

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 **CHIEF JUSTICE DY CHANDRACHUD:** Let's not open the matter. Just give us this, that's
2 all. Listen, we are in a combination of 7 don't... On that day we will put it.

3

4 **GURMINDER SINGH:** The order of this matter we've placed before Your Lordships.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** Yes. The Advocate General will argue first. Then
7 Mr. Shadan Farasat, then Mr. Sibal, Mr. Venugopal, Mr. Nilesh Gupta, Mr. Gopal
8 Sankaranarayanan, Seshadri, Rakesh Khanna, Salman Khurshid, Shraddha Deshmukh,
9 Shivam Singh, Vivek Sharma. The time, which, of course, everybody has reserved for
10 themselves, we'll have to substantially cut down, because after the first few lawyers have
11 argued, I think the matter will be clear then, both sides. Yes.

12

13 **GURMINDER SINGH:** May I please, My Lords. In my humble submission, My Lord, there
14 are two core issues that eventually will steer the arguments in this matter. The first, of course,
15 being My Lord, that as regards reservation, what is the efficacy of the measures taken by the
16 government to eradicate inequality in the 76 years of independence wherein the constitutional
17 provisions have been in play as regarding reservation. And the second core issue would be...

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Solicitor, on your side, it will be the Attorney
20 and you, right?

21

22 **TUSHAR MEHTA:** Yes, we are not on this side.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** Right. Absolutely.

25

26 **TUSHAR MEHTA:** In absence of the space, we are sitting on this side.

27

28 **R. VENKATARAMANI:** There is some kind of a merger of thoughts, so...

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** In fact, I noticed that at the time when the matter
31 was referred, Attorney was appearing then for the state of Tamil Nadu. So, the submissions
32 are recorded by Justice Misra's referring order.

33

1 **R. VENKATARAMANI:** In fact I appeared for the private party, but the Court has
2 generously said I have appeared to the state of Tamil Nadu. Doesn't make a difference at all.
3 The stand is the same.

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** Stand is the same. Who will be taking a contrary
6 viewpoint?

7

8 **SHEKHAR NAPHADE:** I am appearing for state of Tamil Nadu.

9

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

11

12 **SHEKHAR NAPHADE:** So my turn will be after Mr. Sibal or...?

13

14 **TUSHAR MEHTA:** We are not aware of that sequencing. But whenever... it's Your Lordships
15 call.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** We'll take a call. After the parties in the main
18 matter have argued, then we can hear whoever is supporting on the side.

19

20 **SHEKHAR NAPHADE:** That is, after that Your Lordships will hear the other side and...

21

22 **GURMINDER SINGH:** So My Lords are trying to determine, is there another side or not.

23

24 **SHEKHAR NAPHADE:** I'll be arguing for *Chinnaiah*. Supporting..

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** You are supporting *Chinnaiah*. That's good.
27 Mr. Ganesh, are you supporting *Chinnaiah* also?.

28

29 **MR. GANESH:** I'm supporting the state of Haryana, I'm in the Haryana appeal which is
30 effectively the lead appeal because that was the earlier referral [UNCLEAR]

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** That's all right. Therefore, you are saying that
33 *Chinnaiah* should be reconsidered.

34

35 **MR. GANESH:** It should be revisited.

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37 **CHIEF JUSTICE DY CHANDRACHUD:** So apart from your learned friend, who else?

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PETITIONER'S COUNSEL: I am just saying that It should not be reconsidered.

CHIEF JUSTICE DY CHANDRACHUD: So, at least we have some contest then. That's very important because we must have two perspectives.

RESPONDENT'S COUNSEL 1: Tamil Nadu also..

CHIEF JUSTICE DY CHANDRACHUD: That's all right. We are on who says *Chinnaiah* need not be reconsidered, because we must have some contest and somebody from the other side.

PETITIONER'S COUNSEL: We are supporting *Chinnaiah*.

CHIEF JUSTICE DY CHANDRACHUD: All right, so that's good. We have therefore, we have counsel on both sides.

SHEKHAR NAPHADE: Tamil Nadu, he wants...

PETITIONER'S COUNSEL: [UNCLEAR] He is actually appearing in the writ petition. He is not appearing in the... Because I think the list wrongly mentions that he's appearing in the intervention.

CHIEF JUSTICE DY CHANDRACHUD: As every counsel gets up, we'll ask them which matter they're appearing in, so that we have that clearly defined.

TUSHAR MEHTA: Your Lordship, the parties and then interveners so that we can...

CHIEF JUSTICE DY CHANDRACHUD: So first, the parties and then the interveners. I think that'd be correct.

TUSHAR MEHTA: So, that we can adjust our...

CHIEF JUSTICE DY CHANDRACHUD: Yes Mr....

SHEKHAR NAPHADE: Tamil Nadu also wants *Chinnaiah* to be revisited.

1 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, of course. We have seen the referring
2 judgment, so we know that. Yes, Mr. Advocate General.

3

4 **GURMINDER SINGH:** To start again... The first core issue, My Lord, which Your Lordships
5 would examine, is the efficacy of measures taken under the constitutional provisions framed
6 for eradication of inequality, in over 76 years of our independence and the second issue...

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** The efficacy of measures adopted...

9

10 **GURMINDER SINGH:** ...by the states for eradication of inequality in over 76 years of
11 independence. That's the first. And the second is the interplay of the constitutional provisions
12 regarding the powers in the federal structure of our country, interplay of the constitutional
13 provisions regarding the powers in the federal structure for identification and implementation
14 of the measures so taken. I can repeat it, My Lord. The interplay of constitutional provisions
15 regarding powers in the federal structure for identification and implementation of the
16 measures so taken. But before we go into this My Lord, what is very necessary to understand
17 is, very briefly the concept of reservation. It obviously has two perspectives which are very
18 strongly entrenched in our social and legal fraternities. The first perspective of course is of
19 those who believe they are entitled and the second perspective which most certainly needs the
20 attention of this Honourable bench is of those who are actually in need. My Lord, before I go
21 any further, we have to understand that reservation is no benevolence. It is not an act of
22 benevolence by the entitled to the needy at all. If at all, it is compensation for centuries of
23 suppression of the needy, if at all. And My Lord, nothing would correct itself on its own, so
24 therefore, the established requirement is that of an affirmative action, what we are addressing
25 Your Lordships on today. The only way to provide support to the needy is the affirmative action
26 on which we will be addressing Your Lordships. Why this has come about to be is not far to
27 see, especially in our country where the caste system has prevailed for centuries, we are all
28 aware, and there has always been a deep divide and the ramifications of that have resulted in
29 certain castes being marginalised to a status of despair and almost of non-existence in the
30 social fabric of our society. What has come to those who have been marginalised in the generic
31 sense of the word, we can call backwardness, because that word will occur repeatedly as we
32 address Your Lordships and refer to the judgments. In a generic sense, that word is
33 backwardness as opposed to what we never talk about and take it for granted for the people
34 who have it is, forwardness. Forwardness is taken as an entitlement by those who have it. But
35 what we need to really look at is the backwardness. And the backwardness My Lord in my
36 humble submission, can be faceted in many ways. It being social backwardness or economic
37 backwardness or educational backwardness, so on and so forth, My Lord. We can have a

1 debate on this alone, that for those who suffer, what is the kind of ignominy and backwardness
2 that they are victims of, but the issue, My Lord is the cure. We've been striving to find this cure
3 through a series of judgments, through a series of legislations, through a series of executive
4 decisions, but obviously, My Lord, because we stand before Your Lordships to address again
5 on this issue, means that much needs to be done and what has been done is most certainly not
6 enough. If we were to put it very simply. Though not a panacea for this ill of society, a cure
7 definitely is equality. The only thing by which these lines can be blurred, and we have a society
8 that the constitution envisages, the cure is eventual equality. Now to achieve this, we must
9 understand, however overrated the issue of reservation is, but reservation is only a tool.
10 Reservation is only a means to achieve the end of the sacrosanct ideal which is equality. Now,
11 as in everything else, a tool is of no consequence till in the hands of a good sculptor. Merely
12 providing for reservation is not the answer. A tool has to be used for the purpose that it has
13 been designed to achieve the result that we seek to so desperately achieve for our country,
14 which is equality. And this implementation can be done most certainly through law, definitely
15 through the executive action of the state and also through social debate and the constitutional
16 framers had this intent very clear in their mind, while providing for reservation, that the only
17 reason which weighed with them was the realization of the disparity that existed, the disparity
18 that was hard to ignore, the disparity which was in the face of the country when we became
19 independent, and the effort was to achieve Bharat, India, where eventually everyone has a right
20 to equality. So, My Lord, Article 14 is what we strive to achieve, and everything else thereafter
21 in part 3 or the parts thereafter,
22 has been designed to achieve that end, is equality of opportunity. It is not a case where we are
23 before Your Lordships to say, that somebody who has not played could definitely not have
24 won. That's not the case here.

25

26 The case here is, did he have a chance to play? Did he have the opportunity to play? Did he
27 have the means to play? And did he even have the path to the ground where the game was
28 played? The answer is no. When the privileged played the game and the top amongst them
29 win, we failed to think about those who couldn't even make it to the playground because of the
30 inadequacy of the means that they do not possess. So therefore, My Lord, I'll read the
31 Preamble, but what comes out of it is, that equality of status and opportunity is the hallmark
32 of our constitution and the assurance that we propose to give it is an assurance of dignity
33 because no opportunity or status without dignity is complete. You cannot give opportunity as
34 charity because, charity takes away the dignity. There have to be provisions enacted and
35 implemented in law to achieve this equality of status and opportunity with dignity, and this is
36 what can effectively eradicate what we call backwardness. My Lord, there is a reason why, as I
37 said, after 75 years of independence, we are still struggling to achieve this goal. It's easier

1 written, than implemented. The words have been there, the intent has been there, the
2 implementation has been there, but there is not much achievement to show for it because what
3 has been precipitated by centuries of suppression was not expected to go away in a decade. It
4 wasn't. As some people might say, ten years was the limit set for reservation to achieve what
5 centuries had caused. Can't be done. We are very well aware of it, My Lord, but let us not
6 marginalize the efforts that we've made, but most certainly we are not there as yet, and this
7 matter, My Lord, is yet another effort to convince Your Lordships to lay down a law which will
8 eventually help the benefits of reservation to percolate down to the strata who need it the most.
9 The reason is My Lord, that a class of people belonging to varied castes... these are two
10 different concepts My Lord, as we go along, we'll obviously dwell on them that caste and class
11 are totally two different concepts. A lot many number of castes in India My Lord, are stuck,
12 unfortunately in a self-deprecating cycle of occupational drudgery. Even today, there is one
13 thing in inheritance which a lot of castes get, which is their occupation. Scavengers, sweepers,
14 cobblers, blacksmiths... what they've handed down in inheritance, legacy and estate to their
15 next generation is an occupation which will never allow them to come out till aided by what
16 we call affirmative action. The reason is that there is a condition. We are all as human beings
17 victims of conditioning. We are conditioned to believe that everything is all right. We are
18 conditioned to believe that things are the way they are because they are meant to be. oft heard
19 dialogue is My Lord, if these people were not to do this job, who else will? And that is the
20 reason these things should remain as it is but that definitely is a mindset we need to shake
21 ourselves out of. There are no ironclad barriers, which should keep the backward confined to
22 their backwardness just because what they do is what nobody else would do and they're not
23 doing what they are doing will not suit the entitled. That is the answer. We have to change
24 these prejudices, we have to change the mindset. The problem is the resistance. The problem
25 is the resistance to change that mindset. The problem is that it seems like a huge shift in a
26 societal mindset to steer ourselves away from it and think that why can everybody in the
27 society not be equal. And as we go along, My Lord, the core issue here is not only the
28 advantaged and the disadvantaged but the more advantaged and the more disadvantaged
29 within the disadvantaged. That is the issue that we are addressing Your Lordships.
30 Undoubtedly, My Lord, the change has to come at the grassroots level of society. Undoubtedly.
31 What happens in the mind is controlled by exposure mostly to what is taught in each and every
32 household of this country. That has to change. But it still does not take away the obligations
33 upon the State to aid and assist this change which either in the form of bringing about a law
34 by the legislature, decisions of the executive and more important than anything else, the laying
35 down of the law by Your Lordships, which will eventually bring this change. Because once Your
36 Lordships lay down a law, the acceptance of a proposition goes up tremendously, because Your
37 Lordship says so there is a dispensation of the public to follow the law. So from either of these

1 three wings, if an assistance and aid is coming in achieving these results, it is more important
2 than the other. We cannot downplay any part of this. Because as I put it My Lord, normally
3 when we argue cases of reservation, a very common plea is raised that My Lord I have 99%
4 marks. I am being ousted by a person who has 56% marks. Is that fair? Yes, it is. It is fair
5 because the person who has 56%, he never had the means to be brought up in a family that
6 you've come up in. He never had the means to go to a school that you went to, to the college
7 that you went to and to the competition, preparation that you went through and today 99 is
8 not your achievement. It is a conglomeration of all the factors that you've been through. That
9 56 is in spite of the factors that that child has been through. He has today reached 56 starting
10 from zero. Your ride has been of an airplane from your birth. This person has walked his way
11 to 56. That is what we need to understand. That the person who got 56 had no access to a
12 dignified life, he was brought up in a neighbourhood which did not give him any access to good
13 education, what to talk of employment and eventually, My Lord, what are we striking to
14 achieve here? By way of employment, we are wanting to make that person a part of
15 governance. He has to feel that, 'I am a part of running this country. I am a part of aiding the
16 growth of this country by getting employment'. That is why we mostly be, My Lord, on 16(4).
17 So for that purpose, the obligation of the State is best discharged by affirmative action under
18 15(4) and 16(4), to give this person, who is backward, access. We have to give him at least an
19 opportunity. I will go as far as to say that, the old phrase, that you can take a horse to water,
20 you can't make him drink. We will have to make an effort to make that horse drink, because
21 that horse has never seen water. That horse does not know that, it is this water which would
22 eventually quench his thirst for becoming a part of governance. He wants it, but he doesn't
23 know how to get it because he's stuck in a cycle of occupational drudgery, which the society
24 doesn't let him come out. Though opportunities are available, but they are not being
25 capitalized because of... I would not say the intent but the effectiveness of the implementation
26 is lacking. My Lord, eventually if we all agree on this, that the goal is equality of opportunity,
27 then what we urge before Your Lordships today, is that measures need to be taken to make
28 this goal not illusionary or formal, not a mere provision on paper. These goals do not have to
29 be illusionary or formal, but actual and effective. They have to be end oriented. If I can put it
30 simply, they have to be end oriented. Results have to show. And in this there is a heavy onus
31 upon the State, either at the centre or the state level, for achieving this equality of opportunity.
32 This implementation has happened in phased manners. There have been amendments in the
33 constitution, there have been large number of executive orders, memorandums, laws,
34 legislations brought out by various states, one of them of my state is under challenge before
35 Your Lordships, from where this litigation arose. Just to put it briefly, though it's not a relevant
36 issue that Your Lordships would be deciding. In Punjab, we brought out an Act in 2006, where

1 out of the posts which were reserved for the Scheduled Castes, 50% of the posts were reserved
2 for Balmikis and Mazhabis.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** That is your first circular, which you brought
5 out?

6

7 **GURMINDER SINGH:** This was circular apart, this was the legislative act which was under
8 challenge.

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10 **CHIEF JUSTICE DY CHANDRACHUD:** The circular preceded the [UNCLEAR] because
11 the circular had been struck down basically for want of legislative sanctions.

12

13 **GURMINDER SINGH:** Yes. So therefore, the legislation in 2006 and Section 4(5) reserved
14 50% of the posts for Balmiki Sikhs and Mazhabis and My Lord, there is a twofold
15 implementation which saves it from the vice of discrimination and reverse reservation and
16 reverse discrimination as we know it. This reservation in the 2006 Act, was done on a twofold
17 check and balance. One, that this reservation was limited to 50%, which in the development
18 of law, My Lord, has become the *Lakshman Rekha* which we are all advised not to cross and
19 the second check in balance was that this was implemented on a preferential basis. So, My
20 Lord, as I would say, this was not an act of exclusion by any standard, by any standard. What
21 **Chinnaiah**, seeks to say is that, this would be an act of exclusion. No. This was, if at all, an
22 act of inclusion of those who were the most backward of the backward to bring them if not at
23 par, at least up from where they stood.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Attorney General, when you said that it was
26 implemented on a preferential basis...

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28 **GURMINDER SINGH:** That's right

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Can you elaborate that? How is it implemented
31 on a preferential basis?

32

33 **GURMINDER SINGH:** My Lord, suppose there are ten vacancies for Scheduled Castes in a
34 particular year or a particular recruitment. Five were reserved for Balmikis and Mazhabis, if
35 they were available, and if they were not available, it was to go to SC Others, which are
36 Ramdasias and other Scheduled Castes, which were available. So in every recruitment, one

1 would ensure that ten Scheduled Castes definitely came in, but at the first instance, the right
2 of preference of five of those ten was to go to Balmikis and Mazhabis.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** There's no carry forward for...?

5

6 **GURMINDER SINGH:** Carry forward was, My Lord...

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** For the SC together?

9

10 **GURMINDER SINGH:** Yes.

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12 **CHIEF JUSTICE DY CHANDRACHUD:** But not for the Balmikis and Mazhabis seats
13 within the SC.

14

15 **GURMINDER SINGH:** No, they were exhausted within that recruitment. So therefore, if I
16 can put it My Lord in cost effective way, this preference based reservation was not at anybody's
17 cost. It was not that if they did not get it, nobody would get it. If they did not reach the My
18 Lord cut off for getting that reservation, a Scheduled Caste only, would get it. And Your
19 Lordships are right. Those Scheduled Caste vacancies were to be then, in Common Law My
20 Lord, as we all know it, to be carried forward and not counted towards reservation, this, that
21 and the other. All those parameters were to follow. It was not that they would either be
22 converted to General or not be filled up and left vacant. There's nothing of that sort. So
23 therefore, that is the core My Lord, that if you cannot even as much as give preference to
24 somebody who's really needy, without that being at the cost of somebody, and that act of the
25 state government is squashed, is that correct? We are here to urge that before Your Lordships.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** Actually, Mr. Attorney General, there is an
28 element of exclusion. I mean, let's not gloss over it. The point only is this that because the same
29 exclusion which applies to reservation per se...

30

31 **GURMINDER SINGH:** Per se of excluding merit, as we all put it.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Post are reserved for the backward community,
34 a) there is necessarily an exclusion of the forward community in competing for those posts.
35 Right? Yet our constitutional jurisprudence permits it. Why? Because we treat as, we treat
36 equality as a substantive equality, not formal equality.

37

1 **GURMINDER SINGH:** That's right.

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** Therefore, post *N.M Thomas*, we have now
4 developed jurisprudence to the effect that, reservation is not really a breach of equality,

5

6 **GURMINDER SINGH:** But in aid of equality.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** But the same. Interestingly, the same argument
9 which applies for reservation for the backward communities is the block, the backward versus
10 forward would also apply within the backward community. Because what now we are really
11 doing here by the measure which the Punjab legislature brought about was this, that within
12 the reservation of seats for the Scheduled Castes, its 15.5%. We'll take it for a moment. Just as
13 a benchmark.

14

15 **GURMINDER SINGH:** That's right. As a ballpark figure.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Out of the 15.5% which falls within the overall
18 50% cap, 50% of the 15.5% is reserved for the Mazhabi Sikhs and the Balmikis.

19

20 **GURMINDER SINGH:** That's right.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** So, to that extent to which the reservation is
23 exclusively carved out for them, the Other Backward Castes cannot compete for those posts
24 which are set apart from this. So in a sense...

25

26 **GURMINDER SINGH:** In the first instance, they can't.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** In a sense, it is in that sense, exclusionary. We
29 can't gloss over the point that it is exclusionary.

30

31 **GURMINDER SINGH:** We can't.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** The only question, really, is this, that can that
34 exclusion not be justified on the same yardstick, that we have applied for the exclusion in the
35 backward versus forward context.

36

37 **GURMINDER SINGH:** My Lord if I had to put it very...

1

2 **CHIEF JUSTICE DY CHANDRACHUD:** Because within the backward within the
3 backward communities, within the Scheduled Caste, is there anything in constitution
4 jurisprudence which restrains the State from saying that, I am not deleting a community from
5 the list of Scheduled Caste which has been designated by the President and Article 341 or 342.
6 But within those communities, I am now making a classification that certain communities are
7 more backward and therefore, in greater need for protection on the same touch stone of
8 substantive equality. And if that can be done by the State in reserving, in carving out certain
9 posts out of the competition of the general community, then why can't the state do it within
10 the backward communities? That's really the...

11

12 **GURMINDER SINGH:** Absolutely.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** But there is an element of exclusion. We must
15 face it there. I don't think we can gloss over it.

16

17 **GURMINDER SINGH:** What this entire example that Your Lordship have given in is based
18 upon a very simple word which is, relative backwardness. Once we concede to the argument
19 of relativity and backwardness, and it is the backwardness vis-a-vis the forward which brings
20 them into the 50% and it is the further more backwardness within the 50%, which gives them
21 the reservation within the reserved, then this argument has no problem.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** Now *Chinnaiah*, said... *Chinnaiah's* whole
24 rationale was this, that the power to designate communities as Scheduled Caste and Scheduled
25 Tribes exclusively belongs to the President, and now, therefore, Parliament.

26

27 **GURMINDER SINGH:** Absolutely.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** For instance you know in Milan we have got all
30 those *Palghat Jilla Thandan* and Milan Chatvari which came from Maharashtra.

31

32 **GURMINDER SINGH:** That's true.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** It is not open, for instance, for the court to say,
35 that though this community is designated as a Scheduled Caste, another community is part of
36 the designated community. You have to take the list, that you can't do, that jurisprudence is
37 now very, very well set. You can't think away the list.

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GURMINDER SINGH: That power has been reserved, that power has been reserved for the Parliament remains so.

CHIEF JUSTICE DY CHANDRACHUD: But the argument that seems to have found favour in *Chinnaiah* was this, that if that is so, then the State cannot classify within the list of communities which are designated as Scheduled Caste, because to make that classification would amount to an exclusion of some communities within the Scheduled Caste that seems to be the logic of...

GURMINDER SINGH: Yes and no.

CHIEF JUSTICE DY CHANDRACHUD: I mean, very simply. That's really the heart of the controversy.

GURMINDER SINGH: Because, *Chinnaiah* in my humble submission was a plane which took off from the wrong runway.

CHIEF JUSTICE DY CHANDRACHUD: And your argument would be, I guess that you are not deleting any community from the list which has been designated by the Parliament.

GURMINDER SINGH: There's no exclusion.

CHIEF JUSTICE DY CHANDRACHUD: There's no exclusion, but within the quota, within the quota, you're saying...

JUSTICE VIKRAM NATH: Why should there not be exclusion? According to you, amongst a particular category, some of these sub-castes have done better, they are the forward in that category.

GURMINDER SINGH: Absolutely.

JUSTICE VIKRAM NATH: So they should come out of that and compete with the General, why stay there? Let the remaining who are still backward within the backward, let them have the reservation.

1 **GURMINDER SINGH:** My Lords are absolutely right. But there are two ways that this
2 whole concept...

3

4 **JUSTICE VIKRAM NATH:** Once they achieve the concept of reservation, they should move
5 out of that category.

6

7 **GURMINDER SINGH:** That is the aim.

8

9 **JUSTICE VIKRAM NATH:** Yes.

10

11 **GURMINDER SINGH:** And if the aim is achieved, then the purpose for which the exercise
12 was taken should come to an end. Because nobody My Lord...

13

14 **JUSTICE VIKRAM NATH:** Aim is achieved according to you for certain sub-castes, in that
15 particular community.

16

17 **GURMINDER SINGH:** Within, within My Lord. That's what I'm saying it works in two
18 ways.

19

20 **JUSTICE VIKRAM NATH:** They have achieved, they should come out and the remaining
21 should get that benefit.

22

23 **GURMINDER SINGH:** Yes, Now My Lord, Your Lordships are suggesting...

24

25 **JUSTICE B.R. GAVAI:** Your argument appears to be, among the backward there are more
26 backward and therefore, they require a more special treatment than the backwards.

27

28 **GURMINDER SINGH:** Yes, yes. My Lord what Justice Nath is suggesting is the ultimate.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Your argument also would be at two levels. One
31 is the equality argument and the other is a federal argument, which you also made. One, the
32 equality argument postulates that it is open to the state to classify within the Scheduled Caste,
33 by identifying those who are really, really within them in a state of relative marginalisation.

34

35 **GURMINDER SINGH:** Absolutely.

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** That's the substantive equality argument. And if
2 you can do that between the General communities and the Backward Castes, why can you not
3 apply the same principle there?

4

5 **GURMINDER SINGH:** Same principle there.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** The second, of course, is the federal argument,
8 that every state within the nation, is peculiarly conversant with the conditions of the caste and
9 communities which are prevalent in that state.

10

11 **GURMINDER SINGH:** So right.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** And therefore, what Parliament is done, is to
14 designate castes and tribes for the entirety of the nation. But that does not take away the power
15 of every State within its own territories to say that, well, these are the communities within my
16 State, who are particularly marginalized, who are worthy of special attention..

17

18 **GURMINDER SINGH:** Benefits, as they call.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Benefits. And there is nothing in the
21 constitutional structure to prevent the State from doing it, because it ultimately owes
22 responsibility to its own decision.

23

24 **GURMINDER SINGH:** Absolutely. My Lord now, what Justice Nath saying is the ultimate
25 argument, which they rightly note, is for the Parliament.

26

27 **JUSTICE VIKRAM NATH:** You must have done some exercise, in identifying...

28

29 **GURMINDER SINGH:** Yes, in identifying the backward within the backward

30

31 **JUSTICE VIKRAM NATH:** The backward within the backward, the Mazhabis and the
32 Balmikis.

33

34 **GURMINDER SINGH:** Absolutely.

35

36 **JUSTICE VIKRAM NATH:** What are the parameters or the considerations you have taken
37 in identifying?

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GURMINDER SINGH: Various reports, which show that those people are two things. One, they continue to be backward, and or, in spite of being what they are, they are not adequately represented in services under the State. These are two parameters. One, are they really the backward within the backward? Two, whether they are backward within the backward or not so backward, or forward backward or backward forward, they are still not represented. So there is something lacking somewhere in the matter of policy, and that is what the State seeks to address.

CHIEF JUSTICE DY CHANDRACHUD: Now, Mr. Advocate General, do we have some population data on what is the total population of SCs in Punjab, and what is the population of the Balmikis and Mazhabi Sikhs within that group of SCs? What is the population available?

GURMINDER SINGH: We do, My Lord. We do. They are all statistically available. But why I am not stressing upon that, is because the reference to Your Lordships primarily...

CHIEF JUSTICE DY CHANDRACHUD: It's not a numerical argument, but..

GURMINDER SINGH: Not a numerical argument. The argument is, first of all, can you do it, as Justice Nath has correctly put, can you do it? If you can, and the answer is yes, who is to do it? Parliament, State, Executive, Legislative. And if who is to do it is determined, then how that State has to do it? How is not the issue before for Your Lordships.

CHIEF JUSTICE DY CHANDRACHUD: Now, you have sort of laid down the jurisprudential framework in the first part of your submission. Now, why don't we go into the nitty-gritty of it? First, the statutory provision.

GURMINDER SINGH: I will come to that in two minutes.

CHIEF JUSTICE DY CHANDRACHUD: And then, we'll look at *Chinnaiah* and why we look at the law before *Chinnaiah* and after *Chinnaiah*, *Chinnaiah* 2005. *Chinnaiah* has then been overtaken by a lot of law on the subject.

GURMINDER SINGH: Now My Lord, why I'm trying to distinguish that argument is, that *Chinnaiah* proceeds on the basic premise that, exercise of power for the purposes of identifying the backward within the backward, is only of the Parliament in any exercise by the State to that effect tinkers with that power. What *Chinnaiah* has possibly failed, we'll go

1 through the judgment and see if I'm correct is that, 16(4) is an independent provision which
 2 has to be exercised by the State, either centre or the state government. The powers which give
 3 the enabling provision, an exercise to be conducted by forming an opinion, is totally within the
 4 legislative domain and the executive domain of the state government. There, Parliament does
 5 not figure. So the distinction is, for instance, that there is a room in which benefits are being
 6 provided. In common parlance 341 and 342, are the pass with which you get into the room,
 7 that's all. Are you entitled to be in the room or not, the President decides. First list, which is a
 8 one-time exercise by the President, that whether you're entitled to be in the room or not. Then
 9 as common culture goes, we have VIP passes. So then the Parliament decides, that whether
 10 who's in the room is entitled to be in the room or to be displaced from the room or whose
 11 outside can be given an entry into the room or not. There are two different exercises. One, is a
 12 one-time exercise by the President. He issues an order in 1950 for Punjab, let's say that these
 13 26 castes are entitled to be in the room for the purpose of benefits which the Scheduled Castes
 14 are entitled. Understood. Thereafter, that power is taken away from the President and vests,
 15 totally in the Parliament that whether those inside, as Your Lordship put it, are entitled to
 16 remain inside any longer or not, and whether those outside have reached a stage where they
 17 now become entitled to be insightful. So what is very interesting is that even the Constitution
 18 in 341 and 342 accepts this exercise to be a two way street. The power of the President is a one
 19 way street. Once you issue an order in common words, you become *functus officio*. You cannot
 20 touch that order on the executive side anymore. Once that exercise has been done, then forever
 21 the Parliament will remain vested with the power to legislate.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** To include more communities or exclude.

24

25 **GURMINDER SINGH:** To include more communities or to exclude. So My Lords were
 26 right. That power to that exclude.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** [INAUDIBLE]

29

30 **GURMINDER SINGH:** You attained. You attained that forwardness, which does not any
 31 more entitle you to be called as a backward class. You have to exit the room and make place
 32 for other people, as Your Lordships have put it.

33

34 **JUSTICE B.R. GAVAI:** Taking further, the concern expressed on my learned brother,
 35 Justice Vikram Nath, if within a particular backward class...

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37 **GURMINDER SINGH:** Please My Lord.

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JUSTICE B.R. GAVAI: ...certain castes have reached that position and they are on par...

GURMINDER SINGH: Please My Lord.

JUSTICE B.R. GAVAI: ...as he pointed out then, then they should move out.

GURMINDER SINGH: They should exit and make...

JUSTICE B.R. GAVAI: But then that is again for the Parliament to...

GURMINDER SINGH: Only for the Parliament. Only.

JUSTICE B.R. GAVAI: Now since we are deciding an important issue...

GURMINDER SINGH: Please My Lord.

JUSTICE B.R. GAVAI: ...just give me a thought for consideration of all issues.

GURMINDER SINGH: Absolutely. Right.

JUSTICE B.R. GAVAI: What happens person from Scheduled Caste and Tribe gets into IAS, IPS.

GURMINDER SINGH: That's right.

JUSTICE B.R. GAVAI: So once you are IPS, IAS, IFS, his children don't suffer the disadvantages that the persons from the category were residing in the village were.

GURMINDER SINGH: My Lords are right.

JUSTICE B.R. GAVAI: But then by virtue of reservation, they are also entitled to get in the second generation and again in third generation.

KAPIL SIBAL : [INAUDIBLE].

1 **JUSTICE B.R. GAVAI:** Beg your pardon. [UNCLEAR] is not available for Scheduled Caste
2 and Scheduled Tribe.

3

4 **GURMINDER SINGH:** Now it is. After *Jarnail* . Now it is. But that's again, My Lord yes,
5 so that is not the area I am immediately coming to, but just to take the example forward of
6 what My Lord Justice Gavai has pointed out. Who enters or exits the room. Let's put it as a
7 two way street. Who enters or exits the room is the prerogative of the President, followed by
8 the Parliament forever.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** But. You are saying the distribution...

11

12 **GURMINDER SINGH:** The distribution of the sweets and the benefits inside the room...

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Those who are already within the room is for the
15 State...

16

17 **GURMINDER SINGH:** My Lord, to say that those who are underweight will be given a free
18 meal. Let us take it. Anybody under 50 kgs of weight is entitled to be in the room for those
19 benefits. Very well understood. A person is 49. He's still in that room. There's a person who's
20 27 kgs, who needs it far more. Are you going to treat both of them equally?

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** Let me test the argument to its logical end.

23

24 **GURMINDER SINGH:** Please. My Lord.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Test the argument. Can the state say that we are
27 giving 100% reservation out of the Scheduled Castes only to these two communities?

28

29 **GURMINDER SINGH:** No, My Lord. Cannot be and should not be. Why?

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** Why?

32

33 **GURMINDER SINGH:** Because then you are excluding. Without legislating, you have
34 virtually done what only 341 can do.

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** You have a problem there, because even if you
37 are making it short of a 100%, exclusion is implicit, so you can't place it on the exclusionary

1 argument. 100% is an absolute exclusion, but 50% is an exclusion *qua* for those who can't
2 compete for that 50% within the backward community for that right.

3

4 **GURMINDER SINGH:** My Lords are right.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** There is an element of exclusion, so we'll have
7 to answer it, if you have to in saying that *Chinnaiah* was perhaps... *Chinnaiah* was
8 overlooked by our jurisprudence, that we can't place it on this that look, I am not excluding.
9 We'll have to place it in a more sound jurisprudential foundation.

10

11 **GURMINDER SINGH:** Whether it's preferential treatment...

12

13 **JUSTICE B.R. GAVAI:** What he is argued is that they have applied the principle of 50%,
14 which is considered as *Laxman Rekha* for...

15

16 **GURMINDER SINGH:** Because in institutional preference...

17

18 **JUSTICE B.R. GAVAI:** There is no complete exclusion.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** No complete exclusion.

21

22 **GURMINDER SINGH:** Institutional preference in medical colleges.

23

24 **JUSTICE B.R. GAVAI:** Even otherwise by providing 50% reservation for backward classes,
25 to exclude 50% for general category.

26

27 **GURMINDER SINGH:** And that Your Lordships have upheld. *Indra Sawhney* which, of
28 course, went into this issue in detail said that otherwise you will be inhibited in taking up any
29 exercise *qua* reservation.... because if you say that you cannot do it because it amounts to
30 exclusion, it will not be the intent of the Constitution. If you have to do it, whether you can
31 place checks and balances on it, is the intent of the Constitution. And that 50% is, of course,
32 My Lord a judge made law. Where Your Lordships have held. Let's be fair.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** Could I go one step further? Is the State bound
35 by the 50% cap while applying the distribution of benefits within the 50%? Why should we? I
36 mean why should we? I mean otherwise it's very attractive but is the State truly bound by the
37 50% cap? Within the backward? Can the States not say, look, in my State, my State, these

1 communities are, these are the truly marginalised communities. I want the benefits to go to
2 them.

3

4 **GURMINDER SINGH:** Yes.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** I'm not breaching the cap insofar as the general
7 communities are concerned. I'm not ousting equality of opportunity for them.

8

9 **GURMINDER SINGH:** My Lords are right.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** But within my State, these are not... Okay these
12 are 2 here, Maharashtra may say or Tamil Nadu may say no, it's not 2, it's 7 in my State, it may
13 say it's 15. Can the State do that? Can they not do it? Why can't they do it?

14

15 **GURMINDER SINGH:** I'll try and answer it My Lord. But when we talk about provision of
16 reservation, let's be very clear that there is no mandate by law, there is no mandate by law to
17 provide reservation. Therefore, 15 and 16 are enabling provisions when we talk of law going to
18 court.

19

20 **DR. K S CHAUHAN:** With reference to *Indra Sawhney* My Lord, I disagree with that

21

22 **GURMINDER SINGH:** No, no, we are developing an argument. To provide for reservation
23 My Lord, what has broadly been laid out.

24

25 **JUSTICE B.R. GAVAI:** It's kind of an enabling provisions.

26

27 **GURMINDER SINGH:** Yes, there are four checks and balances.

28

29 **JUSTICE B.R. GAVAI:** Though *Indra Sawhney* says that even if sub-Article 4 of 16 was
30 not there, still, the state would have been empowered to make reservation, because...

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** Article 16 (1)

33

34 **JUSTICE B.R. GAVAI:** ...Article 46 emphatically states what is implicit in 16.

35

36 **GURMINDER SINGH:** That's Article 46 and the consequences. That you will take care of
37 them, that is your obligation. How you will do it? My Lord then there are powers to be

1 exercised. But there are four checks and balances. My Lord. I can share them at the outset with
2 Your Lordships, which eventually...

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Why don't we do this? Why don't we now look at
5 the judgments? And see what is the area for area, for manoeuvrability that, what is now... ?

6

7 **GURMINDER SINGH:** I will just answer that question in short. So what Your Lordships
8 have determined, My Lord. One is backwardness, which I've submitted before Your Lordships
9 as relative. Backwardness in the case of OBCs has been held to be a determinative factor, that
10 whether you are backward or not, the State will decide. In the case of Scheduled Castes, Your
11 Lordships have held, backwardness is presumed. You cannot go into the exercise of
12 determining the backwardness if you're a Scheduled Caste. The second factor, My Lord, is
13 inadequacy in representation in public services. Now this is a database concept. Just
14 answering My Lord, My Lord Justice Chandrachud's question. This is a database concept, it's
15 statistics. Are you adequately represented or not? Though My Lord, that word may have a lot
16 of connotations because they do not say, 'equally represented', though we've never gone into
17 that. They do not say equally represented. It can't be that they can ever be brought at a common
18 platform. Maybe, maybe not. The word used is adequately represented, and that opinion,
19 again, is to be found by the State. The third My Lord, is the concept of creamy layer. What My
20 Lord Justice Vikram Nath had put it that, once you've achieved it, do you still get the
21 entitlement to remain within the backward classes or not? And the fourth, of course, is
22 efficiency of services, that whether provision of such reservation will eventually amount to
23 compromising the efficiency of services under 335, because that is also your constitutional
24 obligation.

25

26 **JUSTICE B.R. GAVAI:** Therefore, *Indra Sawhney* there can't be reservation in certain
27 type of post.

28

29 **GURMINDER SINGH:** Yes, certain type of post, not beyond 50%, not without going into
30 the checks and balances. So therefore, the exercise My Lord in my humble submission, is
31 pretty comprehensive. Your Lordships are right. Why a state cannot give 70 and the other state
32 give 30 and the other state give 20? When they do it, it will be up for judicial review based
33 upon the quantifiable data on the strength of which such a decision has been taken.

34

35 **JUSTICE VIKRAM NATH:** Has the exercise been done in Punjab yet?

36

1 **GURMINDER SINGH:** Done in Punjab? Yes. I'm sure in Tamil Nadu, yes. I'm sure
2 whichever state has done it, they are expected to and would have carried out this exercise. But
3 that, as I was saying My Lord, a three judge or a five judge bench will decide, that whether that
4 exercise, which has been done is susceptible to judicial review, and if so...

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** The High Court struck it down only on the
7 grounds of *Chinnaiah*.

8

9 **GURMINDER SINGH:** Yes, *Chinnaiah*.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** That you cannot classify further for the...

12

13 **GURMINDER SINGH:** That this amounts to tinkering with 341. That was the entire
14 substance of it. And in the *Davinder Singh*, My Lord, Their Lordships held that,
15 that may not be the correct thing, because 341 and 16(4) operate in two distinct legislative
16 spheres. They have no overlapping as far as their implementation is concerned because, as I
17 put it, 341 decides who's entitled for benefits, who to be given how much, within those entitled,
18 is the exercise by the State. So therefore, my humble submission was, that unless this exercise
19 is permitted by law, if you block it, then what Your Lordships call, will happen, is the word
20 called 'lumping'. Then all the benefits will be lumped upon a part of the park, and the others
21 who are truly deserving, for whom these provisions have been made, to achieve the eventual
22 end of equality will never get it, My Lords have rightly put it. Justice Gawai. IAS, IPS... even if
23 somebody is an inspector, his family has made it. His children will go to a good school. He will
24 be in a city or a town or an urban estate, but for somebody who's still sitting in that part of the
25 village from where you're not allowed to draw water from the well, he's the one who needs it.
26 You cannot allow lumping of benefits with a certain class within a class. And if touching that
27 class within a class is taken to be tinkering of 341, in my humble submission, that would be an
28 erroneous legal view. Nobody intended reservation to be a perpetual concept. Nobody, not
29 even the Constitution framers felt, because we've had studies, we've had Mandal Commissions,
30 we've had judgments. Nobody wanted that reservation should remain in perpetuity, because
31 eventually, then that would mean that the exercise of reservation itself has failed. The idea is
32 to achieve equality in the lowest time frame possible. My Lords, are looking at the clock.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** I was just going to tell you that. The problem on
35 being on this side of the bench is that that clock constantly ticks in my face. So let's get on...

36

1 **GURMINDER SINGH:** I understand Your Lordships view point that this is definitely at the
2 cost of some other case.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** This is the core of the matter. You've laid down
5 your jurisprudential foundation, no doubt about it.

6

7 **GURMINDER SINGH:** Very well. Let me start with the statutory provision. Before we go
8 into anything at all in this matter, what is very essential...

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** Where do we get the Act actually? Can you just
11 tell us?

12

13 **GURMINDER SINGH:** The Act is a part of the Volume 4, page 1. After the index My Lord,
14 there is the Punjab Scheduled Castes Act. Your Lords have it?

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** Volume 4, page 1.

17

18 **GURMINDER SINGH:** Page 1. And Your Lordships would have the offending provision at
19 internal page 3, which was Section 4 and sub-Section 5.

20

21 **JUSTICE B.R. GAVAI:** As a first preference from among the Scheduled Castes.

22

23 **GURMINDER SINGH:** Yes, that is what I was trying to impress, that it is not exclusion in
24 the sense that we take it, but it is only first preference amongst the Scheduled Castes and
25 then...

26

27 **JUSTICE B.R. GAVAI:** And if available.

28

29 **GURMINDER SINGH:** Yes, then it will remain within the Scheduled Castes. Nobody will
30 be denied the benefit by virtue of this Clause. Because we need to now see who are we dealing
31 with.

32

33 **JUSTICE B.R. GAVAI:** That is also part of Volume 4 or you want us to take the book?

34

35 **GURMINDER SINGH:** Whichever way, My Lord. The Constitution is not... My Lords may
36 have the book because the entire Constitution need not... Yes, we've not put it in the
37 compilation. In this Constitution, My Lords...

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CHIEF JUSTICE DY CHANDRACHUD: It's Mr. Sankaranarayanan's gift to the legal profession. The good part about this is that, it has footnotes placing the entire legislative history. So, right at one point then you don't have to flip between amending acts, amending statutes or constitutional amendments.

GURMINDER SINGH: It is a book which, by habit, every lawyer should carry in his breast pocket. I know Your Lordships' affection for the Constitution.

CHIEF JUSTICE DY CHANDRACHUD: My Court Master, says the library has purchased this.

JUSTICE B.R. GAVAI: Mr. Sankaranarayanan gifted us with one copy, I think.

CHIEF JUSTICE DY CHANDRACHUD: Last time Mr. Sankaranarayanan gave one. It must have gone home I think.

GURMINDER SINGH: You can sign it and give it to me.

JUSTICE B.R. GAVAI: We have it on our table in the residential offices.

GURMINDER SINGH: If Your Lordships have 366? It says, definitions. 'In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say', My Lords may straight away come to 23. Schedule, My Lords have it? 'Schedule means a schedule to this Constitution, 24. "Scheduled Castes".' Now My Lords, if Your Lordships would realise, this is kept in inverted commas. 'Scheduled Caste is defined as means such caste, races or tribes or parts of or groups within such castes, races or tribes as are deemed under Article 341 to be Scheduled Castes for the purposes of this Constitution.' So the definition has been directly linked with 341, and similarly, in the case of Scheduled Tribes, My Lord, it means 'such tribes or tribal communities or parts or groups within such tribes or tribal communities as are deemed under Article 342 to be Scheduled Tribes for the purposes of this Constitution'. So we'll straightaway go to 341 My Lord, because that will tell us, though the language is quite *para materia*, My Lords may have 341, the only thing we will get from there is who can do it. May I My Lords?

1) 'The President may with respect to any State or Union Territory and where it is a State after consultation with the Governor, thereof by public notification specify the castes, races or tribes or parts of groups within the castes, races or tribes, which shall for the purpose of this

1 Constitution be deemed to be Scheduled Castes in relation to that state or Union Territory, as
2 the case may be'. So My Lord I'll just analyse this in a very short while. It's very clear that the
3 authority My Lord empowered to do this exercise under 341 is the President under Clause 1.
4 Now when he is exercising this power My Lord, with respect to any state or union territory and
5 when there is a state in consultation with the governor. So this My Lord the consultative
6 process, which is undertaken. There is no dispute regarding the issuance of an order. And it is
7 to be done by way of notification, no problem. The interesting part starts after notification and
8 which is very germane to the present controversy that I'm arguing before Your Lordships.
9 Why? Because even while defining as to whom 341 can be exercised, it is not a monolith block.
10 My Lords may kindly take note of it. When 341 itself says that it has to specify a caste as a
11 whole, races or tribes or parts of or groups within castes. That means a caste can most certainly
12 be split, it's evident. If caste was so sacrosanct that anything would amount to tinkering with
13 the caste, then 341 would not be couched in this language. Because the President can choose
14 that this caste, for instance, I'll give Your Lordships an example A caste is a Scheduled Caste
15 in Punjab

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** May not be in Maharashtra.

18

19 **GURMINDER SINGH:** The same caste may not be in Maharashtra.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** That's why somebody who's designated as a
22 Scheduled Caste in Punjab, if they go to Maharashtra, they may not get the benefit. They will
23 not get the same benefit. Also at one time there used to be territorial restrictions which were
24 abolished after 1976. So even though you are designated as a Scheduled Caste, you could get
25 the benefit only if you belong to that particular region in your state....

26

27 **GURMINDER SINGH:** Quite right.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** Districts, yeah. Now after 1976 that territorial
30 division was done away with, but it was there until 1976.

31

32 **GURMINDER SINGH:** It was there. So, My Lord very interestingly, Your Lordships have
33 rightly put it.

34

35 **JUSTICE B.R. GAVAI:** Certain tribes in general district of Maharashtra may not be in the
36 other parts of the state.

37

1 **GURMINDER SINGH:** So My Lord, Yes, that is what I was coming to. That the same caste
2 in one state may not be a Scheduled Caste in the other. The same caste may be a Scheduled
3 Caste in a state, but maybe a Scheduled Caste only in a particular district of another state. The
4 same caste My Lord may be commonly designated as a Scheduled Caste for many states. So
5 therefore, they say that all will be defined in the part to the Schedule, but therefore the definite
6 conclusion which arises from reading this definition is that Caste in itself is not an indivisible
7 entity, number one. And under definition of 341 it most certainly is not a monolith block. It is
8 not something which is which is to be taken as eradicator of birth marks. No. We all know the
9 birthmark philosophy, My Lord, that once you become a Scheduled Caste then you lose your
10 birth mark, you're only a Scheduled Caste. It doesn't happen in 341. There are two reasons
11 why. One, that, as we have already seen, a caste once it enters the Scheduled Caste maybe a
12 Scheduled Caste in a state or a district or more than one state. So therefore, you will have the
13 benefits of the Schedule only if you are within the definition so ascribed to you in the order
14 issued by the President, as amended by the parliament. That thing is very clear. Two, why it is
15 not a monolith? It is because it is a reversible process. It is a reversible process. Today you can
16 say that a caste is a Scheduled Caste in three districts of Punjab, for instance, I'm only taking
17 an academic example. Tomorrow you may reverse that status for one of those three districts
18 also.

19

20 **JUSTICE B.R. GAVAI:** But now area restrictions are not possible. No restrictions?

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** No, that has been done away with.

23

24 **GURMINDER SINGH:** No. The parliament can say that this Scheduled Caste has, suppose
25 it is located next to an urban centre, people of that particular district have risen in affluence
26 and have the opportunity to compete, they may exclude that district. The Parliament may, in
27 its wisdom.

28

29 **JUSTICE B.R. GAVAI:** The Parliament has the power, because any group of persons in that
30 caste also...

31

32 **GURMINDER SINGH:** That's right My Lord. So therefore it's not an irreversible process.
33 So therefore, when you are saying that even within a caste, you can create parts and for this,
34 all we have to do is, we'll go to the Presidential Order in respect of any state, and this example
35 will be laid bare as to what I'm trying to say. Now the issue is, why are they called Scheduled
36 Caste? Because this word has become very generic. He's a Scheduled Caste. Why? Because, his
37 caste for that particular area is contained in the Schedule. That's all. A Scheduled Caste is not

1 a caste, as we commonly think. A Scheduled Caste is a person whose caste is included in the
2 Schedule, for a particular area of a state or variation thereof in the manner that we have
3 discussed.

4

5 **JUSTICE B.R. GAVAI:** If the Parliament removes a particular caste from the Schedule,

6

7 **GURMINDER SINGH:** It can remove a caste.

8

9 **JUSTICE B.R. GAVAI:** That caste would cease to be a Scheduled Caste.

10

11 **GURMINDER SINGH:** Would cease to be a Scheduled Caste. That doesn't mean he's not a
12 caste, which was backward, is backward, or continues to be backward. But if the Parliament,
13 in its wisdom, removes that caste, or the parliament, in one context, removes a part of that
14 caste or a group of that caste, because there's a lot of interpretation, given in *Milind* and other
15 judgments, that you can either put a comma where there are castes which denote the same
16 category of people, they are known by different names, or you can put a sub-caste in a bracket.

17

18 **JUSTICE B.R. GAVAI:** That is not permissible. It can be done only by Parliament. The court
19 can't...

20

21 **GURMINDER SINGH:** I am saying you can. You meaning the Parliament. The Parliament
22 can do it. That they can amend it, put a sub-caste in a bracket along with the main castes. They
23 can put a comma and add a caste to a particular entry where the caste is synonymous with the
24 caste already entered, or they can add or delete a part of that caste on a territorial basis. This
25 power is endowed to the Parliament, most certainly, and that has been recognized by Your
26 Lordships. Now...

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** In fact 15(4) specifically, Article 15(4) specifically
29 refers to the Scheduled Castes and Scheduled Tribes. 16(4) has no reference to Scheduled
30 Castes and Tribes at all. It refers to any backward class of citizens, who in the opinion of the
31 state, are inadequately represented in the services of the state. Now, because 16(4) uses that
32 generic expression, any backward class of citizens, that will, of necessity, include the
33 Scheduled Castes and Scheduled Tribes.

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35 **GURMINDER SINGH:** That's right. But 15(4), Your Lordships are aware, came later,

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

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GURMINDER SINGH: It was by way of a subsequent amendment. So maybe, by the first amendment the framers got wiser that, why not specify. Why not specify?

JUSTICE B.R. GAVAI: It was a result of *Champakam Dorairajan*.

GURMINDER SINGH: It was a result of *Champakam* judgement. So, the effort was to make the intent very clear that when we say backward classes, as in 16(4), we mean backward Scheduled Castes and Scheduled Tribes. Though, that will not have an effect on the merits because the backwardness, the only thin line that we've seen has been drawn is that backwardness in case of OBCs can be tested, while backwardness in the case of Scheduled Caste and Scheduled Tribes is presumed. A state cannot go into the exercise of determination of backwardness as one of the four parameters for grant of benefits. Now, the only word I was struggling with, and I was looking for guidance from Your Lordships is this word 'deemed'. I was discussing with Mr. Farasat also in the morning, it troubles me. Why would the constitution framers use this word 'deem'? My only explanation was, because it is not an exercise in perpetuity. So for that period of time, a deeming fiction is attached to that caste.

JUSTICE B.R. GAVAI: It could be the read as deemed to be Scheduled Castes in relation to that state.

GURMINDER SINGH: That's what I'm saying. That's the only explanation that I could...

JUSTICE B.R. GAVAI: Could be included in the lease for that state, it will be deemed to be Scheduled Caste for that particular state, not for the other states.

GURMINDER SINGH: Why I say so is, that otherwise, normally as we interpret statutes, Your Lordships are far more experienced.

JUSTICE B.R. GAVAI: Clearly said that in relation to state has been construed to a particular state only.

GURMINDER SINGH: If we take the word deemed out of it, does it change the sense of the article? Then it would be, shall, for the purposes of this Constitution be, Scheduled Castes in relation to that state or union territory, why deem? I could not come up with an explanation, so therefore, I'm leaving it My Lord, at that, because...

1 **CHIEF JUSTICE DY CHANDRACHUD:** The reason is that, what Article 341 does is, it
2 recognizes the sociological existence of castes. Whereas, Article 342 recognizes the sociological
3 existence of tribes.

4
5 **GURMINDER SINGH:** That's right.

6
7 **CHIEF JUSTICE DY CHANDRACHUD:** Having done so, it creates an artificial grouping
8 called Scheduled Caste in 341, and Scheduled Tribes in 342. Sociologically there is no
9 Scheduled Caste as such.

10

11 **GURMINDER SINGH:** That's what I was saying.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Scheduled Caste is an expression, which the
14 Constitution has adopted for the conferment of benefits on these communities. So therefore,
15 it uses the expression 'deem' to highlight that this is really a deeming fiction which is being
16 created to...

17

18 **GURMINDER SINGH:** Attaching to a particular caste. Yes.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** The existing sociological grouping consists of
21 castes which 341 fares in 342.

22

23 **GURMINDER SINGH:** My Lord, I'll put it, as Justice Gavai said...

24

25 **JUSTICE B.R. GAVAI:** Or, it could be read for the purposes of Article 46. Article 46 refers
26 to Scheduled Castes and Schedule Tribes.

27

28 **GURMINDER SINGH:** That's right. No, no, but my...

29

30 **JUSTICE B.R. GAVAI:** Though 15(4) has come subsequently, 46 is from inception.

31

32 **GURMINDER SINGH:** Quite right.

33

34 **JUSTICE B.R. GAVAI:** It will be deemed to be Schedule Caste and 46 provides for the
35 special provisions for Scheduled Caste and Scheduled Tribes and weaker sections.

36

1 **GURMINDER SINGH:** And the caste is by birth. Caste is by birth. This is the deeming
2 fiction.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Second, Article 341 also contemplated, apart
5 from castes, races or tribes can also be a Scheduled Caste.

6

7 **GURMINDER SINGH:** That's right.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** It's not only a caste, which can be designated as
10 a Scheduled Caste under 341, but races or tribes can also be designated as Scheduled Caste,
11 because it says specify the castes, races or tribes or parts of groups within caste, races are
12 tribes, which shall be designated as Scheduled Caste. So, it recognizes this could be an
13 amorphous group of castes, races, tribes, groups within caste, races or tribes, or parts of caste,
14 races and tribes. Which can be designated. And therefore, the reason why they use the word
15 deeming or deemed, is that it is really a fiction which is created for the purpose of this
16 Constitution.

17

18 **GURMINDER SINGH:** That's right. The caste will remain, whether you're in or out.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** The caste will remain. The tribe remains. The
21 race remains. Those groups within, they don't lose their identity. The identity as caste, races
22 or tribes, their sociological identity continues despite their being deemed to be Scheduled
23 Caste for the purpose of the constitution.

24

25 **GURMINDER SINGH:** That's right. That's the only explanation I could think of My Lord.
26 And the other thing was My Lord, that if tribes can be Scheduled Caste, it would have an
27 overlapping effect, which doesn't reconcile with the framing of the Constitution. Then why
28 have two different? If tribes can be a part of Scheduled Castes, then there is a separate
29 provision for tribes in 342. Under what article would the President issue an order of a tribe?
30 It can't be either under 341 or 342.

31

32 **JUSTICE B.R. GAVAI:** 342 doesn't include caste under it.

33

34 **GURMINDER SINGH:** It doesn't. But 341 includes a tribe.

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** It includes a tribe.

37

1 **GURMINDER SINGH:** So, therefore, an overlapping jurisdiction as far as the tribes is
2 concerned.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** But this is in recognition of the fact, that tribes
5 and castes were not, in that sense, watertight compartments all over the country. In some
6 states or in some in the case of some castes, that castes will not include a tribe at all. In other
7 states, possibly the Constitution took a broader perspective, that there may be certain castes
8 which are akin to tribal communities, and therefore 341, they give a much broader power.

9

10 **GURMINDER SINGH:** Possibly.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** 342 says, only tribes and tribal communities.

13

14 **GURMINDER SINGH:** Right. Because there would be some states in India My Lord, where
15 there are no Scheduled Castes. They only have a tribal community, which is ...

16

17 **JUSTICE B.R. GAVAI:** Like Andaman Nicobar or....

18

19 **GURMINDER SINGH:** Yes. Northeast My Lord, one or two states where they are classified
20 only under 342. There are no orders of 341 in those states.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** There are some states, where there's virtually no
23 Scheduled Tribe.

24

25 **GURMINDER SINGH:** That's right. None whatsoever. Punjab My Lord.

26

27 **JUSTICE B.R. GAVAI:** Punjab, Haryana could be.

28

29 **GURMINDER SINGH:** None.

30

31 **JUSTICE B.R. GAVAI:** The reservation of Scheduled Tribes was on the ground of...

32

33 **GURMINDER SINGH:** ... went from Punjab My Lord.

34

35 **JUSTICE B.R. GAVAI:** Was on the ground of geographical handicaps.

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37 **GURMINDER SINGH:** That's right.

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JUSTICE B.R. GAVAI: Where else 341 Schedule Caste is account of socio-economic backwardness.

GURMINDER SINGH: Quite right. Like in Punjab, My Lord, we have Sikhridar and we have Rai Sikhs. Rai Sikhs were a 'criminal tribal community, but they're always being categorized as castes. So, different headings were given to them. One which has been entered now.

CHIEF JUSTICE DY CHANDRACHUD: That's exactly. That's very important because that shows that though they were essentially tribes, they've been classified as caste for the purpose of Article 341.

GURMINDER SINGH: That's right. So, therefore, what we have to understand is that the President issues an order which may or may not be not be in perpetuity. We have to understand that. Because while issuing the order, what the Constitution very fairly recognises is, that the President, after the issuance of that order, cannot change that order. So, in case there is any error in the order issued or in case because of the sociological conditions a caste or a tribe or a race needs to be added to that order, the parliament, in its wisdom, would do that exercise which also is challengeable, My Lord on very, very narrow spectrum.

CHIEF JUSTICE DY CHANDRACHUD: Where is the Presidential Order here?

GURMINDER SINGH: Yes, I am coming to that. Kindly, have the schedule. Volume 4 is there in the... My Lords have the Volume 4?. It is bookmarked My Lord and if Your Lordship would have the second last document, the constitution, My Lord, is wrongly typed. It is Scheduled Caste order and the third last is Scheduled Tribes. Kindly have the second last. Page 1371 it starts.

CHIEF JUSTICE DY CHANDRACHUD: 1371.

GURMINDER SINGH: Now what I've just stated before, Your Lordships would become clear from here. My Lords have 1371?

CHIEF JUSTICE DY CHANDRACHUD: Yes.

GURMINDER SINGH: If Your Lordships would straight away come, My Lord to Part 1, Andhra Pradesh, and if Your Lordships would have Clause 4, that empowers the interpretation

1 by saying that any reference in this order to a state or to a district or other territorial division
2 thereof shall be construed as a reference to state, district, or territorial division as constituted
3 on the 1st of May 1976. So when we see Andhra My Lord, if Your Lordships would come to
4 1372, entry number 9 My Lord. It has all the contingencies that I was pointing out. My Lord,
5 it has a caste called Beda. If Your Lordship would have it..

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** In the districts of Hyderabad, Rangareddy.

8

9 **GURMINDER SINGH:** No, first of all, it has Beda, then it has (Budga), which means
10 Budga's are also Bedas. Jangam in the districts of now, Jangam is a separate caste, but it's at
11 the same entry, but only in selective districts of Andhra Pradesh. So, therefore, My Lord, in
12 line with what the constitution is saying...

13

14 **JUSTICE B.R. GAVAI:** Beda Jangam?

15

16 **GURMINDER SINGH:** That's right.

17

18 **JUSTICE B.R. GAVAI:** Caste is Beda Jangam and it could be Budga Jangam also.

19

20 **GURMINDER SINGH:** That's right.

21

22 **JUSTICE B.R. GAVAI:** It has to be read in continuation because otherwise...

23

24 **GURMINDER SINGH:** That's right. It is Beda Jangam.

25

26 **JUSTICE B.R. GAVAI:** Because otherwise, there will be a comma in between.

27

28 **GURMINDER SINGH:** That's right. There's no comma. So it's either interchangeable with
29 Beda or Budga.

30

31 **JUSTICE B.R. GAVAI:** So it could be Beda Jangam or Budga Jangam.

32

33 **GURMINDER SINGH:** My Lords are right. And in selective districts or Andhra Pradesh.
34 Now Your Lordships would see entry 30. There they possibly are synonymous castes which
35 have been subsequently added, which are My Lord Kolupul Valdu, Pambada, Pambanda and
36 Pambala. Now they are interspersed with a comma meaning thereby that the entry is one, but
37 they may be inter-changeable.

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JUSTICE B.R. GAVAI: Either of them?

GURMINDER SINGH: Yes. Why My Lord, this is very important is that if, in such an entry, a person, My Lord, who is born into one of these castes. Say, for instance, he is born as a Pambala but he gets a Scheduled Caste certificate of Pambada, it will be recognised, because it is synonymous and that will not disentitle him.

JUSTICE B.R. GAVAI: 14 also, Chamar, Mochi.

GURMINDER SINGH: That's right, that's right. Mochi, Chamar Ravidass, Chamar Rohidas. So they are all a part of one entry. When we come to this, it's a caste. Now, why 341 was made sacrosanct, is we can just refer to this and understand that, as My Lords had put it, tomorrow, a state feels that, forget about the Scheduled Caste status of this caste. It has a population of 12% in my state. If I give them the benefit of Scheduled Caste by tinkering of the list of under 341, I can get voter friendly. To avoid that mischief, Your Lordships held 341 as far as the entry and exit is concerned, is sacrosanct. No state in the federal structure will be able to tinker with the entry and exit or a caste or a part thereof, or a race or a group or a part thereof, while exercising the powers which are not vested in it. That was the reason. What *Milind* and the subsequent judgment says is this, it is not for conferring of benefits at all, which *Chinnaiah* interprets it to be. It is not a theory of inclusion or exclusion at all. So therefore, My Lord, the principal argument that 341 and 16(4) operate in completely different legislative spheres. The word used there is state. It could either be Centre or the State government. And they can, in their opinion confer the benefits which they are enabled to provide under 16, in the manner that they deem fit. The provision of those benefits in the ratio as the state decides, is definitely open to judicial review, but it is not tinkering with the list. That is the principal argument on which we propose to, My Lord, seek the setting aside of *Chinnaiah*, is that it does not tinker with 341. So now, My Lords would have the Punjab list, which was an issue in my case. 1381, part 3. Now the statute said Balmiki, because Balmiki is synonymous with Chooda and Bhangi at Entry 2 and it said Mazhabi, which is interchangeable with Mazhabi Sikh, at entry 23.

CHIEF JUSTICE DY CHANDRACHUD: The statute uses the word Balmiki and Mazhabi and Mazhabi Sikhs.

1 **GURMINDER SINGH:** Mazhabi Sikh. So, Mazhabi Sikh and Mazhabi, as per the order, is
2 interchangeable. It's interspersed with a comma. And so is My Lord, Balmiki with Chooda or
3 Bhangi.

4

5 **JUSTICE VIKRAM NATH:** But your act doesn't say so.

6

7 **GURMINDER SINGH:** Act doesn't say so. So we'll have to refer back to the constitution to
8 say if somebody holds a certificate as a Bhangi, he will be considered for the benefit...

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** So he will not be denied the benefit under 4(5).

11

12 **GURMINDER SINGH:** My Lords are right. So that is the intent.

13

14 **JUSTICE B.R. GAVAI:** But then, if you are giving that preferential treatment, it will be only
15 for Balmiki, or Balmiki, Chooda and Bhangi?

16

17 **GURMINDER SINGH:** No, we are giving to Balmiki, as at entry 2, along with the caste
18 entailed therein, and Mazhabi at entry number 23 with the caste entailed therein, interspersed
19 by a comma.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** Because they are, according to the constitution,
22 as indicated, that these other two communities are also synonymous. And these are included
23 in that, though really the statute has used only one, Balmiki and Mazhabi Sikhs.

24

25 **GURMINDER SINGH:** That's right. Now, if Your Lordship would see, at serial number 37,
26 is a caste called Sikriband and serial number 39 are two castes, which are Mahatam, Rai Sikh.
27 Now, as the proposal of the state was that, Mahatam is the principal caste and Sikriband --
28 Sikribands are those people who weave rope from jute. So Sikribands and Rai Sikhs, which I
29 was just referring to, who were a criminal community, used to engage in the occupation of
30 weaving of rope and making beds and chairs with the help of that rope. They were engaged in
31 that vocation. The proposal was that, include Mahatam and Rai Sikh with a comma at
32 Sikriband. But the parliament decided, 'No we will include them as a separate entity, at a
33 separate place, interspersed with a comma, but not synonymous with Sikriband. Now, the
34 problem is that a lot of people from Rai Sikhas and Mahatams had certificates as Sikriband,
35 because they actually belong to that cast. In any case, that litigation I'm doing in the High
36 Court. So, just sharing it with Your Lordship. So, there this whole interpretation of *Milind*
37 and comma and a separate entry, we are engaged in the debate My Lord, that whether, if

1 historically, they are a part of the same community engaged in the same vocation, which
2 confers the same benefit amongst them as a caste. Why should they be given the benefit not
3 from 76 but from 50 when Sikriband was entered as a Schedule Caste.

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** Now Mr. Advocate General, we have seen why
6 jurisprudentially you are saying that *Chinnaiah* is not a correct, has not interpreted the
7 Constitution correctly because there's no question of inclusion or exclusion.

8

9 **GURMINDER SINGH:** That's right.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** 16(4) is enabling.

12

13 **GURMINDER SINGH:** Enabling.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** 341 designation.

16

17 **GURMINDER SINGH:** That's right.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** Now, should we go to the judgments and see
20 what is there...

21

22 **GURMINDER SINGH:** My Lord, we'll just read quickly, 15 and 16, because that is the whole
23 basis of my argument.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** There's only one distinction between 15(4) and
26 16(4). 16(4) doesn't use the word 'Any'.

27

28 **GURMINDER SINGH:** 'Any'.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Which 15(4) uses. Does that make any
31 difference? Because, 15(4) says 'Any'... may provide benefit for any socially and educationally
32 backward class of citizens.

33

34 **GURMINDER SINGH:** My Lord, 15(4) says 'Special Provision'.

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** 'Special Provision'.

37

1 **GURMINDER SINGH:** And 16(4) says 'Any'.

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** Right. No 15(4) says, 'Any'.

4

5 **GURMINDER SINGH:** No, My Lord. 15(4), says Special Provision.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** For making any special provision.

8

9 **GURMINDER SINGH:** That's right

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** for the advancement of any socially and
12 educationally backward classes of citizens...

13

14 **GURMINDER SINGH:** Your Lordships, are talking about the second 'Any'.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, the second 'Any'.

17

18 **GURMINDER SINGH:** Alright. And there is a difference if Your Lordships, would have
19 15(4) first...

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** Why I'm asking you this...

22

23 **GURMINDER SINGH:** Let's just read 15(4) and 16(4) My Lord.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** Right. Let's see. 15, 16(4)...

26

27 **GURMINDER SINGH:** Because the other sub-clauses are not relevant. It says nothing in
28 this article or in Clause 2 of Article 29, shall prevent the state, the state in this case, meaning
29 either the centre or the state, from making any special provision for advancement of any
30 socially and educationally backward classes of citizens, or for the Scheduled Castes and the
31 Scheduled Tribes. Now, My Lord, the word here could have been anything. Because instead of
32 'or' the word could have been 'including'. It is not including. So, when we see the intent, it
33 means that it distinguishes backward classes...

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** I didn't get you.

36

1 **GURMINDER SINGH:** If Your Lordships, would see the word between backward classes of
2 citizens or for the Scheduled Castes and the Scheduled Tribes. It can have two meanings. One,
3 that you can make a law exclusively for backward class of citizens or for Scheduled Caste and
4 Schedule Tribes, but in definite form it recognizes the distinction between Backward Classes
5 and Scheduled Castes and Scheduled Tribes, because in 16(4), the deeming inclusion of
6 Scheduled Castes is there in Backward Class.

7

8 **JUSTICE B.R. GAVAI:** Come after *Champakam*. Maybe she was belonging to Scheduled
9 Castes.

10

11 **GURMINDER SINGH:** That's right.

12

13 **JUSTICE B.R. GAVAI:** And that [UNCLEAR] was challenged, wherein the reservation was
14 provided for Scheduled Caste.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** They said, and our Court said that you cannot
17 have community based reservations and admissions, that would ever be taken away.

18

19 **JUSTICE B.R. GAVAI:** Scheduled Caste and Scheduled Tribes is there. But 16(4) there from
20 inception.

21

22 **GURMINDER SINGH:** That's right. Now if Your Lordship would see...

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** You know the only thing, I mean nothing will
25 turn on this case. But there's a little issue here. 15(4) says, from making any special provision.
26 Any special provision, that means any kind of special provision.

27

28 **GURMINDER SINGH:** That's right.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** For the advancement of any socially and
31 educational backward class of citizen. That is, the state can pick out any socially and
32 educationally backward class of citizens. Because there is no, it's not like a presidential
33 designation here or for the Scheduled Caste and Scheduled Tribe. Can the state under 15(4)
34 say I'm going to make a special provision for only these Scheduled Castes in my state or these
35 Scheduled Tribes in my state? Or, is it bound, if you make that special provision, that it must
36 apply to all Scheduled Castes and Tribes in the state. Because, any in 15(4) qualifies only the

1 formers, especially socially and educationally background class of citizens are not Schedule
2 Caste and Schedule Tribe.

3

4 **GURMINDER SINGH:** That's right. So as far as the Scheduled Caste and Scheduled Tribes
5 are concerned.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** You must treat them together as one unit.

8

9 **GURMINDER SINGH:** Exactly. You may make the provision for all, but as far as the
10 internal, My Lord that will come in 16 (4), where you can limit extent or reserve within that
11 category.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** 16(4) is even more clear.

14

15 **GURMINDER SINGH:** Yes, kindly have it.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Because 16(4) says nothing in this Article shall
18 prevent the state from making any provision, like there any special provision, any provision
19 for the reservation of appointments or posts in favour of any backward class of citizens.

20

21 **GURMINDER SINGH:** Any backward class.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** So any backward class of citizens could include
24 Scheduled Caste and Scheduled Tribes,

25

26 **GURMINDER SINGH:** Scheduled Caste and Scheduled Tribes My Lord..

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** In which case the state can considerably say that,
29 well, though these Scheduled Castes have been designated in my state, in my opinion out of
30 them only these are not adequately represented in my services.

31

32 **GURMINDER SINGH:** So My Lord the recording of opinion.....

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** In Maharashtra there may be 29 and in another
35 state X number of Scheduled Castes. You can say in my state, the inadequacy of representation
36 applies only to these.

37

1 **GURMINDER SINGH:** That's right.

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** Therefore, I'm going to make this provision only
4 for these.

5

6 **GURMINDER SINGH:** Only for these. But why 16(4) qualifies it unlike 15(4), a recording
7 of an opinion is necessary..

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** Of inadequacy of representation

10

11 **GURMINDER SINGH:** Inadequacy of representation, which is not in 15(4). So 16(4) as
12 enacted My Lord, in fact, places a check and balance on the power of the state when exercised
13 talking of adequacy, of representation. So therefore, those four checks and balances...

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** Realistically, if you look at it textually, the
16 Punjab legislative measure, which reserves 50% for these two communities, Balmikis and
17 Mazhabi Sikhs.

18

19 **GURMINDER SINGH:** Balmikis and Mazhabi Sikhs. Yes.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** Can that also not be justified in the ground. That
22 in regards to the relative representation amongst the Scheduled Castes, these two
23 communities are the least represented within the represented group.

24

25 **GURMINDER SINGH:** That's right My Lord. That's right. So it can be either or. One, that
26 they continue to be extremely backward...

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** And they continue to be the least represented in
29 the services of the state.

30

31 **GURMINDER SINGH:** And or ...

32

33 **JUSTICE B.R. GAVAI:** Therefore a more special treatment among the special...

34

35 **GURMINDER SINGH:** Yes. So that's why I qualified it in the beginning, that it can be
36 and/or.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** That quantifiable data and all is not before us.
2 We are only on the broader contextual scenario.

3

4 **GURMINDER SINGH:** So therefore, My Lord in Scheduled Caste that issue will come up
5 because when they say backward class, as far as Scheduled Caste within the backward class is
6 concerned, you cannot apply the test of backwardness.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** Right, but you still have to [UNCLEAR] you have
9 to apply.

10

11 **GURMINDER SINGH:** Inadequacy of representation....Yes, three tests will still remain.
12 Inadequacy of representation will remain then My Lord efficiency of services as countered by
13 335 will remain and My Lord creamy layer, which is a law in progress..

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** *Jarnail* has applied.

16

17 **GURMINDER SINGH:** Yes My Lord, that is still work in progress, but as it stands today,
18 creamy layer will apply to Scheduled Caste also because within the backward classes, as
19 defined by 16(4)

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** In the case of Scheduled Caste, there's a
22 presumption of backwardness..

23

24 **GURMINDER SINGH:** Yes

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Which there isn't in the case of the SC/BC,
27 especially an educationally background.

28

29 **GURMINDER SINGH:** So therefore, this debate followed that when there is a presumption
30 of backwardness but they have attained the forwardness to sever the umbilical cord which
31 attaches them to the definition of backward classes, will they be excluded from the benefit or
32 not? Nobody is saying they will become de-scheduled, Scheduled Caste they will remain but
33 they may not be entitled to the benefits which are under 16(4) to be given only to backward
34 classes. So the moment they become forward enough to declassify themselves as backward
35 classes, they will be disentitled to the benefits which flow from 16(4). Because creamy layer is
36 not a caste based concept. It is an individual concept.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** It's an economic concept.

2

3 **GURMINDER SINGH:** It's an economic, educational or a sociological. It can be either.

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** Could be.

6

7 **GURMINDER SINGH:** Could be either that the caste has come up socially to a very even
8 platform with the other castes or educationally. Most of them are educated or economically,
9 five families of that caste who shifted to the capital town have risen to an extent where, as you
10 Your Lordships put it that they have severed the link between backwardness and them. And
11 the moment that link goes they are disentitled to benefits.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Now, what's next Mr. Attorney General?

14

15 **GURMINDER SINGH:** Yes, now, Your Lordships would only have one more article My Lord
16 which, of course, is below 46 Your Lordships have seen we all know. Then My Lord 335 which
17 is one of the tests My Lord which says the claims of members of Scheduled Castes and
18 Scheduled Tribes shall be taken into consideration, consistently with the maintenance of
19 efficiency of administration, in making of appointments to the services and posts in connection
20 with the affairs of union or the state. So, why I say so this, that this is now relatable to entry 41
21 in list 2 and entry 61 in list 1 and entry 25 in the concurrent list, which pertains to services,
22 though I don't, in my humble submission, think that there is any direct contact between the
23 controversy at hand and the exercise of power of legislative or executive intent through those
24 entries. I don't think that will detain Your Lordships, but *Chinnaiah* proceeds on this, that
25 you cannot exercise powers under 41 and 25, being a state, because this would amount to
26 tinkering with the intent of 341. So, My Lord, in my humble submission, that argument is
27 misplaced. So I will not dwell on it much. Then Your Lordship would have commission for
28 Scheduled Caste, which they say that everything has to be routed through them and then the
29 338A, which is for Scheduled Tribes. I'm just skipping them because they may not be of
30 relevance in this controversy. And 341 we've read and the list I've seen. Now, straight away we
31 can come to the judgments. In *Chinnaiah*, My Lord, there are 3 orders. The first, which I'll
32 read, what has come to Your Lordships, is the reference order

33

34 **JUSTICE B.R. GAVAI:** Volume?

35

36 **GURMINDER SINGH:** Volume V.

37

1 **JUSTICE B.R. GAVAI:** Volume V there are three orders. V(a), V(b) and...

2

3 **GURMINDER SINGH:** Page 1400, the third last bookmark.

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** Volume V?

6

7 **GURMINDER SINGH:** Just one second. First, Your Lordship would have V(a), because that
8 is an order prior in time, Roman five small a. In this, the last bookmark, *Davinder Singh*,
9 which is the matter before Your Lordships.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** PDF page for that?

12

13 **GURMINDER SINGH:** Page 247 in volume V(a), roman five, small a, PDF 249, the last
14 order.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** V(a), 249?

17

18 **GURMINDER SINGH:** That's right. PDF 249, running page 247. This is in civil appeal,
19 2317.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** That is Justice Lodha, Justice Joseph and Justice
22 Nariman.

23

24 **GURMINDER SINGH:** This is the order of 2020, Volume VIII, SCC 65.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Though the order interestingly is of 2014. I was
27 wondering how 2020 [UNCLEAR] Justice Lodha.

28

29 **GURMINDER SINGH:** An order of 20th August, My Lords may note. The order of 20th
30 August of 2014 by a three judge bench.

31

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

33

34 **GURMINDER SINGH:** It says the Learned Counsel for the Respondents heavily relies upon
35 the constitution bench decision of *E.V. Chinnaiah vs State of AP*. On the other hand, the
36 Learned Additional Solicitor General for the Appellants submits that *E.V. Chinnaiah* has no
37 application on the controversy in hand. Moreover, he submits that *E.V. Chinnaiah* is not in

1 accord with the nine judge bench of this court in *Indra Sawhney vs Union of India*.
2 Having heard the Additional Solicitor General and the learned counsel for the parties, we are
3 of the view that *E.V. Chinnaiyah* needs to be revisited in the light of Article 338 of the
4 Constitution of India and *inter alia*, exposition of law in *Indra Sawhney*. Moreover, the
5 matter also involves interpretation and interplay between 16(1), Article 16(4), Article 338 and
6 Article 341 of the Constitution of India as well. In this view of the matter, we refer the matter
7 for consideration of the above aspects by the larger bench. Let the matter be placed before the
8 Chief Justice. Then comes the order, which I was earlier pointing out in Volume V, the third
9 last bookmark PDF, page 1404.

10

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

12

13 **GURMINDER SINGH:** This is My Lord, an order of 27th of August 2020.

14

15 **JUSTICE B.R. GAVAI:** Volume V. Page?

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** 1404.

18

19 **GURMINDER SINGH:** And in this My Lord, if Your Lordship, would come to the
20 concluding part of the judgment.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** So, three placed it before five and then five placed
23 it before seven.

24

25 **GURMINDER SINGH:** That's right. My Lord, in this judgment, if Your Lordship, would
26 kindly have para 49 on page 1460...1464 PDF My Lord, which is in contra to the earlier finding
27 of *Chinnaiyah*, providing a percentage. My Lords, have it?

28

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

30

31 **GURMINDER SINGH:** Providing a percentage of the reservation within permissible limit
32 is within the power of the state legislatures. It cannot be deprived of its concurrent power to
33 make reasonable classification within the particular classes of Scheduled Castes, Scheduled
34 Tribes, and socially and educationally backward classes, without depriving others in the list.
35 To achieve the real purpose of reservation within constitutional dynamics, needy can always
36 be given benefit. Otherwise, it would mean that inequality is being perpetuated within the
37 class, if preferential classification is not made ensuring benefit to all. The sub-classification is

1 to achieve the very purpose as envisaged in the original classification itself and based
2 thereupon, evolved the very concept of reservation, whether the subclassification would be a
3 further extension of principle of the said dynamics, is the question to be considered
4 authoritatively by this Court. And, 52 My Lord, they say, what exactly is the mind of the court.
5 The state has competence to grant reservation benefit to the Scheduled Caste and Scheduled
6 Tribes, in terms of Article 15(4) and 16(4). And also Article 341(1) and 342(1). It prescribes the
7 extent/percentage of reservation to different classes. The state government can decide the
8 manner and quantum of reservation. As such, the state can also make sub-classification when
9 providing reservation to all Scheduled Castes in the list based on a rationale, that would
10 conform with the very spirit of Article 14,15 and 16 of the Constitution providing reservation.
11 The state government cannot tamper with the list. It can neither include nor exclude any caste
12 in the list or make an inquiry whether any synonym exists, as held in *Milind*. And then My
13 Lord, the next paragraph 51. Coming back My Lord, the Scheduled Caste, because of that
14 transient nature of the list My Lord, the Scheduled Caste as a Presidential List are not frozen
15 for all time and neither they are homogeneous group, as is evident from the vast
16 anthropological and statistical data collected by various commissions. The state law of
17 preferential treatment to a limited extent, does not amend the list. It adopts the list, as it is.
18 The state law intends to provide reservation for all Scheduled Castes in a pragmatic manner,
19 based on statistical data, it distributes the benefits of reservation based on the needs of each
20 Scheduled Caste. So My Lord if it all, there is an application of mind in 341 for inclusion and
21 exclusion, the application of mind for dissemination of benefits is only under 16(4), only under
22 16(4), no other provision. We can go back to *Chinnaiah* and see what was, what weighed
23 with their Lordship's mind, to give that judgment and how it has been distinguished, My Lord,
24 in the Davinder Singh's reference order and I'll come to the other judgments like *Indra*
25 *Sawhney*, that is more generic in nature. *Chinnaiah* is My Lord Volume V, page 774 My
26 Lord. PDF is 778, it's the 6th bookmark after the index.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** 774 or 778?

29

30 **VIKRAM NATH:** PDF 778.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** PDF 778.

33

34 **GURMINDER SINGH:** PDF 778. My Lord the principal judgment is by Justice N. Santosh
35 Hegde, on behalf of himself and Justice Variava and Justice Singh. My Lord, what brought this
36 matter to the Supreme Court, was the leave granted by the Andhra Pradesh High Court. The
37 issue emanated from a report of a commission headed by Justice Ramachandra Raju. And the

1 scope of this commission was to identify, that within the list notified under Article 341 for
2 Andhra Pradesh, please identify who had failed to secure the benefit of reservations, provided
3 for Scheduled Caste in the State, in admission to professional colleges and appointment to
4 services in the State. My Lord, in pursuance of this report, the commission opined, that within
5 the 15% reservation for Backward Classes in the state educational institution, and services of
6 the state under 15(4) and 16(4), the Scheduled Caste were primarily apportioned in four
7 groups, in the following manner. They identified those four groups in para 2. For reservation
8 My Lord, Group A- 1%, Group B- 7%, Group C- 6% and Group D- 1%, showing that Group A
9 and D, were hugely under represented. Then My Lord, an ordinance was issued and thereafter,
10 which was My Lord, made an Act of 2000, both were challenged and the matter came to this
11 Hon'ble Court, after the High Court dismissed the challenge by 4:1. Para 5, My Lord, the
12 contentions were My Lord, the contentions advanced on behalf of the appellants are, that the
13 state legislature has no competence to make any law, in regard to bifurcation of the
14 Presidential List of Scheduled Caste, prepared under Article 34(1) of the Constitution.
15 Therefore, the impugned legislation being one solely meant for sub-dividing or sub-grouping,
16 the caste enumerated in the Presidential List, the same suffers from lack of legislative
17 competence. It is further submitted, that once the castes are put in the Presidential List, the
18 said castes become one homogeneous class, for all purposes under the Constitution. There
19 could be no further division of the said castes, in the scheduled list, by any Act of the state
20 legislature. His further submission was that in the guise of exercising its legislative
21 competence, under Entry 41 in List 2 or Entry 25 of List 3, the state legislature cannot exercise
22 its legislative power, so as to make a law, tinkering with the Presidential List, because the said
23 entries do not permit any law being made in regard to Scheduled Castes, in guise of providing
24 opportunity to some of the cast in list of Scheduled Castes in state cannot invoke Entry 41 of
25 List 2 and Entry 25 of List 3. Divide the Schedule Caste according to the learned Counsel for
26 the impugned enactment does not really deal with the field of legislation, contemplated under
27 the said entries, but in reality, is targeted to subdivide the Schedule Caste. Alternatively, he
28 submitted that the classification or sub-grouping made in the state legislature- amounted to
29 subclassification or micro classification of Schedule Caste is violative of Article 14 of the
30 Constitution. Then, My Lord, 3389 argument
31 is there in Para 7. My Lord, come to Mr. Venugopal's argument in Para 8. On behalf of the
32 Respondent Shri K. K. Venugopal and a senior Counsel appearing for the state who led the
33 argument on behalf of the Respondents contended, that Article 341, only empowers the
34 President to specify the caste in the Presidential List and the Parliament to include or exclude
35 from the specified list any caste or tribe, and beyond that, no further legislative or executive
36 power is vested with the Union or India or Parliament to decide to what extent the caste
37 included in the Scheduled Castes List, should be given the benefit of reservation, which,

1 according to the learned Counsel, depended upon their degree of backwardness. His further
2 argument is, that authority to decide to provide reservation or not, and if yes, then the
3 quantum of reservation to be provided, is the exclusive privilege of the state in that process,
4 the state will have to keep in mind the extent of backwardness of a group, be it other Backward
5 Classes, Scheduled Caste or Schedule Tribe. Therefore, having found a class of persons within
6 the Scheduled Caste is having been deprived of such benefits. The state has the exclusive
7 legislative power, to make such grouping for reservation under Article 15(4) and 16(4), of the
8 Constitution, subject, of course, to Article 245, 246 of the Constitution, since in the instant
9 case, there is no allegation that there has been any violation of Article 245, 246. The argument
10 of lack of legislative competence, advanced on behalf of the appellant should fail. He further
11 submitted, that there is an obligation on the state under Article 16(4), to identify the group of
12 Backward Class or citizens, which in the opinion of the state, is not adequately represented in
13 the service under the state and make reservation in their favour for such appointments, and
14 under Article 15(4) of the Constitution, there is an obligation on the state to make special
15 provisions for the advancement of Scheduled Caste and Scheduled Tribes and what the state
16 has sought to do, under the impugned Act, was only to make such provisions to fulfil the
17 constitutional obligation, after due inquiry. Hence, the allegation of violation of Article 14,
18 cannot be sustained. He strongly relied on the findings of fact, recorded in Justice Raju
19 Commission Report, which according to him establishes that some particular groups within
20 the Scheduled Caste, have cornered all the benefits, at the cost of others, in the said list.
21 Therefore, with a view to see that the benefit of reservation percolates to the weaker of the
22 weakest, it had become necessary to enact the impugned law. The learned Counsel submitted,
23 that by re-grouping the caste in the Scheduled Caste List, there is no re-classification or micro-
24 classification as contended by the appellants. Then My Lord the basis of that report is given,
25 which was on the basis of the Constituent Assembly debates and so on and so forth. My Lords,
26 may straight away now come to questions framed in paragraph 12. My Lords have it?

27

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

29

30 **GURMINDER SINGH:** Whether the impugned act is violative of Article 341(2) of the
31 Constitution of India, whether the impugned enactment is constitutionally invalid, for the lack
32 of legislative competence, whether the impugned enactment creates sub-classification or
33 micro-classification of Scheduled Caste, so as to violate Article 14, of the Constitution of India?
34 Though My Lord touched on fringes, surprisingly, the interplay of 16(4) and 341 was not even
35 framed as a question. Completely *dehors* the constitutional power under 15(4) and 16(4),
36 because essentially the court proceeds on the conflict between 341 and Entry 41 and 25. It was

1 argued, but not My Lord, essentially, I would say, considered as it should have been. I'll now
2 come to the findings, starting from paragraph 13, My Lord. May I, My Lord?

3

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

5

6 **GURMINDER SINGH:** We will first consider the effect of Article 341 of the Constitution
7 and examine whether the state could, in the guise of providing reservation for the weaker of
8 the weakest, tinker with the Presidential List by sub-dividing the castes, mentioned in the
9 Presidential List into different groups. Article 341, which is found in Part 16 of the
10 Constitution, refers to special provisions relating to certain classes, which includes the
11 Scheduled Caste. The article provides, that the President may, with respect to any state or
12 union territory, after consultation with the Governor by public notification, specify that caste,
13 races, or tribe or parts of, or groups within caste, races or tribe, which shall, for the purposes
14 of Constitution, be deemed to be Scheduled Caste in relation to that state or union territory.
15 Now My Lord, here they give their opinion. This indicates, that there can only be one list of
16 Scheduled Caste, in relation to a state, and that list should, include all specified castes, races
17 or tribes or part of groups notified in the Presidential List, any exclusion or inclusion from the
18 said list can only be done by the Parliament, under 341 (2) of the Constitution. In the entire
19 Constitution, wherever reference has been made to Scheduled Caste, it refers only to the list
20 prepared by the President under Article 341, and there is no reference to any sub-classification
21 or division in the said list, except maybe for limited purposes of Article 330, which refers to
22 reservation for seats for Schedule Casts in the House of People, which is not applicable to the
23 facts of the case. It is also clear from 341 that, except for a limited power of making exclusion
24 or inclusion in the list by an act of Parliament, there is no provision either to sub-divide, sub-
25 classify, or sub-group, these castes which are found in the Presidential List of Schedule Castes.
26 Therefore, it is clear that the Constitution intended all the castes, including the sub-caste, races
27 and tribes mentioned in the list, to be members of one group for the purposes of the
28 Constitution and this group, would not be sub-divided for any purpose. A reference to the
29 Constituent assembly in this regard may be useful at this stage. What they rely upon is, while
30 discussing 341, if Your Lordship, would have, the in court part, the page is bottom of 780, PDF
31 794, para 14, it forms a part of. The object of these two articles, as I stated, was to eliminate
32 the necessity of burdening the Constitution, with a long list of Scheduled Castes and Scheduled
33 Tribes. It is now proposed, that the President in consultation with a Governor or ruler of a
34 state, should have the power to issue a general notification in the Gazette, specifying all castes
35 and tribes or groups thereof, deemed to be Scheduled Castes and Scheduled Tribes for the
36 purposes of privileges, which have been defined for them in the Constitution. The only
37 limitation that has been imposed is that, once a notification has been issued by the President,

1 which undoubtedly he will be issuing in consultation with and on the advice of the government
2 of each state, thereafter if any elimination was to be made, from the list so notified, or any
3 addition was to be made, that must be made by the Parliament and not the President. The
4 object, now, My Lord, this is the italicized part, *The object is to eliminate any kind of political*
5 *factors having a play in the matter of disturbance in the schedule so published by the*
6 *President*. Because they felt that, any kind of provision made to a group within the scheduled
7 list, will amount to political interference with the list.

8

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

10

11 **GURMINDER SINGH:** A discussion that ensued in regard to the framing of this article
12 indicates, that there was an attempt on the part of some of the members of the Constituent
13 Assembly, to empower the states also, to interfere with the list prepared by the President under
14 the said article. As a matter of fact, an amendment to this effect was also moved by Shri
15 Kuldharshila who, while moving the said amendment, stated, that the Amendment 201 of List
16 5, in Clause 2, of the proposed Article 300B, after the words 'Parliament may' the words 'and',
17 'subject to' its decision the state legislature be inserted. They gave what was said in support of
18 that amendment. However, My Lord, I think we can skip that and come to para 19, because
19 eventually they hold that the original proposed Article 341, was legislated. Para 19, this part of
20 the Constituent Assembly debate, coupled with the fact that Article 341, makes it clear that the
21 state legislature or its executive, has no power of disturbing term used by Dr. Ambedkar, quote,
22 the Presidential List of Scheduled Castes for the state. It is also clear that articles, in Part 16 of
23 the Constitution, that power of the state to deal with the Scheduled Castes is totally absent,
24 except to bear in mind the required maintenance of efficiency of administration, in making of
25 appointments which is found in Article 335, therefore,... My Lord, this is the finding.
26 Therefore, any executive action or legislative enactment which interferes, disturbs, rearranges,
27 regroups or reclassifies the various castes, found in the Presidential List will be violative of the
28 scheme of the Constitution and will be violative of Article 341, of the Constitution, completely
29 *per incuriam* 16(4). Then My Lord they say, we will now consider whether the Scheduled Caste
30 list, prepared by the President under 341, forms one class of homogeneous group or does it
31 still continue to be a list consisting of different castes, subcastes and tribes etc.. We have earlier
32 noticed the fact that the constitution has provided for only one list of Scheduled Castes to be
33 prepared by the President, with a limited power of inclusion and exclusion by the President.
34 The Constitution intended that all castes included in the set schedule would be deemed to be,
35 they say, deemed to be, one class of persons. That is nowhere in 341, but arguments have been
36 addressed to the contrary, stating that in spite of the Presidential List, these castes continue
37 to hold their birth mark and remain to be separated and individual castes, though put in one

1 list by the President. It is contention of the Respondents, that by merely including them in the
2 list, by the President, these castes do not become a homogeneous group. Therefore, to fulfil
3 the constitutional obligation of providing an opportunity to these castes, more so, to the
4 weaker among them, it is permissible to make classification within the class, as was made
5 permissible in this regard to other Backward Classes by the Court in the case of **Indra**
6 **Sawhney**. We cannot accept this argument, for more than one reasons. Then the second
7 finding comes My Lord, it cannot be denied, that all castes included in the Presidential List for
8 a state, are deemed to be Scheduled Caste, which means they form a class by themselves. So,
9 My Lord, here that age old argument, and an example comes of a fruit *chaat* and jam. If the
10 intention of the legislature was make it into a jam once they come into the class, then inclusion,
11 exclusion becomes, *otiose*. That means, after it becomes a jam, you can't take out the apple
12 from it, and leave the peach inside. But if the option has been given to the Parliament to keep
13 one and take out the other, it remains a fruit *chaat* and not a jam. But the court proceeded to
14 make it that once they come in, they all merge into one, birthmarks are lost. Which in my
15 humble submission is erroneous interpretation of 341. Then My Lord, Krishna Iyer speaking
16 in the same case, with reference to the status of castes included in the Presidential List, had
17 this to say, "We may clear the clog of Article 16(2), as it stems from a confusion about caste
18 and terminology of Scheduled Caste and Scheduled Tribes". This latter expression has been
19 defined in Article 341 and 342. A bear reading brings out the quintessential concept, that they
20 as I see there, are no caste in Hindu fold, but an amalgam of caste, race, group, tribes,
21 communities or part thereof, found on investigation to be the lowliest and in need of massive
22 state aid and notified as such by the President. Then My Lord, they interpret this comment in
23 Paragraph 24, according to Justice Krishna Iyer, though there are no castes, races, groups,
24 tribes, communities or part thereof in Hinduism, the President on investigation, having found
25 some of the communities within the amalgam, as being lowliest and in need of massive state
26 aid included them in one class, called the Scheduled Castes. The sequitur thereof is, that
27 Scheduled Caste are one class for the purposes of Constitution. Now, instead of recognizing,
28 My Lord, that it's a list of different caste groups, parts of groups. They say once you come in,
29 you become a part of a list, that list becomes the homogeneous class.

30

31 **JUSTICE B.R. GAVAI:** Your contention would be that merely because of their inclusion in
32 the Scheduled Castes list, they don't... their birthmark is not removed.

33

34 **GURMINDER SINGH:** Absolutely.

35

36 **JUSTICE B.R. GAVAI:** That still remains.

37

1 **GURMINDER SINGH:** That birthmark will remain because that is the birthmark, by which
2 you will eventually be excluded by the Parliament, or, the benefits to be granted under 16(4),
3 will be to a certain group or groups within that cast. You cannot say that today you are
4 *adharmi*. The moment you come in the list My Lord, this would be a misnomer, because that
5 is how the society stands it. The moment you come in, the list, you cease being an *adharmi*,
6 you become a Scheduled Caste, can't be. There is nothing called as just a Scheduled Caste. It's
7 only the inclusion in the schedule, which makes it in common parlance to be called a Scheduled
8 Caste, otherwise there is no caste, known as a Scheduled Caste.

9

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

11

12 **GURMINDER SINGH:** Then My Lord, 26. Thus, from the scheme of the Constitution,
13 Article 341 and above, opinions of this court in *N. M. Thomas*, it is clear, that castes once
14 included in the President List, form a class by themselves, if they are one class under the
15 Constitution, any division... any division of these classes of persons based on any consideration
16 would amount to tinkering with the Presidential List. My Lord, I'll resume.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** About how long, Mr. Advocate General now,
19 after this?

20

21 **GURMINDER SINGH:** We'll take an hour and a half.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** An hour and a half?

24

25 **GURMINDER SINGH:** This is the first judgment. The only thing is, My Lord, once I read
26 those judgments maybe the repetitive content will not be necessary to be read. I am not going
27 into the My Lord '63 '64 judgments, because everything has eventually crystallised into five
28 judgments. So, this being the first, it will take a little while. I'll try to finish today.

29

30 **JUSTICE B.R. GAVAI:** You need not go to the pre *N.M Thomas* judgement.

31

32 **GURMINDER SINGH:** That's right. *N. M. Thomas* being very important

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** Thereafter Akhil Bhartiya

35

36 **GURMINDER SINGH:** And *Indra Sawhney*.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** *Indra Sawhney* really is one.

2

3 **GURMINDER SINGH:** We'll have to see that, because eventually what the law has come to
4 be, is that what is good for Backward Classes is good for the Scheduled Castes. So therefore,
5 that connection may have said.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** Well, *Indra Sawhney* was cited in
8 *Chinnaiah*. But they said, well, that is only for OBCs. And not for...

9

10 **GURMINDER SINGH:** That's right, That is the wrong interpretation because it is not.
11 *Indra Sawhney* itself makes it clear that we are only putting aside the Schedule Castes
12 argument because we're not dealing with it.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** We need to just look at that part..

15

16 **GURMINDER SINGH:** Those paragraphs. Yes.

17

18 **GOPAL SANKARANARAYANAN:** The reference order, in fact, sums up all of this.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Yes they are, in fact, extracted the relevant parts
21 of the...

22

23 **GURMINDER SINGH:** Grateful, My Lords.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** Come back after lunch.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** Which is the judgment you want us to see?

28

29 **GURMINDER SINGH:** I was on *Chinnaiah* My Lord, which is Volume V, fifth bookmark.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, we got it. The theme is the same actually,
32 that, they say that, "sub-classification which is committed in *Indra Sawhney* for OBCs is
33 not permissible for SCs. Because they say it's one homogeneous class."

34

35 **GURMINDER SINGH:** That's right.

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** "And therefore, once Parliament has designated
2 certain castes or tribes or races as Scheduled Castes, you cannot further sub-group sub-
3 classify." They use that expression, right? 'Sub-divide, sub-classify or sub-group.' That's the
4 theory, really.

5

6 **GURMINDER SINGH:** One is that.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** And your contention is that Parliament's power
9 to designate is very different from the state's power to implement reservations under 16(4).
10 And they have not done and therefore had due regard to the ambit of Article 16 (4), I think
11 that is your submission.

12

13 **GURMINDER SINGH:** That's the issue of identification, and this is the issue of
14 implementation.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** Implementation.

17

18 **GURMINDER SINGH:** That's right.

19

20 **JUSTICE B.R. GAVAI:** They have not considered the interplay between 16(4) and 341.

21

22 **GURMINDER SINGH:** That's right. None at all. In fact, argued by Mr. Venugopal, but not
23 considered at all.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** So, Article 341 is all about?

26

27 **GURMINDER SINGH:** Identification.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** The identification.

30

31 **GURMINDER SINGH:** Identification/inclusion and exclusion of caste.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Inclusion and exclusion.

34

35 **GURMINDER SINGH:** While 16(4) is conferring of benefits on those who are not
36 adequately represented in services.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** Which paragraph were you on?

2

3 **GURMINDER SINGHI:** I was on 26. I just read 26 before they....

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, there is 31 also. 31 says, "sub-classification
6 is beyond legislative competence under entry 41 of list 2 and entry 25 of list 3." Then para 38,
7 they say, "subclassification, which is permitted in *Indra Sawhney* for OBCs is not
8 permissible for SCs, who form one class." That's para 31.

9

10 **GURMINDER SINGH:** *Indra Sawhney* does not say so. I'll come to that in a bit.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** We'll go directly thereafter to *Indra Sawhney*,
13 because... And then...

14

15 **GURMINDER SINGH:** Correct. That's right, My Lord, because....

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** in para 39 and 41, they say.... so, the whole
18 theme is, this is one homogeneous group, you cannot....

19

20 **GURMINDER SINGH:** Yes. The second question, which they frame in 27. I will just frame
21 that?

22

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

24

25 **GURMINDER SINGH:** Which is on judicial... Sorry. On legislative competence.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** Competence, yes. And they answer that in para.
28 31, page 798.

29

30 **GURMINDER SINGH:** That's right. Without examining 16, though. If Your Lordship would
31 have... Yes. 31 My Lord. Last 10 lines are relevant. "It is the prerogative of the concerned state."
32 My Lords have it? Bottom of page 794.

33

34 **JUSTICE B.R. GAVAI:** Placitum E?

35

36 **GURMINDER SINGH:** Yes that's right. May I My Lord? It is the prerogative of the state
37 concerned, if it so desires, with an object of providing opportunity of advancement in the

1 society to certain backward classes, which includes the Scheduled Caste to reserve certain seats
2 in educational institutions under 15(4) and in public services of the state under 16(4). That
3 part of its constitutional obligation, as stated, has already been fulfilled by the state. My Lord
4 now, this is a very interesting part, My Lord. They call this a one-time exercise, which I could
5 not My Lord conceive how. But they say once you've provided reservation, you've done what
6 you had to do. So if I read it further, My Lord, having done so it is not open to the state to sub-
7 classify a class already recognized by the constitution and allot a portion of the already
8 reserved quota amongst the state created sub-class within the list of Scheduled Castes. From
9 the discussion here and above, it is clear that primary object of the impugned enactment is to
10 create groups of sub-castes in the list of Scheduled Castes, applicable to the state and in our
11 opinion apportionment meant of reservation is only secondary and consequential. So they say
12 the primary objective is creating a sub-class while.....

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Totally the state may also feel that look,
15 backward classes as a whole are represented in the state adequately but within the component
16 of backward classes there are some communities who have no representation at all and
17 therefore that skewed distribution of benefits has to be corrected.

18

19 **GURMINDER SINGH:** And My Lords it is no synonymous. It is not synonymous that every
20 backward class would be a Scheduled Caste.

21

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

23

24 **GURMINDER SINGH:** Can't be.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Some of them may be Socially and Educationally
27 Backward Classes. Some of them maybe Socially and Educationally Backward Classes.

28

29 **GURMINDER SINGH:** Yes, so if I from from amongst the Backward Classes those which,
30 in your opinion, you want to confer the benefit on, it's as simple as that.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** What they seem to suggest is if you are giving
33 reservations to Scheduled Castes and Scheduled Tribes, you must take them as one composite
34 whole.

35

36 **GURMINDER SINGH:** That's right.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** That seems to be the logic of the judgment. The
2 entirety of the judgment is this really.

3

4 **GURMINDER SINGH:** That once they've been included in the list you cannot...

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** Then either take it or leave it as it is.

7

8 **GURMINDER SINGH:** Yes, either take the whole.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** You decide not to give reservations at all. But if
11 you give, you must give to everybody.

12

13 **GURMINDER SINGH:** To everyone in equal proportion. That seems to be the intent.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** Not equal proportion. Equality.

16

17 **GURMINDER SINGH:** No. They say you cannot apportion reservation.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** That is everybody must have a bite at the entirety
20 of the issue.

21

22 **GURMINDER SINGH:** Entirety of the issue. It should be either 100% or zero.

23

24 **JUSTICE B.R. GAVAI:** It should go as per merit among that category.

25

26 **GURMINDER SINGH:** I bow My Lord. That is it. That is right. Then My Lord they say
27 whatever be the object of this sub-classification and apportionment of reservation, we think
28 now My Lord this is where the My Lord interpretation of only 41 and 25 kindly My Lord may
29 take note. We think that the state cannot claim legislative power to make a law dividing the
30 Scheduled Caste list of the state by tracing its legislative competence to entry 41 of list 2 or
31 entry 25 of list 3. Therefore, we are of the opinion that in pith and substance, the enactment is
32 not a law governing the field of education or the field of state public services. Here 16(4) should
33 have found its part. They say that power is being traced, only to entries.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** I think we've dealt enough with this. Now let's
36 go straight to *Indra Sawhney*, I think because....

37

1 **GURMINDER SINGH:** My Lords, Your Lordships have seen question 3 My Lord, para 32
2 and 33.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** 32 and 33.

5

6 **GURMINDER SINGH:** 32, they frame the next classifications....

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** They follow *Triloki Nath Khosa*, that micro
9 classification.

10

11 **GURMINDER SINGH:** Yes. There they consider a very important issue that is it violative of
12 14. They say that whether it would stand the test of Article 14. Then My Lord, considering
13 *Khosa's* Judgment.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** There actually *Khosa*, if you see page 416, what
16 happened was Placitum B.

17

18 **GURMINDER SINGH:** That's right.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** If in this case the government had prescribed
21 that only those degree holders who had secured over 70% marks could become chief engineers,
22 and those with 60% alone would become be eligible by the SCs or that foreign degrees would
23 be preferred. We would have analytically avoided it. I think there what happened was that they
24 were going by the birthmarks and the argument of...The finding of our court is once you enter
25 service, whether you are a director to, whether you are a diploma holder or a degree holder.
26 Once you enter service then your birthmarks arethen you become a member of the service.

27

28 **GURMINDER SINGH:** Then you will be governed by the rules under 309. If you were a
29 DSP, for promotion to SP, it doesn't matter how you came. You have to compete with the others
30 and get through your quota. If there is for direct recruitment or promotion, it will govern you.
31 Your Lordships are absolutely right. They answer this, if Your Lordships would only have one
32 line. The third question in para 37. We have already held that the members of Schedule Caste
33 form a class by themselves and any further classification would be impermissible while
34 applying the principle of reservation. Then My Lord, *Indra Sawhney's* finding comes in
35 para 38. On behalf of the Respondents.

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** That we need not. Go straight to *Indra*
2 *Sawhney*.

3

4 **GURMINDER SINGH:** I will go straight to *Indra Sawhney*. I will show that *Indra*
5 *Sawhney* never decided that in Schedule Caste, sub-classification should not be done. Then
6 more backwardness, end of para 41.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** The only thing is, we may read only one sentence
9 there, Placitum D. Because that very judgment itself is specifically held that subdivision of
10 other backward classes is not applicable to Scheduled Caste and Scheduled Tribes.

11

12 **GURMINDER SINGH:** It has not. That is what I will show. That is what I'll show. For other
13 purposes it has deliberated, but for this purpose it has never held it. Para 41 Your Lordships
14 have seen.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** Class as a whole.

17

18 **GURMINDER SINGH:** That's right where last five lines they say that...

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Leave it there. I think it is the same now. Same
21 thing.

22

23 **GURMINDER SINGH:** Justice Sema's judgment is on the same lines below, then Justice
24 Sinha's judgment concurring.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Advocate, as Mr. Sankaranarayanan said in
27 the morning, the reference order penned by Justice Arun Mishra...

28

29 **GURMINDER SINGH:** That's right.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** ... contains now an elaborate extraction of all the
32 judgments in *Indra Sawhney*. So maybe we can go directly to the reference orders. So, we'll
33 find everything at one place.

34

35 **GURMINDER SINGH:** Everything would be there.

36

37 **CHIEF JUSTICE DY CHANDRACHUD:** We don't flip pages then.

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GURMINDER SINGH: My Lord, In *Indra Sawhney*, it was a judgment where Justice B.P. Jeevan Reddy has given the majority opinion. So that majority opinion, on behalf of him and four other judges. That we'll just need to see the gist of it as to what exactly have they held.

CHIEF JUSTICE DY CHANDRACHUD: All right.

GURMINDER SINGH: So then, I'll skip this judgment. Your Lordships can have a look at it.

CHIEF JUSTICE DY CHANDRACHUD: You have not dealt with this judgement. Where is *Indra Sawhney*? Do you want to go?

GURMINDER SINGH: Yes, My Lord. Indra Sawhney is a part of this compilation.

CHIEF JUSTICE DY CHANDRACHUD: [UNCLEAR] or Justice Arun Mishra's judgement, whatever.

GURMINDER SINGH: The original.

CHIEF JUSTICE DY CHANDRACHUD: Volume V, page?

GURMINDER SINGH: My Lord, it starts at page 190, PDF 194. Let me just say at the outset My Lord, the exceptions which they talk of are only on two issues. One is on presumption of backwardness, which they opine on, and then creamy layer. These two Your Lordships may note. They do not opine on sub-classification. We can come to page 688, PDF 692.

CHIEF JUSTICE DY CHANDRACHUD: Yeah.

GURMINDER SINGH: Para 780. Identification of backward class of citizens.

CHIEF JUSTICE DY CHANDRACHUD: Which page is that?

GURMINDER SINGH: This is the Placitum E, page 692 PDF, internal page 715 of the judgment in SCC. Para starts with now we may turn.

CHIEF JUSTICE DY CHANDRACHUD: Yes.

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GURMINDER SINGH: Now we may turn to the identification of backward class of citizens. How do you go about it? Where do you begin? Is the method to vary from state to state, region to region, from rural to urban? What do you do in case of religions, where caste system is not prevailing? What about other classes, groups and communities which do not wear the label of caste? Are the people living adjacent to ceasefire line in Jammu and Kashmir or hilly or inaccessible regions to be surveyed and identified as Backward Classes for the purpose of Article 16(4)? And so on and so forth are many questions asked of us. We shall answer them, but our answers will necessarily deal with generalities of the situation and not with problems or issues of peripheral nature which are peculiar to the particular state, region or district. Each and every situation cannot be visualized and answered. That we must leave to the appropriate authorities appointed to identify. We can only lay down general guidelines. Then 781. "At the outset, we may state that, for the purposes of this discussion,... Now, My Lords, for the purposes of 'identification', we keep aside the Scheduled Tribes and Scheduled Caste (since they are admittedly included within the Backward Classes), except to remark that backward classes contemplated by 16(4) do comprise some castes, for it cannot be denied that Scheduled Castes include quite a few castes. So, for the purposes of identification, they keep aside Scheduled Caste, saying that, "there is a presumption of backwardness with the Scheduled Caste. We are not going into it." Then para 782 would be slightly relevant. "Coming to the question of identification, the fact remains that one has to begin somewhere with some group, class or section. There is no set or recognized method. There is no law or other statutory instrument prescribing the methodology. The ultimate idea is to survey the entire populace. If so, one can well begin with caste, which represent explicit, identifiable social classes/groupings, more particularly when 16(4) seeks to ameliorate social backwardness. What is unconstitutional with it, more so when caste, occupation, poverty and social backwardness are so closely intertwined in our society. Individual survey's out of the question since Article 16(4) speaks of class protection and not individual protection. This does not mean that one can wind up the process of identification with the castes, besides, caste, whether found amongst Hindus or others. There may be other communities, groups and classes and denomination, which may qualify as Backward Class of citizens." So My Lord, they have pretty much carved out, My Lord. Then the religious denominations like Muslims, Sikhs who do not follow the caste system. And that, My Lord, if Your Lordships would have seen, in the order, issued by the President is an exception under Clause 3, that, "this will not apply to Sikhs, Muslims." I'd shown that to Your Lordships, from the order. Now, the second exception, My Lord, is just below in para 792 My Lord. It starts from running page 695, para 790, PDF 699.

JUSTICE VIKRAM NATH: Para 792?

1
2 **GURMINDER SINGH:** Para 790. " Means, test and creamy layer." That is the heading of
3 the discussion, Sub-clause (d). "Means test in this discussion..." My Lords have it? "
4 signifies imposition of an income limit for the purpose of excluding persons from Backward
5 Class, whose income is above the said limit." This submission is very often referred to as, 'the
6 creamy layer argument.' Petitioners submit that, "some members of the designated Backward
7 Classes are highly advanced socially, as well as economically and educationally." So, My Lord,
8 they are talking about, "what is the creamy layer principle." And in 792 on page 697, I'll read
9 My Lord, the umbilical cord argument My Lord. In our opinion it is not a question of
10 permissibility or desirability of such tests but one of proper and more appropriate
11 identification of a class, a backward class. The very concept of a class denotes a number of
12 persons having certain common traits which distinguish them from others. In a Backward
13 Class under Clause 4 of Article 16 if the connecting link is the social backwardness, it should
14 broadly be the same in a given class. If some of the members are far too advanced socially,
15 which in the context necessarily means economically and may also mean educationally, then
16 the connecting thread between them and the remaining class snaps. The connecting thread
17 between, they would be misfits in the class. After excluding them alone would the class be a
18 compact class. In fact such, excluding them alone exclusion..... Sorry. Such exclusion benefits
19 the truly backward. Difficulty, however, lies in drawing the line. How and where to draw the
20 line for while drawing the line it should be ensured that it does not result in taking away with
21 one hand what it gives by the other. The basis of exclusion should not be merely economic,
22 unless, of course, the economic advancement is so high that it necessarily means social
23 advancement. Let us illustrate the point. A member of Backward Class say a member of a
24 carpenter class goes to Middle East and works there as a carpenter. If you take his annual
25 income in rupees, it would be fairly high from the Indian standard. Is he to be excluded from
26 the Backward Class? Are his children in India to be deprived of the benefit of 16(4)? Situation
27 may, however, be different if he rises so high economically as to become, say, a factory owner
28 himself. In such a situation his social status also rises. He himself would be in a position to
29 provide employment to others. So My Lord, they are going on a very subjective satisfaction of
30 at which stage the chord between backwardness and the individual breaks. Now My Lord, I'll
31 straightaway go to the last ten lines of this paragraph, where the individual argument ends. It
32 starts with it is then argued for the Respondent. Placitum B on page 698. My I My Lord, it is
33 then argued. It is then argued for the Respondents that one swallow does not make the
34 summer, and that merely because a few members of the caste or class become socially
35 advanced, the class or caste as such does not cease to be backward. It is pointed out that Clause
36 4 of Article 16 aims at group backwardness and not individual backwardness. While we agree
37 that socially advanced members will make a class a truly Backward Class and would more

1 appropriately serve the purpose and object of Clause 4, this discussion, My Lord may kindly
2 note this. This discussion is confined to other Backward Classes only and has no relevance in
3 the case of Scheduled Tribes and Scheduled Castes. So this discussion is on creamy layer.
4 Whether the individual income or the income of the class as a whole and the parameters and
5 factors which would define as to whether the cord and the thread between the class and the
6 individual and its backwardness has snapped or not. So these are the only two parameters
7 where they exclude the discussion on Scheduled Castes. Otherwise, *Indra Sawhney*
8 nowhere excludes Scheduled Caste for the purposes of sub-classification. So My Lord in fact,
9 if Your Lordship would see on sub-classification they positively My Lord, if Your Lordship
10 would come straight away to 801 My Lord, the question number 5. It is answered on page 702.
11 PDF 706, where the question is framed, whether backward classes can be further divided into
12 backward and more backward categories. My Lords have it?

13

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

15

16 **GURMINDER SINGH:** And this backward includes SC/ST because they say in *Balaji*, it
17 was held that subclassification made by order between backward classes and more backward
18 classes does not appear to be justified under Article 15(4). Article 15(4) authorizes special
19 provisions being made for the really backward classes in introducing two categories of
20 backward classes what the impugned order in substance purports to do, is to devise measures
21 for the benefit of all the classes of citizens who are less advanced compared to the most
22 advanced classes in the state, and that, in our opinion, is not the scope of 15(4). The result of
23 method adopted by the impugned order is that nearly 90% of the population of the state is
24 treated as backward. And that illustrates how the order, in fact, divides the population of the
25 state into most advanced and the rest and puts latter into two categories of backward and more
26 backward. The classification of the two categories, therefore is not warranted by Article 15(4).
27 My Lord, this is quote from *Balaji*. Then they hold, the correctness of this holding is
28 questioned before us by the counsel for the Respondents. It is submitted that in principle,
29 there is no justification for the said holding. It is submitted that even among backward classes,
30 there are some who are more backward than the others and that the backwardness is not and
31 cannot be uniform throughout the country, nor even within the state. In support of this
32 contention, the Respondents rely upon observation of Chinnapa Reddy J. in *Vasanth*
33 *Kumar*, where the learned judge said we do not see why on principle, there cannot be
34 classification into backward classes and more backward classes. If both class classes are not
35 merely a little behind, but far behind the most advanced classes. In fact, such a classification
36 would necessarily help the more backward classes. Otherwise, those of the backward classes

1 who might be a little more advanced than the more backward classes might walk away with all
2 the seats.

3 Then in para 802, they say we are of the opinion that there is no constitutional or legal bar.
4 This was a specific question which fell from Your Lordships. To the state, categorizing the
5 backward classes as backward and more backward. We are not saying that it ought to be done.
6 We are concerned with the question if the state makes such categorization, whether it would
7 be invalid, we think not. Then they give the example of Mandal Commission, which may not
8 be so relevant because here they are comparing two castes like in Andhra Pradesh My Lord.
9 They are comparing goldsmiths and vaddes, which who has stone cutters, to be a part of the
10 backward class but goldsmiths will always be more affluent than the stone cutters. So there if
11 a distinguishing factor is made between both of these, there is a rationale which is supported.
12 Basically, My Lord, the issue is that that exercise, as and when done, has to be taken to be
13 whether it is done with the object sought to be achieved in mind, whether it is a reasonable
14 classification or not. Now, 803 My Lords, may have. There is another way of looking at this
15 issue. Article 16(4) recognizes only one class which backward class of citizens does not speak
16 separately of Scheduled Caste and Scheduled tribes, as does Article 15(4). Even so, it is beyond
17 controversy that Scheduled Caste and Scheduled Tribes are also included in the expression
18 backward class of citizens and that separate reservations can be provided in their favour. It is
19 well accepted phenomena throughout the country. What is the logic behind it? It is that if
20 Scheduled Caste and Scheduled Tribes and other backward classes are lumped together, OBCs
21 will take away all the vacancies, leaving Scheduled Caste and Schedule Tribes high and dry.
22 The same logic also warrants categorization as between the more backward and backward. We
23 do not mean to say, we may reiterate, that this should be done...

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** There is a little confusion over here. Does that
26 really apply to the sub-classification of the Scheduled Caste and Tribes? Or is it really referring
27 to the sub-classification of the OBCs, other than the.....

28

29 **GURMINDER SINGH:** My submission would be 'both'. Because, as Your Lordships
30 correctly said...

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** I don't know, actually, whether that ... That may
33 not be a correct reading of *Indira Sawhney*, actually.

34

35 **GURMINDER SINGH:** My Lords, in fact said that, "what is the logic?" If you choose....

36

1 **JUSTICE B.R. GAVAI:** *Indra Sawhney* would only be for reservation of OBCs is only for
2 consideration. The issue was with regard to the reservation of OBCs.

3

4 **GURMINDER SINGH:** That's right.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** That's why we say right up front, that we are
7 leaving aside the issue of SC and ST.

8

9 **GURMINDER SINGH:** They leave that aside only on two issues, creamy layer and
10 identification of backwardness. When they discuss backward within the backward, they do not
11 say, "We are not talking about Schedule Castes."

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** It appears with that whole discussion was in the
14 context of the socially and educationally Backward Classes. So they are OBCs, really.

15

16 **GURMINDER SINGH:** My Lord, 'whether or not it's a positive mandate', I leave it to Your
17 Lordships to decide. Because, this judgment would most certainly be binding upon all of us.
18 The only thing is, 'there is no bar.' They clearly and categorically say...

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** That's separate argument altogether. But to say
21 that, "this expressly recognizes that there can be sub-classification among Scheduled Castes,
22 may not be... that was not the issue, really, that they dealt with.

23

24 **GURMINDER SINGH:** Not really. But it recognizes the logic. If there is a gap between the
25 disadvantaged and the most disadvantaged, it's a reason enough for classification. That is a
26 rational criteria. That's what *Indra Sawhney* holds, that 'backward and more backward' is
27 a rational criteria.

28

29 **JUSTICE VIKRAM NATH:** And it is permissible in law?

30

31 **GURMINDER SINGH:** It's permissible in law. Also, nothing in law bars it. Nothing in law
32 prohibits it. So, if the state.... That is what I said in the beginning. There's no mandate to do it,
33 but if the state chooses to do it, there's nothing against it.

34

35 **JUSTICE VIKRAM NATH:** Question is already answered here. 'What remains?' End of the
36 matter.

37

1 **GURMINDER SINGH:** That's right.

2

3 **JUSTICE VIKRAM NATH:** Nine judges have decided.

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** Yeah, finally.

6

7 **GURMINDER SINGH:** then we can straight away come to *Nagaraj*, My Lords, because
8 that is, My Lord, a judgment, which is very clear in category and an emphatic reiteration of the
9 principle. This is also in Volume V. Page 23, My Lord.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** PDF page?

12

13 **GURMINDER SINGH:** 27.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** Of the same volume?

16

17 **GURMINDER SINGH:** That's right.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** Justice [UNCLEAR].

20

21 **GURMINDER SINGH:** This was a seven judge bench, which was considering....

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** 20? That is *Thomas*?

24

25 **GURMINDER SINGH:** Yes, *Thomas*, My Lord, (1976) 2 SCC.

26

27 **JUSTICE B.R. GAVAI:** You want to go through a paragraph?

28

29 **GURMINDER SINGH:** Just a couple of paragraphs which are relevant. Because, otherwise
30 it reiterates the issue. Because it talks specifically of 16(1) and 16(4) interplay, My Lords. My
31 Lord, may just come straight away to para 24 to 28 My Lord.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** High Court here has decided only on the basis
34 non-suited you or really held against you only on the basis of *Chinnaiah*.

35

36 **GURMINDER SINGH:** Quite right.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** So if we come to the conclusion, of course we're
2 here to hear the other side that *Chinnaiah* has wrongly decided. You still have to go to the
3 High Court for any other challenges. Right? Any other challenges which are there to this
4 statute. Otherwise, we will be deciding issues like adequate representation, whatever other,
5 whatever other challenges there are.

6

7 **GURMINDER SINGH:** My Lord what I can also suggest is that once Your Lordships set
8 aside that judgment on the basis that *Chinnaiah* itself is set aside.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** We can set this with three judges.

11

12 **GURMINDER SINGH:** And leave the question of law open My Lord. If somebody
13 challenges in a fresh litigation, we will deal with it My Lord.

14

15 **JUSTICE VIKRAM NATH:** But you know what were the challenges there before the High
16 Court?

17

18 **GURMINDER SINGH:** Primarily this My Lord, that there's a five judge bench which has
19 got to be there.

20

21 **JUSTICE VIKRAM NATH:** Other than that, there was no other ground.

22

23 **GURMINDER SINGH:** No fresh grounds were taken to challenge.

24

25 **JUSTICE VIKRAM NATH:** No ground for judicial review of that.

26

27 **GURMINDER SINGH:** Grounds were same which were otherwise reiterated in
28 *Chinnaiah*.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** The original petitioners before the High Court
31 are represented here?

32

33 **PETITIONER'S COUNSEL:** Yes. Yes.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** So we'll see what is the nature of their challenge.

36

37 **GURMINDER SINGH:** Yes.

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CHIEF JUSTICE DY CHANDRACHUD: If *Chinnaiah* was fundamentally on the basis of the petition, then we can conclude it here, one way or the other after hearing.

GURMINDER SINGH: That's what I'm saying.

CHIEF JUSTICE DY CHANDRACHUD: And then if somebody else wants to challenge it, file a repetition there, why should we.....

GURMINDER SINGH: My Lords may grant them the liberty if any additional issues arise other than *Chinnaiah*. I'm sure My Lord there's no bar in challenging them, because that would be a fresh challenge.

CHIEF JUSTICE DY CHANDRACHUD: Unless they say they have raised other valid challenges which were not adjudicated, then we have to restore the petition there.

GURMINDER SINGH: For which they would want to revive their petition. Yes, that's right.

CHIEF JUSTICE DY CHANDRACHUD: Because one thing is clear, the High Court has gone only on that.

GURMINDER SINGH: That's right.

CHIEF JUSTICE DY CHANDRACHUD: The other way is that we restore it to a two judge bench, two judge bench will decide all the other questions. But they do that, whoever. One person loses a right of appeal then.

JUSTICE VIKRAM NATH: Go back to the High Court.

JUSTICE B.R. GAVAI: You have not knowledge with regard to quantifiable data and all that?

ADVOCATE NIDHESH GUPTA: No, not to my knowledge.

KS CHAUHAN: They can't be because there in Punjab, the Scheduled Caste are 38% and the reservation is only 25%. So, there can't be quantifiable data to that extent.

1 **JUSTICE B.R. GAVAI:** Why?

2

3 **KS CHAUHAN:** That is in the statute. 25% in direct recruitment.

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** No, there would be data at two levels. One, are
6 the Scheduled Castes, as a group in Punjab adequately represented in the services of the state.
7 That's one. Two, within the group of Scheduled Castes, is there a, not proportionate, but is
8 there a fair representation to the Mazhabi Sikhs and Balmikis? Government will have data on
9 that. They would have collected data.

10

11 **JUSTICE B.R. GAVAI:** Obviously, without that, they won't have [UNCLEAR]

12

13 **KS CHAUHAN:** My Lord, if population [UNCLEAR] is there, that has to be 38%.

14

15 **NIDHESH GUPTA:** 27 departments [INAUDIBLE] From across the government and we put
16 that data in a compiled shimmer showing their miserably inadequacy they means who some
17 departments.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** They means who? The Mazhabis.

20

21 **ADVOCATE NIDHESH GUPTA:** Some departments, not a single person, since the time
22 the department was created. We put that [INAUDIBLE]

23

24 **JUSTICE VIKRAM NATH:** What is the population ratio?

25

26 **ADVOCATE NIDHESH GUPTA:** 39%.

27

28 **JUSTICE VIKRAM NATH:** Amongst the Scheduled Caste?

29

30 **NIDHESH GUPTA:** Yes, My Lord.

31

32 **JUSTICE VIKRAM NATH:** Amongst the Scheduled Caste, they constitute 39%?

33

34 **NIDHESH GUPTA:** Yes sir and yet they represent very, very miniscule, and the post they
35 occupy are of scavengers. That's the kind of disparities.

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** What is the total representation of Schedule
2 caste in Punjab?

3

4 **NIDHESH GUPTA:** 25% is the limit.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** Of total population?

7

8 **KS CHAUHAN:** 38%, My Lord.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** 25% or 38%?

11

12 **KS CHAUHAN:** 38%. There is no Scheduled Tribe there My Lord.

13

14 **GURMINDER SINGH:** They are 33%.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** 33%. And the Mazhabi Sikhs and the Balmiki
17 constitute about?

18

19 **NIDHESH GUPTA:** 39% of the 33%.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** 33% of the 39%.

22

23 **NIDHESH GUPTA:** Although there are 39 castes mentioned, I've given the data from
24 government records. Some of these castes are only 30 people, 70 people, 100 people, 200. So
25 although these are two castes, but they represent 39%. And on the other side two or three
26 castes represent a much larger number, represent about 43% people, but they are occupying
27 81% of the course. They are the main people who are left out, who the other side represent.
28 We will give that data. We can place that.

29

30 **JUSTICE B.R. GAVAI:** We're not going to that question.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** Actually this doesn't arise. We are dealing
33 with...It's a bench of seven judges. We are dealing with the validity of the decision or the
34 correctness of decisions of *Chinnaiah*.

35

36 **RESPONDENT'S COUNSEL:** That's what I was admitting My Lord.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** We will not go beyond that. Mr. Manu Swaroop,
2 we shouldn't be going into things which are not argued by the High Court and the subject
3 matter reference by 3 [INAUDIBLE]

4

5 **JUSTICE VIKRAM NATH:** Only out of curiosity, we ask.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** Generally, we ask. Rest assured, we will not rest
8 our decision on that at all.

9

10 **RESPONDENT'S COUNSEL:** I will just ventilate one indication to Your Lordships. There's
11 a reason why the state did not go into the empirical [UNCLEAR] advice. I'm not going into that
12 for the reason that other people may have different data, as they are volunteering. But the state
13 data is a 2020 data, of the year 2020. Their first notification came as Your Lordships observe
14 in 1975, their act came in 2006. They've put on record data of 2020, again unverified. Although
15 there's a commission... constitutional commission...

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** That will have to be argued at the appropriate...
18 What data was there when you passed the act because that will impact upon the reservations
19 for that period between the act and 2020.

20

21 **RESPONDENT'S COUNSEL:** When they produce it basically on behalf of the state.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** We're not going into that.

24

25 **RESPONDENT'S COUNSEL:** One of the arguments which we would address also here, that
26 the concept of creamy layer has no applicability here for the simple reason the difference
27 between the Scheduled Caste and the downtrodden Scheduled Caste is not much. The creamy,
28 they are not far ahead that one is earning a little, one is earning Rs. 10, other is earning Rs. 5.
29 So whole proposition is a fallacy.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** That has not been accepted in *Jarnail*. Justice
32 Nariman's judgement *Jarnail* specifically doesn't argue. The argument before that
33 constitution bench was the concept of creamy layer has no application to the Scheduled Caste
34 and Scheduled Tribe, and that has been rejected by... That is not.

35

1 **RESPONDENT'S COUNSEL:** That's the general proposition. But when we come to the
2 factual aspect, then we see what the Scheduled Caste is earning and what the down trodden
3 Schedule Caste is earning, Your Lordships will say that they are not far ahead. They have just...

4
5 **CHIEF JUSTICE DY CHANDRACHUD:** We can't decide that at prior basis.

6
7 **RESPONDENT'S COUNSEL:** With that we would be arguing and supported by that, that
8 under what circumstances the That's all we have.

9
10 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Advocate General, now what more? What
11 next, now?

12
13 **GURMINDER SINGH:** Please, My Lord, I was in para 24, My Lord, of *Thomas*. Page 45,
14 PDF 49. They're just short-short paragraphs, My Lord, I'll quickly go through them.
15 "Discrimination is the essence." My Lords have it?

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

18
19 **GURMINDER SINGH:** Justice Ray's opinion. "Discrimination is the essence of
20 classification. Equality is violated if it rests on unreasonable basis. The concept of equality has
21 an inherent limitation, arising from the very nature of constitutional guarantee. Those who
22 are similarly circumstanced are entitled to an equal treatment. Equality is amongst equals.
23 Classification is, therefore, to be founded on substantial differences which distinguished
24 persons group together from those left out of the groups. And such differential attributes must
25 bear a just and rational relation to the object sought to be achieved." So, My Lord, further in
26 para 31 on page 47, PDF 51, My Lord. Here also they talk of 'equality amongst equals.' They
27 say, "the rule of parity is the equal treatment of equals in equal circumstances. The rule of
28 differentiation is enacting laws differentiating between different persons or things in different
29 circumstances. The circumstances which govern one set of persons or objects may not
30 necessarily be the same as those governing another set of persons or objects, so that the
31 question of unequal treatment does not really arise between persons governed by different...."

32
33 **JUSTICE B.R. GAVAI:** [UNCLEAR] is not different. Equal treatments to unequal is a ...

34
35 **GURMINDER SINGH:** That's right. My Lord, that's settled law. Need not much labour on
36 it. So, Your Lordships will come to para 44, My Lord. 'About preference, My Lord, PDF 54.
37 'Our Constitution.' " Our Constitution aims at equality of status and opportunity for all

1 citizens, including those who are socially, economically and educationally backward. The
 2 claims of members of Backward Classes require adequate representation in Legislative and
 3 Executive bodies. If members of Scheduled Caste and Tribes who are said by this Court to be
 4 Backward Classes can maintain minimum necessary requirement of administrative efficiency,
 5 not only representation, but also preference may be given to them to enforce equality and to
 6 eliminate inequality. Article 15(4) and 16 (4) bring out the position of Backward Class to merit
 7 equality. Special provisions are to be made for advancement of Backward Classes and
 8 reservations of appointment enforce for them to secure adequate representation. These
 9 provisions will bring out the content of equality guaranteed by Article 14, 15(1) and 16 (1). The
 10 basic concept of equality is, 'equality of opportunity for appointment, preferential treatment
 11 for members of Backward Classes with due regard to administrative efficiency alone can mean
 12 equality of opportunity for all citizens. Equality under Article 16 could not have a different
 13 context from equality under Article 14. Equality of opportunity for unequal can only mean
 14 aggravation of inequality. Equality of opportunity admits discrimination with reason and
 15 prohibits discrimination without reason. Discrimination with reason means rational
 16 classification for differential treatments having nexus to the constitutionally permissible
 17 object, preferential representation for Backward Classes and services with due regard to
 18 administrative efficiencies, permissible object and Backward Classes are a rational
 19 classification recognized by Constitution. Therefore, differential treatment in standards of
 20 selection are within the scope of equality." My Lord, basically the judgment proceeds on this
 21 standard that, 'differentiation for the purposes of achieving the Constitutional objective is
 22 permissible', which I am citing, My Lord, to basically support my argument that, 'if, within
 23 the class....'

24

25 **JUSTICE B.R. GAVAI:** Unequal treatment to unequal.

26

27 **GURMINDER SINGH:** Yes. So, if there are unequal even within the Backward Classes....

28

29 **JUSTICE B.R. GAVAI:** To bring them equal.

30

31 **GURMINDER SINGH:** That's right. Eventually. My Lord, if the government is holding the
 32 hands of people who are Socially and Economically Backward. There can absolutely be no
 33 adversarial claim of that very class holding the hand of people who are further downtrodden.
 34 Basically with the eventual idea of bringing everybody, if not equal but adequately represented.
 35 That is the basic substance. Then My Lord the next judgment, we can come straight away to
 36 My Lord, **Nagaraj** PDF 1336 My Lord pagination 1332. 1336 My Lord PDF. Here My Lord
 37 the sub-classification was discussed and upheld, pertaining specifically to Scheduled Castes

1 and Scheduled Tribes, My Lord the main judgment, Justice Kapadia's judgment, My Lords
2 may kindly have page 1398 straightaway My Lord, PDF.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Page?

5

6 **GURMINDER SINGH:** 1398 PDF My Lord. Here My Lord *Indra Sawhney* as Your
7 Lordships were wanting to clarify, that is discussed, as to on what purposes and what is the
8 further interpretation given. May I My Lord?

9

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

11

12 **GURMINDER SINGH:** In *Indra Sawhney*, the equality which was protected by the rule
13 of 50% was by balancing the rights of General Category vis-a-vis, the rights of BCs and block
14 consisting of OBC's, SCs and STs. On the other hand, in the present case, the question which
15 we are required to answer is whether within the egalitarian equality indicated by Article 16(4)
16 the sub-classification in favour of SCs and STs is a principle, constitutionally valid. So this is
17 specifically framed as a question. Article 16(4)(a) is inspired by the observations in *Indra*
18 *Sawhney* vide paras 802 and 803, in which this court has unequivocally observed that in
19 order to avoid lumping of OBCs, SCs and STs, which would make OBCs take away all the
20 vacancies, leaving SCs and STs high and dry. The state concerned was entitled to categorize
21 and subclassify SCs and STs on one hand, vis-a-vis OBCs on the other hand. My Lord then 802
22 and 803 are reproduced. Then 115 My Lords may have. Therefore, while judging the width and
23 ambit of 16(4)(a), we must ascertain whether sub-sub-classification is permissible under the
24 constitution. The sub-classification between OBCs on one hand and SCs and STs on the other
25 is held to be constitutionally permissible in *Indra Sawhney*. In the said judgment, it has
26 been held that state could make such sub-classification with SCs and STs vis-a-vis OBCs. It
27 refers to subclassification within the egalitarian equality vide para 802 and 803. Therefore,
28 Article 16(4)(a) follows the line suggested by this court in *Indra Sawhney*. In *Indra*
29 *Sawhney*, on the other hand, vide para 829, this court has struck a balance between formal
30 equality and egalitarian equality by laying down the rule of 50% ceiling limit for entire BCs as
31 a class apart vis-a-vis GC. Therefore, in our view, equality as a concept is retained even under
32 Article 16(4)(a), which is carved out of Article 16(4). As stated above, Article 14 enables
33 classification. A classification must be founded on intelligible differentia which distinguishes
34 those who are grouped together from the others. The differentia must have a rational relation
35 to the object sought to be achieved by law under challenge in *Indra Sawhney* and opinions
36 was expressed by this Court vide 802, that there is no constitutional or legal bar to making of
37 classification under 16(4)(b) is also an enabling provision. It seeks to make classification on

1 the basis of differentia between current vacancies and carry forward vacancies. In case of
2 Article 16(4)(b), we must keep in mind that following the judgment in **R.K. Sabharwal**, the
3 concept of post based roster is introduced. Consequently, specific slots for OBCs, SCs and STs,
4 as well as GCs have to be maintained in the roster.

5
6 Well then see therefore, by Article, two lines below 16(4)(b) a classification is made between
7 current vacancies on one hand and carry forward backlog basis is on the other. Article 16(4)(b)
8 is a direct consequence of the judgment of this court in **RK Sabharwal**, by which the concept
9 of post based roster is introduced. Therefore, in our view, 16(4)(a) and 16(4)(b) form a
10 composite part of the scheme envisaged. Therefore, in our view, Article so and so together
11 form a part of the same scheme. As stated above. 16(4)(a) and 16(4)(b), both are inspired by
12 observations of the Supreme Court in **Indra Sawhney** and **R.K Sabharwal**. They have
13 nexus with Article 17 and 46 of the Constitution. Therefore, we uphold the classification
14 envisaged by Article 16(4)(a) and 16(4)(b). The impugned constitutional amendments
15 therefore, do not obliterate equality. So My Lord, here they've extended that principle of
16 **Indra Sawhney** of BCs to SCs and STs. Can I take Your Lordships to 16(4)(a) and (4)(b), just
17 for the sake of reference? Kindly have the Constitution My Lord. 4(a) reads: Nothing in this
18 article shall prevent the state from making any provision for reservation in matters of
19 promotion with consequential seniority to any class or classes of posts and services under the
20 state in favour of Scheduled Caste and Scheduled Tribes, which in the opinion of the state are
21 not adequately represented in the services under the state. So, My Lord, here specifically the
22 state is endowed with the power.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** To make reservations.

25

26 **GURMINDER SINGH:** To make reservations for Scheduled Castes and Scheduled Tribes,
27 which, in the opinion of the state are not adequately represented, not backward classes, even
28 within the Scheduled Caste and Scheduled Tribe.

29

30 **JUSTICE B.R. GAVAI:** That are not adequately represented. Therefore quantifiable data.

31

32 **GURMINDER SINGH:** So therefore in Schedule caste also, there may be some which are
33 adequately represented, some which may not be totally adequately represented, so they can be
34 carved out under 4(a) and then under consequential seniority under 4(b).

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** Which other judgment? Are we done?

37

1 **GURMINDER SINGH:** Yes. *Nagraj* is done. My Lord. We can come straightaway to
2 *Davinder* now, which Your Lordship was saying, is the letter reference order.

3

4 **JUSTICE B.R. GAVAI:** This is Arun Mishra?

5

6 **GURMINDER SINGH:** Yes, which is 2010.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** Which page?

9

10 **GURMINDER SINGH:** Page 1400, PDF...

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** *1404, 2028 SCC*, page 1.

13

14 **GURMINDER SINGH:** That's right.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** Now you've taken us through the basic judgment.
17 You don't have to go through the reference.

18

19 **GURMINDER SINGH:** I think this discusses everything in detail. I'll just come to the
20 relevant parts of it.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** It basically extracts all the judgment.

23

24 **GURMINDER SINGH:** We come straight away to My Lord, page 1416, which is 1420 PDF.
25 1420, PDF running 1416. The opinion of Justice Arun Mishra, this was a unanimous verdict.
26 It's authored by him. A bench of three judges. May I My Lord?

27

28 **JUSTICE VIKRAM NATH:** Bench of 5.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** 5. This is 5.

31

32 **JUSTICE VIKRAM NATH:** Reference by 3.

33

34 **GURMINDER SINGH:** That's right, My Lord, reference by 3.

35

36 **JUSTICE B.R. GAVAI:** Decided by 5.

37

1 **GURMINDER SINGH:** That's right. It's not a simpliciter reference, Your Lordships had
2 correctly put, it gives details as to, 'why they feel that *Chinnaiah* needs to be reconsidered...'

3

4 **JUSTICE B.R. GAVAI:** But it answers all those 3 questions.

5

6 **GURMINDER SINGH:** Yes, that's right.

7

8 **JUSTICE VIKRAM NATH:** They made the.... recorded all your arguments here.

9

10 **GURMINDER SINGH:** Exactly, My Lord.

11

12 **JUSTICE B.R. GAVAI:** Held in your favour.

13

14 **GURMINDER SINGH:** That benefit I surely had, My Lord. Para 2, they framed the
15 questions.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** See para 35, at page 1458. Before that, it's
18 basically quotations.

19

20 **GURMINDER SINGH:** Then, have Your Lordship, seen paras 7, My Lord? Where these
21 submissions are noted, and then the conclusions. Or we can come straight away to the findings.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** Yeah, we can go straight to the findings. First
24 sentence of the para 35, they formulate the question. 'Whether it amounts to an inclusion or
25 exclusion sub-classification?'

26

27 **GURMINDER SINGH:** That's right. In fact, My Lord, a reference is made to Justice Sinha's
28 opinion from *Chinnaiah*, in paragraph 20, page 1431 PDF, My Lord. If Your Lordships could
29 just have that.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** Yeah, Mr. Sankaranarayanan, you're right. It's
32 para 43, Placitum D. They say that, "preferential treatment would not tantamount to
33 excluding other classes as total deprivation caused to any of the castes in the list of Scheduled
34 Caste. It is a case of classification to provide benefit to all and to those deprived the benefit of
35 reservation being the poorest to the poor." They say, here is the question, " whether the action
36 based on intelligible differentia to trickle down the benefits can be said to be violative of
37 Articles 14 and 16? And whether sub-classification can be said to be an act of inclusion or

1 exclusion? Particularly when various reports indicate that there is inequality *inter se* various
2 castes, including the list of Scheduled Castes. They do not constitute homogeneous class have
3 been relied upon."

4

5 **GURMINDER SINGH:** In fact, My Lord, in this, they opined that *Jarnail Singh* lays
6 down the fact that, 'creamy layer is applicable to SC, ST', in para. 27. If Your Lordships.... After
7 discussing *Ashok Kumar....*

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** Then they say in para 44 again.... 44 at page
10 1462. "The caste of group or sub-group continued exactly as before in the list. It is only those
11 persons within that group or sub-group who have come out of the untouchability of
12 backwardness by virtue of belonging to the creamy layer, who are excluded from the benefit of
13 reservation. A million dollar question is, "how to trickle down the benefit to the bottom rung?"
14 Reports indicate that benefit is being usurped by those castes, class who have come up
15 inadequately represented. Here, caste, occupational poverty are inter-govern. State cannot be
16 deprived of the power to take care of the qualitative and quantitative differences between
17 different classes to make ameliorative measures."

18

19 **GURMINDER SINGH:** Para 46, also, Your Lordships may have. There is a cry.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, *para 46 bhi important hai.*

22

23 **GURMINDER SINGH:** Para 46, there is a cry and caste struggle within the reserved class,
24 as benefit of reservation in services and education is being enjoyed, who are doing better
25 hereditary occupation, the scavenger class, given the name of Balmikis, remains more or less
26 where it was, and so on disparity between Schedule Caste is writ large from various reports.
27 The sub-classification was made under Section 4 sub clause 5 of the Punjab Act to ensure that
28 benefit of the reservation percolate down to the deprived section and do not remain on paper
29 and to provide benefit to all and give them equal treatment, whether it is violative of Article
30 14, in our opinion, it would be permissible on rational basis to make such sub-classification,
31 to provide benefit to all, to bring equality and it would not amount to exclusion from the list,
32 as no class/cast is deprived of reservation in totality. In case the benefit which is meant for the
33 emancipation of all the castes included in the list of Scheduled Castes is permitted to be
34 usurped by few castes who are adequately represented, have advanced and belong to the
35 creamy layer, then it would tantamount to creating inequality. Whereas in case of hungry,
36 every person is required to be fed and provided bread. The entire basket of fruits cannot be
37 given to the mighty at the cost of the others under the guise of forming a homogeneous class.

1 The constitution is an effective tool of social reformation. Removal of inequalities intends to
2 wipe off tears from every eye. The social realities cannot be ignored and overlooked while the
3 Constitution aims at comprehensive removal of disparities. The very purpose of providing
4 reservation is to take care of disparities. The constitution takes care of inequalities. There are
5 unequals within the list of Scheduled Castes, Scheduled Tribes, and socially and educationally
6 Backward Classes. Various reports indicate that Scheduled Castes and Scheduled Tribes do
7 not constitute a homogeneous group. The aspiration of equal treatment of the lowest strata, to
8 whom the fruits of reservation have not effectively reached remains a dream. At the same time,
9 various castes by large remain where they were and they remain unequals, are they destined
10 to carry their backwardness till eternity? Then they answer it in 48 and 49. The State's
11 obligation is to undertake the emancipation of deprived section of community and eradicate
12 inequalities when the reservation creates inequalities within the reserved class itself it is
13 required to be taken care of by the same.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** It's okay. You can leave that I think. Thank you,
16 Mr. Attorney General, I think we are wrapped up now.

17

18 **GURMINDER SINGH:** Please, My Lord. I think that's more or less.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you so much.

21

22 **GURMINDER SINGH:** Grateful.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Farasat. What ground are you going to cover
25 now?

26

27 **SHADAN FARASAT:** I have My Lords, three submissions. I'll just formulate them and then
28 I'll go straight into them also. The first submission is that *Chinnaiah* has certain internal
29 contradictions because it's proceeded on the basis that Article 341 is solely for the purpose of
30 reservations alone.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** No, it's for the purposes of this constitution.

33

34 **SHADAN FARASAT:** That's correct. So My Lords, the way *Chinnaiah* proceeds,
35 absolutely. I'm so grateful to My Lord the Chief Justice, the way *Chinnaiah* proceeds, it in
36 fact, says that....

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** Alright. You can formulate and then. ...

2

3 **SHADAN FARASAT:** Yeah, so that's the first formulation. My Lord the second submission
4 is that Article 342 A has now been introduced in the Constitution and that has been introduced
5 in the constitution and that read with Your Lordship's judgment in *Jaishri Patil* completely
6 negates the fundamental logic of *Chinnaiah*. And My Lords the third submission is that
7 insofar as efficiency in service, that is, Article 335 is concerned that is something when read in
8 the context of constitution in fact, supports subclassification. It does not negate
9 subclassification because *Chinnaiah*.

10

11 **JUSTICE B.R. GAVAI:** Please repeat.

12

13 **SHADAN FARASAT:** Article 335, the requirement of efficiency in administration of the
14 government mandates or requires sub-classification. Before I go into each of the points, if I
15 may submit, there are broadly two approaches Your Lordships have followed. This is at the
16 risk of slight over-simplification in matters of reservation. One is, if I may articulate it, the
17 cautious approach where the court is primarily concerned with preventing misuse of
18 reservation, ensuring that it goes to the right people ensuring that hopefully, in a certain
19 amount of time, it comes to an end. The order, in reference with the learned advocate general
20 just read, is in my respectful submission example of that approach. And there is another
21 approach, which is the deepening approach, which is the court is primarily concerned with
22 how to deepen the impact of reservation to all the groups and that is the primary concern
23 which the court is really concerned with. My respectful submission is that the question of sub-
24 classification within Scheduled Castes and Schedule Tribes, irrespective of which of the
25 approaches the court takes leads to the same conclusion.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** That is the first approach. You say?

28

29 **SHADAN FARASAT:** I said it's a cautious approach. Whether court is more concerned with
30 the formal mechanisms of reservation and preventing its misuse. In the second, the court's
31 emphasis is more on deepening the impact of reservation. If I may say, the Chief Justice's
32 judgement in *Pavitra* is the example of the deepening approach and my submission is that,
33 irrespective of which of those two approaches the court takes, both of them lead to the same
34 conclusion, that is, sub-classification is not just constitutional, but possibly desirable and
35 necessary. Second, it is clear that the principles which apply in the context of reservation
36 versus non-reservation can be mirrored in the context of sub-classification within Scheduled
37 Caste. No doubt about it, one of the same principles can be mirrored. Like My Lord, the Chief

1 Justice pointed out in the morning. However, in my submission with one difference, and that
2 is that when we are dealing with Scheduled Caste, we are dealing with the weak and the weaker.
3 There is no forward group. That distinction is of some essence because this subclassification,
4 either in the way we formulate our submissions, or the legislature or the court engages should
5 not be used to beat the parent category of Scheduled Caste itself, that is also essential. So really,
6 we are discussing not a forward, backward or more forward and backward within backward.
7 We are discussing weak and weaker. So with that distinction I will just broadly go into my first
8 submission. Your Lordships will straight away have **Chinnaiah** para 41 and that is internal
9 page 418, Volume V and running page 798, Volume V, PDF page 802, begins at 801 bottom.
10 This is Justice Hegde speaking for the majority. The conglomeration of caste given in the
11 Presidential Order, in our opinion, should be considered representing a class as a whole, the
12 contrary...

13

14 **JUSTICE B.R. GAVAI:** Para?

15

16 **SHADAN FARASAT:** Para 41 My Lords. PDF 801

17

18 **JUSTICE VIKRAM NATH:** PDF 801. Otherwise it is 797.

19

20 **SHADAN FARASAT:** That's right. I'm grateful. The conglomeration of caste given in its
21 Presidential Order, in our opinion, should be considered as representing a class as a whole.
22 The contrary approach of the High Court, in our opinion, was not correct. The very fact that a
23 legal fiction has been created is itself a justice of the fact that a legislature of a state cannot
24 take any action which would be contrary to our inconsistent therewith the very idea of placing
25 different caste or tribes of groups or parts thereof in a state as a conglomeration by way of a
26 deeming definition clearly suggests that they are not to be subdivided or subclassified further.
27 If a class within a class of member or a Scheduled Caste is created, the same would amount to
28 tinkering with the list such sub-classification would be violative of 14 of the Constitution. It
29 may be true, as has been observed by the High Court, that the caste system has got stuck up in
30 the society, but with a view to do away with the evil effect thereof, a legislation which does not
31 answer the Constitutional, cannot be upheld. It is also difficult to agree with the High Court
32 that for the purpose of identifying backwardness, a further inquiry can be made by appointing
33 a commission as to, 'who amongst the members of Scheduled Castes is more backward?' Now,
34 this is important. "If benefits of reservation are not percolating to them equitably, measure
35 should be taken to see that they are given such adequate or additional training, so as to enable
36 them to compete with the others, but the same would not mean that in the process of
37 rationalizing the reservation to the Scheduled Castes, the Constitutional mandate of 14, 15 and

1 16 be violated." So, what the court is suggesting, and this becomes more explicit in Justice
2 Sinha's opinion, which I'll just read now, is that, "you can take other measures for them. But
3 not reservation." That is the suggestion. And My Lords, that will become explicit. Your
4 Lordships will now have para 114, which is at page 819 PDF.

5

6 **JUSTICE B.R. GAVAI:** 890?

7

8 **SHADAN FARASAT:** 8-1-9 My Lords. Para. 114. It begins under the heading, 'What is the
9 remedy?' So, My Lord, after holding it to be unconstitutional...

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** Page?

12

13 **JUSTICE VIKRAM NATH:** 819.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** What is the remedy?

16

17 **SHADAN FARASAT:** That's right. "There is one practical aspect of the matter which we may
18 not also be lost sight of. The chart of... chart produced before us clearly shows that the
19 members belonging to Relli and Adi-Andhra are hardly educated. What are necessary in the
20 situation was to provide to them scholarship, hostel facilities, special coaching, etc. so that
21 they may be brought on the same platform in the members of the other Scheduled Tribes,
22 namely Madiga and Mala, if not with the OBCs. It is not in dispute that the members belonging
23 to Relli are hardly educated. Only 2% of members of the said community have studied in
24 secondary school." And then there is some discussion. Et cetera. So what the court is
25 suggesting as a remedy is that, "you give other forms of affirmative action only to the sub-
26 category." That, in my respectful submission is a contradiction in terms of interpretation of
27 341 itself. Because 341 is 'Scheduled Caste for the purposes of this Constitution. It doesn't say
28 for the purposes of reservation alone.' So, my submission is in their imagination. The court,
29 the *Chinnaiah* court has assumed, that 341 is really for reservation. You can do these other
30 things, which will not hit 341. But in fact, those very things which the court suggest will equally
31 be hit by the interpretation of 341.

32

33 **JUSTICE VIKRAM NATH:** in fact, they are supporting your argument here.

34

35 **SHADAN FARASAT:** In a way, yes, My Lord. So, what I'm really saying is that, "if what the
36 court suggests is possible."

37

1 **JUSTICE VIKRAM NATH:** [UNCLEAR] and... identify them and accordingly dealt with it.

2

3 **SHADAN FARASAT:** Correct. So, My Lord.....

4

5 **JUSTICE B.R. GAVAI:** [UNCLEAR] the position that they are more backward among the
6 backwards.

7

8 **SHADAN FARASAT:** Yes, correct. So factually, they concede... the court says that factually
9 the problem exists, and it says....

10

11 **JUSTICE B.R. GAVAI:** But, reservation is not the remedy.

12

13 **SHADAN FARASAT:** Reservation is not the Constitutional remedy, because it's not
14 permissible on account of my interpretation of 341. But at the same time, the court says, "there
15 is other remedy." What I'm saying is, "either both remedies are available to me or none are
16 available to me."

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** They couldn't have said that, "You take this and
19 not the other."

20

21 **SHADAN FARASAT:** That's right. And...

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** That's the purpose of Article 341 cuts across the
24 Constitutional...

25

26 **SHADAN FARASAT:** That's right. And that will become evident when Your Lordship looks
27 at Article 46. Because for the purposes of this constitution, of course, reservation under 15(4)
28 and 16(4) is one aspect. Now, just have a look at 46(4). I know Your Lordships are aware of it,
29 but just for a moment, have a look at it. "Promotion of educational and economic interest of
30 Scheduled Castes, Scheduled Tribes and other weaker sections. The state shall promote with
31 special care, the educational and economic interest of the weaker sections of the people, and
32 in particular of the Scheduled Caste and Scheduled Tribes and shall protect them from social
33 injustice and all forms of exploitation."

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** This is actually a postulate that, 'the Scheduled
36 Castes and Scheduled Tribes are deemed by the Constitution to be weaker section."

37

1 **SHADAN FARASAT:** I'm grateful. Absolutely. And My Lord, this 46 is couched in such
2 broad language, that any affirmative action will be covered under this for the Scheduled Caste
3 and Scheduled Tribes. Scholarship, the kind of examples the court gives in *Chinnaiah* will
4 be squarely covered by 46. And if My Lord now has 15(4) for a moment, because those
5 measures are, in effect, protected by 15(4). A government can give scholarship to only a sub-
6 category or a group only upon protection from 15(4). So 46 and 15(4) are really two sides of
7 the same coin. So My Lords that is my submission. And therefore, the logic of *Chinnaiah* if
8 applied fully in fact is in my favour. My Lords I'm grateful to Justice Nath. My Lords my second
9 submission is that there is a new provision introduced in 2018 and that is 342A. Your
10 Lordships may just have that provision first. It is similar but not identical to 342, that's why
11 Your Lordships were then required to interpret it in one judgment. 342A part-1. The President
12 may with respect to any state or union territory and where it is a state after consultation with
13 the Governor thereof, by public notification specify the socially and educational backward
14 classes in the central list, this is actually amended. Specify the bracketed portion Your
15 Lordships will leave and be deemed to be socially and educationally backward in relation to
16 the state or union territory as the case may be. Initially there was no reference to Central list.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Initially it read the socially and educational
19 background classes which shall, for the purposes of this Constitution,

20

21 **SHADAN FARASAT:** That's right. So there was no reference to central list in the initial 2018
22 amendment, but Clause 2, Parliament made by law include in or exclude from central list of
23 socially and educationally backward classes, specified in a notification issued under Clause 1,
24 any socially and educationally backward class. But save as aforesaid, a notification issued
25 under the said clause, shall not be varied by any subsequent notification. so, Clause 342A as it
26 originally stood, Part-1 of it was almost identical to Part-1 or Clause 1 of 342. Right. But insofar
27 as Clause 2 was there, there was the word Central List, which is different even as it originally
28 stood from 342. Therefore, the question which arose in *Jaishri Patil's* case is what is the
29 real intent of the original amendment to 2018 amendment because the word central list is
30 there. So is it taking away the power of the states to actually identify the OBCs. Because this is
31 a provision which for the first time is introduced in 2018. So the power to identify was all,
32 unlike the SC/STs, the power even to identify was always with the states for OBC. Now, this
33 provision is introduced, 342A, and the question was, is that power lost?

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** The power of the state.

36

1 **SHADAN FARASAT:** Power of the state, to identify. And the court says, yes, it is lost in
2 *Jaishri Patil* by reading the question was whether two will control one. Clause 2, Central list
3 will control 1 or 1 will control Clause 2, really speaking. And the court came to the conclusion
4 that the word Central list in 2 will be controlled by 1 and therefore the states have lost the
5 power. So, although the word central list is there in 342 in *Jaishri Patil*, Your Lordship says
6 in effect, 342A is identical to 342. That is from here on, for all purposes, not just central list. It
7 will be only the President and thereafter the Parliament, which will identify the caste. That is
8 the majority in *Jaishri Patil*. There are two judges dissenting on this also. But that's the
9 majority. Three is to two My Lords.

10

11 **KAPIL SIBAL:** They also then held that till such time as the central government identifies,
12 the State List will continue. The central government is not so far identified, so the state list
13 continues. It is a matter of fact My Lord. That also needs to be looked at again, because the
14 entire federal structure is disturbed because the states don't have any power anymore. That's
15 the whole issue.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** But the 21 amendment was before *Jaishri*
18 *Patil*, right?

19

20 **SHADAN FARASAT:** No, after. As a response to *Jaishri Patil*. I'm just coming to that. I'm
21 just coming to that.

22

23 **KAPIL SIBAL:** This was 2018.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** *Jaishri Patil* was which year?

26

27 **SHADAN FARASAT:** *Jaishri Patil* is 2020.

28

29 **KAPIL SIBAL:** 2021.

30

31 **SHADAN FARASAT:** My Lords, the amendment is a response to *Jaishri Patil's* finding. I
32 will place that. Now, My Lords will just first have... Now the submission I'm making for the
33 court's consideration is this. That even in *Jaishri Patil*, where the court interpreted 342-A
34 to be identical to 342, even though the word central lists were present in the second part.
35 Despite that says that all, for all other purposes, that is, sub-classification, etc., etc. Nothing
36 changes. So, here you have now for the SC, BCs, a structure like 342, but they are permitted
37 to... the states are permitted to sub-classify. That's my submission. I'll just make that good by

1 taking Your Lordships to the judgment. So now on ***Jaishri Patil***. Your Lordships has been
2 straight away have page 1462 is where it begins and Your Lordships will have para 162, which
3 is at PDF 1607.

4

5 **JUSTICE B.R. GAVAI:** At page number?

6

7 **SHADAN FARASAT:** This is that at page number 1607, PDF 1603 on the right hand side.
8 162. Parliament, through the 102nd Amendment, clearly intended that the existing legal
9 regime for identification of communities as SC and ST and for inclusion in the list of SC and
10 STs under Article 341 and 342 which had hitherto existed, ought to be replicated in relation to
11 the identification of SC, BCs. To achieve that, parliament inserted Article 338-B, which is a
12 mirror image of Article 338 and 338-A. The task assigned to the new Commission for backward
13 class, which is envisioned as a multi member commission are radically different from the
14 duties which were assigned by Parliament to the National Commission for Backward Caste Act
15 under Section 9 of the erstwhile SC/BC Act, which was repealed just before the
16 commencement of the 102nd Amendment, the SC/BC was to examine requests for inclusion
17 of any class of citizens of as backward classes in the list. An advice of the Commission was
18 ordinarily binding upon the central government. Section 11 provided for a periodic revision of
19 list. As noticed by Ashok Bhushan J., Article 338-B envisions a larger role for the new
20 commission. This commission not only advises the central government, but also the states. It
21 is impossible to read Articles 338-B in isolation from the pre-existing *para materia* provisions.
22 It must be interpreted in the light of the two provisions which had existed all this while 338...

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** Justice Bhat also concurred with Justice
25 Bhushan?

26

27 **SHADAN FARASAT:** Justice Bhushan was in dissent.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** With Justice Nazir?

30

31 **SHADAN FARASAT:** Yes. So, on this point, My Lords, the majority of this judgment was
32 Justice Bhat, Justice Nageshwar Rao, and Justice Nazir and the other two judges are really in
33 a dissent.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** On this point?

36

1 **SHADAN FARASAT:** On this. For this matter, this is the only point in this judgment which
2 my submission is relevant.

3

4 **JUSTICE VIKRAM NATH:** Relevant for this?

5

6 **SHADAN FARASAT:** Yes. Now those provisions clearly contemplate the same consultative
7 role of the commission, et cetera. I'm not going to read that. Your Lordships will now come to
8 166. My learned friend wants me to read. This commission not only advises the central
9 government, but also the state. It is impossible to read Article 338-B in isolation from the
10 preexisting *para materia* provisions. It must be interpreted in the light of other two provisions
11 which had existed all this while, Article 338 and 338-A. Those provisions clearly contemplate
12 the same consultative role with the Commission on policy matters of the central government
13 as well as the state government. This is evident from Clause 9 of these articles. Thus, the
14 commission under Article 338- B is not only assigned a constitutional role, but is also expected
15 to act as an expert and engage with experts in the determination of the communities. 338-B(5)
16 uses the term SC/BC, no less than on six occasions. The expression also occurs in Article 338-
17 B(9). Thus, for the purpose of the constitution, the commission newly established under 338-
18 B that is SC/BC shall be the only body to whom both the Central Government and the State
19 Government have to turn in all matters of policy, necessarily the question of matters of policy
20 would also include identification of caste or communities at backward classes. Now, My Lords
21 will have 166 and I'll just read the first part, My Lord. I don't want to trouble Your Lordships
22 with too many paras. And I'll just formulate the point. " Given the weight of such precedents
23 which to this court giving full effect to the newly added provision by adopting the literal
24 meaning in the definition set out in the Constitution, as well as in the amendments to the
25 definition clause, and all of which was noticed, the changes brought about through
26 amendments and gave them plain effect. It is difficult to accept that the power of amendment
27 of the Constitution in accordance with the special procedure set out in 368, was used to bring
28 about cosmetic changes conferring Constitutional status." So, there are two arguments. One
29 argument was that, 'this 342A, if I may use the word slightly funnily worded in terms of
30 difference from 342, was only to confer a Constitutional status on the *status quo*, which was
31 legally already present.' And the other argument was that, 'no, this actually brings it in line
32 with 342. States lose the power to identify.' The court says it is not cosmetic. It is substantive.
33 And the states lose the power to identify." Now, despite that, what the courts hold is what I am
34 canvassing to the court, My Lord. Your Lordship will have, para 168. And below, Placitum E.
35 "Yet one must be mindful of a crucial fact, which is that the task for making special provisions
36 under Article 15 and for making reservations under Article 64, extends to the states. The power
37 exercised by the President in relation to every state visa vis SC/ST has been smooth and by all

1 accounts, there has been no resentment or friction. Once the community or the caste
2 concerned is reflected in the list of one or the other State Union Territory, the extent of
3 benefits to be provided to members of such community is a matter that lies entirely in the
4 State's domain." So, identification, the President does exclusively, and the Parliament. But the
5 nature of benefits will be rolled out is
6 in that State's exclusive domain. Now My Lord will have para 182. It is at page 1616, PDF.
7 "This Court is also of the opinion, that the change brought about by the 102nd Amendment,
8 specially Article 342-A, is only with respect to the process of identification of SC/BCs and their
9 list." That is the real meaning of 342 as well. "Necessarily the power to frame policies and
10 legislations with regard to all other matters, that is, welfare schemes for SC/BC, setting up of
11 institutions, grants, scholarship, extent of reservation and special provisions under 15 (4), 15
12 (5) and 16 (4), are entirely with the State Government, in relation to its institutions and its
13 public services, including services under the agencies and corporations and companies
14 controlled by the State Government. In other words, the extent of reservation, the kind of
15 benefits, the quantum of scholarship, the number of schools which are to be specially provided
16 under 15 (4) or any other beneficial or welfare scheme, which is conceivable under 15(4) can
17 all be achieved by the State through its legislative and executive powers. These powers would
18 include making suggestions and collecting data, if necessary, through statutory commissions
19 for making recommendations towards inclusion and exclusion of caste and communities." So,
20 My Lords, that's the second part on... even on inclusion or exclusion, I can recommend. But
21 once included or excluded, with that category, what is to be done? The entire gamut of things
22 which can be done, is still with the state exclusively. So, My Lords, this is... *Chinnaiah* goes
23 this way, this judgment in my respectful submission goes the opposite way. It identifies that
24 there are two different things. Which is the submission we are trying to make to the Court.
25 Now, My Lord finally, Your Lordships will have para 194.5.5. That is at page 1619.

26

27 **JUSTICE VIKRAM NATH:** PDF 2623.

28

29 **SHADAN FARASAT:** And PDF page 1623. My Lords 194.5.5. The state's power to make
30 reservations in favour of particular communities or caste, the quantum of reservation, the
31 nature of benefit and the kind of reservations and all other matters falling within the ambit of
32 15 ex-16, except with respect to identification of SC/BCs remains undisturbed. Remains
33 undisturbed except identification. My Lords what is the sequitur of this? In SC/BCs, My Lords
34 there's sub-classification already. Your Lordships have seen *Indra Sawhney*.

35

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

37

1 **SHADAN FARASAT:** Now, here you have a provision which has been read by this court to
2 be identical to 341 and except identification, everything else is left undisturbed. Therefore, My
3 Lords that sub-classification power also has been left undisturbed. Now My Lords 3. What
4 does the amendment do? I'll just conclude this point with that amendment. The amendment
5 came as a response to this judgment My Lords and that is Clause 3. Your Lordships will have
6 Clause 3. Notwithstanding anything contained in Clauses 1 and 2, every state or union territory
7 may by law prepare and maintain for its own purpose a list of socially and educationally
8 backward classes, increase in which may be different from central list. My Lords this restores
9 the power to identify to the state, Clause 3. I'll read it again. Notwithstanding anything
10 contained in Clause 1 and 2, every state or UT may by law prepare and maintain for its own
11 purpose a list of SC/BCs. So this restores the power to identify, which Clause 1 and 2, as
12 interpreted by *Jaishri Patil* did not provide.

13

14 **JUSTICE B.R. GAVAI:** This is brought on 15th of September '21?

15

16 **SHADAN FARASAT:** Correct. But My Lords my submission is this.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Is the same amendment also amended Clause 1?

19

20 **JUSTICE VIKRAM NATH:** By bringing the central list.

21

22 **SHADAN FARASAT:** That's right. I'm grateful. That was brought in as well.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** Specify the socially and educationally
25 background classes in the central list, which, for the purpose of the central government. Those
26 words came in.

27

28 **SHADAN FARASAT:** So that's true. So it restores that position. But, so what it does is it
29 restores the position vis-a-vis OBCs pre the amendment and pre *Jaishri Patil*. That's what
30 it does. But my submission is when the court took it as equal to 342, that is what *Jaishri*
31 *Patel* is prior to the amendment. Even at that stage, the court says everything else....

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Else is left to the state.

34

35 **SHADAN FARASAT:** And My Lord that is in contra-distinction and complete contrast to
36 the approach *Chinnaiah* has stated. My Lord that's the second submission. My Lords my
37 third and final submission...

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CHIEF JUSTICE DY CHANDRACHUD: Of course, both are judgments of five judges

SHADAN FARASAT: And since Your Lordships are in seven, we will commend My Lords the approach of this judgment to Your Lordships as opposed to *Chinnaiah*. My Lords the third submission is that insofar as Article 335 is concerned, My Lords normally it is seen, although My Lords some judgments of Your Lordships in recent times have undone that that it is a restriction on the principle of reservation. My Lords I'll just read 335. "Claims of Scheduled Castes and Scheduled Tribes to services and posts'. The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration consistently with the maintenance of efficiency of administration in making appointments in the union or state. Consistent with maintenance of efficiency in administration. My Lords in my respectful submission, this provision actually is not a provision which is a limiting principle of reservation, certainly not in government service. And My Lords I'll try to make it good. It is, in fact the enhancing principle for reservation and subcategorization, both.

CHIEF JUSTICE DY CHANDRACHUD: I think I've dealt with this.

SHADAN FARASAT: In *Pavitra* My Lords, I'll place those paras. I'll place. Your Lordships have dealt with them My Lords directly in *Pavitra*. My Lords but before I go to *Pavitra*, just one submission. My Lords what is, this is about My Lords efficiency is contextual.

CHIEF JUSTICE DY CHANDRACHUD: Yes.

SHADAN FARASAT: Something which may be efficient in one context will cease to be efficient in other context. Now just one example.

CHIEF JUSTICE DY CHANDRACHUD: It depends on how you define efficiency. If you define efficiency in an inclusive sense, by the inclusion of people who have hitherto been excluded from government, then it promotes efficiency. Also putting people from the marginalized communities in important positions of responsibility itself is receptive to the needs of those communities and to the needs for inclusion as a social doctrine. And therefore, it's not really something which detracts from efficiency.

SHADAN FARASAT: Absolutely. And in addition...

1 **CHIEF JUSTICE DY CHANDRACHUD:** Because the postulate of the constitution is not
2 that people who belong to the marginalized groups are inefficient. And those who belong to
3 the other groups are efficient and therefore having more of the reserve categories will detract
4 from efficiencies. It's to the contrary.

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6 **SHADAN FARASAT:** Exactly. So that's there. And in addition, this is...

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8 **CHIEF JUSTICE DY CHANDRACHUD:** It is consistent with the need to maintain
9 efficiency in administration.

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11 **SHADAN FARASAT:** Yes, and efficiency in government administration is... what is
12 government administration? What is government? Government? What is government's
13 business? Government's business is the people. So, when we are talking about efficiency in
14 government administration, diversity by itself promotes efficiency. That's my submission for
15 the courts consideration. Efficiency in government administration will necessarily necessitate
16 existence of diversity. Just example, when I came across... example. In Norway they recently
17 took a child of an Indian couple because the children were being fed through hand by the
18 parents. That is basically they don't have the understanding, diverse enough administration to
19 understand this is a cultural but hygienic practice. They assume that that's because you are
20 using hands, they put the child in foster care. So My Lords efficiency in administration will
21 require a certain amount of diversity, because otherwise you will have disastrous
22 consequences of this kind of example. There can be many other examples given, even in our
23 context. So, diversity is essential component of efficiency, especially in government
24 administration, because you are dealing with a diverse public. You're not dealing with just a
25 section. You're not government of a or b, you are government of everybody. And I'll just place
26 the paras in *Pavitra*.

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28 **CHIEF JUSTICE DY CHANDRACHUD:** Where is *Pavitra*?

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30 **SHADAN FARASAT:** Volume 5-A. It begins, Your Lordships will have page 111 PDF, page
31 111 PDF, para 124. The substantive para 124, page 111 PDF.

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

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35 **SHADAN FARASAT:** The substantive part of 335 contains a mandate, a requirement to take
36 into consideration the claim of SCs and STs in making appointments to services and post in
37 connection with the affairs of the union or of a state. Consideration is much broader in its

1 ambit than reservation. The consideration of their claims to appointment is to be in a manner
2 consistent with maintaining the efficiency of administration. The proviso specifically protects
3 provisions in favour of SC/ST for relaxing, qualifying in any examination, lowering the
4 standard or reservation in a matter of promotion. Reservation is encompassed within the
5 special provision. But the universe of the latter is wider. Now My Lords, just have 126.
6 Lordships have written a lot of paras. I'll just focus on the ones which assist us the most. Para
7 126. The Constitution does not define what the framers meant by the phrase efficiency of
8 administration. Article 335 cannot be construed on the basis of a stereotypical assumption.
9 That roster point promotes drawn from the SC/STs are not efficient or that efficiency is
10 reduced by appointing them. This is stereotypical because it masks deep rooted social
11 prejudice. The benchmark for the efficiency of administration is not some disembodied
12 abstract ideal measured by the performance of a qualified Open Category candidate. Efficiency
13 of administration in the affairs of the union or of a state must be defined in an inclusive sense
14 where diverse segments of a society find representation as a true aspiration of governance by
15 and for the people. If, as we hold the constitution mandates realization of substantive equality
16 in the engagement of the Fundamental Rights with the directive principles, inclusions together
17 with the recognition of plurality and diversity of the nation, constitutes a valid constitutional
18 basis for defining efficiency. Our benchmarks will define outcomes. If this benchmark of
19 efficiency is grounded in exclusion, it will produce a pattern of governance which is skewed
20 against the marginalized. If this benchmark of efficiency is grounded in equal access, our
21 outcomes will reflect the commitment of Constitution to produce a just social order.
22 Otherwise, a pass will haunt the inability of a society to move away from being deeply unequal
23 to one which is founded on liberty and fraternity. Hence, while interpreting 335, it is necessary
24 to liberate the concept of efficiency from a one-sided approach, which ignores the need for the
25 positive effects of the inclusion of diverse segments of society on the efficiency of
26 administration of the Union or of a State, establishing the position of SCs and STs worthy
27 participants in affairs of governance is intrinsic to an equal citizenship. Equal citizenship
28 recognizes governance, which is inclusive, but also ensures that these segments of our society
29 which have suffered in history, prejudice, etc., are the real voice and governance. Since
30 inclusion is inseparable from a well governed society, therein I would know antithesis between
31 maintaining of efficiency and considering the claims of SC/ ST." So, My Lord, this formulation,
32 I respectfully submit, should be adopted by Your Lordships in the 7-Judge combination, so
33 that, My Lord, 335 is not seen as a limiting principle to reservation, but as a principle to
34 expand. Just like firstly 16(4) was seen as exception to 16 (1), in the initial jurisprudence of
35 this court. And then Your Lordships have held that, 16(4) is actually a facet of 16 (1). Similarly,
36 this is also in fact a facet. And therefore My Lord, insofar as **Chinnaiah**, which, at two
37 places....

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JUSTICE B.R. GAVAI: *Indra Sawhney* also rejects the argument that reservation is anti-meritorious.

SHADAN FARASAT: That's right. Merit is what they call, My Lords, in one of these books, 'Nurtured talent.' Now, if somebody doesn't get to, and something called natural talent.

CHIEF JUSTICE DY CHANDRACHUD: I think I've also considered that here on how benchmarks and....

SHADAN FARASAT: Yes, My Lord. Your Lordships have done a very detailed, this thing. I'm not reading all of it, but the principle really is that, 335 is not, efficiency in governance is not about efficiency for a particular group or defined in a void. It's not rocket science, particularly in government, when you're dealing with people, efficiency has to mean, "how does the government really deal with all the people?" And if I may submit, we really don't know, "what real efficiency is", because real equality really has not arrived in our Government. My Lords, we will see the true meaning of 335, when we have a substantive equality, and then we'll see what real efficiency is. That's the true meaning of 335. So, insofar as *Chinnaiah*, My Lord, in some paragraph says that, "this sub-classification will also be contrary to the principle of efficiency. It's neither contrary to principle of efficiency for normal classification or for sub-classification." That's my third submission.

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

SHADAN FARASAT: I will just... There is one... I will not quote it but, we used to read in our NCERT book as 'Gandhi ji's Talisman,' that "whatever you do, you must think of the weakest person and it does that help to that weakest person and all your doubts will disappear." This is one of those instances where what the state is doing is actually helping the weakest person. I'm grateful.

CHIEF JUSTICE DY CHANDRACHUD: Thank you Mr. Farasat. Mr. Sibal, we start tomorrow morning?

We're almost on the envelope. What we will do is, now, we've substantially covered a lot of ground, we've covered a lot of substantial ground. We'll conclude the submissions of this side by lunchtime tomorrow. So that then we can ask the others to... the other side to argue. So we'd like to wrap up tomorrow. Because we'll see what they have to say after this, we'll conclude the...

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KAPIL SIBAL: Not an issue.

CHIEF JUSTICE DY CHANDRACHUD: So, just as you leave, maybe the others were to follow, between yourselves, ration the time for the people who are appearing on?

KAPIL SIBAL: Not an issue. We'll organise that. Grateful.

END OF DAY'S PROCEEDINGS