them and then you keep on fighting that there are not enough
15 people in promotion.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Well, I guess...

18

19 **KAPIL SIBAL:** I beseech your Lordships, but this is an area. Your Lordships should say
20 something.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** Anything further Mr. Sibal now?

23

24 **KAPIL SIBAL:** Yes. Now My Lords, just my written submissions, and I'm done, this because
25 I don't want to take... Volume I(b), PDF page 29. where is I(b)? I'm not going to take Your
26 Lordships because there's no time. Just come to the page 54, para 54, PDF 27. Just a quick
27 look at that. Your Lordships will see that para 54....

28

29 **JUSTICE B.R. GAVAI:** PDF?

30

31 **KAPIL SIBAL:** PDF 27. Running page 26. It says -'a)...' small paragraph. 'a) Study of Punjab
32 Pastan in 1883 found Mazhabis belonged to the Chuhra caste and were primarily scavengers
33 and sweepers. As per the report of the Evaluation Committee on Welfare regarding welfare of
34 SC so and so and so. For a period commencing 15th August '47 dated '65 to '66, Mazhabis had
35 a total population of 664,000 by Valmiki is a total population of so and so. Said report also
36 found the social conditions of scavengers were awfully.... deplorable. They didn't even have
37 proper access to utensils, let alone housing. They had meagre income were forced to do

1 scavenging despite working from dawn to dusk. Report also noted that educationally, they
2 were extremely backward. Even more,...' The literacy rate is around 41% . So, all I request Your
3 Lordships is read through this, please, because I don't want to waste your time. This will tell
4 you the situation that we are in and I'm deeply obliged. I don't want to repeat anything.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you, Mr. Sibal. Thank you. Mr. Solicitor?

7

8 **TUSHAR MEHTA:** I think only 10-15 minutes.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** [UNCLEAR] to that...

11

12 **GOPAL SANKARANARAYANAN:** No, Mr. Venugopal was on screen.

13

14 **TUSHAR MEHTA:** Mr. Venugopal should argue first.

15

16 **GOPAL SANKARANARAYANAN:** No, no. I am sorry. He was on screen. He was supposed
17 to go next, but he has said there's been a bereavement in my family. So he said that I could go
18 before him. Both him and Mr. Nidhesh Gupta would have been kind enough to say that. I just
19 wanted to inform Your...

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** Certainly. You have to leave the court.

22

23 **GOPAL SANKARANARAYANAN:** Because you have an order, that's why...

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** Certainly.

26

27 **KAPIL SIBAL:** Just one issue *Indra Sawhney* .Paragraph.. note it, My Lord, please. PDF
28 689, paragraph 778.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Just one second.

31

32 **JUSTICE B.R. GAVAI:** *Indra Sawhney*. Volume?

33

34 **KAPIL SIBAL:** Volume V. PDF page 689, paragraph 778. They explain as to Why in 16 (4),
35 the word 'class' is used and not caste. They explain. I'll just read it. 'Indeed, there is a very good
36 reason why the Constitution could not have used the expression caste or caste in 16 (4) and
37 why the word class was a natural choice in the context. The Constitution was meant for the

1 entire country and for all time to come, non-Hindu religions like Islam, Christianity and Sikh
2 did not recognize caste as such, though, as pointed out, here and above caste did exist, even
3 among those religions on various degrees. Further, a Constitution is supposed to be a
4 permanent document expected to last several centuries. It must surely have been envisioned
5 that in future many classes may seek up the test to backwardness, requiring the protection of
6 16(4). It therefore follows that from the word use of the word 'class' in 16(4), it cannot be
7 concluded...' Therefore, judges say the word 'class' in 16(4), in our opinion, is used in the sense
8 of 'social class', and not in the sense [UNCLEAR]. Deeply obliged.

9
10 **CHIEF JUSTICE DY CHANDRACHUD:** We will have a look at it. Thank you Mr. Sibal.
11 Mr. Sankaranarayanan... Mr. Attorney, Mr. Sankaranarayanan... there's been a bereavement
12 in his family, so he has to leave. So, can we hear him for ten minutes or so, and then we will...

13
14 **TUSHAR MEHTA:** He needn't request me for that. Of course, he can.

15
16 **GOPAL SANKARANARAYANAN:** May I please, My Lords? May I just start expressing my
17 gratitude to all the seniors who should have gone before me, who have been kind enough to let
18 me go before them. I'll just keep it very brief. There are just 4 points that I want to make. If
19 Your Lordships would be kind enough to have Volume IV (b). B for Bombay.

20
21 **CHIEF JUSTICE DY CHANDRACHUD:** What's the first point that you would make? So
22 that will make...

23
24 **GOPAL SANKARANARAYANAN:** The four points are these. First, that in identifying the
25 Scheduled Castes and Scheduled Tribes, a bit of a historical context is necessary because
26 eventually we're talking about how you will classify within these groups for the purpose of
27 giving them measures. So, the historical context will broadly show you how they first come to
28 be identified. Why are they forever called Scheduled Castes? Where does that Scheduled come
29 from? It comes from the Government of India Act, 1935 and there's a background behind it,
30 starts with a census in 1891. I'll briefly touch upon that. All of that is in Volume IV (b). The
31 second... This will also briefly touch upon that question that fell from the Bench yesterday
32 about why Tribes, the word, is used while defining Scheduled Caste.

33
34 **JUSTICE B.R. GAVAI:** In 341 also.

35
36 **GOPAL SANKARANARAYANAN:** Yes. Why is it used there as well as in 366. In both
37 places Scheduled Castes including Tribes. Why does that happen? The second is that the

1 Constitution and its approach towards Scheduled Caste and Scheduled Tribes. You'll find that
2 it was a very, very important and integral part of our Constitution making starting from the
3 **Poona Pact**, starting from many other big leaders, both from the Dalit Community and
4 outside, who are responsible for ensuring that many provisions of the Constitution were
5 infused with this and taking steps, Article 15, which has provisions which comes from the
6 **Poona Pact**. Article 17 and its abolition, exploitation provisions in 23, all of these along with
7 15 and 16. Yes, of course, that's what we keep dealing with. But we must draw small distinction
8 between 15 and 16 which are provisions, which are not automatic; which don't immediately
9 give a right to a member of the backward community. It is for the State to make a law under
10 15,16 if it so wishes. So, 15, 16 are enabling provisions. 330, 332 and the provisions dealing
11 with Municipalities and Panchayats, give them a right. So, how that started and that context
12 under the Constitution will perhaps help, I think, this Bench, in looking at the context in which
13 we are arguing this case, because in my view, at least, my submission is that this
14 subclassification is to be done at the end when the enabling provision is being activated. It is
15 at that end that you decide, while dealing only with 15,16. That subclassification cannot be...
16 And I think it came in the discussions earlier today, in 330, 332, et cetera. That can't be done.
17 It's only 15 and 16.

18

19 **JUSTICE B.R. GAVAI:** Or the Panchayat Raj and Municipalities

20

21 **GOPAL SANKARANARAYANAN:** Yes. Or the Panchayats and Municipalities. That's the
22 second limb of the submission. The third, it's been touched upon by Mr. Sibal. I won't spend
23 too much time on it. That error in **Chinnaiah** while looking at the **Thomas**, paragraph of
24 Justice Krishna Iyer. In fact, I'll make this point right away. It's just that this is an editorial
25 intervention, an unnecessary editorial intervention in the SCC Volume which has caused this
26 confusion. What exactly happened is in **N.M. Thomas**, Justice Krishna Iyer uses the word
27 'they.' 'They.' He uses that to refer to the various groups, et cetera, who are the Dalit
28 community. He says that 'they' aren't part of the Hindu groups. Unfortunately, when the editor
29 published in SCC this judgment within brackets it put 'sic' 'sick,' 'their'. Now, that 'their' is
30 treated by Justice Hedge in **Chinnaiah** to mean therefore, complete homogeneous group.
31 They and 'their' made a big difference. I'm just making the submission. My Lordships may see
32 those two paragraphs, but I don't want to spend too much time on that. And finally, there are
33 a few questions that fell from Your Lordships yesterday. I just want to address each of them. I
34 think there were some doubts that Your Lordships have. So, I'll just do that briefly. If Your
35 Lordship, the first main limb is going to be the first two. IV (b), Volume IV(b), b for Bombay,
36 of the compilation and I'll quickly go through that.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** Editorial mistake can sometimes cause very
2 grave blunder. In fact, when I wrote the seven judge judgment on the Arbitration Act, it was
3 an editorial blunder in one of the private publication which was handed over to the Bench
4 which pointed out that a particular provision was brought into force when it was exactly to the
5 contrary. So, we noticed that and corrected the error in seven Judges.

6

7 **GOPAL SANKARANARAYANAN:** So if I can trouble Your Lordships with Volume IV(b),
8 for b for Bombay. I'm sorry. Yes.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** Where is the fourth? Volume IV(b).

11

12 **GOPAL SANKARANARAYANAN:** IV(b). B for Bombay.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** That is the fourth point?

15

16 **GOPAL SANKARANARAYANAN:** No, this is a Volume. For my first point, I'm just taking
17 Your Lordship to the compilation. Compilation, Volume IV(b).

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** Volume IV(b).

20

21 **GOPAL SANKARANARAYANAN:** Yes. IV(b) My Lords. If Your Lordships will take the
22 first page. That's the census report of 1891. Your Lordships have that? Census. That's page 2
23 PDF as well as running page,

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** That is Dr. Ambedkar foundation. That is
26 writings and speeches.

27

28 **GOPAL SANKARANARAYANAN:** Volume IV(b), B for Bombay?

29

30 **JUSTICE B.R. GAVAI:** Dr. Ambedkar writing and speeches chronology of event.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** Perhaps the Nodal Counsel...

33

34 **GOPAL SANKARANARAYANAN:** No, I've been told. No. We have downloaded it as
35 Roman. It's Roman IV(b).

36

37 **CHIEF JUSTICE DY CHANDRACHUD:** Roman IV(b).

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GOPAL SANKARANARAYANAN: For others also it census report I'm sure. Sorry if there is...

CHIEF JUSTICE DY CHANDRACHUD: Roman IV(b).

GOPAL SANKARANARAYANAN: The one Your Lordships are referring to is IV(a).

CHIEF JUSTICE DY CHANDRACHUD: IV(b).

GOPAL SANKARANARAYANAN: I'm sorry. Then would Your Lordships check IV(a). Because we have all been told that..

JUSTICE B.R. GAVAI: Also has some reference to the Norway incident which Mr. Farasat has yesterday mentioned...

GOPAL SANKARANARAYANAN: Okay, I'm sorry.

CHIEF JUSTICE DY CHANDRACHUD: IV(a) is Constituent Assembly debates, et cetera, et cetera. The Tyranny of Merit, Michael Sandel. Meritocracy Trap...

GOPAL SANKARANARAYANAN: Let it be. I'll just address them. We checked to the Nodal Counsel. He said it's been uploaded. If it's not. I'll just. I'll just anyway, address Your Lordships then. It's going right now? They are just uploading it. I'll just address Your Lordships, I don't want to take time. I'll just briefly tell Your Lordships of what it is. There is an 1891 census report. It was the first census report. Now, that census report went into a detailed enumeration. At that point of time, what they did is they went through occupations. Because throughout the 19th century, the British had come up with many reformist processes from their end as far as the Hindu community largely was concerned. Your Lordships know everything with reference to Bentinck reforms, et cetera. But towards this end, they wanted to find out what the various occupations were, because they found that within the large Indian communities you would not have intermarriage. You would have people living on the edges, not allowed to share water, not allowed to eat, et cetera, together. And they looked at the various occupations because many groups were being excluded completely from the occupations. So occupation based Census, is this one of 1891. And this provides for the manner of the enumeration, the classification of the occupation and they specifically say that with reference to these, what they came to refer to as depressed classes, that's the phrase that they

1 use to use then, until it was dropped in 1935, The depressed classes. They said that there were
2 many even within the Rajput and the Jats. They didn't look at them as castes. They looked at
3 them as tribes. That is where My Lords, the notion of tribes, for the purposes of the depressed
4 classes. We are not right now talking of the Scheduled Tribes. Scheduled Castes. With
5 reference to them. They referred to them as tribes and they mentioned community wise. The
6 various groups which are dealt with, which includes the various tribes and they... divide them
7 into various classes. Class (VII). Class (VII) are known as the menials. Those are the ones,
8 today, who have been come to be described as the Scheduled Caste. This is stage 1. 1891. The
9 next one is 1930, which is the Indian Statutory Commission, which goes in detail into these
10 depressed classes. The phrase 'depressed classes' eventually came from a report of 1918 which
11 became a part of the Montagu-Chelmsford reforms. But, they referred to... they used the
12 phrase, employed the phrase depressed classes'. They looked at these statistics from previously
13 and said -'nearly 20% of the population belong to these classes.' They say that - 'These classes
14 are partly functional and partly tribal.' And they mentioned the various types of disabilities
15 that these groups have been suffering over a period of time. The 1931 census is the third in this
16 sequence, and it was carried out by famous anthropologists at that time, Mr. Hutton. And he
17 says... for the first time, he refers to 'primitive tribes.' This is where the concept of Scheduled
18 Tribes come in. They say that there are many tribes... because the exploration of India for the
19 British census takers was taking time. So, they reached Nagaland, Arunachal, et cetera, and
20 discovered many tribes which are nomadic or in jungles and forests, et cetera, and they
21 referred to them as primitive tribes who haven't really come in contact too much with society.
22 And they referred to them. 1931 is the first time that you find that there are these primitive
23 tribes as well. This is for the purpose of the identification. And they shift in 1931 from
24 depressed to referring to them as the ones formally known as 'untouchables' and say that we
25 shall refer to them as a 'Scheduled Caste'. Now the reason why Scheduled Caste is, that in
26 Government of India Act 1935, they eventually laid down that for representation in the Federal
27 Legislature, there would be a 1st Schedule to the Government of India Act, which would
28 provide how the various communities were going to be represented.
29 Now that, I think they're just transferring it, that is the one thing I'd like Your Lordships to
30 see. Because all these communities that you find... where did in 1950 did the President
31 suddenly get this list? He got this list from the 1st Schedule of the Government of India Act
32 1935. And we continue to refer to it as Scheduled Caste and Scheduled Tribe because of the
33 Schedule in the 1935 Act. Nothing to do with the Constitution itself.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** Right.

36

37 **GOPAL SANKARANARAYANAN:** It's come? Can Your Lordships now see it's on screen?

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CHIEF JUSTICE DY CHANDRACHUD: Yes.

GOPAL SANKARANARAYANAN: Yeah, I can see that. If I can trouble Your Lordships... I've told Your Lordships, the first, that's the 1891 census report. Then the next Statutory Commission Report... there are page numbers. I'll give that to you in a single note, My Lord, because, I want to keep it short. And then it's 1931 census and then the Government of India Act 1935. If Your Lordships would be kind enough to come to page 58. That's where the Act starts.

CHIEF JUSTICE DY CHANDRACHUD: Why don't you do this, Mr. Sankaranarayanan?

GOPAL SANKARANARAYANAN: Yes.

CHIEF JUSTICE DY CHANDRACHUD: Today you have to leave the court, but you can add to your submissions just an addendum and make sure it goes into our copy.

GOPAL SANKARANARAYANAN: I'll do that.

CHIEF JUSTICE DY CHANDRACHUD: Then you can also relabel this particular compilation as volume whatever.

GOPAL SANKARANARAYANAN: Yes.

CHIEF JUSTICE DY CHANDRACHUD: You can give us a two page note as the evolution.

GOPAL SANKARANARAYANAN: I'll do that.

CHIEF JUSTICE DY CHANDRACHUD: And I think that will...

GOPAL SANKARANARAYANAN: This is why I'm trying to keep it short. I'll just highlight what I'm saying. Just for a minute, if I can trouble Your Lordships only with, of this volume, page 185. This is the 1st Schedule. Your Lordships can see that. It's marked. It's the 1st Schedule to the Government of India Act. And in this, entry is 4, 8, 18 and 20. Your Lordships may note that. Entry 4, for example, and I'll just read to Your Lordships, to each Governor's province, Chief Commissioner's province and community specified in the 1st column of division, one of the table, there shall be allotted the number of seats, specified in the 2nd

1 column, opposite to that province or community, and of seats were allotted to Governor's
2 province or a Chief Commissioner's province...

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Was the expression 'Scheduled caste' defined in
5 the...?

6

7 **GOPAL SANKARANARAYANAN:** It is defined in 26. But 4,8, 18, 20 refers to Scheduled
8 Caste and 26 defines Scheduled Caste. So just... It's the exact same definition that you find
9 now in the Constitution of India. 26. Can they go to? Can you scroll down? 26. That's it. I'm
10 sorry. That's. At page 189. PDF 189, in the middle of 189. Yes. 'The Scheduled Caste means
11 such castes, races or tribes or parts of, or groups within castes, races or tribes, being caste
12 races, tribes, parts of groups which appear to his Majesty in Council to correspond to the
13 classes of persons formerly known as the 'depressed classes', as his Majesty in Council may
14 specify them.'

15

16 So, this is copy pasted effectively and put in the Constitution. Immediately after this is the
17 Scheduled Caste Order of 1936 by the King and Council, which is at page 253. Very interesting,
18 the previous year, 1935 Government of India Act is by George, the Vth. This is by Edward who
19 abdicated, as Your Lordships remember, because of that. So, in the one year that he was King,
20 page 253. This is issued. First paragraph, page 253. 'Whereas, by certain provisions in the First,
21 Fifth and Sixth Schedules to the Government of India Act, his Majesty in Council is empowered
22 to specify the caste, race or tribes of parts of the groups within caste, race or tribe which are to
23 be treated as the Scheduled Castes for the purpose of those Schedules.' And it's not only
24 Schedule 1, but other Schedules as well, as you'll find from para 2 of this, in the middle of the
25 page. 'Subject to the provisions of this Order for the purpose of so and so Schedules, these are
26 the ones who will be specified.' Para 3 is interesting. It says -'Notwithstanding anything in the
27 last preceding paragraph, no Indian Christian shall be deemed to be a member of the
28 Scheduled Caste. In Bengal, no person who prophecies Buddhism or Tribal religion shall be
29 deemed to be a member of the Scheduled Caste.' After the Partition in Bengal. And next page
30 onwards are the castes. So, this is the caste, tribes, all of them, State wise, as per those States,
31 Madras, et cetera. Now, this in its entirety, this goes on for several pages. This, in its entirety,
32 community wise, was what was replicated in the Presidential Order of 1950. The Presidential
33 Order had to be amended a few times. Every time we had a reorganisation of States because it
34 was unclear whether that community will remain an SC for that partitioned State or not. So
35 they did every time there was a reorganisation in '56, '59, they did, actually amend the
36 Presidential Order of 1950. I'm quickly coming to my second limb. This is to give Your
37 Lordships, context. And to say that these are the groups, therefore at a later stage when you

1 come to enabling provisions, when you decide to give those communities, if some of those
2 communities have been, say for 16 adequately represented, then it is incumbent on the State
3 not to repetitively give them, who are adequately represented, that benefit. I think that point
4 has already been made repeatedly. Second, I'm just handing this over. It's there in this Volume
5 as well. This My Lords, is something I had submitted in the **EWS Reservation Case**, the
6 five judges. Just which has been included in the **Janhit Abhiyan** judgment in fact. It's a
7 chart showing reservation provisions under the Constitution. All the provisions I know which
8 are dealing with this, just to help address Your Lordships, it's in this also. It's at page 805 of
9 this Volume. It's at page 805 but I'm just addressing it from here, if I may? This is to show the
10 provisions which govern each of these communities. The central one, the red one is SC/STs.
11 The one outside, that is SEBC/OBCs, and the one at the outermost, the EWS. We can ignore
12 EWS for the time being. SC/ST, the definition provisions are there. Then the special provisions
13 are there. Now, Why we have colour coded it separately is, for the parameter that has to be
14 applied. The parameter that has to be applied for the Scheduled Caste and Scheduled Tribes
15 with reference to 15 and 16 is historic untouchability. Because I think there has been a general
16 sense that social and educational backwardness is the determinant for being an SC/ST. That's
17 not true. For being an SC/ST it is about its historical backwardness and it's a Constitutional
18 atonement for those years of discrimination. So, for determining who the Scheduled Castes
19 are and this is what even the five judges decision in **Marri Chandra Shekhar** says, specific
20 paragraph, I'll give you. It's paragraph 9 of **Marri. Marri** is, I'm sorry it's not part of this
21 Volume. But the paragraph is extracted. It says that - 'It's a historic untouchability, which is
22 for the determination of SCs.' Social and educational backwardness, which is defined in the
23 Constitution in Article 366, says - 'For the purposes of this Constitution, socially and
24 educationally backward are those who are determined by way of the list, which the President
25 provides.' But that came in by way of an amendment.

26

27 That definition. Because after the **Indra Sawhney** judgment, the **Indra Sawhney**
28 judgment gave one direction to the Government. It said that - 'Please ensure that you set up a
29 National Commission for the backward classes.' And they set up a National Commission. There
30 was a National Commission of Backward Classes Act. Subsequently, when the Constitution
31 came to be amended, that National Commission was taken and put on a Constitutional plane
32 from, Statutory to Constitutional, and therefore the definition had to be given of who are
33 socially and educationally backward class. Now, there has been a little bit of debate in the past
34 whether social, educationally backward classes, the phrase used in 15, it's not used in 16. In 16,
35 you say backward classes, which is why you get the 'O' in the OBC. You have SC's/ ST's, taken
36 anywhere to be backward classes for purpose of 16. Other backward classes are those outside
37 of that. Are they the same as the SEBCs? The Constitution seems to suggest to us, courtesy all

1 these amendments have come, that they're perhaps the same. We don't have a fourth list of
2 OBCs. We just have the SEBC list. That's the one that's adopted. But for determining the
3 Scheduled Castes and Scheduled Tribes...

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** It's historic untouchability.

6

7 **GOPAL SANKARANARAYANAN:** It's historic discrimination. So, that pink one shows
8 that, that's historic untouchability. The reason I put the blue ones, Your Lordships, will see.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** The political backward.

11

12 **GOPAL SANKARANARAYANAN:** Political backward.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Political reservation.

15

16 **GOPAL SANKARANARAYANAN:** So, in municipalities and panchayats, where you have
17 these provisions, as well as, in the Lok Sabha and the Legislature, these are the political
18 backwardness determinations that have to be made. The third, of course are the social and
19 educational backwardness, which are in yellow. Now, one small distinction, I think, which is
20 essential for answering the question that has been referred to Your Lordships, is simply this,
21 that the idea in the Constitution at the time the Constitution came in the SC/ST communities
22 had only one provision of reservation to them, which are the ones in 330 and 332, nothing
23 else. As a provision of reservation available to that community, it was only in the Legislatures
24 and Parliament. Subsequently, when enabling provisions were activated from the outset from
25 **Champakam** and **Venkatraman**, both decided in 1950, one on 15, and the other 16. There
26 was an activation of that even though the GO was prior to the Constitution, there was an
27 activation of 15 and 16. Once you activate 15 and 16. Does the State not have the right to say
28 that -'Look, your list, which the president has made, that remains intact. I'm not trifling with
29 it, but for my purposes, where 15 and 16 gives me the right to make a measure. I believe that
30 these communities need to be favoured.' Now, whether the choice of those communities by me
31 is right or wrong will be determined, based on reports, based on other data. The **Indra**
32 **Sawhney** judgment says use the **Barium Chemicals** measures to determine that, but that
33 list remains intact for the purposes of the political representation. So, for municipalities,
34 panchayats, Legislature and Lok Sabha, so, I can't touch it. The State has absolutely no role to
35 play in that. That remains... I hope I'm making myself clear. So, that distinction is necessary.
36 This entire debate here is really only about 15 and 16, because the definitions both in 343, 342
37 as well as in 341, 42 as well as in 366 make it clear for the purposes of this Constitution, so,

1 the SC/ST determination or definition for the purposes of this Constitution encompasses the
2 mandatory political representation for which the State has no role to play at all. It can't
3 interfere in any way and where the State has a role to play, it's only in that where the State has
4 a role to play under 15 and 16 that it is the entitlement. In fact, it's a Constitutional obligation
5 of the State to make such determinations. So, this chart is for that purpose.
6

7 **CHIEF JUSTICE DY CHANDRACHUD:** We got the point. Should we close it now?
8

9 **GOPAL SANKARANARAYANAN:** The last thing is to address those questions. One more,
10 One more. There's a judgment of Your Lordships, which is in this compilation at page 353 My
11 Lords. This is dealing... this is a small concept which may be relevant. This is a judgment of
12 My Lord, the Chief Justice and Justice Shah in 2021. This at page 353, *Patan Jamal Vali* .
13 It was dealing with the outrage, the rape of an SC/ST lady who was also blind. Now, two
14 paragraphs. Just see paragraph 17, at page 372. Internal 372, Para 17.
15

16 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.
17

18 **GOPAL SANKARANARAYANAN:** This principle of intersectionality, I commend to this
19 Bench. 'Intersectionality can be defined as a form of oppression that arises out of a
20 combination of various oppressions, which together produce something unique and distinct
21 from any one form of discrimination standing alone. While the model of intersectionality was
22 initially developed to highlight the experiences of African- American women. There is a
23 growing recognition that an intersectional lens is useful for addressing the specific set of lived
24 experience of those individuals who have faced violence and discrimination on multiple
25 grounds. A single axis approach to violence and discrimination renders invisible such minority
26 experiences within a broader group, since it formulates identity as 'totemic and
27 homogeneous'. Which is precisely what *Chinnaiah* has done. Each of these communities
28 have lived experiences which are distinct from each other. Even in *Indra Sawhney* I'll give
29 Your Lordships the paragraph, there is an acceptance, just as Krishna Iyer in *N.M. Thomas*
30 says, that - 'Even within the Scheduled Castes, they're not all alike. They're all very, very
31 different. They have different experiences.' My Lords, I won't read the rest of the paragraph.
32 But I believe this paragraph and para 795 of *Indra Sawhney*. Both of these Your Lordships
33 may just consider. Now, quickly I'll just address the questions that came yesterday. Justice
34 Nath had asked a question that - 'Once people have achieved to a certain extent, wouldn't you
35 remove them from the list?' That's not a call for the State to take. For two reasons. One, that
36 they don't have the power. That's for the President to do on recommendations by the State.
37 But when you remove, when they have reached that level, you have to see that they've reached

1 that level, not only in my domain of 15-16, which is education and an employment and
2 everything else socially.

3

4 **JUSTICE VIKRAM NATH:** What can't the State take that call?

5

6 **GOPAL SANKARANARAYANAN:** No, because the removal from the...

7

8 **JUSTICE VIKRAM NATH:** A State is deciding to allocate extra percentage of reservation
9 for specific communities within that Scheduled Caste group, it can say that these are already
10 adequately [UNCLEAR]. They don't require any reservation. Why not? They have to
11 implement the 341....

12

13 **GOPAL SANKARANARAYANAN:** No. Under 15 and 16, it becomes implicit. Because the
14 State, when it's giving its reservation, says -' I choose these 10 communities and give it to them.
15 So the others get excluded.'

16

17 **JUSTICE VIKRAM NATH:** 16 (4) is backward class.

18

19 **GOPAL SANKARANARAYANAN:** Yes.

20

21 **JUSTICE VIKRAM NATH:** So, it can always say this backward class does not require any
22 further reservation.

23

24 **GOPAL SANKARANARAYANAN:** I don't think the negative declaration is necessary when
25 they positively...

26

27 **JUSTICE VIKRAM NATH:** It's a State exercise, not the Parliamentary exercise.

28

29 **GOPAL SANKARANARAYANAN:** So, if they give the entire extent of their reservation,
30 say 10 communities...

31

32 **JUSTICE VIKRAM NATH:** They can continue to gain the advantage of 15 (4) or any other
33 provision.

34

35 **GOPAL SANKARANARAYANAN:** No.

36

1 **JUSTICE VIKRAM NATH:** Or 330 or whatever. But for 16 (4) is concerned, they can always
2 exclude.

3
4 **GOPAL SANKARANARAYANAN:** Yes. So that comes to the second question, My Lord,
5 the Chief Justice posed to the Advocate General, yesterday. If there are only two communities
6 and you decide, can you give entire 100% of the reservation to them? My answer is different.
7 My answer is -'Yes, you can.' Because, the idea of this Constitution is that at some point you
8 will... because you'll reduce from your 100 caste groups. Hopefully we are moving forward as
9 a nation. If you keep moving forward as a nation, some of these communities will get
10 adequately represented. Will move forward. So from 100, you'll come to 50. 40. 30 at some
11 point will come to 2. And you'll say -'Look, these 2 are so terribly ravaged, that there is no
12 question that I'm going to give my 100% of that reservation available to me, to them.' Both the
13 quantum, that is percentage as well as the number of communities is in the state's hand. So,
14 the State doesn't have to give 40%. It can give 4% reservation and say -'The entire 4% will go
15 to 2 communities.' So, that's to answer the second question, which I believe that would be the
16 correct answer, the consistent answer, because this Constitution and its interpretation, not for
17 today. When we have seven judges going into this, 20 years from now, we may hopefully reach
18 a stage where we will have only two communities and we'll be able to take care of them also.
19 Yesterday, Justice Gavai had a question about the creamy layer application in the SC/STs.
20 Now, **Nagaraj**. Said so, saying that 16 (4)(a), 16 (4)(b) as a Constitutional challenge can be
21 sustained only if it has these controls. Efficiency under 335, administrat... the adequacy. And
22 creamy layer. In **Jarnail** when that question had to be referred to a larger bench, they said
23 we're not referring to a larger bench, but this backwardness determination for SC/STs is not
24 necessary. It's implicit. Remove that. Kept the other three intact. Reiterating the fact that
25 creamy layer applies to SC/STs. So, creamy layer applies to SC/STs, because it's an individual
26 removal. But in practice, on the ground, there has been no office memorandum that I know, if
27 the State may assist, which they have issued, for the creamy layer removal among SC/STs.
28 They have one old 1992 office memorandum which removes the creamy layer for the backward
29 classes, which is detailed, which has politicians, Members of Parliament, etc, then income
30 criteria also.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Sankaranarayanan, we'll close it here.

33

34 **GOPAL SANKARANARAYANAN:** I'm grateful, My Lord.

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** Should we hear Mr. Venugopal? That is what...
37 Mr. Venugopal, are you online?

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K. K. VENUGOPAL: Yes, I'm online. May I please, Lordships? Much has been covered.

GOPAL SANKARANARAYANAN: May I take your leave?

K. K. VENUGOPAL: I'm appearing for the Madiga Reservation Porata Samiti and it's Item number 701.22 and it's writ petition 562 of 2022.

CHIEF JUSTICE DY CHANDRACHUD: You are for the intervener?

K. K. VENUGOPAL: No, My Lords, for the petitioner. So far this is concerned, I had appeared before the five judges in the Andhra Pradesh High Court in *Chinnaiah*. They had upheld the subcategorization of 61 Scheduled Castes into four divisions based upon an advancement over the years, and they had given 7% to the weakest amongst the weak, 6% of the jobs and educational institutions seats to another group and the best to the highest among them, 1%-1%. This was upheld on the basis of categorization was permissible. *Chinnaiah* My Lords, reversed it and said that the whole of them being a homogeneous group this cannot be done. Now, the basis of large subcategorization was an elaborate 200 page, investigative report of Justice Ramachandra Raju and the judge My Lord, after [UNCLEAR] this found that there was vast disparities between the different groups in the 61 subcastes. Some of them being workers in leather, they are scavenging and nomadic and so on, who had been excluded to a very great extent, so that the fruits of reservation had been taken over by the more advanced ones, the entire group of 61. And that is a basis on which based on these comparative advancement of the groups, he had grouped it 61 into four groups and has given varied representation. Now, this is what was held by *Chinnaiah* and was reversed by the Supreme Court of India. Now, my submission to Your Lordships is this, Article 14 of the Constitution is a golden thread which runs right through the entire provisions of the Constitution. At a very inception of the Constitution, the founding fathers had examined the disabilities of various groups and had provided in the original Constitution itself for affirmative action for the purpose of their upliftment, and therefore, if Your Lordship should be pleased to take my written submissions, which say short ten pages.

CHIEF JUSTICE DY CHANDRACHUD: Where will we find them, Mr. Venugopal?

K. K. VENUGOPAL: Volume I (G).

1 **CHIEF JUSTICE DY CHANDRACHUD:** Give us just a moment so that all of us can access
2 it. Yes, it's page 1.

3

4 **K. K. VENUGOPAL:** Your Lordships will find, if the Your Lordships be pleased to go to page
5 5. The various steps taken by the founding fathers themselves to ensure their unequals are
6 treated equally with the rest of the category to which they belong and at the bottom in
7 paragraph 11 of page 5, Your Lordships should find Article 15(3), special provision for women
8 and children. Para 11, I hope Your Lordships have it. Para 11 at page 5.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

11

12 **K. K. VENUGOPAL:** And then para 12, 15(4). The backward classes. Then it goes on like
13 that. 15(5) Scheduled Caste, Scheduled Tribe, admission to private institutions. Then
14 economically weaker sections 15(6), which Your Lordships, upheld, 10% My Lord, in addition
15 to the 50%, and 15(6)(b), 16(4), 16(4)(a), 16(4)(b), 16(6), 17, untouchability and 18, which is
16 My Lords, against cycles to citizens which Your Lordships, upheld In one of the judgments,
17 Indian young lawyers that some people are being placed above the others, and this cannot be
18 permissible, and that is why, therefore, so far as, the benefits are concerned, it is in regard to
19 the State has, given benefits socially, educationally, in employment and politically as well. And
20 Your Lordships, will find that politically, which is an article My Lord, when the panchayats,
21 were introduced in para 22, there is seats for Scheduled Castes, Scheduled Tribes in
22 panchayats. Similarly My Lord, in regard to the municipalities. Then the benefits My Lords,
23 to women where they are given one third of the total seats. Rotation of the chairman where
24 the women will be given that also. Now, this is My Lords, the broad basis on which the
25 Constitution has approached this inequalities which have been prevailing in the population of
26 this Country. Thereafter My Lords, they are found during the course of the making of the
27 Constitution that there were certain classes which stood again deprived of what would be
28 unequal treatment under the Constitution and therefore My Lord, amendments were made and
29 that is how My Lords, so far as, their benefits to Scheduled Caste, Scheduled Tribes, to entry
30 to My Lords, into educational institutions, including private institutions was provided for
31 economically weaker sections were given 10%, irrespective of religion, caste, creed, et cetera.
32 Now, similarly, very many other amendments. Now in this background, I request Your
33 Lordships, to go to Article 28(2) of the Constitution.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** 38(2), right?

36

1 **K. K. VENUGOPAL:** 38(2). And this essay is a fulcrum on which the entirety of the problem
2 is to be
3 approached. 38(2) is My Lord, so far as this is concerned, in the directive principles. 'The State
4 shall in particular strive to minimize the inequalities in income and endure to eliminate
5 inequalities in status, facilities and opportunities not only amongst individuals, but also,
6 amongst groups of people presiding different areas or engage in different vocations.' Now, so
7 far as, this is concerned, it was brought in by an Amendment of 1978. Now, this would say that
8 - 'So far as inequalities are concerned, they have to be minimized not only My Lords, that in
9 regard to status, facilities and opportunities, not only among groups, but also among
10 individuals.' And is Your Lordship, would turn to Article 37, 'Application and Principles
11 contained in this part, the provisions contained in this part, shall not be enforceable by any
12 court. But the principles therein has laid down are nevertheless fundamental to the
13 governance of the Country and it shall be the duty of the State to apply these principles in
14 making laws.' Therefore, My Lords, 38(2) is fundamental to the governance of the Country
15 and it shall be the duty of the State to apply these principles in making laws. And this is exactly
16 what the State of Andhra Pradesh has done. And therefore My Lords. The question is whether
17 341 should not be read along with Article 382. There are a number of judgments which say
18 that so far as directive principles are concerned, they should be read along with fundamental
19 rights. Along with other provisions of the Constitution
20

21 **JUSTICE B.R. GAVAI:** Right from *Kesavananda Bharati*.

22
23 **K. K. VENUGOPAL:** Yes, right from *Kesavananda Bharati . Unni Krishnan versus*
24 *State of Andhra Pradesh* that is given to this judgment **1993, Volume (I) Supreme**
25 **Court Cases 645. Unni Krishnan versus State of Andhra Pradesh** and this, from
26 *Kesavananda Bharati*, Justice Chandrachud, at para 161, is extracted. 'As I look at the
27 provisions of part 3 and 4, I feel no doubt that the basic object of conferring freedoms on
28 individuals in the ultimate achievement of the ideal set out in part 4, may I say that the
29 directive principles of state policy should not be permitted to become a mere rope of sand. If
30 a State fails to create conditions in which their fundamental freedoms could be enjoyed by all,
31 the freedom of the few will be at the mercy for the many, and then all freedom shall vanish.'
32 Similarly, there are a number of judgments which would require their harmonic between
33 direct principles and the provisions of the Constitution. Therefore, the golden thread which
34 runs, is not only My Lord, that Article 14, that all persons should be treated equally, but not in
35 that unequal cell to be treated also equally and delivered to be equalised. And if Your Lordships
36 will place my written submission, there is an extract, which brings this out very vividly and
37 that My Lords is *Marri Chandra Shekhar Rao*, referred to in other contexts. But if Your

1 Lordships would be pleased to turn to page 4, para 9, of my written submissions. The extract
2 if Your Lordships will skip the first ten lines and come to, 'those who are unequal. In fact.' I
3 hope, Your Lordships have that. After 10 lines from the top. 'Equality which must cover every
4 process of equalization.' Or shall I read it from the top?

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** We got it, actually, that's the correct text, 'those
7 who are unequal, in fact'

8

9 **K. K. VENUGOPAL:** Yes. And later, 'Those who are unequal, in fact, cannot be treated by
10 identical standards that there may be equality in law, but there may be equality law, but it
11 would certainly not be real equality. Existence of equality of opportunity depends not merely
12 on the absence of disabilities, but on presence of abilities. It is not simply a matter of legal
13 equality. *De jure al* equality must ultimately find its *raison d'etre* in *de facto* equality. The
14 State must, therefore, resort to compensatory state action for the purpose of making people
15 who are factually unequal in their wealth, education, social environment, equal in specified
16 areas. It is necessary to take into account *de facto* inequalities which exist in the society. And
17 to take affirmative action by way of giving preference and reservation to the social and
18 economically disadvantaged persons or inflicting handicaps on those more advantageously
19 placed in order to bring about real equality. Such affirmative action though apparently
20 discriminatory, is calculated to produce equality on a broader basis by eliminating *de facto*
21 inequalities and placing the weaker sections of the community in a footing of equality, with a
22 stronger and more powerful section, so that each member of the community or whatever is his
23 birth, occupational, social position, may enjoy equal opportunity of using with a fullest natural
24 endowments of physique, of character and of intelligence.'

25

26 Now My Lords, so far as this is concerned, Your Lordships will note that the result of not
27 making a subcategorization would be that those who are already more advanced than the
28 weakest of the weak, which is a phrase which has been used by Justice Krishna Iyer. The
29 weakest of the weak will fall to the ground and those who are more advanced will take the
30 lion's share so that these reservation as meaningless and has no effect towards whatsoever in
31 neutralising the disadvantages which we sought to be cured by the reservation. Now, with this
32 connection, the words of Justice Krishna Iyer in *N.M. Thomas* has been extracted at page 9
33 of my written submissions.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

36

1 **K. K. VENUGOPAL:** And Your Lordships should be pleased to see at page 9, para 28, the
2 extract from *State of Kerala versus N.M. Thomas*, page 363 of the judgment, para 124,
3 'Innovations in administrative strategy to help the really untouched most backward classes
4 also emerge from such social legal studies and audit exercises of dispassionately made. In fact,
5 research conducted by A.N. Sinha Institute has revealed a dual society of *Harijans*, a tiny elite
6 gobbling up the benefits and darker layers sleeping distances away from the special
7 concessions.' Therefore, the *Harijans* are the most backward classes among the Scheduled
8 Castes. 'A dual society amongst *Harijans*, a tiny elite gobbling up the benefits and the darker
9 layers, sleeping distances away from this special concessions.' And that is what the State of
10 Andhra Pradesh sought to do, which has reversed by the Supreme Court of India. Your
11 Lordships will find the citation at the bottom of that page of *Jarnail Singh vs Lachmi*
12 *Narain Gupta. 2018 10 SCC 396*. This is a five judges bench presided over by Justice
13 Rohinton and there My Lords, I had argued as Attorney General that *E.V Chinnaiiah* would
14 stand in the way for the principle of the creamy layer, which was apparent for OBC in the
15 *Indra Sawhney* judgment from being applied to Scheduled Castes and therefore, since
16 there are only one homogeneous caste, you can't subdivide it and remove some of them. Now,
17 that was rejected and the same entire judgment focuses on what was held in *N.M. Thomas*
18 and following that the Lordship said that so far as the creamy layer is concerned, they have to
19 be excluded even from a category of Scheduled Castes. The result of this is that a Constitution
20 Bench of this Honourable Court has already taken the first step forward by bridge dissenting
21 from *Chinnaiiah* to the extent that they have said that they have said that a subclassification
22 can be made.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

25

26 **K. K. VENUGOPAL:** I may mention that after the judgment in *Chinnaiiah*, judgement by
27 the Supreme Court of India, the Government of India, Union of India wanted the whole issue
28 of subclassification to be gone into by the committee and for which Justice Usha Mehra was
29 appointed then.

30

31 When the Central Government and which constituted a National Commission to examine the
32 issue of subcategorization of Scheduled Castes in Andhra Pradesh with Justice Usha Mehra as
33 Chairperson. This was My Lords, on 16th of November 2006, and the judgment in
34 *Chinnaiiah*'s case where the Supreme Court was on the 5th of November 2004. Now Justice
35 Usha Mehra went into the issue elaborately and report at page 345 and goes on to 506 and
36 finally My Lords, it is in Volume III(a) My Lords, at page 446. It begins at 285. And My
37 Lordships, if you should be pleased to go to page 444, Para 33, Volume III(a), page 444.

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CHIEF JUSTICE DY CHANDRACHUD: [UNCLEAR] PDF page 447.

JUSTICE B.R. GAVAI: Paragraph 23?

K. K. VENUGOPAL: 33, My Lords.

JUSTICE PANKAJ MITHAL: Repeat it.

K. K. VENUGOPAL: Volume III(a), page 444, My Lords. It's Para 33.

CHIEF JUSTICE DY CHANDRACHUD: This is for subcategorization.

K. K. VENUGOPAL: The analysis of data. Your Lordships have got it?

CHIEF JUSTICE DY CHANDRACHUD: Mr. Venugopal, we read that actually. We've seen that. Anything else, Mr. Venugopal?

K. K. VENUGOPAL: Yes, My Lord. No, I'm closing with this. Please see My Lord, page 446.

CHIEF JUSTICE DY CHANDRACHUD: Yes.

K. K. VENUGOPAL: Para 37. 'The commission desk recommends that Article 341 of the Constitution of India be amended, and Clause 3, thereof, may be added as under 341 Sub-Clause...'

CHIEF JUSTICE DY CHANDRACHUD: This will have been a clarificatory amendment, actually.

K. K. VENUGOPAL: Law provide for subcategorization...

CHIEF JUSTICE DY CHANDRACHUD: It was eventually [INAUDIBLE].

K. K. VENUGOPAL: Categorization of caste so and so. There may be caste, race or tribe....

CHIEF JUSTICE DY CHANDRACHUD: Your argument would be that even in the absence of such an enabling provision, the power is always there in the state.

1

2 **K. K. VENUGOPAL:** My Lord, that is what, where I relied strongly on Article 38(2), which
3 mandated that Your Lordships, would ensure My Lords, that even individuals who are
4 oppressed or suffer from disabilities, [UNCLEAR] to persons, should be given My Lord, equal
5 treatment. Therefore, **Chinnaiah** saying that is homogeneous. It can be broken up. It can't
6 be the weakest of the weak. We have to suffer total deprivation so that, whatever benefits are
7 being given merely a drop of sand. As Chief Justice Chandrachud delivered it, that I submit,
8 has to be introduced.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you very much. Thank you, Mr.
11 Venugopal. Mr. Attorney General would you like to open? Yes.

12

13 **R. VENKATARAMANI:** Volume I(k), I think, is my written submissions. I'll quickly read
14 only a couple of paragraphs in **N.M. Thomas** and **Chinnaiah** which I may like to draw Your
15 Lordships' attention.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Volume I(k). Right?

18

19 **R. VENKATARAMANI:** I(k).

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** To go to?

22

23 **R. VENKATARAMANI:** My Lord have that?

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, we've got it on the screen.

26

27 **R. VENKATARAMANI:** Let me quickly take Your Lordships...

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** All of you will also have learned Attorney's
30 submissions on your screen... on the screen before your [UNCLEAR].

31

32 **R. VENKATARAMANI:** Fair enough. 'The field assigned to Article 341 and 342, and the
33 equality charter contained in Article 14, 16 are distinct. The domain of Article 341 and 342 is
34 confined only to the identification and enumerate Scheduled Castes and Scheduled Tribes for
35 the purposes of the Constitution. What shall be done to effectuate the purpose of the
36 Constitution, is not a matter that will fall under the domain of Article 341 and 342. Notification
37 in Article 341 and 342, either foundation, by devising provisions of advancement with the

1 meaning of Article 15(4) and equality of opportunity and provisions for reservations with the
2 meaning of Article 16(4). That is why Article 341 and 342 talk about specification of caste, race,
3 tribes or parts of groups within castes for the purpose of the Constitution. This means all
4 purposes of the Constitution in relation to Scheduled Castes and Scheduled Tribes, except
5 where the express constraints no dissidents between two Constitutional provisions should be
6 either suggested or accepted. Therefore, Article 341 is not to be seen as a limitation or a
7 constraint in what can be done or what needs to be done under the equality charter of the
8 Constitution of Articles 14 to 16. The dynamics of equality of opportunity and advancement
9 measures will lie the domain of Articles 14 to 16 and may not be controlled by the mere
10 enumeration authority given at Article 341-342. The sprint of equality of opportunity and the
11 distribution of equality measures are essentially matter that will be addressed by the State and
12 not by the President. The *E. V. Chinnaiah*, it provides in the understanding that all the
13 castes and tribes were notified 'constitutive homogeneous class,' except the fact that disparate
14 social groups designated as castes are tribes that are described as 'Scheduled', there is no
15 homogeneity amidst them in a sociological sense. Mere clubbing of distant castes and tribes
16 by itself will not render them homogeneous. As long as amidst this
17 castes and tribes, there is no uniformity of status, position or social attainment, there can be
18 no homogeneity. They continue to be distinct social groups and sections of the community.
19 Each one of them constitute distinct segments deserving distinct Constitutional treatments.
20 The homogeneity, if any, compared with the non-scheduled section of the community, cannot
21 be of any consequence. The distinct Constitutional treatments will always remain subject to
22 be addressed under the equality charter of the Constitution, under Articles 14 and 16. The
23 Constitutional treatment, that the State may devise to address the concerns of one or more of
24 the enumerated Scheduled Castes or Tribes will always depend upon a relevant inquiry on the
25 need and expedition required. The fact that parts of or groups within caste, race, tribes can
26 also be notified is an indication, that, the enumeration still will be based on the connection
27 between enumeration and the purposes of the Constitution. The question, however, as to
28 whether, such measures of advancement under Articles 15 and 16 constitute a fair spread of
29 measures of advancement and *inter se* non-discriminatory will be an independent inquiry,
30 entirely unconnected Article 341-342. The obligation and the part of the state ensure fair and
31 non-discriminatory availability of the measures of advancement will always be tested on
32 relevant grounds. It's also expected that the state will act fairly in this regard, will not be a
33 partisan and will not arbitrarily exclude anyone of the enumerated list from the fruits of
34 advancement measures. The power given to the Parliament under Article 341(2) is also
35 confined to the domain of enumeration and the authority to include in or exclude from the list
36 notified cannot be equated to the power of the State and the equality charter to Articles 14 and
37 16 of the Constitution of India. The

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R. VENKATARAMANI: Constituent Assembly debates an Article 15 (4) show that the framer decidedly use the expression backward classes in plural to comprehend all social groups, including Scheduled Caste, which can be considered backward and certain common criteria aspect. The nine judge decision in *Indra Sawhney* has illustrated its understanding no doubt cannot be raised as the comprehensiveness and inclusiveness expression. To the extent discussed above, it can be said, the *E.V. Chinnaiah* has frozen all state authority or authority of state under Articles 14 to 15 of the Constitution. whether it is in tune with a Constitutional dynamic, is a question deserves to be answered. *E.V. Chinnaiah* does not answer many questions raised above. If built in the premise that all enumerated castes and tribes, then can and must collectively enjoy the benefits of reservation, regardless of inter se in equalities and that any subdivision will dilute collective identity and rob the fruits of collective emancipation. This broad statement has no demonstrable truth in empirical terms and is certainly not supported in the judgment itself. The *E.V. Chinnaiah* holding that homogeneity approach in the State of Kerala is open to question.' I don't propose Your Lord to reading several paragraphs in it, I just point out two or three paragraphs of Justice Thomas and Justice Krishna Iyer in a short while. 'Articles 14 to 16 constitute a triumvirate of Citizen's Rights and States Obligations. They've been considered equality and social justice charter, guaranteeing both rights towards emancipation from social, educational and economic backwardness. And non-discrimination all walks of life and the State transactions. The State of the STATE corresponding obligations to devise measures and methods, fashion policies and tools to regard, promote and protect these rights. The enabling nature of Articles 15 and 16 are insert duty coupled with power. Any unusual limitation on both duty and power. In the context of these provision will be constitutionally suspect. The court has delineated several facets of these rights and also declare an interplay between these rights. The equality rights in Article 14, an equal opportunity rights in 15 to 16 have mutually reinforcing facets. The evolving dimensions resize in consonants are changing social and economic aspects, have been carefully crafted over a period of time, both by legislations and judicial pronouncements. The obligation of the State of the STATE to undertake emancipation deprives in weaker sections of the community. The obligation to eradicate inequalities in status and wealth are complex obligations involving redistribution and reallocation of resources and opportunities and equitable access to all public and social goods. Education, health and public employment are all public goods of immense value facilitating citizen participation in the efforts of the State on the informed and equal basis. The State will, therefore, always need the freedom to carry out informed experiments without being fettered by undue or disproportionate claims. There are no and cannot be any textbook answer or precedence of perennial value and relevance which can guide the State of the STATE as regards the roads to be travelled or measures to be taken

1 to promote fundamental rights. The court too will bear the social dynamics in mind and be
2 careful not to change the State or clamp its hand while interpreting Constitutional provision.
3 Rule of law also demands that the State is able to harmonize and balance several competing
4 claims and interest.' Just take a couple of paragraphs in. ***N. M Thomas***.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** Just give us a paragraph. Mr... We'll have a look
7 at them because they have been read out. Give us a volume and page, that's all.

8

9 **R. VENKATARAMANI:** ***N.M. Thomas***, Volume V.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** Volume V, which paras?

12

13 **R. VENKATARAMANI:** Paras 53 and 54. Just turn to PDF page 26. Just probably read it
14 from the head note to give those references.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** 53 and 54, and then?

17

18 **R. VENKATARAMANI:** Justice Matthew's judgment at PDF of page 26. There are two
19 paragraphs refer to that and paragraph 53 and 54 bracketed together.

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21 **CHIEF JUSTICE DY CHANDRACHUD:** Anything more? Which other para?

22

23 **JUSTICE B.R. GAVAI:** ***N.M. Thomas*** has been read to us many times.

24

25 **R. VENKATARAMANI:** Paras 53 and 54. This PDF page 53 or 57, paragraph 53.

26

27 **JUSTICE VIKRAM NATH:** 7, correct?

28

29 **R. VENKATARAMANI:** Yes.

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31 **JUSTICE VIKRAM NATH:** Paragraph 53 and 54.

32

33 **R. VENKATARAMANI:** 57...[UNCLEAR] para 53.

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35 **JUSTICE B.R. GAVAI:** Para 53, Para 54.

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37 **R. VENKATARAMANI:** That's right.

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JUSTICE B.R. GAVAI: Proportional equality?

R. VENKATARAMANI: That's right. The third line - 'But men are not equal in all respects. The claim for equality is in fact, they protest against an unjust, undeserved and unjustified inequality.' So, going a little down in the same paragraph. Last line, 'We therefore have to resort some sort of proportionate equality in many spheres to achieve justice.' Then the next paragraph, 'The principle of proportional equality is attained when it equals so and so. If you read a baffling question, equal and unequals in what. The principle of proportional equality, therefore, involves in appeal to some criteria in terms of which differential treatment is justified.'

JUSTICE B.R. GAVAI: There are various laws used in the various judgments. In *N.M. Thomas*, it has also been decided as a compensatory discrimination.

R. VENKATARAMANI: That's right. And also, Paragraphs 81 and 82 My Lords, make a note of that. 81, 82 again, Justice Thomas judgment.

JUSTICE PANKAJ MITHAL: 82.

R. VENKATARAMANI: PDF page 65.

JUSTICE B.R. GAVAI: This has already been argued Mr. A.G.

CHIEF JUSTICE DY CHANDRACHUD: Yes. You made a note in your...

R. VENKATARAMANI: Paragraph 141 of Justice Krishna Iyer judgment, at PDF page 806.

CHIEF JUSTICE DY CHANDRACHUD: Thank you Mr. Attorney General. Thank you so much.

R. VENKATARAMANI: The paragraph begins with a basic question.

CHIEF JUSTICE DY CHANDRACHUD: Yes, we'll have a look at it, Mr. Attorney. Thank you so much.

R. VENKATARAMANI: That's right.

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CHIEF JUSTICE DY CHANDRACHUD: Anybody else now, who would like to? Mr. Solicitor is here?

R. VENKATARAMANI: In *Chinnaiah*. Paragraph 113 of Justice Sinha judgement, just kindly look at that. This is PDF page, Volume... Volume V, page 815.

CHIEF JUSTICE DY CHANDRACHUD: Paragraph?

R. VENKATARAMANI: 113.

CHIEF JUSTICE DY CHANDRACHUD: Page?

R. VENKATARAMANI: PDF page 819.

CHIEF JUSTICE DY CHANDRACHUD: We'll have a look at it, Mr. Attorney.

R. VENKATARAMANI: Just look at the paragraph. 'The power of the state legislature to decide as regard, grant or benefit of reservation so and so, is not in dispute.'

CHIEF JUSTICE DY CHANDRACHUD: Yes.

R. VENKATARAMANI: 'Furthermore, not in dispute, that if, such a decision is made, the state can also lay down Legislative policy and regard the extent of reservation to be made for different members of the backward class including Scheduled Caste. But if you not take away the state benefit on the premise that one or the other group among members so and so, has advanced and that is not entitled entire benefits of reservation. That begs the question.'

CHIEF JUSTICE DY CHANDRACHUD: Thank you Mr. Attorney, thank you. Mr. Solicitor?

TUSHAR MEHTA: I'll not take more than ten minutes, My Lords. I'll bear in mind the distinction between a person, My Lord, who has something to say. And the person who has to say something... My Lord, it is very ably argued by all my predecessors, My Lord, and especially the learned Advocate General, please take my Volume I (i). It's a 15 page note. I'm not going to read the entire..

1 **JUSTICE VIKRAM NATH:** It has come on the screen...

2

3 **TUSHAR MEHTA:** It is there, My Lord. Your Lordships could find it at 1...

4

5 **JUSTICE VIKRAM NATH:** It's here on the screen, yes.

6

7 **TUSHAR MEHTA:** My Lord, what I have done is, I have given a history which I am again
8 not going to place before Your Lordships, as to how this developed, but the most relevant part
9 is, slowly and gradually, Your Lordship, from the judicial side has started taking note of the
10 fact that there needs to be some rationing.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** Well.

13

14 **TUSHAR MEHTA:** At the outset I say, on behalf of the Central Government, My Lord, it is
15 not my submission about the reservation. Reservation as a policy, the Central Government is
16 committed to. My written submissions, My Lord, are only confined to the question referred,
17 whether there can be a sub-classification or not? And sub-classification, as a concept, was
18 bothering Your Lordships, My Lord. And there are some judgments, which reflect that. Please
19 see page 1. It starts with, My Lord the Chief Justice recently said **Champakam**. I am not
20 going into that My Lord. Thereafter comes **Balaji**. **Balaji** says that -'This is an exception to
21 15 and 16 (1)' And thereafter, which is changed in **N. M. Thomas**, which says that -'It's not
22 an exception, it's an equality thing.' Thereafter, Your Lordships may kindly come to, **M.**
23 **Nagaraj**, which is at page 3. In **M. Nagaraj**, in my respectful submission, this question My
24 Lord, started bothering Your Lordships, whether there needs to be some rationing, so that the
25 real beneficiary gets the benefit? Please come to para 19... para 10. Thereafter, the judgment
26 in **Nagaraj** was referred to a 5-judge bench to examine the correctness on two counts. My
27 Lord, first Your Lordships can skip. 'B) second being whether the concept of creamy layer can
28 be made applicable to the Scheduled Caste and Scheduled Tribes? So, those who are taking
29 the majority of the benefits and depriving the more backward, should that concept come in or
30 not?' Thereafter comes **Jarnail Singh**, please come to page 12 and I have quoted My Lord,
31 the relevant part. Para 12, I'm sorry. Page 4, para 12. 'The judgment in **Jarnail Singh** refers
32 to the broader object of amelioration of backward classes and clarifies that this cannot be
33 achieved, if only the creamy layer within that class bag all coveted jobs in the public sector and
34 perpetuate themselves, leaving the rest of the class as backward as they always were.'
35 Thereafter comes, My Lord, **Jaishri**, recent judgment, **Maratha reservation judgment**,
36 there, Lordships have seen they have not reiterated 'the Constitution is always an evolving
37 document and therefore we will have to answer to the needs of hour.' I am just placing it for

1 Your Lordship's consideration. I'm not reading it My Lord, because, it gives a broader
2 perspective how Your Lordships would view a Constitutional provision, which is My Lord, for
3 the betterment of the backward classes. Then, I have... though that's not the question referred,
4 just by way of an abundant caution, I have at page 5, given finality of Article 341, which remain
5 unaffected. Even if Your Lordships were to take the view that sub-classification is a permissible
6 board, that also would be as per the same Constitutional route as prescribed. The state would
7 recommend to the President. Then thereafter it will go to the Parliament, and Parliament will
8 decide whether to put it in the scheduled or not? That's not the question. But by way of
9 abundant caution, My Lord, I have placed it for Your Lordship's consideration.

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11 **JUSTICE B.R. GAVAI:** According to you, sub-classification can be done only by the
12 Parliament?

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14 **TUSHAR MEHTA:** Yes, My Lord. No...

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16 **CHIEF JUSTICE DY CHANDRACHUD:** It can be done even by the State.

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18 **TUSHAR MEHTA:** Identification by the State...

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20 **CHIEF JUSTICE DY CHANDRACHUD:** By Parliament.

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22 **TUSHAR MEHTA:** Yes. On what is happening now...

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24 **CHIEF JUSTICE DY CHANDRACHUD:** And implemented by the state.

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26 **TUSHAR MEHTA:** By the state, again. What happens for My Lord, now, one caste is
27 identified as a Scheduled Caste. It's only identification by the State. It comes to the President
28 of India, then goes to the Parliament, and thereafter, after Parliamentary Legislation that Caste
29 is notified for that State as a Scheduled Caste and thereafter implemented by that State. So,
30 my Lord, that is not the question, but by way of abundant portion I have quoted My Lord
31 **Basavalingappa** that 341 is absolute and **State of Maharashtra versus Milind**. I'm
32 not reading it because that's not the question My Lords are considering. But now kindly come
33 to page 11, **Ashok Kumar Thakur**. This is 2008 where almost Your Lordships were
34 bordering on this issue, which Your Lordships are considering now para 6 and 9. 'Reservation
35 is one of the many tools that are used to preserve and promote the essence of equality. So that
36 disadvantaged groups can be brought to the forefront of civil rights. It is also the duty of the
37 state to promote positive measures to remove barriers of inequality and enable diverse

1 communities to enjoy the freedoms and share the benefits guaranteed.' Thereafter, please
2 come to **M. Nagaraj**. Para 23, page 11. Para 48 is a relevant at the foot of that page. 'It is the
3 equality in fact which has to be decided looking at the ground reality. Balancing comes in
4 where the question concerns the extent of reservation. If the extent of reservation goes beyond
5 cutoff point, then it results in reverse discrimination. Antidiscrimination Legislation has a
6 tendency of pushing towards *de facto* reservation. Therefore, a numerical benchmark is the
7 surest immunity, et cetera, etc.' Please then come to **N. M Thomas**. This is quoted in **Jarnail**
8 **Singh**, para. 124. 'A word of sociological caution in light of the experience here and elsewhere,
9 the danger of reservation, it seems to me, is threefold.' I'm not arguing against reservation. I'm
10 just flagging the subclassification issue because sometimes we are likely to be misled,
11 misunderstood intentionally or unintentionally. 'It's benefits, by and large, are snatched away
12 by the top creamy layer of backward class, caste or class, thus keeping the weakest among the
13 weak always weeks and leaving the fortune layer to consume the whole cake.' Yes. Your
14 Lordships flagged this for the first time . Justice Krishna Iyer flagged it, which is now followed
15 by the recent judgment in **Chebrolu Leela Prasad Rao versus State of Andhra**
16 **Pradesh**. My Lord would find it at page 13, para 165. 'In our opinion, it was rightly urged by
17 Dr. Rajeev Dhavan that the government is required to revise the lists. It can be done presently
18 without disturbing the percentage of reservation, so that benefits trickle down to the needy
19 and are not used by those classes who have come up after obtaining the benefit for the last 70
20 years or after their inclusion in the list.' Thereafter comes not in point of time, My Lord, in my
21 chronology are **Chitralkha**. 'This interpretation will carry out the intention of the
22 Constitution expressed in the aforesaid Articles. It helps the really backward classes instead of
23 promoting the interest of individuals or groups, who they belong to a particular caste, a
24 majority whereof is socially and educationally backward, really belonged to a class which is
25 socially and educationally advanced. To illustrate, take a caste in a state which is numerically
26 the largest therein. It may be that though a majority of the people in the caste are socially and
27 educationally backward and effective minority may be socially and educationally far more
28 advanced than another small subcaste, the total number of which is far less than the minority.
29 If we interpret the expression classes or castes, the object of the constitution will be frustrated
30 and the people who do not deserve any advantages they may get it to the exclusion of those
31 who really deserve. This anomaly will not arise if without equating castes with castes, et cetera,
32 et cetera.' Your Lordships may then come to this **Vasanth Kumar** was read by the learned
33 AG. I am not there for repeating. On page 15. I have given My Lord... my propositions. There
34 are three... four, proposition My Lord. I'm not going to read. I am just placing it for Your
35 Lordship, consideration. This is again My Lord, the cost of repetition, only to answer the
36 constitutional question, whether subclassification is constitutionally permissible but not
37 against reservation in any form.

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CHIEF JUSTICE DY CHANDRACHUD: Thank you, Mr. Solicitor. Thank you.

TUSHAR MEHTA: Mr. Agarwal is appearing for Chandigarh Administration, but he may be given some time My Lord, maybe after...

CHIEF JUSTICE DY CHANDRACHUD: We'll hear Mr. Naphade today right after lunch.

SHEKHAR NAPHADE: I will start after lunch.

CHIEF JUSTICE DY CHANDRACHUD: After lunch because we are almost at the stroke of one.

SHEKHAR NAPHADE: Very well, My Lord.

CHIEF JUSTICE DY CHANDRACHUD: We actually planned to complete this side by one. So,[UNCLEAR] eating into the time of the others

DS NAIDU: I'm also there My Lords. I may take five minutes. I'm also there.

CHIEF JUSTICE DY CHANDRACHUD: We'll hear Mr. Naphade right now.

CHIEF JUSTICE DY CHANDRACHUD: Yes. Mr. Naphade.

SHEKHAR NAPHADE: I appear for State of Tamil Nadu cited 701.9.

CHIEF JUSTICE DY CHANDRACHUD: 701.9?

SHEKHAR NAPHADE: 9. this is a transferred petition from Madras High Court. So the challenge is to our Law known as Tamil Nadu Arunthathiyar Special Reservation of Seats In Educational Institutions including Private Education Institutions and Appointment or Posts in the Services under the State.

CHIEF JUSTICE DY CHANDRACHUD: So Mr Naphade, once we decide on the correctness of *Chinnaiah*, there may be other challenges to the validity of that is.

1 **SHEKHAR NAPHADE:** Undoubtedly, for that you have to go back to the High Court. But if
2 Your Lordship hold that the...[UNCLEAR]

3
4 **CHIEF JUSTICE DY CHANDRACHUD:** Then the law goes out.

5
6 **SHEKHAR NAPHADE:** Now, let me first begin with on a little bit of a philosophical note.
7 Marx said about more than a century ago, that history of all hitherto existing societies is the
8 history of class conflict. But in a democratic setup, we must have an organised legal system
9 which can resolve this conflict and today Your Lordship sees, in several parts of the Country,
10 there are conflicting interest amongst the Scheduled Castes themselves or OBCs, as we see in
11 Maharashtra now. Now the problem is how to resolve this? Now, what is the legal mechanism?
12 One is the reservation policy. The State of Tamil Nadu has been vigorously pursuing
13 reservation policy for several decades. By 2008, it came to the notice of the Government and
14 which is reflected in the Governor's address to the Assembly that, though there is reservation
15 policy enforced for several years, a certain group of Scheduled Caste have not yet got the
16 adequate benefit and they are not adequately represented. This was the beginning of the
17 enactment of this Act.

18
19 **CHIEF JUSTICE DY CHANDRACHUD:** What is the year of this Act you say?

20
21 **SHEKHAR NAPHADE:** 2008, though the Act is of 2009 but by 2008, it came to the notice
22 of the Government that certain Scheduled Castes have not adequately received the benefits of
23 the reservation policy, and that is reflected in the Governor's address. That led to the
24 appointment of a committee of a retired High Court judge Justice Janarthanam which
25 collected the empirical data and came to the conclusion that a group of Scheduled Castes
26 known as Arunthathiyars have received practically nothing and therefore, something is
27 required to be done. This is how the 2009 Act is enacted.

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29 **CHIEF JUSTICE DY CHANDRACHUD:** Arunthathiyar is one community?

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31 **SHEKHAR NAPHADE:** 2009.

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33 **CHIEF JUSTICE DY CHANDRACHUD:** Is it one community? It's one community?

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35 **D.S. NAIDU:** It's an umbrella term.

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37 **CHIEF JUSTICE DY CHANDRACHUD:** Umbrella term.

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SHEKHAR NAPHADE: It consists of group of Scheduled Caste out of about 76 notified under Article 341. Now, let me begin with what is the wrong with *Chinnaiah*. So I have identified seven errors which I will quickly enumerate. First, is an interpretation of Article 341. Now, Article 341 only empowers the President to notify, identify and notify the Scheduled Caste. Thereafter, the Legislative Competence of the State under Article 246 read with Schedule 2 and Schedule 3 get triggered thereafter

CHIEF JUSTICE DY CHANDRACHUD: Thereafter?

SHEKHAR NAPHADE: Thereafter, the State's Legislative Competence under article 246 read with Schedule 2 of the 7th Schedule, list 2 of the 7th Schedule and the list 3 of the 7th Schedule get triggered. Read with Article 15 (4) and 16 (4), now all these Constitutional scheme permits the states to enact a law and Your Lordships are aware that the executive power is coextensive with the Legislative power. In *Balaji's* case, Your Lordships have already held that to make reservation policy, it is not necessary to enact a law. It can even be done by an executive fiat. Now *Chinnaiah* what holds is that subclassification is inconsistent with Article 341 notification. Now the wording of Article 341 and the conclusion that the subclassification is inconsistent with Article 341, there is no connecting link. See in the process of ratiocination. You take a proposition and derive another proposition, then derive another proposition and then come to the conclusion. That's the logical way of looking at things. Now straight away that, because 341 empowers the President to notify a list of Scheduled Castes. You cannot straight away jump to the conclusion that subclassification is inconsistent.

CHIEF JUSTICE DY CHANDRACHUD: No, I think what the logic. That's the correctness which falls for determination. The logic was that, yes, that Article 341 is the process of designation or notification, as you call it, but once notified, all of them comprise one group of Scheduled Castes.

SHEKHAR NAPHADE: I'll come to homogeneous, I'll come to that part. Because that is one of the ground.

CHIEF JUSTICE DY CHANDRACHUD: Right and therefore, since it is one composite group of Scheduled Caste, therefore, if you give reservation in a State, you must give it to all of them. That's the logic of *Chinnaiah*, I think.

1 **SHEKHAR NAPHADE:** Now, that would be inconsistent with Article 15(4), 16(4). These
2 are enabling provisions.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** So, is that a second [UNCLEAR]...?

5

6 **SHEKHAR NAPHADE:** That's why, therefore, I demarcate the legislative competence in
7 two different aspects. One, the power to notify a particular Scheduled Caste under 341, that is
8 exclusively with parliament. No difficulty on that score. Now, from that list which is given to
9 the State, who should be the beneficiaries. Article 341 doesn't deal with it.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** Just 1 second.

12

13 **SHEKHAR NAPHADE:** It stops at that.

14

15 **JUSTICE B.R. GAVAI:** That's what the learned Advocate General argued into, taking
16 consideration the interplay between Article 341 and 64.

17

18 **SHEKHAR NAPHADE:** So, therefore Article 341 is merely a filter on the State's power to
19 identify a particular caste as a Scheduled Caste and it stops at there. Thereafter, it is for the
20 State to decide. This is same argument but I am putting it. Ultimately in law Your Lordships
21 are aware, the elephant and the blind man, everybody looks at it from a different perspective.

22

23 **JUSTICE B.R. GAVAI:** Fortunately on this side from the arguments which are advanced so
24 far, it proves that everybody looks from the same eyes.

25

26 **PETITIONER'S COUNSEL:** My Lord, In Tamil Nadu recently similar place of Caste
27 are[UNCLEAR] enacted an act of Parliament itself. So itself proves that State Government has
28 power. So, it's the same State Government enacted...

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Fair enough.

31

32 **JUSTICE B.R. GAVAI:** We will hear you.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** One second. We are now in the midst of a
35 Constitution Bench. Yes.

36

1 **SHEKHAR NAPHADE:** Now, my second limb of argument on this core is that Court is
2 reading into Article 341, some words which do not exist in it. The Court is adding words. And
3 the last limb with My Lord, Chief Justice said just now that **Chinnaiah** proceeds from the
4 assumption that it's a homogeneous class and therefore, if the State decides to grant benefit of
5 reservations, then the State must grant to all the Scheduled Caste and the level of benefit must
6 be same otherwise it will be made by Article 14. Now, this reasoning, according to me, runs
7 counter to the basic concept of classification. Now it is settled law that Scheduled Caste are
8 also a class. Scheduled Class are also a class and 15(4) and 16(4) deal with also class.

9
10 Now, what happened in **Chinnaiah's** case? There was a report of Justice Raju. Report of
11 Justice Raju. It collected an empirical data and came to the conclusion that a certain Scheduled
12 Caste have received disproportionately large benefit and comparatively some Scheduled
13 Castes have received practically nothing, and therefore, on the basis of the empirical data the
14 classification was made into A,B,C and D. This classification of Scheduled Caste must also pass
15 the test of classification which Your Lordships have let down. Intelligible differentia. Nexus to
16 the object of legislation or to the policy. If these two tests are satisfied, where is the question
17 of going into subclassification? And to say that subclassification is per se, contrary to Article
18 14. Because ultimate test is that. The Court has declined to go into the empirical data. On an
19 abstract proposition that the subclassification is violative of 14. No factual foundation. The
20 Court has not applied the test of classification. The Court has not made any attempt to find out
21 whether there is an intelligible differentia or not, and if there is an intelligible differentia
22 whether it has nexus to the object of Legislation. Complete absence of discussion.

23
24 **JUSTICE B.R. GAVAI:** Once they hold that it is not permissible then where is the question
25 of going into the empirical data?

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27 **SHEKHAR NAPHADE:** Correct. But that..

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29 **JUSTICE B.R. GAVAI:** If they court comes to a conclusion...

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31 **SHEKHAR NAPHADE:** But the premise is that per se it is violative of 14. Per se it is violative
32 of 14. Now, this is where our difference starts because classification... because as far as, say,
33 OBC, which are not Scheduled Castes, if they are to be differentiated, as is done in **Indra**
34 **Sawhney**, what is the test that we apply? Same test, intelligible differentia. Nexus to the
35 object of Legislation. So the basic test of classification is not applied.

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37 **CHIEF JUSTICE DY CHANDRACHUD:** Because they say it's per se one.

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SHEKHAR NAPHADE: Per se that you must grant to everybody at the same level.

CHIEF JUSTICE DY CHANDRACHUD: Now, what is the fourth Mr. Naphade? This is the last.

SHEKHAR NAPHADE: Now the next ground is that Court has read into Article 341. The Court has read into Article 341 prohibition. That it prohibits subclassification

CHIEF JUSTICE DY CHANDRACHUD: I am not sure we should go there, because 341 will not permit the States to make subclassification. If the Union of India makes a subclassification [UNCLEAR] 341 acting through an Act of parliament it's permissible. The point really is that the actual reservation, the actual implementation of reservation under 15(4) and 16(4) stands in a different sphere as compared to the work of designation, which is exclusively under Article 341.

SHEKHAR NAPHADE: No difficulty on that score. But look at this Legislative Competence is divided into two parts. Identification of Scheduled Caste 341, exclusive parliament. Whether to grant benefit you come to the State.

CHIEF JUSTICE DY CHANDRACHUD: Yes.

JUSTICE B.R. GAVAI: That is [UNCLEAR] condition. That is been consistently argued by everyone. That if so far as 341 says that...

SHEKHAR NAPHADE: But *Chinnaiah* says that State...

JUSTICE VIKRAM NATH: Everyone has argued that *Chinnaiah* is wrong on this

JUSTICE B.R. GAVAI: Everybody has argued the same thing *Chinnaiah* is wrong on this premise. That *Chinnaiah* has not not taken into consideration that Article 341 and 16(4) and 15(4) act in a different sphere. The precise argument of Advocate General is that 341 is only for the purpose of identification and designation. Once it is identified and designated, then as to what measures has to be provided for uplifting them is within the domain of the State and the Article...

1 **SHEKHAR NAPHADE:** There is no difficulty on that score. But *Chinnaiah* further say
2 that the State has no Legislative Competence.

3

4 **JUSTICE B.R. GAVAI:** Because it comes to a conclusion that it amounts to tinkering with
5 the [UNCLEAR]

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7 **SHEKHAR NAPHADE:** The *Chinnaiah* says...

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9 **JUSTICE B.R. GAVAI:** Therefore, every body's argument is that *Chinnaiah* went wrong
10 in holding [UNCLEAR].

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** That's right.

13

14 **SHEKHAR NAPHADE:** Now I just want to indicate to Your Lordship the relevant entries
15 from these 3 of the 7th Schedule. I'll quickly enumerate those lists, those entries. Entry 25.

16

17 **JUSTICE VIKRAM NATH:** But why do you need to go there? 16 (4) itself says that the State
18 has to make... implement the backward [UNCLEAR]

19

20 **SHEKHAR NAPHADE:** I was only, I was just trying to show the entries. Because the
21 reading of *Chinnaiah*

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** Entry of 25 is education.

24

25 **SHEKHAR NAPHADE:** 25, 26 then Entry 5, 41 of the State list.

26

27 **SHEKHAR NAPHADE:** Public service...

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29 **CHIEF JUSTICE DY CHANDRACHUD:** *Nahi, nahi*

30

31 **SHEKHAR NAPHADE:** State service..

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33 **CHIEF JUSTICE DY CHANDRACHUD:** Where is it?

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35 **SHEKHAR NAPHADE:** List 2, list 2.

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37 **CHIEF JUSTICE DY CHANDRACHUD:** Ah, list 2, State Public Services.

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SHEKHAR NAPHADE: Entry 5 is local Government.

CHIEF JUSTICE DY CHANDRACHUD: Just 1 second.

SHEKHAR NAPHADE: And Entry 20 of the Concurrent list, Social and Economic Planning.

CHIEF JUSTICE DY CHANDRACHUD: Entry 5 and then you give us Entry 41.

SHEKHAR NAPHADE: 25 and 26 deal with education of the Concurrent list and Entry 20 of the Concurrent list is Economic and Social Planning. Reservation policy is therefore a part of the social... and as far as

CHIEF JUSTICE DY CHANDRACHUD: So, according to you, by legislating in the Article...

SHEKHAR NAPHADE: Entry 5 and 41.

CHIEF JUSTICE DY CHANDRACHUD: Entry 5 and?

SHEKHAR NAPHADE: 41.

CHIEF JUSTICE DY CHANDRACHUD: So, according to you, under Article 245 the State can, for instance, legislate on State public services. You can legislate on education under 25. While as an incidental part of that, you can provide for Legislation on reservation.

SHEKHAR NAPHADE: On reservation, correct.

CHIEF JUSTICE DY CHANDRACHUD: We got the point.

SHEKHAR NAPHADE: Now, the next point, which I wish to urge, is that the social scenario is changing rapidly changing. The social scenario is rapidly changing. Anyone who reads the daily newspaper would see that there is a sea change. Now reservation policy, therefore, must keep pace with the social dynamics.

JUSTICE B.R. GAVAI: It should be organic and evolving, not static.

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SHEKHAR NAPHADE: Correct, correct. If you keep reservation policy, which was there 50 years back it will get fossilised. It will lose its connection with the contemporary situation.

CHIEF JUSTICE DY CHANDRACHUD: All right, what is the next point, Mr. Naphade?

SHEKHAR NAPHADE: The next point is, the next error, which I find is, the test of Article 14.

CHIEF JUSTICE DY CHANDRACHUD: That we...

SHEKHAR NAPHADE: Which is... I already have already indicated.

CHIEF JUSTICE DY CHANDRACHUD: You have already indicated.

JUSTICE B.R. GAVAI: Intelligible differentia.

SHEKHAR NAPHADE: Then the court has without adequate reasons, has declined to follow *Indra Sawhney*. That in my view, is directly contrary to *Indra Sawhney*. Because if there can be subclassification amongst the...

JUSTICE B.R. GAVAI: Backward

SHEKHAR NAPHADE: Other backward classes..

JUSTICE B.R. GAVAI: Why not in this?

SHEKHAR NAPHADE: Why not this? Any logic what is the test?

JUSTICE B.R. GAVAI: At that time 342A was not there. When *Chinnaiah* was decided 342A was not there, but 341 and 340 were there.

SHEKHAR NAPHADE: But we are concerned with the test of classification, the test of classification has not changed. The two ingredients, intelligible differentia, and nexus to the..... those are solid rocks which have survived all these Constitutional crisis. And the last is the usual argument that it will affect the efficiency.

1 **CHIEF JUSTICE DY CHANDRACHUD:** That we've heard yesterday, Mr. Farasat also
2 argued that.

3

4 **SHEKHAR NAPHADE:** Because again, there is no logical connection between
5 subclassification and..

6

7 **JUSTICE B.R. GAVAI:** Mr. Farasat has rightly referred to the judgment declared by My
8 Lord, the Chief Justice, wherein that this aspect has been discussed at length..

9

10 **SHEKHAR NAPHADE:** Now, as far as subclassification is concerned, in *Vasanth Kumar*
11 there are two paragraphs which I want to invite Your Lordship's attention. One is paragraph
12 22 and there is paragraph 55.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** *Vasanth Kumar*?

15

16 **SHEKHAR NAPHADE:** *Vasanth Kumar* case, 1985, supplement SCC.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Where will you get in the compilation? Volume
19 V?

20

21 **SHEKHAR NAPHADE:** It is in volume V.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** Page 1114? What are the paras, Mr. Naphade?

24

25 **SHEKHAR NAPHADE:** 1114, 1985.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** And paras?

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29 **SHEKHAR NAPHADE:** Paras 22 and 25. 22. I'm sorry. 25 and 55. I stand corrected.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** And what is the point that...?

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33 **SHEKHAR NAPHADE:** That point is this. I am just reading the one line from that para 25.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

36

1 **SHEKHAR NAPHADE:** 'The assumption that all members of the same caste are equally
2 socially and educationally backward is not well founded. Such an approach provides an
3 oversimplification of a complex problem of identifying the social and educationally backward
4 class.' And para 55. Para 55, in turn says, that there can be subclassification. This...

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** Can you just read out that one sentence where it
7 says that...

8

9 **SHEKHAR NAPHADE:** Which one?

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** That para 55.

12

13 **SHEKHAR NAPHADE:** Para 55, I will just read My Lord. This is what it says. 'A result of
14 the subclassification was that nearly 90% of the that is... 'Their Lordships are referring to
15 *Balaji* . 'The propriety of such a court...' I must state the background of beyond this
16 paragraph. In *Balaji*, question of subclassification was not the main issue. The main issues
17 were whether reservation can be done by the executive order. Second issue was whether caste
18 itself can be a criteria for classifying. These were the two issues. Incidental reference was made
19 to subclassification, and they found that the criteria which was adopted in *Balaji's* case that
20 nearly 90% of the population became backward. That was found to be bad but there is no direct
21 discussion about subclassification. So this is in my respectful submission, not a ratio at all, not
22 even an orbiter because...

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** What does *Vasanth Kumar* say in para 55?

25

26 **SHEKHAR NAPHADE:** This is what they say in the context of *Balaji*. 'A result of
27 subclassification was nearly 90% of the population of the State was treated as backward. The
28 propriety of such a court may be open to question on the facts of each case. But we do not see,
29 why on principle there cannot be a classification into backward classes and more backward
30 classes.'

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** All right.

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34 **JUSTICE VIKRAM NATH:** Just read the last sentence of this paragraph. That's the crux of
35 it.

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37 **SHEKHAR NAPHADE:** Last two lines?

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JUSTICE VIKRAM NATH: All that we can say is...

SHEKHAR NAPHADE: 'All that we can say is that subclassification may be permissible if there are classes of people who are definitely far behind the advanced classes but ahead of the very backward classes.'

CHIEF JUSTICE DY CHANDRACHUD: As a matter of principle, there is no constitutional bar.

SHEKHAR NAPHADE: That's the point.

CHIEF JUSTICE DY CHANDRACHUD: We got the point. Anything else, Mr. Naphade? We'll have to get on now. Thank you.

SHEKHAR NAPHADE: So, the point ultimately is this, that whether my subclassification stands the scrutiny of classification test, otherwise the different groups of Scheduled Caste. They are unequals and therefore they can't be treated equal.

CHIEF JUSTICE DY CHANDRACHUD: Thank you, Ms. Naphade. Mr. Gupta?

D.S. NAIDU: My Lord, may be, it's my turn now.

CHIEF JUSTICE DY CHANDRACHUD: One second. We have got an order here. Yes, Mr. Nidesh Gupta.

SHEKHAR NAPHADE: One moment. Last... The State has been following this policy very vigorously, and therefore, State [UNCLEAR]

CHIEF JUSTICE DY CHANDRACHUD: Thank you.

NIDHESH GUPTA: I'm mindful of the mood of the Court, and I'm mindful also of time constraints. So, I will not repeat with it. First, submission is that *Chinnaiah* is bad in view of the Constitutional scheme, and I have four submissions on that. Four reasons why *Chinnaiah* is contrary to the Constitutional scheme. Number one, the Constitution uses the expression Scheduled Caste, Scheduled Tribe, Socially and Educationally Backward Classes in various provisions. Your Lordships may make a note. Articles 15...

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CHIEF JUSTICE DY CHANDRACHUD: 1 second. Constitution uses the expression...

NIDHESH GUPTA: Scheduled Caste, Scheduled Tribes and Socially, Educationally Backward Classes in Article 15, partly in Article 16(4)(a) and 16(5), 16(4)(a). Then, My Lords, 46, 164. It speaks of Scheduled Caste and Scheduled Tribes in Articles 243D, 243T, 330, 332, 334 and 335. It refers to National Commission for Scheduled Caste, Scheduled Tribes, Backward Classes in 338, 338A and 338B. It also refers to Scheduled Tribes in 339, to Backward Classes, SEBC in 340 and lastly the definitions under 366, namely 24, 25 and 26(c) for SC/ST and SEBC, respectively. It is only in 16(4) that the expression used is backward classes and well settled Paras. 787 *Indra Sawhney* that backward classes here covers Scheduled Caste, Scheduled Tribes and SEBC. Therefore, intent of constitution framers was that backward class under 16(4) is a category where they are all at par because it is an expression used singularly in 16(4). Not in 15, not in 16(4)(a) and not elsewhere. But the intent being that for the purpose of backward classes under 16(4) SC/ST SEBC are at par. Therefore, the rationale of *Indra Sawhney qua* SEBC, OBC should squarely apply here is my first submission on Constitution. Number Two, My Lords.

CHIEF JUSTICE DY CHANDRACHUD: One second. Yes.

NIDHESH GUPTA: Now, kindly take Article 15 and 16 with me for a moment.

CHIEF JUSTICE DY CHANDRACHUD: Yes.

NIDHESH GUPTA: I now want to show the words preceding Scheduled Caste, Scheduled Tribes, SEBC and backward classes used in these articles. And my submission is if Your Lordship kindly takes 15(4) first. 15(4) says -'Nothing in this Article or Clause so and so of 29 shall prevent State from any making any special provision for the advancement of any socially educationally backward class of citizens or for Scheduled Caste and Scheduled Tribes.' Now it could be argued, as was being debated yesterday, whether 'any' is a prefix to socially and educationally backward class citizens alone Or is it also *qua* Scheduled Caste and Scheduled Tribes.

CHIEF JUSTICE DY CHANDRACHUD: *Prima facie* is only the former.

1 **NIDHESH GUPTA:** Only the former. Otherwise, they could again have been clubbed
2 together like in 16(4). I bow to that. And importantly, when it comes to Scheduled Castes and
3 Scheduled Tribes.

4
5 **CHIEF JUSTICE DY CHANDRACHUD:** I'll tell you why it qualifies only the former.
6 Because 'for' is used twice. If they wanted to apply the word any to SC/ST, they would have
7 said -'For the advancement of any socially and educational backward classes of citizens or for
8 Scheduled Caste and Scheduled Tribes.'

9
10 **NIDHESH GUPTA:** I bow to that. So my submission is, that were they wanted to use the
11 word 'Any', They have specifically said that -'*qua* socially and educationally backward.'

12
13 **CHIEF JUSTICE DY CHANDRACHUD:** Right.

14
15 **NIDHESH GUPTA:** And then they go on to say 'for the Scheduled Caste and Scheduled Tribe
16 in 15(4)'.

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18 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

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20 **NIDHESH GUPTA:** Similarly, 15(5)

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22 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

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24 **NIDHESH GUPTA:** Similarly, 15(5). Now, when we come to 16(4). Now you here, as Your
25 Lordships have already noticed yesterday, 'nothing in this article prevent the state from
26 making any provision for the reservation of appointment or post in favour any backward class.'
27 So specifically Constitution permits making of any provision for any backward class which
28 considerably includes Scheduled Caste/Scheduled Tribe. Therefore, *Chinnaiah* is in the
29 teeth of the plain language of 16(4).

30
31 **JUSTICE BELA M. TRIVEDI:** Then the backward class... then the backward class includes
32 SEBC, ST and SC.

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34 **NIDHESH GUPTA:** My Lords, paragraph 787 of *Indra Sawhney* specifically says so.

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36 **JUSTICE BELA M. TRIVEDI:** What was the reason of specifically mentioning all these
37 three in 15 (4)?

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NIDHESH GUPTA: That's what the Chief Justice just said, My Lords. That because there 'any' is qualifying only SEBCs. What fell from My Lord the Chief Justice a moment back is the answer for that. That the word 'any' is qualifying SEBC not *qua* SC, ST.

JUSTICE BELA M. TRIVEDI: Not for Scheduled Castes and Schedules Tribes?

NIDHESH GUPTA: Yes, My Lords. So there is 'any' is not preceding My Lords in 15 (4), is not preceding the words 'Scheduled Caste/Scheduled Tribes.

CHIEF JUSTICE DY CHANDRACHUD: But in 16 (4) it says..

JUSTICE BELA M. TRIVEDI: 16 also says.

CHIEF JUSTICE DY CHANDRACHUD: Any backward class..

NIDHESH GUPTA: Any backward class, So, therefore, any backward class means anybody is SC, ST, SEBC. Because backward class includes everybody, therefore for any of the three you can do it. Has to be My Lords.

JUSTICE B.R. GAVAI: So if your argument that 'any' is not to be read with Scheduled Caste and Schedules Tribes...

NIDHESH GUPTA: No, no. I'm saying, My Ladyship... only 15(4).

JUSTICE BELA M. TRIVEDI: 15 (4).

NIDHESH GUPTA: 15 (4) My Lord. The Chief Justice observed...

JUSTICE B.R. GAVAI: Yeah, but if that argument if you accept that, then it will be...

NIDHESH GUPTA: My Lords I'll, My Lords I'm saying...

JUSTICE B.R. GAVAI: No, no. Then it has to be considered a homogenic block.

NIDHESH GUPTA: Now, My Lords, I'd say that is a debatable issue. Not relevant *qua* this bench.

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JUSTICE B.R. GAVAI: Not relevant, then why are you arguing?

NIDHESH GUPTA: No I'm, No My Lords it is, it is relevant in the sense that different expressions have been used.

JUSTICE B.R. GAVAI: Yes.

NIDHESH GUPTA: There is a point in this that if you don't, what fell from...

JUSTICE B.R. GAVAI: This argument [UNCLEAR] interplay [UNCLEAR]

NIDHESH GUPTA: Under 15 (4), therefore 16 (4). I see that.

JUSTICE B.R. GAVAI: Into consideration..

NIDHESH GUPTA: My Lords, what is, what I'm submitting here is this once 16 (4) is..

CHIEF JUSTICE DY CHANDRACHUD: Now, I'll tell you the danger of your argument. For the purpose of this case, you may be right, but this argument will hit at any attempt by the State to subclassify for the purpose of measure in the 15(4).

NIDHESH GUPTA: I'm not saying that, I'm only saying this. Therefore, I will not pitch it there. What I am saying is this, what I'm saying Is this. The language here..

CHIEF JUSTICE DY CHANDRACHUD: Dangerous *hai yeh toh*.

NIDHESH GUPTA: My Lords, what I'm saying is this, My Lords what I'm saying is this, that as far as 60...

JUSTICE B.R. GAVAI: [UNCLEAR] otherwise it will...

NIDHESH GUPTA: I'm only saying My Lords there is a language used in 15 (4), 15 (5), 16 (4), 16 (4) (a), 16 (6). And 16 (4) is the widest, which says 'any backward class' and 'any' has to therefore, mean My Lords...

1 **CHIEF JUSTICE DY CHANDRACHUD:** See, but there also there may be an answer to
2 what you're arguing. Because when it says... 16 (4) says, any backward class, it means any
3 backward class into brackets, parenthesis SCs, STs or SEBCs

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5 **NIDHESH GUPTA:** SEBCs..

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7 **CHIEF JUSTICE DY CHANDRACHUD:** Right?

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9 **NIDHESH GUPTA:** Yeah.

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11 **CHIEF JUSTICE DY CHANDRACHUD:** So their argument is, when it refers to SCs it's
12 one composite block, not, you can't... 16(4) does not give you the power to further bifurcate
13 what is one composite block into subcategories. That's their argument.

14

15 **NIDHESH GUPTA:** My Lords, but I would say. Then My Lords, why would the Constitution
16 use the expression backward class only here and nowhere else? Because and then prefix with
17 any..

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** Any backward class.

20

21 **NIDHESH GUPTA:** So My Lords...

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** We got the point.

24

25 **NIDHESH GUPTA:** Now, this is number two. Number three, now, just notice also My Lords
26 in 16(4)(a) the expression uses very different. Please just see 16(4)(a). 'Nothing in this article
27 shall prevent the state from making any provision for reservation' and so on, so and so' in
28 favour of the Scheduled Caste and the Scheduled Tribe'. So here, perhaps My Lords, in matters
29 of promotion, there is a restriction being applied.

30

31 **JUSTICE B.R. GAVAI:** It is only applicable to Scheduled Caste and Scheduled Tribe.

32

33 **NIDHESH GUPTA:** Yes, only 'Scheduled Caste and Scheduled Tribe' and doesn't say 'any
34 Scheduled Caste and Scheduled Tribe', but uses the expression 'the'. So My Lords using 'any'
35 before 16(4) has to have some meaning My Lords, which is different from 16 (4)(a). Similarly,
36 16(6) also says - 'Any economically weaker section.'

37

1 **JUSTICE VIKRAM NATH:** Naphade was right, that every blind man sees the elephant in a
2 different manner....

3

4 **NIDHESH GUPTA:** This is point number two My Lords. Now point number 3. My Lords, in
5 Article 16 and 19 'provision' is used at some places and 'law' in some places. 16(4) and
6 (4)(a) speak of provision, as does 15(4) and 15(5) My Lords. And 16 (6) also. 15 (4), 15 (5), 16(4),
7 16(4)(a) and 16 (6) speaks of provision.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** Provision, the word 'provision'.

10

11 **NIDHESH GUPTA:** Which means, which Your Lordships have interpreted to mean includes
12 an executive order, et cetera. the circular, et cetera is good enough.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Is used in?

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16 **NIDHESH GUPTA:** 15(4), 15(5), 16(4).

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18 **CHIEF JUSTICE DY CHANDRACHUD:** Right.

19

20 **NIDHESH GUPTA:** 16(4)(a) and 16(6). In contrast, law is used in 16(3) and 16(5).

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** Then?

23

24 **NIDHESH GUPTA:** Therefore, intent was that this State should have the discretion not to
25 require something for a law to be passed but just an executive order is also good enough. This
26 is what Your Lordships have said in *Indra Sawhney* that the use of the expression
27 'provision' as distinct from law, has to be given some meaning.

28

29 **JUSTICE B.R. GAVAI:** That was said in *Balaji* also.

30

31 **NIDHESH GUPTA:** Yes, My Lord. My Lords, may just note para 737 of *Indra Sawhney*.
32 Para 737 of *Indra Sawhney* allows that, mentions that. The intent being that you don't need
33 a law. You can do it by an executive order.

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35 **CHIEF JUSTICE DY CHANDRACHUD:** Right.

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37 **JUSTICE B.R. GAVAI:** That's very well settled.

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NIDHESH GUPTA: Yes. So therefore, the use of the word from which... My Lords my submission is that it shows that the Constitution framers wanted greater and simpler discretion with the executive. You don't need to pass a law. You can do it by an executive order.

JUSTICE B.R. GAVAI: Total discretion.

NIDHESH GUPTA: Absolutely.

CHIEF JUSTICE DY CHANDRACHUD: Then?

NIDHESH GUPTA: The other parts have been covered regarding a 341 part, groups, et cetera. I won't repeat that. This is as far as the constitution. Now in *Indra Sawhney*, at six places, it is noticed for different issues and I'll give you the para numbers. Your Lordship need not bother with opening the paper book, where this Honourable Court gives discretion again to the state to decide on six different aspects in six different places. The first is in para 709. If you also don't mind opening the PDF, it's at 647, in Volume V. I'll quickly run Your Lordships through that.

JUSTICE B.R. GAVAI: PDF?

NIDHESH GUPTA: 647, Volume V.

CHIEF JUSTICE DY CHANDRACHUD: Page 647?

NIDHESH GUPTA: PDF 647. It's para 709 of the SCC. It's page 670. 647, My Lords has para 709?

CHIEF JUSTICE DY CHANDRACHUD: Yes.

NIDHESH GUPTA: 'Again in State of so and so, a case arising from Andhra Pradesh division bench, so and so adopted the same approach after the identification made by so and so, answering the criticism that backward class commission appointed by the State Government did not do a scientific, thorough job. Bench observed...' Your Lordships may come down to Placitum E. 'Therefore, the proper approach in our opinion.' This is quoting from the High Court. 'Should be to see whether the relevant data material referred to in the report of the commission justify the conclusions. In our opinion, there was sufficient material to enable the

1 commission to be satisfied with the persons that put in the list are really socially, educationally
2 backward. No doubt, there are a few instances where the educational average is slightly above
3 the state average. That circumstances itself is not enough to strike down the entire list, even
4 assuming there are a few categories which are little above the state average in literacy. That is
5 a matter for the State to take note of in review position or such categories of persons that take
6 a suitable decision.' Then this Honourable Court says -'We agree with these observations.' This
7 is one. Then at PDF page 671, para 744 at the foot. 744, 745. On the issue whether reservation
8 is exhaustive under 16(4) or whether it can go to 16(1) also. 744. My Lords have that?

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10 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

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12 **NIDHESH GUPTA:** My Lord, the chief Justice has that?

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14 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

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16 **NIDHESH GUPTA:** 'This aspect needs to be considered in whether 4 is exhaustive of
17 reservation. In other words, question whether any reservation can be provided outside 4?
18 There are two views on the aspect. Fuller consideration of the matter, we are of the opinion,
19 Clause 4, is not, cannot be held to be exhaustive, it's so and so, so and so.' Just turn the page
20 over at the top of the next page. 'But at the same time, one thing is clear it is in very exceptional
21 situations and not for all sundry reasons that any further reservation of whatever time should
22 be provided under 1. In such a case the State has to satisfy if called upon that making such a
23 provision was necessary in public interest to so and so.' Then the next para. Towards the last
24 4 lines of the next para. 'In principle we see no basis for exceeding to the said contention. What
25 kind of special provision should be made in favour of a particular class is a matter for the State
26 to decide, having regard to facts and circumstances of a given situation, subject, of course to
27 observations of the preceding paragraph.' Again, discretion being given to the State. Then PDF
28 page 694, para 783. The topic starts in para 780, which is identification of backward class of
29 citizens. Para 782 is also important. But that was read yesterday, so I'll come to 783. The fourth
30 line in para 783 at page 694. PDF SCC, page 717. The fourth line. 'It is for the authority
31 appointed to identify to adopt such approach and procedure as it thinks appropriate and so
32 long as the approach adopted by it is fair and adequate, the Court has no say in the matter.' on
33 how to identify. On this third aspect. This is what Your Lordship said. Then Page 704 PDF
34 which is of the SCC page 727, para 796, 797. Placitum B, C. Placitum B -'They two represent
35 backward social collectivises for the purpose of 16(4). Neither the Constitution nor the Law
36 prescribes the procedure or method of identification of backward class nor is it possible or
37 feasible for the Court to lay down any such procedure or method. It must be left to the authority

1 to identify.' Then at 704 PDF which on the same page at the bottom, adequacy of
2 representation in services. In this para. Para 798. The test of **Barium chemicals** is laid down
3 in my written submission. First ten pages are dedicated to this. My Lord, the Chief Justice has
4 accepted that submission in **Pavitra** that the opinion...I will come, when I show my written
5 submission very quickly I will come to this part there. And lastly, at page 706 PDF which is on
6 the issue of backward or more backward. Question number 5, whether backward can be
7 divided into backward or more backward. Your Lordship will find in para 802 at the bottom
8 of page 706 PDF. Para 802. ' We are of the opinion that there is no Constitutional legal bar to
9 a State categorizing the backward classes as backward or more backward. We are not saying it
10 ought to be done. We are concerned with the question, if a State makes such a categorization,
11 whether it would be invalid? We think not.' Again giving discretion to the State. And then at
12 the foot of the page...

13

14 **JUSTICE B.R. GAVAI:** [UNCLEAR]

15

16 **NIDHESH GUPTA:** Similarly, at the foot of this page, again reiterating. So these are six
17 places where discretion has been given specifically to the State. Now, if Your Lordship will
18 kindly take my written note Volume I, page 1. I've tried not to read what has been read. I'm
19 sorry if I read it.

20

21 **JUSTICE VIKRAM NATH:** Where is it written??

22

23 **NIDHESH GUPTA:** Volume I Page 1.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** Volume I Page 1 is KK Venugopal.

26

27 **NIDHESH GUPTA:** Page 3. It starts perhaps in PDF. It is the first written submission in
28 Volume 1. I think, starts at page 3.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

31

32 **NIDHESH GUPTA:** Page 6 is PDF, I think.

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34 **JUSTICE VIKRAM NATH:** Page 4 PDF.

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36 **NIDHESH GUPTA:** The first point is on this **Barium chemical** test and I have at page...
37 My Lord is following the PDF page?

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CHIEF JUSTICE DY CHANDRACHUD: Yes.

NIDHESH GUPTA: So that is page 6. Page 4 is the first PDF page, right??

CHIEF JUSTICE DY CHANDRACHUD: Yes, page 6.

NIDHESH GUPTA: If Your Lordship will turn the page over to page 7. My Lords, *Barium chemical* is in the lower half of the page. After quoting that paragraph from *Indra Sawhney*. And if Your Lordship will come now to page 8. Para 61 and 64 are the tests given in *Barium Chemicals* where Your Lordships have said the last 4 lines of para 61. 'The power is executive and the opinion requisite before an order can be made is of the Central Government or the Board, as the case may be, and not of the Court. Therefore, the Court cannot substitute its own opinion and the opinion of the authority. But the question is whether the entire action under the state is... section is subjective.' So this section here has said that there should be some material to justify the opinion, whether it is good, sufficient or not is for the State to decide. But there should be some material and Your Lordships say so at the bottom at page 6... paragraph 64.

CHIEF JUSTICE DY CHANDRACHUD: That has to be tested when the challenge comes up on [UNCLEAR] Statute

NIDHESH GUPTA: I see that. This goes on My Lords, till page 12 of the PDF. And after that, My Lords, I have come on point number two from page 14 of PDF. You should find paragraph 2 at page 14.

JUSTICE B.R. GAVAI: Historical perspective.

NIDHESH GUPTA: Historical perspective. And My Lords, just come to page 15, paragraph 25. This is from *Rangachari*. In paragraph 25, what was emphasised was that they should not be just lower posts because insofar as Mazhabi Sikhs are concerned.

CHIEF JUSTICE DY CHANDRACHUD: That was numerical as well as qualitative,

NIDHESH GUPTA: Qualitative and values, et cetera. Then Your Lordship may skip the next few pages as it deals with the same thing. And come to page 18 where My Lords, I have quoted, I have reproduced My Lords from...

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CHIEF JUSTICE DY CHANDRACHUD: *Akhil Bharatiya Soshit.*

NIDHESH GUPTA: From *Akhil Bharatiya*, Justice Krishna Iyer paragraph 46. Where, Justice Iyer says... Paragraph 46. My Lords have that? 'Government moved further because real power could be shared by weakest only if the doors of higher decks were open to them. Higher accolades and real controllerless, not menial levels. So on and so. Obviously, 16 (4) was not designed to get more Harijans into Governments as scavengers, sweepers, but officers and bosses, so that administrative power may become the common property of the so on, so and so on.' 'Social stratification, bane of caste system could be undone in vertical mobility won. Not by [UNCLEAR] exercise, but by the exercise of shared power.' And then My Lords the next page. Paragraph 65 notices that - 'This may take centuries and aggressive policies are required.' And then page 20, Swami Vivekandanda's famous quote My Lords, for Shudras. And then, page 22 where My Lords, specifically Valmikis are mentioned, the Rishi Valmiki is mentioned and incidentally, My Lords the Valmiki Sikhs have taken their name from Rishi Valmiki.

CHIEF JUSTICE DY CHANDRACHUD: All right. Thank you, Mr. ...

NIDHESH GUPTA: Now My Lords... Just two more things, My Lords. Very quickly .

JUSTICE B.R. GAVAI: Almost half and hour Mr. Gupta.

NIDHESH GUPTA: Very well, very well. Now My Lords, Your Lordship may see this note,

CHIEF JUSTICE DY CHANDRACHUD: We'll have a look at it. Thank you...

NIDHESH GUPTA: Your Lordship, just see two factual things. I put very interesting data, which is as recent as My Lords this, this month. If Your Lordships will just take Volume V(b) for a moment, I have put data concerning Mazhabi Sikhs and of course, it goes back to My Lords....study is done in 1871. But I won't show that. I'll just show the latest.

CHIEF JUSTICE DY CHANDRACHUD: Volume V(b), page?

NIDHESH GUPTA: Volume V(b) starts from page 1. It's an independent volume.

CHIEF JUSTICE DY CHANDRACHUD: At page?

1 **NIDHESH GUPTA:** My Lords in this, at page 29 to 34, I have placed before Your Lordship
2 My Lords RTI's which we have got. From 22 Government departments, which show data from
3 1950 to 1975. My Lords, 1975 were letters issued by the Government under which this 50%
4 was provided.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** Alright.

7

8 **NIDHESH GUPTA:** After '75, what has happened' till date is also provided in that. Till 2006
9 and then after the enactment till today and what we find is...

10

11 **JUSTICE B.R. GAVAI:** We're not going into that aspect. That will be considered whether
12 sufficient material was there or not. [UNCLEAR]

13

14 **NIDHESH GUPTA:** And I've also given percentages to show we are 39%, but we are
15 [UNCLEAR]

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, Mr. Naidu? Yes.

18

19 **D.S. NAIDU:** May I Sir please?

20

21 **JUSTICE B.R. GAVAI:** There's somebody between you and Mr. Gupta.

22

23 **D.S. NAIDU:** 'Why we can't wait?' My Lords, there's a clamour of supplication of some people
24 and also the title of the book.

25

26 **JUSTICE B.R. GAVAI:** You are appearing for whom?

27

28 **D.S. NAIDU:** My Lords, I'm appearing for Respondent number 10 in transfer petition. That's
29 701.9. I have given my written submissions as well, My Lords.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** Where is your written submissions?

32

33 **D.S. NAIDU:** He is from the Arunthathiyar community. I'll take 5 minutes.

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35 **JUSTICE VIKRAM NATH:** He is supporting the Legislation or challenging the Legislation?

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37 **D.S. NAIDU:** No. No. He supports the reservation and the Tamil Nadu Act.

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JUSTICE VIKRAM NATH: Supporting Section 4, 5 of the 2006 Act.

D.S. NAIDU: He is a beneficiary. 2009, My Lords.

JUSTICE VIKRAM NATH: 2009.

JUSTICE B.R. GAVAI: Tamil Nadu Act.

D.S. NAIDU: Tamil Nadu Act.

CHIEF JUSTICE DY CHANDRACHUD: Give us the distilled defence in a minute.

D.S. NAIDU: Absolutely. Could I be given five minutes? Beyond that...

CHIEF JUSTICE DY CHANDRACHUD: Tell us what it is.

D.S. NAIDU: I just give some interesting quote how our caste has shocked even Martin Luther King. He has an interesting incident. I'll just narrate and just give only the gist. I won't be referring to anything except two paragraphs that have to be read. One from Martin Luther king. Then the other one is Isabel Wilkerson, The Caste. These are the two things. May I submit?

CHIEF JUSTICE DY CHANDRACHUD: Yes.

D.S. NAIDU: My Lords, in his book, Why we can't wait. That's of 1963, page 147. I'll give you...

CHIEF JUSTICE DY CHANDRACHUD: Page 147 of?

D.S. NAIDU: Martin Luther King's classic book. Why we can't wait.

CHIEF JUSTICE DY CHANDRACHUD: Where is it Available?

D.S. NAIDU: I'll give that.

CHIEF JUSTICE DY CHANDRACHUD: Oh, you are going to give that.

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D.S. NAIDU: Yes, My Lords.

JUSTICE B.R. GAVAI: This is not included in your submissions?

D.S. NAIDU: Whatever I've given in that one, has already been repeated. I don't get a chance if I go for that one.

JUSTICE B.R. GAVAI: So, just for getting a chance, you want to read something which is not applicable?

D.S. NAIDU: I am trying to underline the importance of the issue. What has been happening with the issue of classification or subclassification...

CHIEF JUSTICE DY CHANDRACHUD: All right. Read it out.

D.S. NAIDU: 'Whenever this issue of compensatory or preferential treatment for the Negro is raised, some of our friends recoil in Hara. The Negroes should be granted equality, they agree, but should ask for nothing more. On the surface it appears reasonable, but it's not realistic. But it's obvious that if a man enters the starting line of a race 300 years after another man, the first would have to perform some incredible feat in order to catch up.' Taking que from this one Lyndon Johnson, the very next year, in commencement address of Harvard University has said this, which is relevant for us. 'You do not wipe away the scars of centuries by saying, now you are free to go where you want to, do as you desire and choose the leaders you please. You do not take a man who for years has been hobbled by chains, liberate him, bring him to the starting line of a race, saying, you are free to compete with all others and still justify, justly believe you have been completely fair. This is a next and more profound stage of the battle for civil rights. We seek not just freedom, but opportunity, not just legal equality.'

CHIEF JUSTICE DY CHANDRACHUD: Thank you, Mr. Naidu.

D.S. NAIDU: May I just My Lord?

CHIEF JUSTICE DY CHANDRACHUD: Yes.

D.S. NAIDU: Now kindly have a look at the Act.

1 **CHIEF JUSTICE DY CHANDRACHUD:** What is the submission?

2

3 **D.S. NAIDU:** The Act has never classified, or much less as it indulged in any subclassification.
4 It's only one provision.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** Volume V.

7

8 **JUSTICE VIKRAM NATH:** Tamil Nadu would be different.

9

10 **D.S. NAIDU:** I'll just read that for consideration. 1 minute. My Lords, kindly at page 760,
11 Volume IV.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** 760?

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15 **D.S. NAIDU:** Volume IV, 760, page number.

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17 **JUSTICE B.R. GAVAI:** Volume IV?

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19 **D.S. NAIDU:** Page 760.

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21 **JUSTICE B.R. GAVAI:** PDF page?

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23 **D.S. NAIDU:** 760. I wonder whether it's PDF page. It's continuation page. PDF page 761 My
24 Lords or could it be 765. 765, perhaps Section 2. It's a two page enactment. Or rather, one page
25 enactment, 772. Your Lordships got it?

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

28

29 **D.S. NAIDU:** 'Now the Government of Tamil Nadu has enacted Act 4 of 2009, thereby
30 offering reservation to Arunthathiyar on preferential basis within the reservation available for
31 Scheduled Castes, and the said Act came into force with effect from 29-04-2009. In pursuance
32 of the above Act, the roster prescribed in the Government order, third read above et cetera, et
33 cetera.'

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** Which is the statutory provision? Which is the
36 provision?

37

1 **D.S. NAIDU:** My Lords, may I come to 756? Yes. My Lords got it?

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** 756?

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5 **D.S. NAIDU:** PDF page, perhaps 761.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

8

9 **D.S. NAIDU:** Section 3 - 'Notwithstanding anything contained in the 1994 Act or 2000 or the
10 2006 Act or any other law for the time being enforced or any judgment, et cetera, et cetera.
11 Having regard the social and educational backwardness of Arunthathiyars, including the
12 Scheduled Castes, 16% of the seats reserved for the Scheduled Castes shall be offered to
13 Arunthathiyars, if available in respect of annual permitted strength in each branch or faculty
14 for admission, et cetera, et cetera.' The same thing applies in 4 also. First, my submission is
15 My Lords.

16

17 **JUSTICE B.R. GAVAI:** [UNCLEAR] in Punjab High Court.

18

19 **D.S. NAIDU:** It is an umbrella term. Not a particular caste has been done. It's an umbrella
20 term, having about seven castes included in that one. My Lords, for the last 2009 means up to
21 2023, thousands have been uplifted thanks to this enactment and in fact, the committee that
22 has recommended has taken the date...

23

24 **JUSTICE B.R. GAVAI:** [UNCLEAR] We are only here to answer the question of law. As to
25 whether is it permissible, *Chinnaiah* is correct or not.

26

27 **D.S. NAIDU:** Yes My Lords. As I submitted. My Lords may kindly have that to be taken note
28 of that it is not any sort of subclassification My Lords. Because among the Scheduled Castes in
29 Tamil Nadu there are 76 castes and incidentally, these Arunthathiyars are treated as
30 untouchables even by those other SC communities. This is the discrimination they have
31 suffered from.

32

33 **JUSTICE B.R. GAVAI:** Untouchable among the untouchables.

34

35 **D.S. NAIDU:** Yes, indeed. It's an established fact which even the Commissioner, the learned
36 single commission has recorded, and they are also called *Chandala*, who have been in the

1 leather industry. They are the cobblers, to put it simply. Now My Lords may kindly see, I just
2 say when it comes to ***Davinder Singh***, para 35.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** [UNCLEAR] Arunthathiyars you mean the caste
5 Arunthathiyar, Chakkiliyar, Madari. Madiga, Pagadai, Totti and Adi Andhra within the list of
6 76 Scheduled Castes.

7

8 **D.S. NAIDU:** Yes, My Lords. There are seven of them and they have been completely
9 marginalized. To this day, nothing has speculated to them, and I've just said at the cost of
10 repetition, they've been treated as untouchables among the untouchables. They don't have any
11 social upliftment until this Act came into force. And it's been founded on intelligence
12 differentia there's been a commission that has gone into. It has taken the social profile and
13 then it has concluded that. I don't think it offends [UNCLEAR] When it comes to ***Davinder***
14 ***Singh***. Para 35 I rely on. Then My Lords ***Indra Sawhney*** I rely on para 802 and 803.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** It has been read out.

17

18 **D.S. NAIDU:** And finally, when it comes to ***Jarnail Singh*** para 27.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** All right, thank you.

21

22 **SHRADDHA DESHMUKH:** Three problems with ***E V Chinnaiah*** as I want to place with
23 Your Lordships is, the first one is that ***E V Chinnaiah*** goes on the foundation.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** Just 1 second. Just 1 second. Let's make a note
26 of.

27

28 **SHRADDHA DESHMUKH:** Yes, My Lords. My Lords, I am appearing in IA 267730-23.
29 This is a Karnataka...267730 of 2023. This is a Karnataka Mazar Mahasabha. So the three
30 problems with ***E V Chinnaiah***- The first one is that it tackles Scheduled Caste as a
31 homogenous group. A lot of arguments have already preceded me about why it is not
32 homogeneous because of its representation not being homogeneous in nature. There being
33 diversity in occupation and the way they have been dealt with. I would like to deal with that
34 part of homogeneity which goes into the very definition and the structure of what form
35 Scheduled Castes. That is my first argument. The second argument is that ***E V Chinnaiah*** in
36 para 39 says that because the subclassification group affects only a minuscule proportion of
37 the Scheduled Caste community, therefore, it is not an exercise that they are willing to

1 undertake at the moment. The argument of minuscule proportion has been well settled by
2 legal tenets, My Lords. I would place one of those judgments, wherein they are specifically
3 heads, that when there is a right, there is a remedy, and it does not matter whether it is a
4 minuscule proportion or a large proportion.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** In *Navtej Johar* also.

7

8 **SHRADDHA DESHMUKH:** *Navtej Singh Johar* My Lords. And the last point is that the
9 judgment itself is in violation of the principles of constitutional morality, which has also been
10 expounded in *Navtej Johar* and the judgments thereafter. Without taking much time, My
11 Lords I would like to rely in my submissions, which is at Compilation I(f) My Lords.
12 Compilation I(f) at page 8. My Lords have page 8?

13

14 **JUSTICE VIKRAM NATH:** Numbered page eight.

15

16 **SHRADDHA DESHMUKH:** Yes, My Lord. Number page 8, PDF Page 12. I apologise.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** PDF page 12. Yes.

19

20 **SHRADDHA DESHMUKH:** PDF page 12. This is an extract from the book, Marc Galanter's,
21 equating it. In his book *Competing Equalities, Law and Backward Classes in India*, and I have
22 placed the book on record My Lords. I'm only extracting the portion that is relevant at page 8.
23 There was an interesting conversation when the Constitutional framers were deciding how to
24 define Scheduled Caste, how to define untouchability, there was a conversation within them
25 whether this is a term that could be defined at all. And I would read point number two. "The
26 very different nature of the matter in the North from the South was brought out in the
27 testimony before the Indian Franchise Commission Mr. G. S. Pal, representing the United
28 Provinces Hindu Backward Classes League, which had submitted a list of 115 castes estimated
29 to make up over 60% of the population for inclusion as depressed classes in the United
30 Provinces. Dr. Ambedkar asked a very interesting question - 'My point is, is this a list of what
31 might be called backward communities, economically backward and educationally backward
32 or is this a list of castes which are called untouchables, whose touch causes pollution? Is this a
33 list of castes which are touchable, but are educationally and economically backwards?' Mr. Pal
34 says this - 'I respectfully submit, that this is a list of all the castes which in the opinion of the
35 league, are depressed classes. Untouchability in the sense, in which it is understood in Madras
36 or Bombay does not exist here. *Mangi* is the only caste that is universally untouchable,
37 pollution by whose touch is regarded as something very undesirable. Here untouchability

1 exists, of course, but in a very mild form or exists in some form or another in all the caste I've
2 enumerated.' Then Sir Surindar Singh Majitia asked -'How would you then define depressed
3 class of people?' To which Mr. Pal responds -'Not in the sense of the definition by Bombay and
4 Madras. But apparently here the Hindu class is divided into high and low caste. The problem
5 is very acute. As acute as untouchability is in Bombay and Madras. I applied three tests the
6 first is, we are socially despised then there is economic backwardness and educational
7 bankruptcy.' J. H. Hutton which Gopal Sankaranarayanan, my senior argued before this
8 wherein he talked about the different criteria that were put forward. 9 criteria were put
9 forward by J. H. Hutton, wherein he said that - 'Are these people who will upper class Hindus
10 will take water from? Will they be allowed access to public convenience?' So he plays these 9
11 criteria before the committee. Then the report said this, 'The existence of multiple and
12 ambiguous criteria permitted regional variation by giving the census superintendent's core for
13 discretion. Each provincial superintendent was instructed to drop his own list, taking these
14 tests into account and to recognise depressed only those castes who definitely suffer from
15 serious social and political handicap on account of their degraded position in the Hindu social
16 scheme. The final reckoning, then did not apply Hutton's test, pure and simple. Excluded were
17 some castes which were theoretically untouchable, but who, by virtue of prosperity and
18 vigorous organisation, have built up for themselves a strong position which obviates the need
19 of any special measures for their social, political, religious protection. Conversely, some groups
20 were included, even though theoretically they were untouchables.'

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** They were not untouchables..

23

24 **SHRADDHA DESHMUKH:** 'They were not untouchable.' So therefore, even at that stage,
25 the factors and the criteria that form Scheduled Caste as a group, there was no consensus.
26 Because India being such a varied country, it was not possible to define what exactly a
27 Scheduled Caste can be, and that is the reason why My Lord's Constitution even today does
28 not have a definition of Scheduled Caste. And the point is that the reason that the Constitution
29 did not provide for subclassification is because originally, when the Constitution thought
30 about bringing in reservation, it was to be only for a period of 10 or 15 years. They did not
31 imagine that this reservation policy would extend to now, over 60 years, about 75 years that
32 the reservation policy has continued, so they imagine that would have come to an end so there
33 would have been no need for subclassification. A judgment of this honourable Court, My Lord
34 said I've extracted at page 6, which is *K.C Vasanth Kumar*, it has already been read, but
35 only one paragraph, which is at paragraph 7 My Lords. At page 7, PDF page 11 My Lords, the
36 bottom portion of it My Lords which is the italicized and highlight portion. 'In fact, the upper
37 crust of the same caste is verily accused of exploiting the lower strata of the same caste. It is

1 therefore, rightly argued that the basis of the caste system, namely purity and pollution is
2 slowly being displaced by the economic condition of the various segments of the same class. It
3 is recognised on almost all hands that the important features of the caste structures are
4 progressively suffering erosion'. So what was originally understood to be a criteria for
5 Scheduled Caste, which is purity and pollution has itself eroded over a period of time and has
6 become more economic in nature. So that's why My Lords, this is in terms of what is the factors
7 of definition of Scheduled Caste itself. There is a very interesting article, My Lords, which is
8 placed at page 15 of my submission. PDF page 15 running number 11. This article is called
9 'Heterogeneous Effect of the Indian Affirmative Action the Role of Caste Certificates'. I've
10 placed the article also on record.

11

12 What this article says is that only by an inclusion of your name in the Scheduled list, you don't
13 automatically get the benefit as a Scheduled Caste. You need to get a caste certificate in order
14 to enjoy the benefit as a Scheduled Caste. This article then goes on to study the different factors
15 which will determine whether an individual will have access to that caste certificate and
16 therefore enjoy the benefits of the caste certificate. One of the factors, they say, is the demand
17 side factor. So they look at localities and communities where the parents of the person who's
18 seeking the benefit has an employment, either in Government employment, has education. If
19 they have education and employment they have found that such families have a 7.6% better
20 chance of getting a caste certificate.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

23

24 **SHRADDHA DESHMUKH:** The second factor is supply side, which is, I understand My
25 Lords time is less. The supply side, which is school. If I am from a locality where there is a
26 primary or a secondary school, there is a 13% better chance of me getting a caste certificate
27 and enjoying the benefits. The third is procedural, which is if, from my locality, there are seats
28 reserved for an MP or an MLA, there is a 9.2% better chance of me getting access to a caste
29 certificate. And the lastly, which I found very amusing, was a community factor. They say that
30 if these people live in a village, along in a hybrid society where there are not just Scheduled
31 Caste members but also other members from other castes and communities, those people were
32 going to have a higher benefit of getting a caste certificate versus somebody who was living in
33 an exclusive area reserved only for Scheduled Castes. So, therefore, even in the enjoyment of
34 the benefits that accrue to a Scheduled Castes, there are so many different defining factors that
35 Scheduled Castes as a group can never be homogeneous, and it always has to be understood
36 as being a heterogeneous group. Coming to my second point, My Lords, which is the miniscule
37 argument. My Lords may refer to Page 23, of the PDF page 23 and the relevant pages at 24.

1 I've extracted this from the judgment itself, para 39. My Lords have page 24? May I read, My
2 Lords? Para 39. 'Legal Constitutional policy adumbrated in a statute must answer the test of
3 Article 14 of the Constitution. Classification, where the permissible or not must be judged on
4 the touchstone of the object sought to be achieved. If the object of reservation is to take
5 affirmative action in favour of a class which is socially, educationally and economically
6 backward. The State's jurisdiction, while exercising its executive or legislative function is to
7 decide as to what extent reservation should be made for them, either in public service or for
8 obtaining admission and education institutions.

9 In our opinion, such a class cannot be subdivided so as to give more preference to a minuscule
10 proportion of the Scheduled Caste, and preference to other members of the same class. My
11 Lords, with due respect, I believe that this is an erroneous finding because, number one, in
12 fact, there are reports which show that there are communities which have 70% representation
13 in population. But have only 9% representational in education, so it's not really a miniscule
14 proportion. But in any event, even if it were, even if there were five people in a class of 50, even
15 the miniscule proportions rights had to be addressed by the Honourable Court and My Lords
16 of paragraphs is paragraph 144, which is **Navtej Singh Johar** which is at PDF page 24, at
17 the bottom. This is from the landmark judgment given by the Honourable Chief Justice in
18 **Puttuswamy**, which has been extracted My Lord. May I read? 'Neither of the above
19 reasons can be regarded as a valid constitutional basis for disregarding a claim based on
20 privacy under Article 21 of the Constitution, that a miniscule fraction of the Country's
21 population constitutes lesbians, gays, bisexuals or transgenders, as observed in the judgment,
22 is not a sustainable basis to deny the rights to privacy, the purpose of elevating certain rights
23 to the stature of guaranteed fundamental right is to insulate their exercise from the disdain of
24 majorities, where the Legislative are popular. The guarantee of Constitutional rights does not
25 depend upon their exercise being favourably regarded by majoritarian opinion. The test of
26 popular acceptance does not furnish a valid basis to disregard rights which are conferred with
27 the sanctity of Constitutional protection. Discrete and insular minorities face great dangers of
28 discrimination for the simple reason that their views, beliefs or way of life does not accord with
29 the mainstream. Yet in a Democratic situation, Constitution founded on the Rule of Law, their
30 rights are as sacred as those conferred on other citizens to protect their freedoms and liberty.'
31 Therefore, the argument that this affects only a miniscule proportion could not have been a
32 foundation of this judgment.

33

34 In far as far as the Presidential list goes **Jarnail Singh** and I only want to mention the para
35 number and not read it. Para 26 of Justice Nariman's judgment specifically says that even if
36 we were to extend this to creamy layer, and apply creamy layer to SCs and STs and even in that

1 case, it does not affect or it does not have any embark on the power of the President under
2 Article 341 or 342. This is para 26 My Lords.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** At page 28.

5

6 **SHRADDHA DESHMUKH:** 28. Yes, My Lords.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

9

10 **SHRADDHA DESHMUKH:** So therefore, My Lords, I'm not reading into this, but Justice
11 Nariman, the Constitution bench of this Hon'ble Court has specifically said that by virtue of
12 even including creamy layer, you don't have, it doesn't tinker with the presidential list under
13 Article 341 or 342 of the Constitution. Para 741 of the *Indra Sawhney* has been read out My
14 Lord, but the only point is that when they say that Article 61 is a right of equality and 16(1)
15 naturally includes the reasonable classifications under Article 14. 16(4) which is an exercise of
16 classification, which is what *Indra Sawhney* says at 741 has to definitely bring about the
17 exercise of reasonable classification. And the last point which is the constitutional morality
18 point. My Lords may have the paragraphs in *Chinnaiah* which my learned seniors have
19 already read para 41 and 113 where they pass a buck onto the State to do something more
20 rather than doing something themselves despite understanding that the problem of
21 subclassification exists, and the need of the hour is to provide for it. It ignores the provisions
22 at page 30 at the bottom is *Navtej Johar* where the Doctrine of Constitutional Morality has
23 been expounded and the relevant page is at page 31. This is an extract from *Navtej Johar*
24 para 111. May I read, with permission?

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

27

28 **SHRADDHA DESHMUKH:** 'Our Constitution has often been described as transformative.
29 One of the most important purposes of this transformation is to ensure that by realization of
30 fundamental socioeconomic rights, people disadvantaged by their deprived social and
31 economic circumstances become more capable of enjoying the life of dignity, freedom, and
32 equality that lies at the heart of our Constitutional Democracy. It is the concept of
33 Constitutional morality which strives and urges the organs of the state to maintain such a
34 heterogeneous fibre in the society, not just in the limited sense, but also in multifarious ways.
35 It is a responsibility of all the three organs of the state to curb any propensity or proclivity of
36 popular sentiment or majoritarianism. Any attempt to push and shove a homogeneous,
37 uniform, consistent, and a standardized philosophy throughout the society would violate the

1 principle of Constitutional morality.' And my argument, My lord says that *EV Chinnaiah*
2 does the exact same. I'm extremely grateful My Lords for the opportunity granted.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, Mr. Khurshid

5

6 **SALMAN KHURSHID:** I am grateful to Mr. Khanna. He's allowed me to come first. I would
7 seek Your Lordships' reward in being for brevity. My Lords just two principles, I think a broad
8 spectrum and the layout is there very clearly before Your Lordships. My Lords, there are two
9 streams that Your Lordships would examine one is a stream, there is a stream of the difference
10 between vertical reservations and horizontal reservations. This has been brought to Your
11 Lordships. In horizontal reservations there is no creation of a separate class. It is part of an
12 existing class, that the horizontal reservations come. So My Lords, so long it's a horizontal
13 reservation a new class would not be created. That's one argument. Mr. Khanna has given
14 some submissions on that. I only want to add in my written submissions. I've said there are...
15 If Your Lordships would open my written submissions at I(j), I've only indicated examples
16 where women have been offered in given categories, women have been offered certain
17 percentages. 33% and so on, including now reservations both in Legislature and Parliament.
18 Your Lordships would only note paragraph 2, where we have indicated the State of Tripura,
19 where it has provided six categories in which women are given a share and paragraph 3, where
20 the state of Madhya Pradesh has given, has given a share to women which is about 33% or so.
21 If Your Lordship would above see, above that, the six categories given if Your Lordship will see
22 women in the unreserved list. Merit list. ST men and women in the merit list. ST women in the
23 merit list. SC men and women in the merit list and then SC women in the merit list. So within
24 an existing category, horizontal reservations do not impact whatever is considered as the
25 creation of a new category entirely. My Lords, the other stream that Your Lordship will
26 consider and I do believe that this has not been placed before Your Lordship is 341 creates a
27 list. And Your Lordships will see 341 proviso talks about a list, and that list Your Lordship will
28 see 341 Sub -Section 2, 'Parliament may by law include or exclude from the list of Scheduled
29 Caste specific in a notification issued on the so and so.' So you can delete or include, but include
30 in a list. My Lords, my submission is, the list is not the class. Every entry in the list is a class.
31 Every entry in the list is a class. And so between two entries in the list there could be
32 competition where distributional justice and equity between those two classes are what Your
33 Lordships can examine and that would not fall foul of the 341 and the President's power. My
34 Lords, that's my submission for this Your Lordships will understand as always, I have quoted
35 I have put in an article of Ronald Dworkin on 'What is Equality'? Distributional aspects of
36 equality and welfare aspects of equality, including the vision that we come across in the works

1 of Mr. Amartya Sen. My Lords, that's all I want to say, and I hope I met Your Lordships
2 demand of brevity, I'm grateful.

3

4 **RAJESH KUMAR KHANNA:** Kindly have My Lord, my written submissions at page 217,
5 Volume I, My Lord.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** Which volume?

8

9 **RAJESH KUMAR KHANNA:** Volume I My Lord. PDF Page 217 My Lord. Partly my senior
10 colleague, Mr. Khurshid, has touched that point. But My Lords, two points I want to raise
11 which have not been touched. One is if Your Lordship would be kind enough to have it 217, the
12 first three points I have raised for consideration of this Constitution Bench.

13

14 **JUSTICE:** Volume I, page?

15

16 **RAJESH KUMAR KHANNA:** Page 217 PDF My Lord. The written submission starts
17 followed the first three issues I applied My Lord, the other issues I am not repeating. 'Whether
18 the subclassification or subdivision of SC/ST declared in the state under Article 341 is
19 permissible under Article 16(4) of the Constitution in order to give them adequate
20 representation in the service under State. In other words, whether the horizontal reservations
21 cutting across the extent provision of the vertical reservation in SC/ST in a State is innately
22 intravenous the Constitution of India or not?' Second My Lord, I am requesting Your Lordship
23 to consider is 'Whether ST/SC is duly recognized under 343, 341 and 42 of the Constitution of
24 India. On the basis of the statistical data and their representation in the State services can
25 cogently be given proportionate preferential treatment, so as to provide them adequate
26 representation in the services under the State or not.' Third point, on Article 14 has been
27 flagged by my previous colleagues. My Lord, I'll only request My Lord to kindly have
28 paragraph. I'll just not read paragraph 7 and 8. Where I have The Golden Thread Principle and
29 Maneka Gandhi that Article 14, that's part of the body they can't be. Kindly have My Lord
30 paragraph 19. These are the two paragraphs which have not been placed before Your Lordship
31 from *Indra Sawhney*. And I say in paragraph 38 of the *Chinnaiah* Your Lordships have
32 missed these two paragraphs which were the crux of the judgment. Paragraph 5.4 My Lord, 'It
33 is necessary to add here a word about the reservation for women. Clause 2 of Article 16 bars
34 the reservation in the service on the ground of sex. Article 15(3) cannot save the situation since,
35 all the reservations in the service under the State can only be made under Article 16.
36 Furthermore, the women come from both backward and forward classes, but the reservations
37 are kept for the women as a class under 16(1). The same iniquities phenomena will emerge. So

1 women from the advanced class will secure all the post, leaving those from the backward
2 classes without any, it will amount to indirectly providing statutory reservation for the
3 advanced classes as such, which is impermissible under any of the provisions of the Article 16.
4 However, there is no doubt that the women are vulnerable section of the society, whatever the
5 strata to which they belong. They are more disadvantages than the men in their own social
6 caste.' Para 812, where Your Lordship said - 'We are also of the opinion that this rule of 50%
7 applies only to the reservations in favour of the backward classes made under Article 16(4). A
8 little clarification is in order at this juncture. All reservations are not of the same nature. There
9 are two types of reservations which may, for the sake of convenience, be referred to as vertical
10 reservations and horizontal reservation. The reservations in favour of the Scheduled Castes,
11 Scheduled Tribes and Other Backward Classes under Article 16(4) may be called vertical
12 reservation, whereas the reservation in favour of the physically handicapped under Clause 1
13 of section, Article 16 can be referred to as horizontal reservation. Horizontal reservation cut
14 across the vertical reservation, what is called as interlocking reservation, to be more precise.
15 Suppose 3% vacancies are reserved in favour of the physically handicapped person. This would
16 be reservation relatable to Clause 1 of Article 16. The person selected against this quota will be
17 placed in the quota by making the necessary adjustment. Even after providing for these
18 horizontal reservations, the percentage of reservation in favour of the backward classes of
19 citizens remains and should remain the same. This is how the reservation are worked out in
20 several states, and there is no reason not to continue this procedure.' Only para 21 and 22. In
21 21, I have said that under Article 343(d) and 343(t), My Lord, Your Lordships have? I'm sorry.
22 243(d) and 243(t). Your Lordship have noticed that it is the horizontal reservation which is
23 recognized by the Constitution. So therefore, subclassification, as a concept has been
24 recognized in the Constitution in 1992 when they have
25 provided for reservation within reservation, that is My Lord, I have extracted in last four lines
26 of para 21. Article 343(d)(2), My Lord, which reads - 'Not less than one-third of the total
27 number of seats reserved in Clause 1 shall be reserved for women belonging to SCs and or, as
28 the case may be Scheduled Tribe. Thus, the subclassification has been envisaged in the Indian
29 Constitution. '

30

31 **JUSTICE B.R. GAVAI:** Women come in the horizontal reservation. So at the most, it would
32 be interlocking of horizontal reservations with that of vertical?

33

34 **RAJESH KUMAR KHANNA:** No. That is not My Lord. In *Indra Sawhney...*

35

36 **JUSTICE B.R. GAVAI:** *Indra Sawhney*, also the say that there could be a reservation for
37 women.

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RAJESH KUMAR KHANNA: In *Indra Sawhney*, Your Lordships have said that - 'These are the vertical reservations for SC/ST/ backward and other classes and in horizontal reservation you can provide for different categories.' This is what Your Lordship will be now providing for in this judgement.

CHIEF JUSTICE DY CHANDRACHUD: Thank you, Mr. Khanna.

DR. VIVEK SHARMA: Volume I, page number 104. Only two minutes sir.

CHIEF JUSTICE DY CHANDRACHUD: Yes.

DR. VIVEK SHARMA: Volume I, page number 104, last two lines. My humble submission is that for the upliftment there can be subcategory under category of SC/ST reservation, but that cannot be done by the state Legislature. It can be done by only the Union Parliament. And for it only two logics.

CHIEF JUSTICE DY CHANDRACHUD: You are on this side or that side?

DR. VIVEK SHARMA: Let me say that partly this side and partly that side. Sir, let me say...

JUSTICE B.R. GAVAI: Neither here nor there.

CHIEF JUSTICE DY CHANDRACHUD: Then somewhere between Mr. Meshram and Mr. Mitra. You are right towards the Advocate General.

DR. VIVEK SHARMA: I am assisting the Court to reach the right conclusion.

CHIEF JUSTICE DY CHANDRACHUD: Are you contending that the Punjab Act is un-Constitutional?

DR. VIVEK SHARMA: Yeah.

CHIEF JUSTICE DY CHANDRACHUD: Because according to you, it can only be done by parliament.

DR. VIVEK SHARMA: Yeah, absolutely.

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JUSTICE B.R. GAVAI: Let the argument on this side get over.

CHIEF JUSTICE DY CHANDRACHUD: You know what, why are you pre-empting their argument?

JUSTICE VIKRAM NATH: *Poora kar lene dijye 1-2 minute mein.*

CHIEF JUSTICE DY CHANDRACHUD: *Acha*, what do you want to say?

DR. VIVEK SHARMA: Sir, please. It's the request. The interplay of Article 15(4), 16(4), 341, and 342 is not giving power to subcategorization to the State Legislature. And second one, the original of the Scheduled Caste going back to the Pune pact, when the... it is between the Gandhiji and the Babasaheb Bhimrao Ambedkar. And it have its origin to the moment, for the reservation of the depressed class in the State Legislature of that time and this scheme got the space in the Government of India 1935. Scheduled Caste...

CHIEF JUSTICE DY CHANDRACHUD: You have opened the batting for the Respondents. But the Captain of the Respondent has to decide who will open the batting.

DR. VIVEK SHARMA: Because my name is included in the list of this side. So sir, let me say my name is included in the list of this side. And it is. So that's why.

CHIEF JUSTICE DY CHANDRACHUD: Alright.

DR. VIVEK SHARMA: let me complete one point, Sir. Scheduled Caste is a class. Is a group of classes, origin to untouchability, not to the backwardness. Because the list of the Petitioner's side included my name as an intervenor in the *State of Punjab vs Davinder Singh*. Client is a private party, Sir. Being the citizen of India it is the...

JUSTICE VIKRAM NATH: In which petition?

DR. VIVEK SHARMA: At number 701, sir.

CHIEF JUSTICE DY CHANDRACHUD: Who's the client?

JUSTICE B.R. GAVAI: Who's the client?

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DR. VIVEK SHARMA: It is Ms. Shaila Sharma.

JUSTICE B.R. GAVAI: Ms Shaila Sharma?

DR. VIVEK SHARMA: Yeah.

JUSTICE B.R. GAVAI: Is she belonging to any reserved category?

DR. VIVEK SHARMA: Pardon?

JUSTICE B.R. GAVAI: Is she belonging to any reserved category?

DR. VIVEK SHARMA: No, Sir. It is the question that matters and it affects the society in the long run...

CHIEF JUSTICE DY CHANDRACHUD: The surname with Ms. Shaila Sharma as with you, the commonality. Is there any other link?

DR. VIVEK SHARMA: No, Sir. Nothing.

CHIEF JUSTICE DY CHANDRACHUD: Okay. Thank you.

SHIVAM SINGH: Your Lordships, much has been argued and I restrict my argument to one aspect which has only been alluded to. And I'll just take about four to five minutes because I'm conscious of the time limitation.

CHIEF JUSTICE DY CHANDRACHUD: What is the argument that you're making

SHIVAM SINGH: The core argument, which I'm advancing is that about intersectionality. This is the argument of intersectionality, which was briefly alluded to by Mr. Farasat and Mr. Sankaranarayanan, while dealing with *Patan Jamal Vali* talked about this case. We talked about this proposition. My argument restricts itself to this aspect on why intersectionality or intersectional discrimination would be at the core of this and would assist Your Lordships in arriving at the conclusion that *Chinnaiah* has been wrongly decided and therefore, it requires a revisit. Before that, Your Lordship, just to give a matter of context to this. Your Lordship, this issue first arose in the case of *Chebrolu*, while Justice Arun Mishra and the

1 five judge bench of 100% reservation was deciding the issue. And then, as a matter of a biter,
2 it was opined that the Scheduled Caste and the Scheduled Tribe list under 341 may require a
3 revisitation. That in 2020 April was followed by the five judge bench decision which Your
4 Lordships are now sitting in reference of. In ***Davinder Singh*** it therefore requested Your
5 Lordships to have a revisit on the issue of why the ***Chinnaiah's*** decision is wrong. And
6 therefore Your Lordships are now called upon in the seven judge composition to decide the
7 correctness of it. My argument on intersectionality is that there can be an overlap between the
8 preexisting discriminations that exist and the effect of this preexisting discriminations would
9 affect some parties or some groups or some classes and some caste to a far greater extent than
10 it would affect the others. In this regard, the only case which I would like to cite and it follows
11 then in sequence is ***Vikas Kumar versus UPSC***, 2021. Now there, Your Lordship, what has
12 already been argued in extenso is the concept of substantive equality and Your Lordships while
13 deciding the concept of substantive equality, thought it proper that substantive equality must
14 now be extended to reasonable differentiation and for specific measures in both regards. This
15 aspect which was there Your Lordship has then been extended to which Mr. Sankaranarayanan
16 already talked about in ***Patan Jamal Vali*** Your Lordships of 2021. Now, when the State
17 acknowledges intersectionality in this regard, then the most potent tool to remedy the
18 difficulties which are faced by the most disadvantaged in the most oppressed becomes
19 subclassification.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

22

23 **SHIVAM SINGH:** And therefore, Your Lordships, when subclassification comes about the
24 fountain head of powers as has already been argued is 15(4) and 16(4). So the source of power
25 is available. There is no Constitutional embargo as such, because ***Indra Sawhney*** itself, and
26 that has again been argued in extenso. Speaks about the fact that backward classes will be read
27 in a manner which will not exclude the others, Your Lordships. So since that has been argued
28 in extenso. What I would only urge, Your Lordship to keep in mind, and this again, sorry, that
29 if there is some amount of overlap and repetition. Is that the Constitution itself is
30 transformative in its character, and it needs to be interpreted in a dynamic manner. The static
31 nature of interpretation, as was argued, if it is accepted, will lead to fossilization. The difficulty
32 in that regard, which then arises Your Lordships is that because there are competing groups,
33 competing castes within the same category, until and unless subclassification is permitted as
34 a tool there will be internal contradictions, and that leads to a net negative and therefore
35 inefficiency. In this regard, may I just extend the argument to just one more line and then I'll
36 rest, Your Lordships. Your Lordships realise that in case there is no transformative nature
37 which is accepted and there is fossilization, then even EWS reservation, which came up as a

1 five judge combination decision Your Lordships, there was an acknowledgment that until and
2 unless the state is allowed to identify the accesses of disadvantages and thereafter move upon
3 towards utilizing tools that remediate, there cannot be an effective solution to the issue it had,
4 and therefore, in the present situation Your Lordships the advantage, which is derived out of
5 subclassification, is that it moves ahead with time, it addresses the competing concerns and
6 the State being the best possible agency to utilize all its superior resources to identify who are
7 the most disadvantaged, through this idea of intersectionality is best equipped to address them
8 and the tool available is that a subclassification.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you, thank you.

11

12 **SHIVAM SINGH:** Grateful, Your Lordships.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Luthra?

15

16 **SIDHARTH LUTHRA:** I have just two things to say, because everything has been said. But
17 we are.. but I represent the State of Telangana and the original Legislation applied to the
18 combined State in Andhra Pradesh which was struck down My Lord in *Chinnaiah*. For us,
19 we believe that subclassification is essential, therefore, we support the Petitioner's prayer in
20 Writ Petition (Civil) 562 of 2022. Secondly, My Lord, the point that is sought to be made is
21 insofar as *Madigas* are concerned there is a 70%. I'm sorry, I'm coming very late into the
22 matter, I'll give Your Lordship a 2 or 3 page note with the numbers. There's 70% *Madiga*
23 population in Telangana, and the benefits to that are only 20% of the entire reservation, so it's
24 completely disparate the way it has been done and that has to be rectified.

25

26 **JUSTICE B.R. GAVAI:** 70% of the population of Telangana is *Madiga*?

27

28 **SIDHARTH LUTHRA:** No, 70% amongst the reserved category is *Madigas* and they are
29 only getting 20% of the benefits. Now, that being the position there becomes a situation where
30 we are are totally handicapped in ensuring that benefits reach the last man to the actual
31 intended beneficiaries, and that's the concern of the State. This was considered and My Lords
32 may just note the page numbers of the Usha Mehra committee. The Usha Mehra committee
33 notes this issue at pages 437 and 438 of the report of that petition, it's there as part of the
34 petition and also notes the other aspect, that it's not a homogeneous entity. At 419, 420. But
35 My Lord 437, 438 is important. My submission is really this MY Lord, my learned friend said
36 earlier it can't be a static exercise, I will only add this, we cannot have a situation where States
37 are disabled from providing the benefits of reservation to the person who deserve the most

1 within the community. That's the short issue I had to say My Lord. I'm most grateful for Your
2 Lordships' time. We'll give a short note, My Lord, if My Lord may give me that liberty to give
3 a short note with the numbers.

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** You're for the other side Ms. Nisha? Who else
6 now on this side remains?

7

8 **VIJAY HANSARIA:** Can I address Your Lordship for five minutes My Lord? I'm online.

9

10 **SIDHARTH LUTHRA:** That liberty may be granted My Lord, because we've come in late
11 My Lord, change in...

12

13 **VIJAY HANSARIA:** On this side My Lord, can I have two minutes My Lord?

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** Alright Mr. Hansaria, what is it that you want to
16 say on this side?

17

18 **VIJAY HANSARIA:** I'm sorry. My written submission circulated late. May I just only point
19 out to the Lordship My Lord, the Constitution has been amended on the issue of reservation
20 from first Constitutional Amendment to the 105th Constitutional Amendment on nine
21 occasions only the issue of reservation. I have given the details on pages 1, 7 and 8. Page 7 and
22 8 of my written submissions. I appear for the Petitioner. In the transfer petition 464 of 2015
23 for Arunthathiyars. I am one of the Arunthathiyars.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

26

27 **MR. HANSARIA:** The Constitution has been amended on eight occasions out of nine
28 occasions on the reservation issue, only to overcome the decisions of this Honourable Court.
29 The reason why I'm saying it and it's important that Your Lordship, while considering the
30 Constitutional interpretation takes into account that the Constitution is a living instrument. It
31 is an organic document and cannot be frozen. Unfortunately, on all eight occasions where the
32 Parliament had to overcome their decisions My Lord. The Court...

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Hansaria, does that mean that therefore the
35 fact that the constitution was not amended after *Chinnaiah* is an indicator that the
36 Parliament did accept *Chinnaiah*, right?

37

1 **MR. HANSARIA:** No, My Lord. Parliament has... All these reports have been that it should
2 be amended, and Your Lordships have been considering this issue since 2009. The Act is there
3 already. In my so far, Tamil Nadu is concerned, 2009 Act is there. It has not been State. We
4 are getting benefits out of that State for last 14 years. So, the Parliament maybe, there are
5 reports which is saying that Parliament is emitting the decision of the Honourable Court
6 because *Davinder Singh* was already there, and that is referred.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you Mr. Hansaria. Thank you very much.

9

10 **Mr. HANSARIA:** One more submission. If the courts, by creamy layer principle, can exclude
11 a category of persons from the benefit of..

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** That point has been made already.

14

15 **Mr. HANSARIA:** The Parliament and Legislature can give accelerated benefit to a category
16 of persons. It cannot be deprived.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** That point has been made.

19

20 **Mr. HANSARIA:** Your Lordships may only note page 7 and 8. I've given the details of the
21 amendments which are there in my written submission and details are there.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** Tomorrow. Now, who will open the arguments
24 on your side?

25

26 **DR. MURLIDHAR:** I appear for the State of Andhra Pradesh.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, Dr. Murlidhar. Yes

29

30 **DR. MURLIDHAR:** I appear for the State of Andhra Pradesh. My instructions are that after
31 *Chinnaiah*, we have not continued with the subclassification as far as providing reservations
32 are concerned, and we abide by the judgment of this Court which will now be delivered.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** All right. State of Andhra Pradesh. So tomorrow
35 now, who will be opening?

36

1 **ARUN BHARDWAJ:** Just 1 minute. I will not take time. I'm representing Haryana. My
2 notification and Act are under challenge where we have also similar Act like the Punjab. My
3 submission only are, one that 16(4) actually permits the State to go to that extent of tinkering,
4 tinkering My Lords, with the list of 360. And why My Lord because...

5
6 **JUSTICE B.R. GAVAI:** Everybody has argued that it does not... tinkering[UNCLEAR]

7
8 **CHIEF JUSTICE DY CHANDRACHUD:** That doesn't amount to tinkering at all. You are
9 virtually destroying the case of the other States.

10

11 **JUSTICE B.R. GAVAI:** You are washing away their two days efforts.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Exactly to the contrary, Punjab has argued,
14 Telangana has argued, Andhra has... I mean. everybody has argued to the contrary.

15

16 **ARUN BHARDWAJ:** Punjab says, we are not tinkering. I say My Lords...

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** That you can tinker?

19

20 **ARUN BHARDWAJ:** I say 16(4) says, we have to see inadequate representative. For that,
21 we have to conduct data collection.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** You can't tinker with the 341 list. The moment
24 you concede that, you're in deep water.

25

26 **ARUN BHARDWAJ:** My Lords, I say that we make reservations for those who are
27 inadequately represented which for we have to collect the data, and the data has to be
28 collected, in the granular extent, to the deepest extent. And therefore, I say that providing for
29 reservations...Therefore, 16(4) My Lords. *Chinnaiah* has used that word, tinkering.
30 *Chinnaiah* uses that word, tinkering. I say, 16(4) gives power to the State to make
31 reservations for those inadequately represented, that is one. Number two, the question which
32 fell from Your Lordships, could a single caste could reserved? Now, municipal committees...
33 municipal committee of a small area. The municipal committee of a small area, small
34 territorial jurisdiction may have two castes, three castes living within it. It is State My Lord.
35 Now using 16(4), municipal committee of that small area make reservations, provide for
36 reservations.

37

1 **JUSTICE B.R. GAVAI:** Does Municipal Counsellor has independent power to make
2 reservations?

3

4 **ARUN BHARDWAJ:** That's State My Lord. It is covered by the definition of State. And
5 number 3 My Lords...

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you thank you.

8

9 **ARUN BHARDWAJ:** [UNCLEAR] under inclusiveness. In para 70.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** All right we will consider that.

12

13 **PETITIONER'S COUNSEL:** I need only one or two minutes

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** So you will have it right now.

16

17 **RESPONDENT's COUNSEL:** Before my learned friend begins I am challenging the order.
18 My arguments before the *Chinnaiah* bench are recorded in para. 9 saying *Chinnaiah* needs
19 to be revisited. I'm not advancing, probably taking up Your Lordships time with any rural
20 argument. I'm appearing in item 11, which is Civil Appeal number 5586 of 2010. The appellant
21 is Haryana Dhanak Seva Samiti IPF [UNCLEAR]. All that I'm saying is that in view of the
22 submission made just before lunch by the learned Solicitor on behalf of the Union of India that
23 even if grouping is done by the State, it will have to run the gauntlet of 338 and 341.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

26

27 **RESPONDENT's COUNSEL:** On that, I may be permitted to file a written submission,
28 that's all. To assist Your Lordships.

29

30 **PETITIONER'S COUNSEL:** My Lords, I just want to say this much only, what I submitted
31 is a first layer of my arguments in the EWS Justice Trivedi may kindly recollect. The Facts.
32 And My Lords, the facts is extremely important ground H of the Civil Appeal is the crux of this
33 particular matter. Ground H and therefore accordingly, I have an effective research. I got some
34 judgments from other countries also whether subclassification is possible and due to this
35 subclassification...

36

37 **JUSTICE B.R. GAVAI:** Why don't you give the list of the judgements.

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PETITIONER'S COUNSEL: That's what I'm coming. I will give 2 pages notes and I don't want to go further.

CHIEF JUSTICE DY CHANDRACHUD: Thank you. Yes, Kanu Agarwal.

KANU AGARWAL: I have put everything on a one page so that I don't have to take My Lords through anything. My Lords just accept it I have also served it to the Court Master. The two short points that I seek to make. I'm not going into the distinction between 341 and Article 16. The distinction, according to me, lies at a more doctrinal level. Distinction lies at the policy level. The State, when it takes the decision of providing affirmative action, has two questions before it. The first question is who to provide affirmative action to? The second question is how to provide affirmative action to? The question of who to provide affirmative action to is generally answered through the process of what *Indra Sawhney* calls underlying factors. Those underlying factors in different societies may be social, educational. They may be caste based. They may even be racial. In another society it may even be racial. So that is the process of identification. It is the next sequential process on how to provide affirmative action, is where Article 15 and other articles kick in. The question of how to provide affirmation, how to provide affirmative action includes the areas of operation in which affirmative action is to be given, the manner in which it is to be given and the extent in which it is to be given. The question of subclassification in my humble submission falls under the choice of the manner and the extent, it does not fall in the first question of identification. If My Lords looks at the universe of reservations or affirmative action in the Country, this subclassification is relevant purely from a policy point of view because there is a universe that today starts from the Right to Education under 21(a) ie. education till the level of 14 years. Thereafter it is in the higher education under Article 15. Thereafter it is at the services level. Thereafter, it is also in reservation in promotion. However, it is only provided to a specific class. That is the Scheduled Caste and Scheduled Tribes and not others. There is also political reservation. Right from the panchayat level now, today, all the way up to the Parliament, there is political reservation for OBCs, SCs/STs and women. So therefore, there are different zones of affirmative action and the State needs to exercise this policy malleability, and it is this subclassification that will allow the policy malleability. This malleability should not be hindered by superimposing the limitation of 341.

CHIEF JUSTICE DY CHANDRACHUD: Same thing. Please give us a sort of conceptual.

KANU AGARWAL: The second is a note of caution. I just wanted to flash.

1 [NO AUDIO : Judgment in BK Pavitra that was very discusses and sort of interrogates the
2 concept of efficiency. Sometimes that judgment is, according to me, wrongly read to mean that
3 the diversity itself is the end goal of efficiency. : NO AUDIO ENDS] My humble submission
4 is that certainly diversity is not antithetical to efficiency. However, diversity is a small subset
5 of efficiency. There are other objective factors that colour the definition and the meaning of
6 what efficiency stands for. There has been a development, what the learned solicitor says that
7 in the cauldron of change of equality laws in the Country there has been development. The
8 judgments post *Nagaraj* and *Jarnail* and recently in the *Maratha reservation* case,
9 have referred to these factors of efficiency as controlling factors and therefore, it is not an *ipso*
10 *facto* position that diversity itself is to mean efficiency. These are my short submissions. Thank
11 you.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you. Thank you. Now tomorrow...

14

15 **RESPONDENT's COUNSEL:** IA number 93459.....[UNCLEAR]

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** All right. Thank you. Now tomorrow, who will
18 commence?

19 Three of you will be... No, no, not tomorrow. Today this side is completely over. You just want
20 us to take it on the record, is it? *haan record per rakh li jiye aap.*

21

22 **JUSTICE B.R. GAVAI:** Place it on record.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** *Haan, haan* place it. Whatever is pending is
25 pending. It will be governed by what is decided on the correctness of *Chinnaiah*. The
26 correctness of *Chinnaiah* has decided, everything else will follow.

27

28 **JUSTICE B.R. GAVAI:** Mr. Swarup, you'll have to [UNCLEAR] the timing to yourself.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Right, so you know if the three of you can take,
31 say, 45 minutes. 45 minutes. 45 minutes.

32

33 **RESPONDENT's COUNSEL:** My Lord, at least 2 hours are required because initial
34 readings are required.

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** The two of you will finish in about 1 hour, right?
37 All right all right, fair enough. So, say 10:30, we start. 11:30, 12:30, and you finish by 13:00.

1 We'll give you half an hour after that. Mr. Swarup, don't confuse numbers with volume or
2 volume with substance. So you just...That's why we said.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** *Chaman lal ji aap file kar lijiye.*

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END OF DAY'S PROCEEDINGS