

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 **SANJAY HEGDE:** With My Lord's permission, I have...

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3 **CHIEF JUSTICE DY CHANDRACHUD:** Sorry.

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5 **SANJAY HEGDE:** There is an IA which has been filed in this matter. I had laid the
6 arguments before the 5-judge bench. All that I'm requesting is, My Lords, after my learned
7 friend is finished, I'll...

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** You are for the Petitioner's or the Respondent's?

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11 **SANJAY HEGDE:** On the Respondent side.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** You are for the Respondent, right?

14

15 **SANJAY HEGDE:** For the Respondent. After they finish, may I be allowed to submit? My IA
16 is 32705/20....

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** [UNCLEAR] No problem.

19

20 **SANJAY HEGDE:** I am grateful.

21

22 **MANOJ SWAROOP:** My learned friend's submissions are already on record.

23

24 **CHAMAN LAL:** IA of Chaman Lal.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** *Chaman Lal ji, aap thoda rukiye. Pahale sabko*
27 *sun lete hai, fir dekh lete hai, kitna samay bachta hai. Yes.*

28

29 **MANOJ SWAROOP:** Lordships. My Lords, so that I can be within the time strains, and be
30 very relevant all the time, in an effort to do that, we prepared a one page note, as to the points
31 that I will be making my respectful submissions on. That's in Volume II(e). And if I can hand
32 over copies. A single page on both sides.

33

34 **JUSTICE VIKRAM NATH:** That's cheating, actually.

35

1 **MANOJ SWAROOP:** My Lords, when it reaches Your Lordships, Your Lordships may not
2 find, that I said single page. Yes. That will help my... to focus on the submissions that I'm
3 making to Your Lordships.

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** If you have one more copy, you can just give it to
6 the library team. So they can put it on the document visualizer.

7

8 **JUSTICE B.R. GAVAI:** It's already up there.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** Oh excellent. That is volume...?

11

12 **MANOJ SWAROOP:** Volume II(e), My Lord.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** All right. Let's first read it out.

15

16 **MANOJ SWAROOP:** Yes, My Lord. These are bullet points. May I just.... with Your
17 Lordship's very kind permission, My Lord, can I just begin? My Lord, the first submission I'm
18 making is, regarding the scheme of the Constitution. As to what is the scheme, in my most
19 respectful submission and whether this State action at all fits into that scheme?

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** Let us see what the scheme is now.

22

23 **MANOJ SWAROOP:** Yes. May I just formulate and then request Your Lordships to that...

24

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

26

27 **MANOJ SWAROOP:** May I do that? In my submission, My Lord, 341 indeed, the catchment
28 point, the starting point, is heterogeneous. There's no difficulty about it. It is. Because when
29 we are taking the different.... when we are talking in 341, because 341, the birth takes place of
30 the entry. Because 366 definition will say - 'as mentioned in 341.' It will say that. So to say, the
31 birth takes place of that category, in 341. And in 341 we have it to say that...

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** We can say - 'the birth of that category as an SC
34 takes place in Article 3....' Once it is incorporated in a list under Article 341.

35

36 **MANOJ SWAROOP:** Yes, that's the birth point. And the birth point itself....I'm myself
37 emphasizing the other side's point of view, that it is heterogeneous to start with. Why?

1 Because, we have ample evidence in 341 (1) which says that - 'We are talking of races. We are
2 talking of castes and we are talking of tribes, and we are also talking about parts within and
3 groups within these three categories, which I just said.' So, it is heterogeneous. And Your
4 Lordships have seen the sociological history repeatedly in the last two days that, their
5 vocations are different, their traditions are different, so that origin is heterogeneous. Having
6 said that, it is heterogeneous, then twice the word 'deemed' is used. 341 and 366(24). I'm
7 confining myself initially to Scheduled Castes, shall be deemed to be for the purposes of this
8 Constitution. I'm just still formulating my submission. And then request Your Lordships to
9 see the relevant portions with me once again.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** We have read that now. You are right, the word
12 'deemed' is used in 366 and 341.

13

14 **MANOJ SWAROOP:** Twice over. But the idea is and My Lord, kindly also have this...

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** According to you, what is the implication of the
17 word 'deemed'? What does that mean?

18

19 **MANOJ SWAROOP:** Yes. The implication of the word 'deemed' is... kindly also take hand
20 in hand 342, because then the picture will be clear in my submission. 342 saying about tribes,
21 same language, tribal, tribal communities. That's the only difference. When I come to 342,
22 tribal, tribal communities, nothing more is added, all the language is *pari materia*, even (2) is
23 *pari materia*. What was being done at that stage, at the birth stage, 341, 342 was, in my
24 submission, that two colours, so to say were being identified. 1950, two colours were being
25 identified. The colour of Scheduled Caste, the colour of Scheduled Tribe. The colour of 341,
26 the colour of 342. Now they are shades, if this colour is 341, the Scheduled Caste shade was
27 red and this was green, if I can take that example, these are all shades of red, these are all
28 shades of green. Therefore, My Lord, it explains Your Lordships, when Your Lordships put the
29 query, how is it that occasion arose to, in yesterday's debate, that we find tried both ways, in
30 341, 342. How does it happen? When they were classifying, they found that these tribes...

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** Are more akin to caste.

33

34 **MANOJ SWAROOP:** More akin to caste, more akin into green. They are shades of green, so
35 put them here. This tribe more akin to red, put them here.

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** So the distinction between green and red, to use
2 your simile is not that black and white, they shade into each other. There are some tribes which
3 resemble castes. But there is no corresponding inclusion in 342 of castes into tribes.

4

5 **MANOJ SWAROOP:** No. I would submit, My Lord, 341...

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** There are some tribes which resemble castes, but
8 there are no castes which have been at least constitutionally been treated at par with tribes
9 upon both ways.

10

11 **MANOJ SWAROOP:** Tribes upon both ways. That was the wisdom. That was the wisdom of
12 casting 341, 342, I would respectfully submit. Inter se, there is a difference of colour, in the
13 simile that I give to Your Lordships, with utmost respect, inter se 341, 342, therefore placed
14 differently, 341, 342.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** But how do you make the sequitur to your
17 argument that, according to you, though the birth marks are different, but at the point of birth,
18 before their birth, when does the homogeneity so to speak, come about according to you?

19

20 **MANOJ SWAROOP:** Yes. So, therefore, to start with, it cannot be denied on this side in my
21 most respectful submission, that there was heterogeneity, cannot be..

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** According to you, when they are born in the list...

24

25 **MANOJ SWAROOP:** When they are being taken up.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** There's a certain... there is a homogeneity.

28

29 **MANOJ SWAROOP:** And it will, in very nature of things, will happen. Because we are
30 talking of races, castes and groups and tribes, there will be heterogeneity. We are talking about
31 different... If we are talking of caste alone, there will be heterogeneity. We are talking of three
32 different categories here.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** Right. But...

35

36 **MANOJ SWAROOP:** There has to be...

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** We need not dwell under heterogeneity because,
2 that you are accepting.

3

4 **MANOJ SWAROOP:** Yes.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** When does homogeneity start?

7

8 **MANOJ SWAROOP:** Yes, My Lord. Homogeneity is that acceptance of the fact, that the
9 Constitution placed them, that there was an inquiry, the 341(1) inquiry by the President, the
10 State Governments were consulted, they had a say, and then in the wisdom put in a category.
11 That is not to assume that they will be one to one similarity, My Lord. There won't be. On the
12 ground there won't be a one to one similarity. Because the pickup point, so to say, is different.
13 As I submitted, there is heterogeneity, there. Has to be accepted, to start with. But then, the
14 sequitur... as Your Lordships put the query to me, is, that they are put in the same entry, and
15 then that entry is protected by the word 'deemed.' And twice over 'deemed,' for the purposes
16 of the Constitution, whenever you are talking of Scheduled Caste, please treat them.... if you
17 are talking of benefit to Scheduled Caste, you will treat them... They are deemed to be 'a' class.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** Could it be... I was just reflecting on it. What's
20 the reason for they use the word 'deemed'? There is no caste in India called a Scheduled Caste.
21 Let's be very clear. There is no caste either in Punjab or Maharashtra or Tamil Nadu, which is
22 called a Scheduled Caste. What the Constitution does is, it deems certain castes as Scheduled
23 Castes.

24

25 **MANOJ SWAROOP:** Yes, My Lord. Indeed.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** So, it puts them into an artificial mould of, what
28 the Constitution terms as Scheduled Castes. That's why, they are saying 'deemed to be a
29 Scheduled Caste.' The Constitution is not creating a new caste. The Constitution didn't want
30 to create a new cast called Scheduled Caste, by putting all these castes and saying - 'Oh, all of
31 you are one.' That could have been contrary to sociological profile. What the Constitution
32 intended to do is, that you are all different disparate castes all over the country. For the
33 purpose of this Constitution, we want to put you together in this one combination called the
34 Scheduled Castes and therefore the 'deeming.' And the 'deeming' is because, by a deeming
35 fiction of the Constitution, they become castes. But, they are called a Scheduled Castes.
36 Scheduled? Because, they are put in a Schedule. So, the deeming is not for any other reason,

1 but because they're deemed to become Scheduled Castes. There is no, otherwise a caste called
2 a Scheduled Caste.

3

4 **MANOJ SWAROOP:** It couldn't have been, My Lord, to further submit, My Lord. It would
5 not have been a caste. It is so debated in *Thomas*. So said so in *Thomas*, in so many words.
6 If Your Lordships will permit me, I'll show that.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** You are right. Because even tribes. Tribes
9 become a caste. How can a tribe become a caste?

10

11 **MANOJ SWAROOP:** That's what you said.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** How can a part of a group of a caste... For
14 instance, when you say that, only this tribe in Gadchiroli in Maharashtra will be deemed to be
15 a scheduled... Scheduled Tribe. It can't be. Normally, if you are a tribe, irrespective of where
16 you are found in the state, you are a Scheduled Tribe. The Constitution created this fiction.
17 But the Constitution makers can say that if you are originating in this particular district of the
18 state, then you'll be deemed to be a Scheduled Caste. So, the reason for that deeming thing is
19 really this, not to bring about this homogeneity. But to indicate that...

20

21 **MANOJ SWAROOP:** My Lord, homogeneity is another part of it. My Lord, I'll elaborate on
22 that. Firstly....

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** But according to you... We testing the argument.
25 We are not concluding at all in our approach. But what you are saying is that once... though
26 there was a pre-existing heterogeneity, once they were all placed together in the schedule, they
27 become a homogeneous grouping of Scheduled Caste. Would that be a correct reading of your
28 submission?

29

30 **MANOJ SWAROOP:** That's my respective submission, My Lord. They have placed... kindly
31 also see, those who are placed in 341 or 342, they are not being treated differently, in the
32 Presidential Order itself. Very significant, My Lord, in my most respectful submission. They
33 are not being treated differently. Why? Because as a sequitur to we just...

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35 **CHIEF JUSTICE DY CHANDRACHUD:** What is purpose of the Presidential Order?

36

37 **MANOJ SWAROOP:** Identification.

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CHIEF JUSTICE DY CHANDRACHUD: You got there. You hit the nail on the head. So, the purpose of the Presidential Order is confined to identification and identification alone.

MANOJ SWAROOP: Yes. And identification is complete, in my most respectful submission, in 341-42. There is no endeavour for anybody, to enter in the temple of 341-342.

JUSTICE B.R. GAVAI: Except the Parliament.

MANOJ SWAROOP: Except the Parliament. That is in the second part. I was wanting to say 341 (1). I stand corrected, My Lord. 341 (1), there is no entry for anyone else.

JUSTICE B.R. GAVAI: That explains law is well settled, that there can't be fingering with the entries in 341, in the Presidential Order. You can't add even commas...

MANOJ SWAROOP: Yes, specifically....

JUSTICE B.R. GAVAI: You can't go to [UNCLEAR].

MANOJ SWAROOP: Yes, My Lord, as My Lord is observing, specifically said so, in 341(2), that even the author, namely the President will not vary by a subsequent notification. It was...

CHIEF JUSTICE DY CHANDRACHUD: We have understood your point on 341. Just to assure that it's not a point which can be rejected. And 5 of our colleagues have accepted that point in 2005. But, now, having said that, how do you explain its interplay with Article 16(4)?

MANOJ SWAROOP: Yes, My Lord. I'll come to that... Permit me...

CHIEF JUSTICE DY CHANDRACHUD: So, this first part is over? First submission is over?

MANOJ SWAROOP: No, My Lord.

JUSTICE B.R. GAVAI: Your argument appears that, there is only heterogeneousness at the point of entry.

MANOJ SWAROOP: Yes.

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JUSTICE B.R. GAVAI: Once they enter that class...

MANOJ SWAROOP: Yes.

JUSTICE B.R. GAVAI: Then it forms the homogeneous class and no differential treatment is permissible amongst them.

MANOJ SWAROOP: Yes. And on ground, when we see the Presidential Order, the implementation thereof in the 1950 Order, we find entries and entries and entries, and no *inter se* difference between them to be treated alike. What it looks like is, if I can further take the point, that there was a threshold acceptance. It can't be... When I'm talking of races, castes and tribes and groups within and parts thereof and even Your Lordships have said - 'It can be from a part of the country or part of the state.' That's the variegated variety of catchment points coming up. When such is the catchment point, it can't be that there have to be a one to one ratio, otherwise have to make 341, 342 and so on. I will have to make maybe 120 entries. No, that was not the idea. Idea was, have two groups to begin with. The third group has come later on. 341... 342A has come later on, in 2018, leaving that, for the time being. 2 groups were sought to be created and then divide them for the purpose of red and green as I gave that... I was wanting to give that simile. The threshold why I say so is that, yes, they are heterogeneous, but they have these common traits in themselves. The basics ones, which I call the red ones. They are shades of red. Indeed they are. It has been emphasized very largely on the other side, that 'heterogeneity.' Heterogeneity. Yes. It is. But, that wisdom.... I'm sorry.

CHIEF JUSTICE DY CHANDRACHUD: What do you mean by common traits? Apart from the fact that all of them have faced varying degrees of discrimination in the past, what is a common trait of different entries? The discrimination is common. The fact that all of them faced discrimination, social discrimination, this is common. But can we say that other traits are common? I mean, what are those traits? Social backwardness, economic backwardness, lack of resources, educational backwardness, the social indicators like infant mortality, maternal mortality, age of marriage of women. So typically age of... early the age of marriage, it's always considered to be a... as societies become more progressive, the age of marriage of girls always increases. So that's also regarded as very important. Then life expectancy. The more undeveloped community, the lower a life expectancy.

1 **MANOJ SWAROOP:** What was Your Lordship's query? That what was that threshold? Your
2 Lordship's query. My Lord, I would respectfully sum it, that backwardness alone, it may be
3 social backwardness, it may be educational backwardness...

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** So according to you, there's one common trait,
6 namely discrimination plus backwardness?

7

8 **MANOJ SWAROOP:** And that ought to have been, and that was, it has to be presumed.
9 Why? Because, that exercise is being done under 341 (1). The President of the country is
10 consulting individual States and Union Territories. The Governors are being considered. They
11 have the advantage of the local scenario. It is assisting the President and he in consultation...
12 And that elaborate consultation process has been elaborated by Your Lordship's judgment, in
13 *Bir Singh* and all those judgments.

14

15 **JUSTICE B.R. GAVAI:** *Jilla Thandan.*

16

17 **MANOJ SWAROOP:** Yes. It's an elaborate inquiry. The State has a full say in it. They, the
18 State had a full say at that time. Yes, that is the stage and that alone is the stage where the State
19 comes in.

20

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

22

23 **MANOJ SWAROOP:** Is my respectful submission.

24

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

26

27 **MANOJ SWAROOP:** They have a say. They are not a mute spectators. But what say? As I
28 submitted My Lord, to begin with the scheme of the Constitution.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Now just tell us this. I've gone to your 2nd... We
31 have, I think, gone to the 1st and 2nd bullet point under Serial Number 1. Where you say -' As
32 amended in 2018?'

33

34 **MANOJ SWAROOP:** Yes.

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36 **CHIEF JUSTICE DY CHANDRACHUD:** Then you have said that -'There were proposals
37 for insertion of 341(3) in 2000...' and that was following the Justice Usha Mehra report.

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MANOJ SWAROOP: Yes, My Lord.

CHIEF JUSTICE DY CHANDRACHUD: Was it a bill, which was ever moved for amending or...?

MANOJ SWAROOP: it was a proposal. And the proposal said...

CHIEF JUSTICE DY CHANDRACHUD: Proposal at what stage?

MANOJ SWAROOP: It was a proposal right after the judgment in *Chinnaiah* . Just after *Chinnaiah*. Right after *Chinnaiah*.

RESPONDENT's COUNSEL: This amendment was made for reservation purpose, My Lord.

CHIEF JUSTICE DY CHANDRACHUD: Yesterday when we were reading that report of Justice Usha Mehra. At the end, the learned judge says that -'It is proposed that... we propose that Article 341(3) should be included', right? But when you say proposal, we just want to know there is any...

MANOJ SWAROOP: There is some assistance...

CHIEF JUSTICE DY CHANDRACHUD: Was there any bill referred to as standing committee, the bill lapsed or didn't come to that stage at all?

MANOJ SWAROOP: I'll investigate that very frankly. But what information I have is, that this was referred to the Justice Usha Mehra Committee...

CHIEF JUSTICE DY CHANDRACHUD: Other side may also just find out a little bit, Mr. Farasat, on what happened to that 341(3), just a matter of historical importance.

MANOJ SWAROOP: Certainly, My Lord. There's something that turns assistance in this regard, that, what was that content and why and what was not accepted. What was suggested by Justice Usha Mehra committee was, an addition to 341(3), and the language is this. 'Parliament may, by law, provide for sub categorisation or de-sub categorization of caste, race, tribes or parts or groups within any caste, race, or specified in the notification, issued under 1

1 or via law made by the parliament under Clause 2.' It was suggested that there can be sub
2 categorisation. Not accepted. Right after **Chinnaiah**.

3

4 **JUSTICE B.R. GAVAI:** Then go to the [UNCLEAR] also [UNCLEAR] what sub caste...

5

6 **MANOJ SWAROOP:** I'll be very clear on that. Then I'll make my submission on that. Bullet
7 point 2, My Lord, if I can elaborate in item one, 342A. 342A is a 2018 endeavour and 3 things
8 are coming in 2018. We are having to add 342A, 338B and 366(26C), all in tandem with each
9 other.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** 2018 amendment brought in?

12

13 **MANOJ SWAROOP:** Brought in 342A, the entirety of it,

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** Yes,

16

17 **MANOJ SWAROOP:** Which has A,

18

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

20

21 **MANOJ SWAROOP:** And it brought in 338B, which is a commission for the same purpose,
22 SEBCs. And it brought in, the definitional in 366 in 26C. It brought in these three things. What
23 is the submission that follows is, that they borrowed the 341, 342 model. Now, we have the
24 1992 judgment, **Indra Sawhney**, we have all other judgments and when I take Your
25 Lordships to the Select Committee report, they are saying that Honourable Supreme Court in
26 **Indra Sawhney** wanted us to make a permanent commission. And that 340 commission is
27 not the statutory constitutional commission. There is a commission, but it is the experiences
28 of the SEBCs. That is not a statutory commission, that is not a constitutional commission. We
29 want a constitutional commission for this purpose also, which will investigate and suggest the
30 working on the ground, to put it very briefly. Yes, it was a direction which is implemented now
31 in 2018. Submission I am making *vis-a-vis* 342A is, that the march, that the constitutional
32 march appears to be in the direction of 341-42, that is, have a Presidential Order, please don't
33 have this backward and more backward. **Indra Sawhney** model was a model - backward,
34 more backward in SEBCs. They are specifically saying - 'Please don't have that model, please
35 have a model of 342A for SEBCs.' That is President will consult the States and will come out
36 with a list. And the variation will only be by the Parliament by law. I wanted to further
37 emphasize the implication of 341(2) as a sequitur to this scheme of the Constitution. My Lord,

1 therefore advisedly in 341(2), expression is being used, 'include or exclude'. It is in tandem
2 with 341, My Lord. Absolutely in tandem with 341. Because in the President has...

3

4 **JUSTICE B.R. GAVAI:** Parliament finds that a particular caste has reached, has come to a
5 mainstream. And Parliament can exclude that from 341.

6

7 **MANOJ SWAROOP:** Yes. Why the word 'vary' was not included in 341(2)? I asked myself
8 this question, My Lord. Only 'include or exclude.' It's crucial to bring to Your Lordship's very
9 kind notice, My Lord. The expressions used in 341(2) akin to 342(2) and all these, the second
10 part of the 341 chapters... is 'include in or exclude from.' Why? Because, they are now 'deemed
11 to be'... This is a Constitutional list, as My Lord, the Chief Justice put it. This is a list borne out
12 of the Constitution never before. It couldn't have been a caste, My Lord. Because it would have
13 been foul on 16(2). 16(2) specifically says -'Please don't discriminate on the ground of caste.'
14 Tribe, incidentally, is not there in 16(2). But, caste is there. Therefore, **Thomas** says very
15 specifically -'This is a class. This is a special class.' I'm using the exact phraseology, as used in
16 **Thomas** -' This is a class.' This... as a big run up to discussions. In 165 paragraph, the
17 Honourable Court says that in **Thomas**, that -'This is a class. This is a special class.' Para. 165.
18 Therefore, I would respectfully submit that, very advisedly, it is in (2) that include or exclude.
19 There can be no other shade of variation. State still has no role. It will be done by the
20 Parliament. And parliament by law will only include or exclude. Why? Because this is all
21 homogeneous now and deemed to be homogeneous. You can't pierce that veil. That is the...
22 That appears to be My Lord, in my most respectful submission, the use of the word 'deemed'.
23 That - 'Please don't pierce that. Either include or exclude.' And My Lord, that fresh experience
24 is not shut out. It is in (2). The fresh experience will be translated in this fashion the State
25 Governments will have a fresh experience. They will send it to the commission. There is a
26 commission now. There was always a commission, 338. The likes of 338 for all the 3 categories.
27 They will... There is a commission. Please send it to the commission. Commission is an expert
28 body sitting there.

29

30 It's a Constitutional Commission. A route created. That's the other submission, it is a route
31 created, a constitutional route already suggested. And if suggested, My Lord, any other route
32 will be out, will be excluded by necessary, necessary implication. The route is, that - 'Please,
33 you have fresh experience? Yes, of course it can be a fresh experience. Nobody can say that
34 fresh experience has no ventilation.' Yes, State Governments will send it to the commission.
35 The commission's report as per the language of 338, to be put before the Parliament. Copy to
36 be sent to the State Legislature, to the State Governments. To be sent to the President.
37 President will exercise 341(2) and will include or exclude, no vary. No vary there, in 341(2)

1 also. Even the President cannot vary. I would respectfully submit, on the scheme of the
 2 Constitution. And further indictment My Lord, further indication, if I may say so, in 341(2),
 3 that the author of 341(1) is injuncted that -'Please don't vary it.' Why? Because, remembering
 4 the words of Dr. B.R. Ambedkar. 2 things he said, My Lord, not only one thing has been
 5 emphasized before Your Lordships. That famous paragraph which is often quoted, he said -
 6 'Political factors and disturbance in the list.' He said two things. Please don't cause any
 7 disturbance. 'Disturbance' is far more. 'Political factors' is one, disturbance in the list. Goes
 8 hand in hand with no variations. State still doesn't have a role.

9
 10 I've completed 341, 342. State doesn't have a role except 341 initial part. You will be consulted.
 11 You, the State Government, will be consulted. Your point of view will be taken. The call will be
 12 taken by the Honourable President. He will make a list. This last bullet point on (1) is just to
 13 give an illustration My Lord, that when we see... this is on the threshold, the submission is that
 14 when we see 341(6) for economically weaker sections, we find that a threshold has been
 15 prescribed, My Lord. That somebody whose income is this much, is below this, is eligible. So
 16 therefore, there had to be a threshold catchment point. Otherwise, if I'm going to have a one
 17 to one ratio, I'll have to have 120 entries. It'll be unworkable. I'm grouping them together and
 18 then I'm protecting it by a deeming fiction, for the purposes of this Constitution. And My Lord,
 19 it can't be argued as it was... As was argued on the other side, that when I make 341, it has
 20 gotten, it has... I am making that list and it has got nothing to do with reservation. Because,
 21 the earlier sections are talking of reservation. The identification of 341 is identification for the
 22 purpose of this Constitution. Wherever I need to talk of Scheduled Castes/Scheduled Tribes, I
 23 will be taking the identified category from 341. Not to say that 341 has nothing to do with a
 24 reservation. Why? Because, reservation word is not used there. It is contained in a different
 25 chapter. It's contained in Chapter 13. 16(4) is contained in part 2. In part 3, part 3. My Lord,
 26 that takes me to summit. This EWS example is for that purpose.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** So, what is your formulation on the EWS point?

29

30 **MANOJ SWAROOP:** The submission there is, My Lord, that this is a threshold.... Yet
 31 another example in the Constitution, that 'threshold prescription,' which manifests itself. 341
 32 is an exercise which was done by the President. We don't have the access to that. This is an
 33 exercise which is out and to be read. So, 41(6)... I'm sorry. 14(6), 14(6).... 16(4), is it?

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** You said 14 by mistake. That's why...

36

37 **MANOJ SWAROOP:** No, I'm sorry.

1

2 **CHIEF JUSTICE DY CHANDRACHUD:** It's 16(6). 'Nothing in this Article could prevent
3 the State from making any provision for the reservation of appointments or posts in favour of
4 an economically weaker sections of citizens other than the classes mentioned.'

5

6 **MANOJ SWAROOP:** Yes, My Lord, the 16(6), 'Nothing in this Article prevents the State
7 from making any provision for reservation of appointments or posts in favour of economically
8 weaker sections of citizens other than the class, in addition to subject to a maximum of 10%.'
9 And here, there is a prescription of the economic threshold. Yes, there is a prescription of the
10 economic threshold. That is to say My Lord, that is to say, that - 'In a classification, one to one
11 relationship is difficult to achieve, and that was not the policy. That's not the scheme. Basic
12 traits being found grouped together.' Nobody's questioning that. So, to begin with, we did have
13 heterogeneity. But then, the Constitution requires us, that this is a constitutional class now.
14 This is not a caste, otherwise it would have been bad on the language of 16 (2). Though
15 classification on the basis of caste, this is a class.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Now, for the purposes of Article 16(4), when the
18 expression that is used as 'backward classes,' it will include the SEBCs...

19

20 **MANOJ SWAROOP:** Yes, My Lord.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** It will include the SCs, and the STs. So, OBCs,
23 SCs and STs.

24

25 **MANOJ SWAROOP:** Yes, My Lord.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** Now, for the purpose of Article 16(4), does the
28 expression 'backward classes' means the entirety of this Scheduled Caste is one
29 conglomeration or can it refer to individual entries in the Presidential list, also as a backward
30 class?

31

32 **MANOJ SWAROOP:** Yes, My Lord.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** Can we deny the fact that, an individual entry in
35 the Presidential order is also a backward class? If it is a backward class, then 16(4) would
36 recognize the power of the State to make a special measure in relation to that particular

1 individual entry as well. On the other hand if you say that -'No. Scheduled Caste as a whole,
2 is a backward class.' Then that is not permissible.

3

4 **MANOJ SWAROOP:** I would say the latter, with respect to my submission. And why My
5 Lord? Throughout the Constitution, Your Lordships would find only one expression coming
6 when I take Your Lordships to 335, the efficiency. When I take Your Lordships to the other 46,
7 when I cite 46, Your Lordships have seen it over the last two days repeatedly, expression
8 Scheduled Caste /Scheduled Tribe will occur as such. And even 16(4). Kindly see, in favour
9 of...

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** If we look at, then we understand the interface
12 between 16 and 341, we must recognize that in 16 itself, certain restrictions or certain measures
13 can be imposed only by parliament. So 16(3), State has no role. 16(3) is only Parliament. It
14 says -'Nothing in this Article shall prevent Parliament from making any law.' 16(4), on the
15 other hand, says -'State.'

16

17 **MANOJ SWAROOP:** Yes.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** Which will include the Union as well as the State
20 Government. It refers to provision, not just law. So, likewise, 16(4)(a) State, 16(4)(b) State,

21

22 **MANOJ SWAROOP:** Yes.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** 16(5) and 16(6).

25

26 **MANOJ SWAROOP:** Law, by law.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** 16(5) Law, 16(6) State. Therefore, the provisional
29 16, while 341 left the designation to Parliament, 16 by itself recognizes that the States will be
30 implementing these special measures or making any provision. Provision as 16(4). So, the role
31 of the States is directly then, recognized by 16(4).

32

33 **MANOJ SWAROOP:** They have a role, but what role, is important. They have a role, because
34 that picture of 341 is incomplete without 16(4). 16(4) will have no meaning if 341 exercise is
35 not there. That's how they're interrelated. So therefore, as the Chief Justice asked me, what is
36 341? And my respectful response - identification process. But can the State take upon itself the
37 identification process, is the question I ask myself.

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CHIEF JUSTICE DY CHANDRACHUD: No. They can't do it.

JUSTICE B.R. GAVAI: There's no question of identification.

MANOJ SWAROOP: They have no role in identification.

JUSTICE B.R. GAVAI: 16(4) also, only an enabling provision. Suppose if the State decides that it will not provide for reservation.

MANOJ SWAROOP: Before the vehicle moves forward... I'm sorry.

JUSTICE B.R. GAVAI: The more necessity to provide reservation. That's the end of the matter. Therefore, can you deny the ground realities that, in a list, blacksmiths are there and scavengers are also there. Did they face the same degree of discrimination when they are brought in the list, when they are not untouchables among the untouchables, and therefore recognizing that, if the State decides to provide among that class a preferential treatment, would 341 come in that way?

MANOJ SWAROOP: Yes. My respectful submission is, that exercise is an exercise which has been done in 341. And the shades of red and the shades of green have been identified.

JUSTICE B.R. GAVAI: No. Exercise of identification of the classes or groups, which suffer from discrimination..

MANOJ SWAROOP: Have been identified.

JUSTICE B.R. GAVAI: But they don't go serial wise, that higher the number in the list, the more discrimination or lesser than...If it is serial number 15, the least discrimination. So if the State...It is for the State, in order to achieve social and economic justice, to provide for reservation. And while doing that exercise, if it tries to find out, that among that class, who are the more disadvantaged, and thus some special provision for that, it would be barred by 341.

MANOJ SWAROOP: Yes. My respective submission is that, it would be barred by 341 and the reason is...

JUSTICE B.R. GAVAI: Then it will perpetuate the inequality among those classes.

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MANOJ SWAROOP: Yes. That's the submission on the other side. And that's Your Lordship's query to me. May I respectfully respond? This submission that comes from the other side is really questioning 341 exercise.

JUSTICE B.R. GAVAI: No, not at all. After *N. M. Thomas*, it has been held that even if 16(4) was not there, still taking cues from Article 14 and 16(1), it could have made reservations.

MANOJ SWAROOP: This is an equality measure. Because, the purpose is to remove inequality, so as to bring them equal. So, taking... if your submission is to be accepted, take for example, a particular caste in Maharashtra. For last 75 years, if a particular caste has been occupying, 75% or 80% of reservation, among that 13% reservation. And there are some castes which have a sizeable representation, but they don't even 1 or 2% reservation. So, would it not amount to perpetuating inequality amongst that class, which has been identified under 341? I need to remove that inequality. If the State decides to do some exercise under 16(4)... or 15(4)?

MANOJ SWAROOP: Yes. The question that is being asked...

JUSTICE B.R. GAVAI: 341 itself said, it does not provide for reservation. It only points for what could be Scheduled Caste. And then the reservation is provided under 16(4) or 46 provide that it shall be the duty of the State to make special provisions for advancement of Scheduled Castes/ Scheduled Tribes and backward classes, for the purpose of 330.

MANOJ SWAROOP: I would respectfully submit, My Lord.

JUSTICE B.R. GAVAI: Would it not hit at the very concept of Article 14?

MANOJ SWAROOP: Yes, My Lord. I quite see that. May I make my respectful response to what comes from My Lord's, My Lord? I would submit My Lord, that, this is the precise scheme of the Constitution. The scheme is, that, "we will identify." And when identified,... This submission that comes from the other side is actually questioning the scheme itself.

JUSTICE B.R. GAVAI: No, they don't question the scheme. They don't say that-'The identification is not correct.' They say that -'Among that identification...'

MANOJ SWAROOP: Allow us.

1 **JUSTICE B.R. GAVAI:** 'There are certain classes which are more [UNCLEAR], and
2 therefore, allow us to bring equality in real sense.'

3

4 **MANOJ SWAROOP:** What is being put to me is, My Lord, this... That having identified, say
5 39 in Punjab. We have 39. Exactly 39 in Punjab. Why can't the State... What is being put to me
6 is... Why can't the State say that on experience, we find that Mazhabi and Valmikis, they
7 deserve some extra preference? 50%.

8

9 **JUSTICE B.R. GAVAI:** Special need [UNCLEAR] among those specials.

10

11 **MANOJ SWAROOP:** Among the special. Why can't they say, especially Your Lordships put
12 it to me, in view of 16 (4). Why? Because, is it not an equality doctrine which is being followed
13 by them? And if they are doing it, what is wrong? Where is the bar? That's, as I understand,
14 the question. My respectful submission is this, that this 'exercise of equation' has been done
15 and there is a mechanism to change it. And there is...

16

17 **JUSTICE B.R. GAVAI:** But, you, yourself argued...

18

19 **MANOJ SWAROOP:** Yes, My Lord.

20

21 **JUSTICE B.R. GAVAI:** There is no provision for variance. Either include or exclude?

22

23 **MANOJ SWAROOP:** Yes.

24

25 **JUSTICE B.R. GAVAI:** So, if there is neither a necessity for inclusion, nor necessity for
26 exclusion, but still there is a situation, that some classes among that class under 341, have
27 reached a particular level, and others are still at the bottom, would some tinkering in that
28 would not be permissible, without touching the list of the special provisions to everyone who
29 are included in that list?

30

31 **MANOJ SWAROOP:** My Lord, kindly see this exercise. Therefore, the word 'deemed' comes
32 in, My Lord.

33

34 **JUSTICE VIKRAM NATH:** One more aspect you need to consider. In 4, it says - 'Any
35 backward class.' That's the widest term used. There are three lists, 341, 342, 342A. Can the
36 State not identify another class as a backward class, which is not included in 341, 42 and 42A?

37

1 **MANOJ SWAROOP:** It is being said so, My Lord. It is being said so.

2

3 **JUSTICE VIKRAM NATH:** No, can the State do it or not?

4

5 **MANOJ SWAROOP:** I can. I'm sorry My Lord.

6

7 **JUSTICE VIKRAM NATH:** Can the State do it or not? Under 16(4)?

8

9 **MANOJ SWAROOP:** It is being said, and authoritatively said in *Indra Sawhney*, that -
10 '16(4)... 'Please don't read it as limiting the power.

11

12 **JUSTICE VIKRAM NATH:** Correct.

13

14 **MANOJ SWAROOP:** Because, the opening words are - 'Nothing in this Article shall prevent
15 the State from making any provision.'

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** But significantly, 16(4) doesn't use... It uses the
18 expression 'backward class'. It doesn't use 'the socially and educationally backward classes'.

19

20 **MANOJ SWAROOP:** Any backward class.

21

22 **JUSTICE BELA M. TRIVEDI:** But at the same time, it doesn't use the word 'caste' or 'tribe'.
23 It has to be a class as a whole.

24

25 **MANOJ SWAROOP:** Yes.

26

27 **JUSTICE BELA M. TRIVEDI:** So, the State would have the power to make reservation for
28 the backward class, not for the caste or tribe. So, that fine distinction.

29

30 **JUSTICE VIKRAM NATH:** Caste is not there in 341, 342, 342A.

31

32 **JUSTICE BELA M. TRIVEDI:** Backward class, which is not adequately represented, that
33 has to be seen. Not a particular caste.

34

35 **MANOJ SWAROOP:** Yes. Otherwise.. I'm very grateful... Otherwise, that will be
36 classification on the basis of caste.

37

1 **JUSTICE BELA M. TRIVEDI:** That's a difference between caste and class. And all this
2 would fall under... the backward class would include SC/ST and SEBC. So that will be a class
3 by itself. It's not caste.

4

5 **MANOJ SWAROOP:** So, class benefit is contemplated. Lordship, Yes. Benefit can accrue to
6 a class as a whole. And My Lord kindly see the facts in *N. M. Thomas* .

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Swaroop, tell us one thing. Does *Indra*
9 *Sawhney* continue to insofar as subcategorization is concerned?

10

11 **MANOJ SWAROOP:** OBC. Backward and more backward.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Right. Yes. It permits that subcategorization for
14 the OBC. We call them OBC just as a...

15

16 **MANOJ SWAROOP:** Backward. More backward.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Now, *Indra Sawhney* permits the
19 subcategorization.

20

21 **MANOJ SWAROOP:** It does.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** Is *Indra Sawhney* overruled by the 2018
24 Constitutional Amendment?

25

26 **MANOJ SWAROOP:** It's substantially, My Lord. When I take Your Lordships to the debate,
27 it's very interesting.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** *Indra Sawhney* continues to be good law.
30 What does the 2018 amendment for Article 342A does?

31

32 **MANOJ SWAROOP:** It does this, My Lord.... Sorry.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** See, under 341 and 332, in relation to the
35 Scheduled Castes and Scheduled Tribes, exclusive power is vested in Parliament, right? What
36 342A does is that, if 342A breaks it into 2. It gives the exclusive power to Parliament, in
37 relation to the Central list, for the purposes of the Central Government, right?

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MANOJ SWAROOP: Yes.

CHIEF JUSTICE DY CHANDRACHUD: 342A (1) refers to 2 things. The Central list for the purpose of the Central Government, right? 341 says -'For the purpose of the Constitution.' That's the other distinction. Now 342. 342A Clause 3, allows the states also.

MANOJ SWAROOP: To have an independent list, separate list.

CHIEF JUSTICE DY CHANDRACHUD: For the purpose of the states. In fact, it says - 'For the purpose of the State, every State or Union Territory, may by law, prepare and maintain for its own purposes.' So, it has bifurcated 341 and 342 into 2, by giving the states also the power to notify.

MANOJ SWAROOP: In regard to SEBCs.

CHIEF JUSTICE DY CHANDRACHUD: Now, notwithstanding this. Notwithstanding this, the logic of *Indra Sawhney* in regard to subcategorization into the backward, and more backward is not taken away by the 2018 Amendment, which was made by Parliament. They could have done it, but they have not done it. Therefore, the logic of subcategorization in relation to the OBCs which was brought about in *Indra Sawhney*, still continues to hold the field, notwithstanding the 2018 Amendment.

MANOJ SWAROOP: Kindly see My Lord...

CHIEF JUSTICE DY CHANDRACHUD: Now, if that is so, would it not be appropriate to then to read, that the power of subcategorization is also implicit in 16(4) itself?

MANOJ SWAROOP: Kindly see My Lord, 342A.

CHIEF JUSTICE DY CHANDRACHUD: Subcategorization... subcategorization, which 342A permits, is not subcategorization. Is actually... I used a wrong phrase...

MANOJ SWAROOP: 2 lists.

CHIEF JUSTICE DY CHANDRACHUD: It contemplates that there can be 2 lists.

1 **MANOJ SWAROOP:** Yes.

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** A Central list for the purpose of the Central
4 Government, and State list for the purpose of the State Government. So what is the distinction,
5 as I said, between 341, 342 and 342A?

6

7 **MANOJ SWAROOP:** For the purpose of the Constitution...

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** There is only one list, Central list made by
10 Parliament. Two. It is for the purpose of the entirety of the Constitution. Right? Now, is there
11 something intrinsically in 342A, which will indicate that 342A recognizes the power of
12 subcategorization, which 341 and 342 don't? There is... The hypothesis which I want to place
13 before you is, 'There is nothing in 342A in regard to subcategorization. Just as there is nothing
14 in 341 and 342 in regard to subcategorizations.'

15

16 **MANOJ SWAROOP:** There's nothing.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Despite that, *Indra Sawhney* recognizes the
19 power of subcategorization between the backwards and the more backward and 342A was not
20 there, when *Indra Sawhney* was pronounced. So even before *Indra Sawhney*, even
21 before 342(A) is brought on the Constitution by the 2018 amendment, our Court reads the
22 power of sub-categorisation, where does it locate it? It locates it not in 341 and 342. It locates
23 it in 16(4). Therefore, the insertion of 342A does not alter that position.

24

25 **MANOJ SWAROOP:** I would respectfully submit..

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** If that did not alter the position. The Parliament
28 could have, while making the constitutional amendment, then why would it be recognized it
29 in relation to Scheduled Castes also? At a conceptual level, Brother Gavai just said you know,
30 for instance, otherwise what will happen is, that the more advanced among the Scheduled
31 Castes, they will grant all the benefits. In fact, Brother Gavai, you can tell that example of the
32 MBBS in Maharashtra.

33

34 **JUSTICE B.R. GAVAI:** In Maharashtra, in 1985, there was not a single candidate from
35 Mehtar community who had got admission in MBBS. So for the first time in 1985, and that
36 too through court, he could get admission. Fortunately or unfortunately, I was his lawyer. He
37 didn't go to that... He became a doctor MBBS, got a Government job. He became a doctor and

1 wrote to me, which I cannot speak. So, that was one of the most happiest moments for me that
2 there was a *pro bono* case. 35 years after the Constitution came into... 45 years and it is one of
3 the most disadvantage... Mehtar Bhangi, you know, they have to do the job of scavengers. Now
4 the position, at least in Maharashtra is that, sometimes, the merit list for MBBS of general
5 category and the SC category is almost same. Because of **Indra Sawhney**, many of the
6 Scheduled Caste persons get admitted in the general category because they can compete with
7 the general category candidates. Because **Indra Sawhney** says those who are admitted in
8 general category, they can't be counted in Scheduled Caste category or Scheduled Tribe
9 category.

10

11 **KAPIL SIBAL:** It is not sub categorisation, it is categorisation for the [UNCLEAR]

12

13 **JUSTICE B.R. GAVAI:** Categorisation for the purposes of giving a beneficial treatment so
14 as to remove inequality.

15

16 **KAPIL SIBAL:** So it is not subcategorization , constitutionally, not per se subcategorization
17 . You are saying, you're giving the benefit, rather giving this much of benefit to A because B is
18 getting all the benefit.

19

20 **JUSTICE B.R. GAVAI:** It is and to bring equality among that class, followed by 341 and 342.

21

22 **KAPIL SIBAL:** [UNCLEAR] amount of equality in categorization. .

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** In your rejoinder and Mr. Gurminder Singh, you
25 will have to deal with this point which Justice Bela Trivedi just made, that 16(4) contemplates
26 that you take whatever makes special provisions in regard to a backward class. And suppose
27 you say these two castes are going to get differential allotment, would that be doing violence
28 to the language of 16(4)?

29

30 **KAPIL SIBAL:** Not at all, because 16(4)...

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** Just reflect on it, because we'll like your
33 response, we'll just leave it at this. We'll just flag it and you can deal with it in your rejoinder.
34 But I might forget to ask and then I realize at the end of it all that I didn't ask that question.

35

36 **MANOJ SWAROOP:** My Lord, my respectful response. In 16(4), *vis-a-vis* 342A, as the Chief
37 Justice questioned, I would respectfully submit 342A, which was not there, of course at the

1 time of *Indra Sawhney*. we have that now, that the list will be prepared and there is a similar
2 deeming provision in the opening of 342A.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** 342A is identical to 341 and 342, save and except
5 for bifurcating the power. It says now, there can be a Central list for the purpose of the Central
6 Government, and a State list for the purpose of the State Government.

7

8 **MANOJ SWAROOP:** So, My Lord, I was drawing the point that, how have we moved away.
9 How have we moved away constitutionally from *Indra Sawhney*? That was My Lord's
10 question. I therefore wanted to read 342 A. 342 A. The first part of it. That unlike then, in '18
11 now we have who will identify. We didn't have the benefit. Obviously, of 342 A in 1992, when
12 *Indra Sawhney* was decided. The later experience, what is brought about is -'The President
13 may, with respect to any State, Union Territory, or where it is a State after consulting with the
14 Governor notification specify socially, educationally backward class of citizens for the purpose
15 of this Constitution, which shall be deemed to be socially, educationally backward class.'

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** When 15(4) use the expression that State, 15(4)
18 use the expression social and educational backward classes citizens, right? So the backward
19 class will also include social and educational classes citizens. But 15(4) made it implicit. But
20 when it says State, the Centre could identify it and the State could identify it because for the
21 purpose of the Central Government special measure.

22

23 **MANOJ SWAROOP:** There is a difference My Lord.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** Scholarships by the Union Government in the
26 Ministry of Human Resource and Development. They can identify. States can do it for the
27 State Civil Service. State scholarship. I'm just giving you an example. So what 338A now does
28 expressly recognize that for the Central Government may do it for its purposes. To that extent,
29 there's a little variation from 341 and 342.

30

31 **MANOJ SWAROOP:** There is indeed, because 3 is there. 342A(3) is there. That is the
32 variation. That variation is there. My Lord, what further variation that has taken place and
33 why we have moved...

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** Could that be an indicator. I'm saying something
36 in your favour. Could that be an indicator, that insofar as a module for the SEBC is concerned,
37 it's a little different from the model which the Constitution adopts for the SC and ST's.

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MANOJ SWAROOP: Certainly, My Lord.

CHIEF JUSTICE DY CHANDRACHUD: We are thinking about the problem. That's something which we can put in your favour, actually.

MANOJ SWAROOP: My Lord, it has to be respectfully answered yes, there is a difference. I would want you to make this further submission, that we have a model identical in 342A, where the identification was earlier being done by the Government... *Indra Sawhney* of the SEBCs, the OBCs. But now that identification is identically being done as 341 by the Honourable President. That is why we have moved away from that. And when it was left in the hands of the executive, it could be backward and more backward in *Indra Sawhney*. But now we have an identical model of 341, 42 to say that exercise will be similar. President will do it. He will consult the Government, State Governments, and he'll prepare a list of SEBCs for that individual state. That's where we have moved away constitutionally. Is my respect to submission.

CHIEF JUSTICE DY CHANDRACHUD: So, now you have finished your item one. I think your point one. Now you can briefly deal with *Thomas*.

MANOJ SWAROOP: Permit me one submission My Lord. Justice Gavai was pleased to ask me on 16(4) if I can respond to that, indulgence. Your Lordships put a question to me identification has been done, there's no difficulty. They are not wanting to tinkering with that. Once they are wanting to get the benefit. If they don't prescribe it under 16(4) you will get nothing. I'll get nothing. But if they prescribe in 16(4), then why can't they address the iniquities which are obtaining within the entries. This is the question as I understand, My Lord's question. My Lord, my respectful answer is this, that this entire exercise has been done in 341.

JUSTICE B.R. GAVAI: Entire exercise of identification of the social discrimination, but not the degree of discrimination. We are again coming to square....

MANOJ SWAROOP: I have to make a further, this is sequitur that I must submit further. This is the first part.

JUSTICE B.R. GAVAI: The ground realities are that, among the untouchables also some untouchables skip others in that list to be untouchables.

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MANOJ SWAROOP: That disparity, how is it to be addressed, and why the State is giving the benefit under 16(4)? Why is it? Where is the bar? Is My Lord's question.

JUSTICE B.R. GAVAI: So to remove those disparities. If the State is doing some affirmative action.

MANOJ SWAROOP: Yes. My respective submission is on the scheme of the Constitution. That there is if that iniquity is... inequality is there, then what is the scheme of the Constitution as I respectfully submit Your Lordships kind consideration. My Lord, exercise of identification having been done in 341, and the imposition of the word 'deemed', they become a homogeneous class.

CHIEF JUSTICE DY CHANDRACHUD: You made the point.

MANOJ SWAROOP: They become a homogeneous class.

JUSTICE B.R. GAVAI: Once they are part of the class there can't be any inter se discrimination.

CHIEF JUSTICE DY CHANDRACHUD: [UNCLEAR]other side now,

MANOJ SWAROOP: And that's the constitutional mandate, as I respectfully submit. Having said that.....

CHIEF JUSTICE DY CHANDRACHUD: Now let's move ahead now, we must make some headway now. Because that, I think we've also asked the question.

MANOJ SWAROOP: I won't go point wise as I see it My Lord. I've covered two, three, four more points as I am making a submission.

CHIEF JUSTICE DY CHANDRACHUD: *Thomas* because that's your item, you can just... may be a minute or two, because, *Thomas*, you have read, but you can make your point in *Thomas*.

MANOJ SWAROOP: I'll do, My Lord. Just one or two lines on *Thomas*.

1 **CHIEF JUSTICE DY CHANDRACHUD:** What do you want to say on *Thomas*?

2

3 **MANOJ SWAROOP:** Can I seek indulgence to make a submission on 16(4)?

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** Go ahead, no problem. That is your point 4?

6

7 **MANOJ SWAROOP:** Yes. That's the last dot on that. On 16(4), I was wanting to answer the
8 query by My Lord, Justice Gavai

9

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

11

12 **MANOJ SWAROOP:** Why can't they address that question? My Lord, that question has to
13 be addressed. I can't be submitting that, that inequity cannot be addressed. It has to be
14 addressed. But by whom? We have a Constitutional Commission now, 338B, the likes of 338,
15 for all the three categories. SC/ST and even for SEBCs also, we have now. Concentrating on
16 Scheduled Castes, we have 338. A Constitutional Commission. So that experience will then go
17 to the commission, will then go to... the State Governments will have a feedback, that report
18 will be placed before the Parliament, will be placed before the State Legislature, will be taken
19 to the President, and he will include or exclude. Therefore, My Lord I submitted right in the
20 forefront, that the power very instructively, very, very importantly in 2... 341(2) is only 'include
21 or exclude.' Why? Because, this is in tandem with 1. Deemed first to be all equal. Now you have
22 fresh experience, I will exclude or include. It's not as if there's no ventilation for fresh....

23

24 **JUSTICE B.R. GAVAI:** That's what you've argued in the beginning. The power is only to
25 either include or exclude. Not to vary.

26

27 **MANOJ SWAROOP:** Yes, not to vary. So there is room for fresh experience, as it ought to
28 be.

29

30 **JUSTICE B.R. GAVAI:** There's no middle path according to you.

31

32 **MANOJ SWAROOP:** I'm sorry, My Lord?

33

34 **JUSTICE B.R. GAVAI:** There's no middle path, according to you.

35

36 **MANOJ SWAROOP:** I would submit and not on the angle of 16(4). 16(4) is not the route.

37

1 **JUSTICE B.R. GAVAI:** That... We've already appreciated your submission.

2

3 **MANOJ SWAROOP:** Because 16(4)...

4

5 **JUSTICE B.R. GAVAI:** We've understood that submission.

6

7 **MANOJ SWAROOP:** Yes, My Lord. I was just wanted to emphasize this. 16(4) is -'I am the
8 State Government. I can prescribe, my prerogative. I may. Not prescribe. I may prescribe 15%-
9 16%. No more. And as a class.' Because, if I do it with regard to *Valmiki* or *Mazhabi*, I'm doing
10 it on the basis of caste. Then I'm foul on 16(2). I have to do it as a class. And this word,
11 Scheduled Caste, Scheduled Tribe is running throughout, hand in hand. 338, 335, 46 all these
12 articles throughout. Yes, My Lord, **Thomas**, my respectful submission.... It was submitted,
13 that lumping will be explained. This is being sought to be answered here, in 2. At one go, that
14 lumping will take place. All the benefits will come to one stand... and this is not a monolith
15 block. The birth mark exists. My Lord, the birth marks do exist. They exist, real as life. Why?
16 Because those entries are there for anybody to read. Open the Presidential Order of 1950, those
17 birth marks are there. Those marks itself, originals are there, what birth marks. They are live
18 as anybody. But, they stand eclipsed - is my most respectful submission, by the constitutional
19 mandate, by the constitutional scheme. When the scheme says that -'They are now, for the
20 purpose of this Constitution. This is my list.' This is a constitutional list, for the first time. The
21 birth mark of a race, part, caste, tribe, whatever... tribal, all those vanish. It stands eclipsed.
22 So, it is heterogeneous and homogeneous at the same time. Heterogeneous at the birth level,
23 at the constitutional level, 341 level, it is eclipsed. It still remains. Anybody can see it. Only
24 eclipsed. That's the aspect of homogeneous and heterogeneous there. And My Lord, kindly see,
25 just one or two observations, I can...

26 Yeah, thank you.

27

28 **MANOJ SWAROOP:** My Lord, Volume..

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** There is that certain pre-existing traits are
31 eclipsed by the Constitution, may to a certain extent hold good in the case of political
32 representation. See Article 330, where 330 says that -'Seats shall be reserved in the house of
33 the people for a) The Scheduled Castes b) The Scheduled Tribes.' So once it says if they shall
34 be reserved for the Scheduled Castes, the Scheduled Tribes, there cannot be any further
35 bifurcation of the Scheduled Castes. It is reserved. And the proportional is indicated in Clause
36 2. So, there the Constitution has provided a clear indicator that you can't... no state can say

1 'well, I'll reserve only for a few of my castes, because they are...' For political representation,
2 all the Scheduled Castes are bunched together as the Scheduled Castes, the Scheduled Tribes.

3

4 **MANOJ SWAROOP:** Identically kindly see 335. The claims of the members of the Scheduled
5 Caste and the Scheduled Tribe shall be taken into consideration. I would respectfully submit
6 there is no room to say that the individual entries can be reached. It's being talked off as a
7 class, members of that class. Kindly see the definition of it, it throws light. 366, of proposed
8 question what the Chief Justice has please put to me, 366(24). 366(24) thereof. The definition.
9 'Scheduled Castes means' - it's exhaustive, means - 'such castes, races, parts or groups within,
10 such castes, tribes as are deemed under 341, to be Scheduled Castes for the purpose of this
11 Constitution.'

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Correct.

14

15 **MANOJ SWAROOP:** We are talking of them as a whole, wherever we are, for the purposes
16 of this Constitution. Otherwise, the moment, I would respectfully submit, the moment we start
17 talking and we start classification on the basis of a entry or another entry, then we will be on
18 the wrong side of 16(2).

19

20 **JUSTICE VIKRAM NATH:** Everywhere, where Scheduled Caste or Scheduled Tribe word
21 is used, starting from 330 and onwards, but again going back to 16(4), there is nothing like
22 that. It's only backward class, why not Scheduled Caste is mentioned there? You have not
23 mentioned it. You have kept it open.

24

25 **MANOJ SWAROOP:** It is explained, advisedly, that 15(4) came later. 15(4) came later. 16(4)
26 is earlier. 16(4) has been explained and Your Lordships know that 16(4) includes not only
27 Scheduled Castes, Scheduled Tribes, OBCs and others, the power is not exhaustive. Para 803
28 of *Indra Sawhney*. It's not exhaustive because the language is 'nothing shall prevent the
29 State from'. So there can be another class also. But when we are talking of 16(4), we are again,
30 in my most respective submission, talking of it as a class, backward class. Scheduled Caste,
31 Scheduled Tribe.

32

33 **JUSTICE VIKRAM NATH:** Scheduled Caste, Scheduled Tribe, SEBC, OBC everyone is
34 included in backward class. There could be others also. Therefore, in identifying where there
35 is inadequate representation, the State can decide which caste to be given how much benefit.

36

1 **MANOJ SWAROOP:** But this exercise is not that exercise. This exercise which is imbued,
2 Section 4(5) of the Punjab Act, is an exercise to puncture the Scheduled Caste list.

3

4 **JUSTICE VIKRAM NATH:** In Scheduled Caste list, they found that these are backward
5 classes. Further classification therefore, they extended that benefit to them. what is wrong?
6 The idea is to get equality, to bring them up. They are trying to bring them up. Others have
7 already come up. Alright, let others also come up.

8

9 **MANOJ SWAROOP:** There are two submissions that propose this. One.

10

11 **JUSTICE VIKRAM NATH:** Why are you resisting that? It's in that class only.

12

13 **JUSTICE B.R. GAVAI:** And it is not as if you are deprived.

14

15 **JUSTICE VIKRAM NATH:** Yes.

16

17 **JUSTICE B.R. GAVAI:** You will still get it and if they... Fortunately, if they can make it, well
18 and good, and if they can't make it, those seats will again fall to you. It's like a general bogie of
19 a railway compartment.

20

21 **MANOJ SWAROOP:** Everybody wants to get in.

22

23 **JUSTICE B.R. GAVAI:** You have got in now, but you'll not permit to others to come in, once
24 you are in.

25

26 **MANOJ SWAROOP:** Kindly you see the bogey example how it translates on me. I am inside.
27 Kindly see the bogey example how it translates on reality to me. I am inside, but for the 50%,
28 I'll be excluded. I don't have. I am there, I am still not there.

29

30 **JUSTICE VIKRAM NATH:** Because the State has found on some, analysis, some survey,
31 some[UNCLEAR] that this is where this has gone down, and this is where it will come up,
32 therefore they are trying to equal them.

33

34 **JUSTICE B.R. GAVAI:** In Tamil Nadu, they have found that those 7 castes, which are
35 grouped into one category. They are 35% or 40%...

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37 **MANOJ SWAROOP:** Out of 76.

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JUSTICE B.R. GAVAI: Out of 76, but they hardly have 2% representation. Some special provision is made for them.

MANOJ SWAROOP: Kindly see the resistance is on two grounds. One, that the moment they pick Mazhabi, and Valmiki the classification is on the basis of caste.

CHIEF JUSTICE DY CHANDRACHUD: That we'll hear the other side.

JUSTICE B.R. GAVAI: Which is prohibited under 16(2).

CHIEF JUSTICE DY CHANDRACHUD: 16(2) and then not contemplated by 16(4). That's his convention.

MANOJ SWAROOP: Yes My Lord. That's one exception. Second exception to that is that this role they are assuming to themselves.

JUSTICE B.R. GAVAI: Which is exclusively with the Parliament.

MANOJ SWAROOP: Is the respectful submission.

CHIEF JUSTICE DY CHANDRACHUD: You know, in 16(4) though it says backward class, not class, it says any backward class. So they can be a class within a class as well. Only thing is, it can be an artificial class. State can't... in fact, we are going to ask them that question, State can't say -'For my purposes this is a class.' They must demonstrate that it is a class on the basis of an objective criteria. What is objective criteria? Lack of representation in the services of the State.

MANOJ SWAROOP: And My Lord here in our case, that class is identified by the Constitution 341, 342 exercise already done by the President, and that class identified, sealed by the Constitution, given a constitutional status, they want to puncture that, enter into that translate their wisdom into that on the basis of caste on the wrong side of 16(2) and say we have come to this conclusion. My Lord that path is not available. Therefore, I started with is this the constitutional scheme? Do they have a role to play? is the question which I asked.

CHIEF JUSTICE DY CHANDRACHUD: Your argument is that, you can either give the benefit to the entirety of one class, maybe the scheduled caste, or you can't give it at all. Don't

1 give it at all. It's your decision not to give it to at all. But if you give it, you must give it to
2 everybody together.

3

4 **MANOJ SWAROOP:** That's the scheme.

5

6 **JUSTICE B.R. GAVAI:** Your argument is that if the State finds, that you have reached a
7 sufficient stage now, then that State can exclude it.

8

9 **MANOJ SWAROOP:** State can't My Lord.

10

11 **JUSTICE B.R. GAVAI:** Parliament can exclude it. If the Parliament finds that somebody,
12 some caste which is not included, the Parliament has the power to include that caste in 341.

13

14 **MANOJ SWAROOP:** And My Lord, kindly see the language. Parts thereof, caste, race,
15 tribes, parts thereof or groups within. So when it comes to exclusion, when the Parliament will
16 exercise the power, they have the benefit of this variegated pieces on the table, so to say. So
17 they can say this part is excluded because of experience. They will again... the State will again
18 have a role to play there. I must concede that. Why? Because they will have a role to feed the
19 constitutional tribunal. 338B. Commission. The commission. The Constitutional Commission.
20 Expert body to monitor and to investigate. Kindly see that expression My Lord. It's very wide.
21 The constitutional, the tribunal, which comes, which is taking me to the next bullet point.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** The only problem is to accept your argument, it
24 will really come down to this, what is your sequitur? We always look at the sequitur. Sequitur
25 is unless Parliament deletes either a particular caste in the entirety, from Article 341 or a part
26 of a group of that caste from 341, if that is not done, then the State is duty bound to give the
27 reservation benefits to the entirety of the Article 341 list in that state...

28

29 **MANOJ SWAROOP:** As it stands.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** Even if the consequence would be the capture of
32 benefits by the dominant among the Scheduled Castes.

33

34 **MANOJ SWAROOP:** I would submit... Therefore, I submitted on the first date.

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** You must necessarily accept a consequence,
37 where benefits can be captured by a dominant... set of dominant castes within the Scheduled

1 Caste list, has a consequence for which the constitutional has no answer. The only answer is
2 then go to Parliament.

3

4 **MANOJ SWAROOP:** I would submit My Lord.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** That's the consequence. Then you have to then
7 accept it.

8

9 **MANOJ SWAROOP:** I would respectfully respond this way My Lord. When we are looking
10 at the constitutional scheme...

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** The states will have no power to then, to alter it.
13 There are going to be the people who are going to be funding the post. They are going to be
14 sanctioning the post. They are going to create the infrastructure, but you will have no choice
15 of redirecting your the channelization of benefits to those who deserve them the most.

16

17 **MANOJ SWAROOP:** I would submit, the remedy lies in this fashion, as I have already
18 submitted. They are not a mute spectator. No. They have to dole out the benefit. They have to
19 be funding it. And it's not as if, this inequity is steering them in their face and they can't do
20 anything. It's not that. The situation is, they have a remedy and this is the mandate of the
21 Constitution that please do it this way. Otherwise My Lord, kindly see the other side.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** We got it. Delete it from 341, in the entirety.

24

25 **MANOJ SWAROOP:** Kindly see the other side of the picture.

26

27 **JUSTICE B.R. GAVAI:** So, take a situation that a particular category has risen up. But, not
28 risen up to a particular level. There are other categories. Who are still at the bottom. So, would,
29 excluding that category who has reached up [NO AUDIO]. The reality has contemplated under
30 the Article 14 or 16(1).

31

32 **MANOJ SWAROOP:** I myself said so, My Lord. That fresh experience has a ventilation. It
33 can't be submitted on this side, that fresh experience cannot be... Yes.

34

35 **JUSTICE B.R. GAVAI:** [NO AUDIO] have been perpetuated. Still... and you'll have to follow
36 the rigor of going to requesting the Parliament to make changes. That's your submission.

37

1 **MANOJ SWAROOP:** Question is... my respectful response is this - 'The question really is,
2 who to do it?'

3

4 **JUSTICE B.R. GAVAI:** Your answer again is, only Parliament can do it.

5

6 **MANOJ SWAROOP:** There is no debate on this side. There's no contest on this side, that -
7 'Yes, if an iniquitous situation is obtaining, it has to be redressed. There can't be a resistance
8 to that.' There is none. But who to do it?

9

10 **JUSTICE B.R. GAVAI:** The [UNCLEAR] will.

11

12 **MANOJ SWAROOP:** No, I said so. I'm making it clear, that, there's no resistance that fresh
13 experience has to come and It's an evolving society. It's an evolving Constitution. There's no
14 difficulty on that. But, 'who to do it as per the Constitutional mandate?' Is the question.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** Now. Mr Swaroop, almost one and a half hours
17 now. What is the next?

18

19 **MANOJ SWAROOP:** I wanted...

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** Read from of your submissions and...

22

23 **MANOJ SWAROOP:** Yes, I was on *Thomas*.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** *Thomas*. Now, just tell us..

26

27 **MANOJ SWAROOP:** Yes, My Lord, Volume V. Volume V. Yes, I'll just do that.

28

29 **JUSTICE B.R. GAVAI:** PDF 27.

30

31 **MANOJ SWAROOP:** Yes. Your Lordship will give me a moment. PDF page 96. P 96. My
32 Lord, I must thank My Lords, that I got acclimatized to working on this. Thanks exclusively to
33 My Lords. But for that cajole, I can speak for myself...

34

35 **JUSTICE VIKRAM NATH:** Which page you are referring to?

36

1 **MANOJ SWAROOP:** Yes, My Lord, this is PDF 97, Volume V. To place 165, My Lord. Para
2 165. My Lords, have that?

3

4 **JUSTICE B.R. GAVAI:** Yes. It's PDF page 96.

5

6 **MANOJ SWAROOP:** 96. I'm grateful My Lord. 'In the instant case.' 'One of the main planks
7 of the arguments put forward by Mr. Abdul Qadir, learned Advocate General, Kerala. This
8 submission is going to be accepted, that, so far as Scheduled Caste/Scheduled Tribes are
9 concerned, they've been given an exalted and a privileged status under the Constitution. And
10 in the directed principles contained in part 4, which mandate of the State to consider their
11 claims. It is necessary to consider this aspect of the matter in a little detail, because the main
12 argument of Mr. Abdul Qadir has been that, the Scheduled Castes/Scheduled Tribes did not
13 fall at all, within the mischief of Clause 2 of Article 16, which prohibits discrimination on the
14 ground of caste. The Scheduled Caste is not a caste as mentioned in 16(2). I'm inclined to agree
15 with the argument advanced by the learned Advocate General, that the word caste appearing
16 after scheduled is really a misnomer, and has been used only for the purpose of identifying
17 that particular class of citizens, which has a special history of several years behind it. The
18 Scheduled Castes and the Scheduled Tribes have been a special class.' - my respectful emphasis
19 - 'is a special class of citizens who have been so included and described as.. have come to be
20 identified as the most backward class of citizens.' Therefore, this is again a deeming provision.
21 They have been identified as the most backward. Now, this is an *ipse dixit* of the State today.
22 That fresh experience they have not been able to come up, they will praise data before the
23 commission, empirical data. Today, it's an *ipse dixit* on affidavit and the and the data across
24 the board vary. Private Respondents A will say..

25

26 **JUSTICE B.R. GAVAI:** We are not going to that question as to whether the data is sufficient
27 or not. That exercise [UNCLEAR] decide the issue. The question is whether...

28

29 **MANOJ SWAROOP:** This cloud is sought to be created that we are facing this iniquitous
30 situation. And therefore we must readily come in and hasten to address that situation. is a
31 cloud being created. But is that cloud available? 'Because identified is a special class of citizens
32 who have been so included and described as they come to be identified as the most backward
33 class of citizens we have in our country.' This is a run up to reading 5 paragraphs earlier. I
34 could give Your Lordships immediately starting from 124 and this is 165. All these paragraphs
35 are devoted to this, expressions, they are the lowliest, they are the backward of the most
36 backward, and then to culminate, to say they are the most backward. In the face of this for the
37 State to say that we have identified this, I would say, it's not available to them. They are arguing

1 against an *N. M. Thomas* when they say so. This is the most backward. Kindly turn to one
2 other paragraph 169, a few paragraphs down. Thus, in view of these provisions, the members
3 of..

4

5 **JUSTICE B.R. GAVAI:** Read para 167 also.

6

7 **MANOJ SWAROOP:** 167. 'A combined reading of 46 and Clause 24, 25 of 366, that's a
8 definitional, clearly shows that the members of the Scheduled Caste and the Scheduled Tribe
9 must be presumed to be backward class of citizens, particularly when the Constitution gives
10 the example of Scheduled Caste and Scheduled Tribe as being the weaker sections of the
11 society.' Constitutionally, 46 says so. Your Lordships have seen it. 46 says so.

12

13 **JUSTICE B.R. GAVAI:** 46 also is reproduced there, in a paragraph above that.

14

15 **MANOJ SWAROOP:** Yes. 'The state shall promote special care, educational, economic
16 interest, weaker section in particular of the Scheduled Castes and the Scheduled Tribes and
17 shall protect them from social injustice and all forms of exploitation as a group.' As a group,
18 no segregation allowed. Whenever we talk of for the purposes of this Constitution, these are
19 the embargoes on them. What is being asked on the other side is, where is the bar. These are
20 all bars. I have a separate heading of a bar. I'll place that also. 167, and my learned friend
21 wanted me to read 169. 'Thus, in view of these provisions, the members of the Scheduled
22 Castes and Scheduled Tribes have been given a special status in the Constitution, and they
23 constitute a class by themselves. That being positioned, it follows that they do not fall within
24 the purview of 16(2) of the Constitution, which prohibits discrimination between the members
25 of the same caste. If, therefore, members of the Scheduled Castes and Scheduled Tribes are
26 not caste, then it is open to the State to make reasonable classification in order to advance or
27 lift these classes, so that they may be able to properly represent the services under the State.
28 Undoubtedly this can be done under 16(1) of the Constitution.' Yes. Plus, please do it as such
29 for the entirety of it. Please don't bifurcate. Why? Because they are the lowliest, and they form
30 a class by themselves. Binding on all of us *N. M. Thomas* says it, and they are arguing right
31 in the contrary to this. In Andhra, in item 4 My Lord, I am in the bullet point 3. Now I just
32 need to touch one or two aspects My Lord, item 4 and the bullet point 3 the Andhra example
33 is given, that all these shades of ingenuity if I may call it with utmost respect, will come up.
34 What is that, ingenuity in Andhra now? Punjab experience, Your Lordship have seen. 76 is
35 my, is my total entry.

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** Out of which seven have been clubbed together,
2 Arunthathiyar.

3

4 **MANOJ SWAROOP:** As one.

5

6 **JUSTICE B.R. GAVAI:** That is Tamil Nadu.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** Tamil Nadu. You will have to correct.

9

10 **MANOJ SWAROOP:** My Lord . My mistake. Tamil Nadu My Lord. Why? I was asking myself
11 this question. Why 7? Because it can be argued that they are a class by themselves. Because if
12 I come one to one, Valmiki and Mazhabi, I may be criticized of 16(2), this is the ingenuity
13 which will come up. And that is exactly what Dr. Ambedkar said no to. We don't want, we don't
14 want political factors to come in. We don't want any disturbance in the list. N number of
15 situations and ingenuities will come in to factorize in that, no, we are not including, excluding.
16 But as it fell from My Lord The Chief Justice first day that this is virtual exclusion. This is my
17 virtual exclusion.

18

19 **JUSTICE B.R. GAVAI:** It's not an exclusion. Among the reserved categories only they have
20 been given preference for 50% of the seats.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** So you can also compete for the 50%.

23

24 **MANOJ SWAROOP:** For the balance 50%.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** No. You can even compete, if suppose a
27 sufficient number of candidates... It is a preferential allotment. So it's not a quota which is
28 exclusively reserved for these two posts, to these communities. In Tamil Nadu. It's only a
29 preferential allotment.

30

31 **MANOJ SWAROOP:** In Punjab, first preference.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Sorry. In Tamil Nadu it is there. In Punjab, it is
34 first preference.

35

36 **MANOJ SWAROOP:** Kindly see My Lord, to the extent of the first preference....

37

1 **JUSTICE B.R. GAVAI:** According to you, among that category the survival of the fittest has
2 to be followed, who are based among that category, irrespective of the relative degree of
3 backwardness they will get to post.

4

5 **ADN RAO:** What has been done. Facilitators [UNCLEAR]

6

7 **JUSTICE B.R. GAVAI:** Where?

8

9 **ADN RAO:** [UNCLEAR] What we were getting earlier gets reduced, My Lord. So that would
10 be the factor. Apart from the other this thing, whether the State has power or not. In my
11 submissions, they don't have. I wanted to distinguish *Chinnaiah* with the other matter. The
12 submission is if Your Lordships, read 15(4) and 16(4). 15 exclusively deals with SC/ST . Which
13 words Your Lordship will not find in 16 to that extent, once it is a class as a whole it is a class
14 of weaker sections or uneducated or lowly income. It will not say the Scheduled Caste or
15 Scheduled Tribe.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** 15(4) also does not exclusively deal with these
18 SC's and ST's.

19

20 **JUSTICE B.R. GAVAI:** Educational backward classes are for Scheduled Caste and
21 Scheduled Tribe.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** As 15(4) also uses expression socially and
24 educational backward class.

25

26 **ADN RAO:** Backward within them My Lord.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** No. 'or for the Scheduled Caste and Scheduled
29 Tribes'.

30

31 **JUSTICE B.R. GAVAI:** Socially and educationally backward class of citizen or for the
32 Scheduled Caste and Scheduled Tribe.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** So 16(4) is actually broader than 15(4). Because
35 16(4) may include other backward... some backward classes which are not Scheduled Castes
36 and Scheduled Tribes and strictly speaking, around the socially ad educationally backward
37 classes of citizens.

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MANOJ SWAROOP: In other words, it's being said it's not exhaustive of the power.

CHIEF JUSTICE DY CHANDRACHUD: So 16(4) may possibly be wider than....

MANOJ SWAROOP: Said so, 803 of *Indra Sawhney*. Said so already that it is wider and the opening language of 16(4). 'Nothing in this article will prevent.. ' Those words...

JUSTICE B.R. GAVAI: And the words 'is not adequately represented in the service under the State.'

MANOJ SWAROOP: My Lord, this brings me if Your Lordships permit me a few moments further....

JUSTICE B.R. GAVAI: We would have ought to take into the consideration the word that, 'is not adequately represented in the services under the State.'

MANOJ SWAROOP: But, that the exercise of 16(4) is not adequately represented is a prerogative their exercise.

JUSTICE B.R. GAVAI: So, therefore, amongst that class, if the State finds that, class amongst that class is not adequately represented, whether it will be devoid from taking an affirmative action under 16(4) to remove those inequalities.

MANOJ SWAROOP: My Lords, the submission is, 16(4) is indeed using that expression, not adequately represented, but it is targeting what? 'The class as such.'

CHIEF JUSTICE DY CHANDRACHUD: According to you, when the State goes into underrepresentation, it must look into underrepresentation of the Scheduled Castes as a whole in that state not that particular... Not that particular community within the...

MANOJ SWAROOP: If they do so....

CHIEF JUSTICE DY CHANDRACHUD: That will be unwarranted.

MANOJ SWAROOP: When they are doing so, they will come out with an affirmative action, by Legislation on executive order. If the State wants to address that situation, that -'We find

1 that in this Scheduled Caste we find that these people are eating away all the vacancies, they
2 will have to come up with an affirmative action.' If they do so...

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** So, if you look at it like this, suppose, the State
5 finds that, say a caste, which has either to be in doing predominantly the occupation of manual
6 scavenging, right? They are underrepresented in the service of the State. The State can't take
7 any action. Why? Because if, as a whole, the Scheduled Castes are not underrepresented in the
8 services of the State, then though, there may be certain communities... I give you the classical
9 example of those who are either who are engaging in manual scavenging, State Government
10 then has no power. Because, as you have to look at the overall Scheduled Castes. You can look
11 at the micro picture in relation to any of these, any of these castes. According to you, 'a caste,
12 is not a class.' That's the argument.

13

14 **MANOJ SWAROOP:** If they do so My Lord, then it will be on the basis of a caste, which will
15 fall, exactly foul on 16(2). That'll be a classification on the basis of caste. This is one reason.
16 Second reason, they have no role to play. They have played their role. Answering 16(4), My
17 Lord, and block... States, they find unrepresented, then they will do so for the entire block.
18 Because any backward class of citizens, which will include SC/ST, OBCs and others, but as a
19 class. It's not as if, as I submitted, the situation is remediless. Yes, there is a route. But State
20 has no role and they...

21

22 **JUSTICE B.R. GAVAI:** What is the route? According to you, you said that, the word used is
23 only 'at include or exclude.' You yourself argued that it is not permissible for anyone to vary
24 that.

25

26 **MANOJ SWAROOP:** It's certainly, My Lord. The route is...

27

28 **JUSTICE B.R. GAVAI:** Therefore, again I have to put the same question. If, the State finds
29 that 'A' caste has reached up to 75%, but not 100%. and 'B' caste is only have 10%. So, either
30 exclude A, though, it has not reached 100%, and continue with the other? Would it not be
31 injurious to you, if the State does that? Or if the State recommends the Parliament to do that,
32 and Parliament does that?

33

34 **JUSTICE BELA M. TRIVEDI:** Probably the route is 342A(3). Kindly read it.

35

36 **MANOJ SWAROOP:** Yes, My Lord. The third part of it? Yes. The State list. The State list?

37

1 **JUSTICE BELA M. TRIVEDI:** State by Law. 'Not withstanding anything.' 342A(3).

2

3 **JUSTICE B.R. GAVAI:** No. But, that is only for SEBCs.

4

5 **JUSTICE BELA M. TRIVEDI:** Right. That class can be included in.

6

7 **JUSTICE VIKRAM NATH:** Duty has been caste to maintain.

8

9 **MANOJ SWAROOP:** Give me that A(3). 'Notwithstanding, anything contained in (1) and
10 (2).' I'm reading 3-4. Sorry. See, My Lord's question and then I'll immediately thereafter read
11 342A also. My Lord, Justice Gavai's question, they find that this is the data, one caste has gone
12 up...

13

14 **JUSTICE B.R. GAVAI:** They don't say one caste is gone up. They say that these two castes...

15

16 **MANOJ SWAROOP:** Have been left behind.

17

18 **JUSTICE B.R. GAVAI:** Have no representation at all.

19

20 **MANOJ SWAROOP:** Kindly see the iniquitous situation. There is no assertion on record
21 from the State.

22

23 **JUSTICE B.R. GAVAI:** We are not going to the [UNCLEAR] of the data.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** High Court will test the data. Whether they had
26 collected data, whether they have data, what should be the threshold requirement, that we also
27 lay down. Because it can't be that the States can just do everything at their whims and fancies.
28 Obviously the State is also duty bound because, to act in accordance with the constitutional
29 mandate, they must have objective data, quantifiable data as we have said, and that, the High
30 Court test ultimately, whether they ...

31

32 **MANOJ SWAROOP:** There is submission I was wanting to make. Mazhabis and Valmikis
33 are taken up by this. Is it to be accepted that none of these categories have advanced? There is
34 an inherent...

35

36 **JUSTICE VIKRAM NATH:** [UNCLEAR] rationale of doing it. [UNCLEAR] whether they
37 have the power or not. We are not going into the rationale..

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CHIEF JUSTICE DY CHANDRACHUD: We are only testing the correctness of *Chinnaiah*.

MANOJ SWAROOP: Yes. I wanted to read 342A, and (3) thereof. And this is, of course, in the background of socially and educationally backward, (3) thereof. 'Nothing contained in Clauses 1 and 2, every State or Union Territory may by law prepare, maintain for its own purpose, a list of socially, educationally backward classes of entries to which, may be different from the Central list. '

JUSTICE BELA M. TRIVEDI: So, it is presumed that SCs and STs are socially and educationally backward. They are the most backward class of the backward class. That can also be done...This could be the route through which, if one finds that a particular caste is not being included, has not been included, so this could be included by way of 344A(3), probably.

MANOJ SWAROOP: Each of each of them, each of these categories in 341, 342, 342A, they have a commission. Now we have a commission, a constitutional commission, which will advise and will send it, as I submitted to the President. And there the fresh experience comes in, that's the route identified. They are trying to find a route in 16(4). 16(4) is only that you may give percentage of reservation. Yes, indeed, so. It's a purpose. It's in part 3 that - 'yes, nothing will prevent the state from making that provision'. For that purpose...

CHIEF JUSTICE DY CHANDRACHUD: Mr. Swaroop, actually the Constitution has used three expressions, backward class, Scheduled Castes and Scheduled Tribes and socially and educationally backward classes of citizens. Though, backward class will include socially and educationally backward class of citizens and Scheduled Castes and Scheduled Tribes. Perhaps the Scheduled Castes and Scheduled Tribes as a grouping, cannot fall within the SEBCs. They are very distinct.

MANOJ SWAROOP: They are distinct.

CHIEF JUSTICE DY CHANDRACHUD: Therefore, apropos my [UNCLEAR] question, when the State is exercising the power under 342A(3), they can't exclude the SCs and STs, or any part thereof in exercise of the power under 342A(3), because 15(4) clearly specifies the Scheduled Castes and Scheduled Tribes is a distinct conglomeration from socially and educationally backward classes of citizens. 16(4) makes that very clear. That it says, for the advancement of any socially and educationally backward class of citizens or for the Scheduled

1 Caste and Scheduled Tribes. If the Scheduled Caste and Scheduled Tribe are deemed to be a
2 part of SEBC, there's no need to refer to them specifically in 15(4). But 16(4) is much broader.
3 Therefore, it says 'backward class', which will include the socially and educationally backward,
4 the Scheduled Caste, the Scheduled Tribe, so on and so forth and any other backward classes.

5

6 **MANOJ SWAROOP:** And that expression 'any' in 16(4). When they say 'any backward class
7 of citizens'. Again top of class. Not any member of that class.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** That is the point, really. That's the point where
10 they have to meet, actually ...

11

12 **MANOJ SWAROOP:** If Your Lordships, just kindly permit it is being said takes me to point
13 5. My Lord, that *Chinnaiah* judgment is *per incuriam* because it doesn't have a discussion
14 on the Interplay 341(1) and 16(4). That was argued.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** Can you give us the para of which in
17 *Chinnaiah*. Which are going to be discussed?

18

19 **MANOJ SWAROOP:** I've given it immediately there. 31 and 50. Right in the heading. Chief
20 Justice has that? In the heading 5.

21

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

23

24 **MANOJ SWAROOP:** I'm sorry. In paragraph 31 and 50.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** *Chinnaiah* does discuss the interrelationship.

27

28 **MANOJ SWAROOP:** Yes, My Lord, it does. And it attributes the role identification role, if
29 I may paraphrase in my own way. Yes. My Lord. In a moment. 796, of Volume V.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** At page?

32

33 **MANOJ SWAROOP:** This is just at 798. My mistake. 798 of Volume V. PDF page.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** Let me just look at it quickly.

36

1 **MANOJ SWAROOP:** And this is the judgment, Justice Hegde's judgment in 31. What would
2 be said is 'The content of 341 will be first considered.' I'm sorry. 31 at PDF 798 of Volume V.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Between Placitum E and F.

5

6 **MANOJ SWAROOP:** Yes, My Lord. And above that is the content of 341. And below that as
7 My Lord is pointing out, is the, is the consideration of 16(4). Can I place that?

8

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

10

11 **MANOJ SWAROOP:** 'On a detailed perusal of the Act, it is seen that Section 3 is the only
12 substantive provision in the Act. Rest of the provisions are only procedural. Section 3 of the
13 Act provides for creation of four groups of the caste enumerated in the Presidential list or the
14 State. After regrouping it provides for proportionate allotment of reservation already made in
15 favour of the Scheduled caste among the four groups. Beyond that the Act does not provide for
16 anything else. Since the State has already allotted 15% of the total quota reservation available
17 to the backward classes for the backward classes to the Scheduled Castes. The question of
18 allotting any reservation under this enactment to the backward classes does not arise.
19 Therefore, it is clear that the purpose of the true intent of the Act is only to first divide the caste
20 in the Presidential list of the Scheduled Caste into four groups and then divide 15% of the
21 reservation allotted to the Scheduled Caste as a class among them. This is clear that the Act
22 does not for the first time provide for reservation of Scheduled Castes, but only intends to
23 redistribute the reservation already made by subclassifying the Scheduled Caste, which is
24 otherwise held to be a class by itself.' And then - 'Well settled principle in law that preservation
25 to a backward class is not a constitutional mandate. It is the prerogative of the State concerned
26 if so desired with the object of providing opportunity of advancement in the society to...'

27

28 **JUSTICE B.R. GAVAI:** In the classification, there was a subclassification. Not on the basis
29 of caste, but on the basis of empirical data of not adequately being represented. How would it
30 read Article 16(2) and it is not a rescue on the basis of a caste?

31

32 **MANOJ SWAROOP:** This is to summate, those were four groups made in *Chinnaiah* case,
33 the criticism on the other side was that, 341 Vs 16(4) is not even has not been considered and
34 therefore *per incuriam*. To that, what I wanted to submit was, that the content of 341 and the
35 content of the 16(4) has been considered by the Honourable Court, in that bench, in these two
36 paragraphs.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** Apropos what my learned brother said, 16(2)
2 uses the expression 'only,'

3

4 **MANOJ SWAROOP:** Only on the ground.

5

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

7

8 **MANOJ SWAROOP:** Yes.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** Therefore, if the positive discrimination, if we
11 can call it that way, in favour of these two communities, is made not on the basis of caste alone,
12 but on an objective factor, namely 'underrepresentation', which is contemplated by 16(4), then
13 it may not offend against 16(2).

14

15 **MANOJ SWAROOP:** But, kindly look how the language of the Statute is 'caste'. The 4 (5)
16 of the Punjab Act. These two categories are picked up. These two castes are picked up. *Mazhabi*
17 and *Valmikis*. And a legislation for that. So the target group, so to say, is the caste which
18 according to our submission, is foul on 16(2).

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** If they fail on underrepresentation, then it's a
21 discrimination on the ground of caste. But if they are right on under representation, then it's
22 not a discrimination on the basis of caste, because when it is based on objective criteria. Only
23 the extent of the underrepresentation.

24

25 **SALIL SAGAR:** There was no data.

26

27 **JUSTICE B.R. GAVAI:** We are not going to that question, whether....

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** High Court will deal with that.

30

31 **JUSTICE B.R. GAVAI:** Whether there was data or not? Or whether the data was sufficient
32 or not?

33

34 **SALIL SAGAR:** [UNCLEAR] But this was framed... There was no such thing.

35

1 **CHIEF JUSTICE DY CHANDRACHUD:** That.... I mean if you are right, then the High
2 Court has to deal with that argument, that you have no quantifiable data at all when you made
3 that...

4

5 **MANOJ SWAROOP:** My Lord, this data... also in the... Your Lordships should kindly

6

7 **JUSTICE B.R. GAVAI:** You know, sufficiency, insufficiency, existence, non-existence of
8 data. The question is whether the State is powerless or not?

9

10 **MANOJ SWAROOP:** On the Constitutional plane, I could submit, when *Thomas* summit...
11 When *Thomas* lays down as a law, that they are a class by themselves and that they are the
12 lowliest. Then for the State to say otherwise, is by respect to submission, not available to them.

13

14 **JUSTICE B.R. GAVAI:** According to you, State cannot go into the question of lowliest
15 amongst the lowliest.

16

17 **MANOJ SWAROOP:** They have reached the rock bottom. And also My Lord, kindly see,
18 this is one side of the picture, that fresh experience and there may be inequality, and we want
19 to redress it. This is one part. There's another part, that there may not be a political tinkering
20 with this. And this is an all India feature now, we don't want a situation. The constitutional
21 mandate. The constitutional debate.

22

23 **JUSTICE B.R. GAVAI:** The courts are there. Under 226, courts can always examine
24 whether the decision taken by them is on the basis of empirical data or not? It can always be
25 found that as to whether the action proposed has a nexus with the object or not?

26

27 **MANOJ SWAROOP:** My submission is, My Lord, why is this freezing exercise being done?
28 If I may call it. Why is this freezing exercise being done? Why is this insulation exercise being
29 done? To take away any aspect of political tinkering. The danger writ large, even at the time,
30 of framing, which Your Lordships, that passage has been seen. These are the two competing
31 factors. Inequalities removal and the political tinkering. This has to be balanced. Therefore,
32 the Court is saying, in *Thomas*, that -'This is a class by itself.' Now, how does the State enter
33 into that class? In my respectful submission, they can't. Without doing violation of 2. It's a
34 class by itself. It's a special class, to use two exact expressions in 165 of *Thomas*. They are the
35 lowest rung. Now, where is the opportunity for the State to say -'No. Our experience is this.
36 Our legislation is this.'? No. Is my respectful submission.

37

1 **JUSTICE BELA M. TRIVEDI:** And we will have to take into consideration the future
2 possibility. Forget Punjab. Punjab doesn't make any reservation for Scheduled Tribe, a
3 particular. Other states may make for a particular Scheduled Tribe, particular Scheduled
4 Caste. That would be in exclusion of other Scheduled Caste and other tribes. So, that may
5 create situations which may amount to discrimination amongst the members of the Scheduled
6 Castes and Scheduled Tribes.

7
8 **MANOJ SWAROOP:** And Scheduled Caste/ Scheduled Tribes, all taken to be the lowliest
9 and to constitute 'a class.' When held by *Thomas*, they want to pierce that. The entire effort
10 is to pierce that. One para, last of this first page, in item 7. This *Jaishri Patil* judgment said
11 so, apropos My Lord's question, that 342A brings in a new regime. 342A. Those three articles
12 which come in in 2018 is being said in *Jaishri*... I could give the paragraph. The exact
13 expression used is, that 'it brings in a new regime' *vis-a-vis*, the *Indra Sawhney*. It was
14 compared. I could give that...

15
16 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

17
18 **MANOJ SWAROOP:** Just give me a moment.

19
20 **JUSTICE VIKRAM NATH:** *Jaishri Patil* is 1466.

21
22 **MANOJ SWAROOP:** Yes, at PDF 1605. In paragraph 157, 158, particularly 158, Volume V,
23 PDF 1605. These are the conclusions. I must first place that at 158, SCC Page 140. 158
24 paragraph of SCC. The evolution from *Indra Sawhney*, et cetera, all being noticed, 2018
25 noticed, Select Committee noticed and then the culmination. Can I place that, My Lord?

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

28
29 **MANOJ SWAROOP:** At 158. 'This sequitur is only reason why changes are envisaged in the
30 first place by the parliament sitting in its Constituent capacity, no less, which is to alter the
31 entire regime by ensuring, that the final say in the matter of identification of SEBCs would
32 follow the same pattern as it exists in relation to the most backward class of citizens, that is
33 the SC and ST through Article 338, 338(8), 341, 342. Too much cannot be read into the
34 expression Central list. ' That controversy Your Lordships have seen. That was redressed by
35 bringing in Central list in 342A later on. That clarification came. I could read one or two
36 conclusions in *Patil*, which are on the same page, at 156, in paragraph 156 just above. 156.2.
37 'The use of the expression means, interpreted to imply exhaustive definitional expression,'

1 That expression used in 366, the definitional one. And then, if Your Lordships just, come a
2 little further down, 156.5, the expression of... 'The use of expression for the purpose of this
3 Constitution also emphasises the idea that, for all purposes under article, this, this, this, only
4 the communities or classes deemed to be SEBCs under 342A would be treated as such in
5 relation to the State.' And then this conclusion. Kindly see the end of 156, paragraph 156, the
6 last few expressions. 'These expressions are omitted and an entirely new provision, exclusively
7 for the purpose of socially and educationally backward classes are inserted, that is, the
8 commission 338B, which has independently considered all aspects relating to SEBCs in the
9 manner identical to SC/STs.' So it's a Constitutional Commission which will consider the
10 entire data. My Lord, if I can take a few moments on item 10 on the page next. But what we
11 said is creamy layer, as if suggested creamy layer, suggested, is accepted norm in SC/ST. That
12 is, in the light of *Nagaraja*, in the light of *Jarnail Singh*, which were 4(a) and 4(b) situations
13 of 16. Promotional, not at the entry points.

14

15 **JUSTICE B.R. GAVAI:** So according to you, that's what... Because as Mr. Gopal
16 Sankaranarayanan said, so far no Government, including the Central Government, have issued
17 any office memorandum that a similar would be applicable to Scheduled Caste and Scheduled
18 Tribe also.

19

20 **MANOJ SWAROOP:** Yes. None at all to our notice as well. None at all. But what is being
21 suggested is that by the root of creamy layer, the homogeneous... the class of SCs is available
22 for dissection. The suggestion on the other side or the submission on the other side was, as if
23 to say, at one point, the State volunteered to say work in progress when creamy layer was
24 posed by the Honourable Court the State Government volunteered work in progress. That's
25 the exact response. Creamy layer is being suggested, what is being suggested is that when we
26 can enter into the list, when we can bifurcate the list on the threshold of creamy layer, why
27 can't it be done? That means it's pierceable. That means it is sub-division-able. That is being
28 suggested My Lord. And in that aid *Indra Sawhney*, *Nagaraja*, *Ashoka Kumar* and
29 *Jarnail Singh* is are being cited what I would submit is a lot. *Indra Sawhney* specifically
30 said, when it was permitting classification backward and more backward, in paragraphs after
31 paragraphs, that we are not talking of Scheduled Caste and Scheduled Tribes. Your Lordships
32 have seen that paragraphs. That's one. *Nagaraja* is a promotional case. 16(4)(a), (4)(b) for
33 Scheduled Caste, Scheduled Tribes, so not at level one. At level two. We are at level one
34 situation. So therefore, very different to talk of *Nagaraja*, very different to talk of *Jarnail*.
35 *Ashoka Kumar Thakur* again, Constitution Bench which is interspaced between the two,
36 between the last two in item ten of mine. Between *Nagaraja* and *Jarnail*, *Ashoka Kumar*
37 *Thakur* comes which is the validity of 15(5). Can make special provision for admission to

1 educational institutions. The State can. So entry point. There they said -'No. No creamy layer.'
2 That's the correct position, according to us.

3

4 **JUSTICE B.R. GAVAI:** So the persons from Scheduled Caste who are now in much
5 advantageous situation, they should also continue to get the benefits of Scheduled Caste.

6

7 **MANOJ SWAROOP:** My Lord , those who are My Lord, will continue to get that benefit.

8

9 **JUSTICE B.R. GAVAI:** You are saying that -'No creamy layer.' For Scheduled Caste persons
10 whose child takes education in the Shri Ram school or Sanskriti, and, a person residing in
11 some small village, taking education in a Gram Panchayat school. He'll compete with the son
12 of a man who is taking education in the best of the schools in Delhi? This is what is meant by
13 Article 14?

14

15 **MANOJ SWAROOP:** My Lord, there has to be... I, myself said, there has to be a redressal,
16 if such situation comes. The route is there. 'But who is to address that situation?' is the
17 question. Is the State to enter into it on the angle of 16(4)?

18

19 **JUSTICE B.R. GAVAI:** Whether, in last 75 years, whether the same family should get
20 benefit of reservation on four occasions, for generations.

21

22 **MANOJ SWAROOP:** The answer, empathetically, has to be, 'No.'

23

24 **JUSTICE B.R. GAVAI:** And the person residing in the villages, to perpetuate, to live in those
25 situations.

26

27 **MANOJ SWAROOP:** Perhaps, before even....

28

29 **JUSTICE B.R. GAVAI:** So, that is not a question before us.

30

31 **MANOJ SWAROOP:** Yes, indeed.

32

33 **SALIL SAGAR:** But, the question, Your Lordship has asked him, that has been answered
34 already. That's why the reservation was given.

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** What else from Mr. Swaroop? Anything now?

37

1 **MANOJ SWAROOP:** Just, on the last two points. If Your Lordships kindly permit, My Lord,
2 very, very briefly. What is being What was argued yesterday in the second half, later session,
3 was vertical and horizontal reservation. This doesn't qualify for intersectional. This is not
4 intersectional reservation at all. It is not. This amounts... This is item 12, in bullet point
5 number 1. This is subvertical reservation. Because Your Lordships know, this has been dealt
6 within.... at all an authority was required, and para 812 of *Indra Sawhney*, that horizontal
7 and vertical, how do they work? And when do we have horizontal? That the horizontal,
8 vertical... horizontal position he can occupy in any of the verticals. Now here the Mazhabi and
9 the Valmikis are staking claim only against one vertical. That is the Scheduled Caste. So,
10 there's no question of intersectional here. A solution being found that intersectional can be
11 considered, in this case. I would respectfully submit. 'No'. This is subvertical. And that takes
12 me to the last two My Lord, where is the bar? It was repeatedly asked on the other side. My
13 answers are these four answers. The bar is 16(2). Where is the bar to State taking into this
14 endeavour? The bar is 16(2). You are identifying on the basis of caste.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** But 16(2) says 'only on the basis.'

17

18 **MANOJ SWAROOP:** Kindly see the target group.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Of course, *Nergesh Meerza* and that line of
21 cases are also dealt with it in my judgement in *Sabarimala*, 16(2) at one stage, for instance,
22 suppose, you discriminate against women, right? For instance, you say that -'A married
23 woman will not be entitled to continue as an airhostess.' The argument was that this is not a
24 violation of 16(2), because we are not discrimination only on the ground of gender, but you are
25 discriminating on the grounds of gender plus. Now our Court is now increasingly... after
26 *Nergesh Meerza* of '83, our Court is increasingly said that -' You can't get around that 'only'
27 phrase in Article 16(2), by adopting some other prohibited ground of discrimination and then
28 say that -'Oh, no, I'm not discriminating against you only because you are a woman. I'm
29 discriminating against you because you're a woman and you've got married.' That is
30 inconceivable.' But here, it's not just a discrimination only on the basis of caste, it's on the
31 basis of a factor which is recognized by the Constitution itself in 16(4), right? Because 16(4)
32 expressly speaks of 'underrepresentation.' So, there is no discrimination 'only on the ground
33 was caste' under 16(2).

34

35 **MANOJ SWAROOP:** Then I respectfully submit, in the 2nd bullet point, the bar is to be
36 inferred from 341(2), that a route is provided. So, all other routes are excluded, as I submitted
37 My Lord.

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CHIEF JUSTICE DY CHANDRACHUD: Correct.

MANOJ SWAROOP: And then the bar is that, Scheduled Caste as a whole have been accepted as a class, which I submitted.

CHIEF JUSTICE DY CHANDRACHUD: That's your argument.

MANOJ SWAROOP: And then the bar, in the last bullet point, in 338, that there is a route of the commission, a committee, etc. My Lords, kindly see these paragraphs, I have mentioned in *Davinder*

CHIEF JUSTICE DY CHANDRACHUD: That's a referring order, right?

MANOJ SWAROOP: Yes, these 4-5 paragraphs.

CHIEF JUSTICE DY CHANDRACHUD: We'll look at them. What are you saying?....

MANOJ SWAROOP: Submission is this... A reading of these paragraphs is this.... State cannot be denuded of its power. State has to run to the aid and to ameliorate the situation. These are answers in generality, with utmost respect. These are not constitutional answers to upset *Chinnaiah*, or to meet the reasoning and the findings of *Thomas*. These are the spate of reasonings running into these 5 paragraphs. That, of course, the State must have the power to do this. It is not as if there is no ventilation to the grievance. Yes, there is, but there's a root. There's a person identified, who will do it as per the constitutional scheme. All these paragraphs run in that tenor. That's the respect to submission.

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

MANOJ SWAROOP: And I far exceeded Your Lordship's time. My apologies for that.

CHIEF JUSTICE DY CHANDRACHUD: But you are opening the arguments for your side. So... Thank you Mr. Swaroop.

SALIL SAGAR: May I please, My Lords. Much of the ground has been already covered by my.. I won't take much time, which I have already told. I will only submit to regard to the one thing. The questions framed by that. The first question was whether the provisions of the

1 contained in Section 4, Sub -Clause 5 of the Punjab Scheduled Caste and Backward Classes Act
2 has the constitutional dialect or whether the state has a legislative competence to enact the
3 provision contained in Section 4, Sub -Clause 5 of the Act, whether the decision in ***E.V.***
4 ***Chinnaiiah versus State of Andhra Pradesh***, I reported in **2005, Volume 1, SCC, 397**,
5 required to be revisited. The number 3, I will address first. Your Lordships may see. whether...
6 My Lord, I have already... These submissions have been submitted by my learned friend. I'll
7 be following that. And that is at Volume 2, page 19, and the relevant, which would be at page
8 23, the heading which has been given already there.

9

10 **JUSTICE B.R. GAVAI:** You are referring to Mr. Hegde's submissions?

11

12 **SALIL SAGAR:** These were submissions before the 5 judge and I have.. have the advantage
13 of...

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** Only 1 second. Mr. Swaroop, which is the... what
16 is the cross reference to your original submission because you gave us two EV, read that two
17 page note. But where are your original submissions, the more comprehensive submissions?
18 You can just give us, so that in our notes, we don't miss it. Before we rise, you can tell us.

19

20 **MANOJ SWAROOP:** It is on page 76, Volume II. Volume II, 76 PDF. And also I have answer
21 to Justice Usha Mehra, if Your Lordship want.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Sagar, you are..

24

25 **SALIL SAGAR:** My lord. Now, Your Lordship may refer to page 28 of my submissions and
26 the para number 3, in which I have very categorically stated that -'Appellant sought to contend
27 that the treason in ***E.V. Chinnaiiah*** does not follow the judgment of a larger bench of this
28 Honourable Court, ***Indra Sawhney versus Union of India,***'

29

30 **JUSTICE B.R. GAVAI:** You are referring to Para 3?

31

32 **SALIL SAGAR:** Para 3.

33

34 **JUSTICE B.R. GAVAI:** Para 3 begins with 'The Punjab Government by a circular...'

35

36 **SALIL SAGAR:** Sorry. Page 28, internal page 10 of the submissions. Volume II.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Hedge's submissions begin at PDF page 19.

2

3 **SALIL SAGAR:** Yes. That is...

4

5 **JUSTICE B.R. GAVAI:** You're referring to your submissions or Mr. Hegde's submissions?

6

7 **SALIL SAGAR:** Mr. Hegde's submissions. I have said so. It has already been submitted by
8 Mr. Hegde. so I am addressing,

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** 'Punjab Government by a circular', right?

11

12 **SALIL SAGAR:** Yes.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** All right, that's PDF page 21 in Volume II. Just 1
15 second,

16

17 **SALIL SAGAR:** Now, My Lords, may I have page 28? May I start? May I?

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** 'The petitioner appellants have...'

20

21 **SALIL SAGAR:** I'm sorry for a little... 'does not follow. This, according to us, is not right. It
22 is absolutely incorrect. And the judgment in *Indra Sawhney* permitting subclassification
23 was limited, as already stated by my learner friend Swaroop, that only other backward classes.
24 I'll be referring, My Lord, certain paragraphs and further, it has in fact been, Court has
25 specifically stated that none of these observation will apply to Scheduled Caste and Scheduled
26 Tribes. The relevant portions are here, My Lord 781, but I'll first address My Lords have asked
27 one question there. Your Lordship may kindly refer to 781 'At the outset, we mistake for the
28 purpose of this discussion that we keep aside the Scheduled Tribes and Scheduled Caste since
29 they are admittedly included within the backward classes. Accept to remark that the backward
30 classes contemplated by Article 16(4) do comprise some caste, but it cannot be denied the
31 Scheduled Caste includes quite a few classes.' Then, My Lord 788 is the next para. 'Further, if
32 we keep in mind the context in which the Article 16(4) was enacted, it would be clear that the
33 assent upon the social backwardness, it goes without saying that the Indian... in the Indian
34 context, the social backwardness leads to educational backwardness, both of them together
35 lead to poverty, which in turn breeds and perpetuates the social and educational
36 backwardness. They feed upon each other the constituting a vicious circle. It is a well-known
37 fact that till Independence of the administrative apparatus was manned almost exclusively by

1 the members of upper caste, the Shudras, Scheduled Caste, Scheduled Tribes and other similar
2 backward class, social grouping among the Muslims, Christians practically to entry into the
3 administrative operators. It was this imbalance which was sought to be addressed by proving
4 for reservation in favour of the backward classes. In the sense Dr. Rajeev Dhavan may be right
5 when he says that the object of Article 44 was empowerment of the backward classes. The idea
6 was to enable them to share the State power. We accordingly of the opinion that backwardness
7 contemplated under Article 16(4) is mainly a social backwardness, and it would not be correct
8 to say that the backwardness under 16(4) should be both social and educational. The
9 Scheduled Tribes and Scheduled Castes are without doubt a backward for the purpose of class.
10 No one has suggested that they should satisfy the test of social [UNCLEAR]. While on this
11 regard.' Then the further My Lord two paragraphs are more important. And if I may permit,
12 I'll also state, though these have been many at times stated so. This support my submissions.
13 'We may now summarized our discussion under question number 3. (a) A caste when a quite
14 often be a social class in India, if it is a backward socially, it would be backward class for the
15 purposes of 16(4). Among non-Hindus, there are several occupational groups, sex and the
16 denomination, which for historical reasons are backward. They do represent the back of social
17 collectivises for the purpose of Article 16(4). (b) Neither the constitution nor the last kinds of
18 procedure or the method for identification of backward class. Nor it is possible or advisable
19 for the court to lay down any such procedure or method. It must be left to the authority to be
20 appointed to identify. It can adopt and method procedure it thinks convenient. So long as
21 survey covers the entire populace, no objection can be taken to it. Identification of the
22 backward classes can be certainly done with the reference to the caste among along with other
23 groups, classes, sections of people. One can start the process with the caste wherever they are
24 found, apply the criteria involved determining the backwardness and find out whether it
25 satisfies the criteria. If does, what emerges is the backward class of citizen within the meaning
26 and for the purposes of Section 4. Similar process can be adopted by the case of other
27 occupational groups, communities, classes so as to cover the entire populace. The central idea
28 and overall objective should be considered all available groups, section, classes in society since
29 the caste represent an existing identifiable social group class, in passing the overwhelming
30 majority of country's population, one can well be begun with it and then go to other groups.
31 Section and classes, (c) It is not necessary for the class to be designated as backward class. It
32 is situated similarly to the Scheduled Caste, Scheduled Tribes. (d) Creamy layer can be and
33 must be excluded. It is not correct to say the backward class contemplated by the Article 16(4)
34 is limited to the socially and educationally backward classes referred in Article 15(4) and 340.
35 It is much wider. The test or the requirement of social educational backward class cannot be
36 applied to Scheduled Caste and Scheduled Tribe who inevitably fall within the expression of
37 backward class citizen. The assent of the Section 6, Article 16(4) appears to be a social

1 backwardness. Of course, social backwardness, educational and all are closely intervened with
2 the Indian [UNCLEAR] The classes contemplated in an Article may be wider than those
3 [UNCLEAR]. My Lord, in this, my respectful submission in this case is, which I'll be also
4 addressing other paragraphs. *Indra Sawhney's* case. Sorry. Very sorry *Indra Sawhney's*
5 case, very categorically states and gives a finding under what circumstances, the concept of
6 creamy layer has to be applied? Then the ultimate finding was given that -'Yes, the backward
7 class can be subdivided.' There are 7 paragraphs preceding this, My Lord, in which, the deep
8 concern was shown, about the rise of the creamy layer. The rise of those persons, in the
9 backward class. May it be any in the backward class, which, at the cost of others, they say, they
10 have risen so high. Even Krishna Iyer in his judgment, *Rangachari* has also shown that this
11 very concern. So, it was that this concern which actually, I must say, that led to the Court to
12 reach on conclusion that -'It can be subdivided. The backward class can be subdivided.' Now
13 before My Lord, which I'll be addressing post-lunch period, that whether these very
14 circumstances granted the State to sub-caste Scheduled Caste and Scheduled Tribes. With
15 very utmost respect, whether there was any material to show that the other caste have risen
16 very high? Or

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Sagar that, as we have been repeatedly
19 saying, is a matter to go back to This is...

20

21 **SALIL SAGAR:** That.... I'm... It is a preface to that. Not I am going to address on that issue.
22 Only on this, My Lord, whether in these very circumstances... They might have. It's a
23 possibility that these two paths, Mazhabi Sikhs and Valmikis have been suffering and they are
24 weakest among the weak. On this very issue, I'll be addressing. This approach of the court, this
25 very Government was erroneous, absolutely. Because, other classes... Mr. Sibal has also an
26 idea, My lord showed to Your Lordships with 39 classes, in which many other like, for example,
27 cobbler, like, for example snake charmer. And when I verified from that, My Lord, these very
28 castes have no houses in the village. They are asked to live in huts outside the village. They are
29 on exact poverty. Some of them indulge in Your Lordship may see theft, etc, which may not be
30 an issue here. The question here is, their non-applicability of mind, may be influenced by the
31 political, whatever it is, but their approach was perfectly incorrect, which I would be...

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** We'll break the lunch and come back.

34

35 **SALIL SAGAR:** Certainly. I'm grateful.

36

1 **VIJAY HANSARIA:** My Lord the Chief Justice asked what happened to that Justice Usha
2 Mehra Committee Report.

3

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

5

6 **VIJAY HANSARIA:** A private member, My Lord, which was lapsed, I have that report...

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** Oh, I see.

9

10 **VIJAY HANSARIA:** I'll leave. Grateful.

11

12 <<<LUNCH BREAK>>>

13

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** So if you can just formulate your points.

16

17 **SALIL SAGAR:** My first point, My Lord, is this, which I have already stated.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** The first point was the judgment in *Indra*
20 *Sawhney* was limited only to OBCs.

21

22 **SALIL SAGAR:** OBCs. And secondly, Your Lordship may kindly see, the ground which they
23 have taken is that that *Indra Sawhney* says that subdivision. Sorry. Which I have been using
24 My Lord, my staff is correcting me, but I just forgot out of emotion. I'm very sorry. That's there.
25 Anyway a great lady is being remembered in this Court.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** The second is in the context of whether the
28 creamy layer can be excluded. *Indra Sawhney* spoke of the subdivision of backward class.

29

30 **SALIL SAGAR:** Yes. The basis of doing that, if it is allowed in subdivision as per the *Indra*
31 *Sawhney's* case, so why not we can subdivide it? Our respectful submission in this case is,
32 citing these judgments is that it was not that they decided to subdivide. There was a reason.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** In the context of creamy layer.

35

36 **SALIL SAGAR:** Creamy layer. But whether....

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** Point taken. Third point now. Don't doing labour
2 a point which you've made. Yes, third point.

3

4 **SALIL SAGAR:** I'm very grateful, My Lord. Now, the third point which you are making that
5 My Lord who we are. I have not stated. I'm very sorry. Out of 39 castes, we are also Scheduled
6 Castes. We are not backward class or educationally or socially backward. No, that is backward
7 class, we are. But actually we are Scheduled Caste. Out of 39 castes 37 are our castes and the
8 reservation has been given to 2 castes. The difference between these, ours and theirs is almost
9 negligible, except this that they are, this Valmikis are as said to be manually scavenging the
10 dirt also, everything. But at the same time, who we are, I'm just going to as Mr. Sibal has also
11 shown the list, that kindly see the list who we are, who are I already told snake charmer, a
12 person who is cutting the crops, harvesting the crops, labour, cobblers, barbers. These are the
13 persons which has been... Your Lordship may kindly refer to, very interesting to see that we
14 are like them. We are not different. We have not risen much in the... Out of us.....

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Sagar, you may have a valid point, but begin
17 there. We will have to leave it open to you to set this up as a ground before the High Court. I'll
18 tell you why. There may be....

19

20 **SALIL SAGAR:** Your Lordship is....

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** I'll tell you, there may be some point to be
23 deliberated on this on a more factual basis before the High Court, because they have picked up
24 two castes, right? Now, suppose those who are excluded are in a position to show *prima facie*
25 that - 'Look, though we have been excluded we rank on the same footing as the others who
26 have been included. And you've been given this preferential treatment within the SCs.' Then
27 the burden will shift on them.

28

29 **SALIL SAGAR:** Of course.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** So demonstrate what was it in regard to these
32 two castes which the others do not possess. That is, you have excluded others, who are
33 according to them similarly circumstanced. So they must then discharge the burden of
34 showing that those who have been picked up are not similarly circumstanced.

35

36 **SALIL SAGAR:** It is just being submitted only for the reason that....

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** That is the factual justification for that
2 backward class.

3

4 **SALIL SAGAR:** Yes. That was what I was submitting. But I have only submitted that petition.
5 The appellant side referred to this very list. In this this was not mentioned at all. Rather, it was
6 said that mochi and other, et cetera, they are suffering for ages. I ask myself, mochis are we;
7 labourers are we. Your Lordship a very interesting example, an example I give My Lord. Which
8 is... I don't have the evidence, but it is correct that scavenger is collecting the dirt. It is being
9 loaded to a truck. Truck driver is a backward class. That driver is another Scheduled Caste who
10 is not Balmiki. Invariably this is happening. Very interesting instances. A person who are in
11 this class...

12

13 **JUSTICE B. R. GAVAI:** But that may be for advanced class also.

14

15 **SALIL SAGAR:** But My Lord, if Your Lordship may see, they may have the reason to say that
16 they are weakest. Very well, they are weakest.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** See, but therefore what, the point I'm trying to
19 tell you is that I'm not saying that you don't have a point on this, but this is a point which has
20 to be argued whether the constitutional validity of the Act is valid.

21

22 **SALIL SAGAR:** But I am just saying for giving a preference to...

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** You know your wider point is that bifurcation is
25 per se impermissible.

26

27 **SALIL SAGAR:** Yes.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** Now, what you are saying is that - 'Look...' In the
30 alternative, I'm putting it in the alternative, even if it is permissible. It can't be justified because
31 those who have been excluded by this Act from the preferential allotment are in all other
32 respects similarly circumstance, or at least some of them, may not be all the 37 are similarly
33 circumstance. But out of the 37, you can certainly establish before the High court that we fulfil
34 the same parameters of backwardness in relation to this two who have been included.

35

36 **SALIL SAGAR:** That's right, My Lord, but I am just...

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** I am saying something in your favour.

2

3 **SALIL SAGAR:** Yes, in first perception, it seems. I am very grateful. But as a matter of fact,
4 Your Lordship may see. Let me also submit. There are other points also that we have not
5 excluded or included in that. We have given a preference. There is a marked difference between
6 preference and reservation on one side and preference and certainly exclusion are also not
7 very having a much difference. One way of saying. One way of saying things.

8

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

10

11 **SALIL SAGAR:** Submission is this that they do not have power. And it relates to exclusion,
12 it literally relates...

13

14 **JUSTICE B.R. GAVAI:** It's already argued by Mr. Swaroop. The power for exclusion and
15 inclusion solely vested the Parliament and the State does not have that power.

16

17 **SALIL SAGAR:** That is in my favour. If the state doesn't have that power...

18

19 **JUSTICE B.R. GAVAI:** That is already argued.

20

21 **SALIL SAGAR:** That is argued. I'm just supplementing. I will not give any details to that.
22 Nor I'm supposed to give. Because he has very elaborately dealt it. That's why I'm grateful to
23 him.

24

25 **JUSTICE B.R. GAVAI:** That is the big point that you have.

26

27 **SALIL SAGAR:** Yes. That's a supplement.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** We'll say that the power for exclusion is not with
30 the States. That is a formulation which Mr. Swaroop has substantially argued that. Please,
31 what is the next point now?

32

33 **SALIL SAGAR:** Yes. Next point, My Lord. I'll come. Please refer to the written statement.
34 Sorry, written submission.

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** Just formulate it.

37

1 **SALIL SAGAR:** Yes. It is 'Whether the state has legislative competence to enact the
2 provisions contained in Section 4, Sub-Clause 5 of the Act.'

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Legislative competence?

5

6 **SALIL SAGAR:** Legislative competence because we are being supported by *E.V.*
7 *Chinnaiah's* case that -'No, as a matter of fact...'

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** Legislative... Actually, *Chinnaiah* has talked of
10 legislative competence, but I think it jumbled up the issue. legislative competence is a term
11 which is applied to the division of powers and not division of entries in List 1, List 2 and List
12 3.

13

14 **SALIL SAGAR:** And *Chinnaiah* has...

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** Really speaking. The power either exists or it
17 does not exist under Article 16(4).

18

19 **SALIL SAGAR:** Yes.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** So, Article 16(4) is not a matter of competence.
22 It's a matter of constitutional authorization.

23

24 **SALIL SAGAR:** Yes, *Chinnaiah* has...

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** One para they say -'Therefore, it is not referable
27 to entry 41 of List 2 or Entry 55.'

28

29 **SALIL SAGAR:** Exactly. The Doctrine of Pith and Substance was applied there in that case,
30 also an *inter alia* stated that actually does this very Act is...

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** See the competence they have. It will be very far-
33 fetched to say that legislative competence is not there because 42 of List 2 says - State Public
34 Services. So, they can enact any...

35

36 **SALIL SAGAR:** 41, My Lord.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** 41. The entirety of the gamut of State Public
2 Services falls within the State Legislative domain. Your point, however, is that while enacting
3 a law under Entry 41 of List 2, you cannot breach a substantive constitutional restriction.

4

5 **SALIL SAGAR:** Yes.

6

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

8

9 **SALIL SAGAR:** I was coming to that, My Lord. I was...

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** All Legislation is subject to part 3 of the
12 Constitution. Part 3 argument does not go to competence but to Constitution.

13

14 **SALIL SAGAR:** My Lords may kindly refer to *Chinnaiah*. There are certain, My Lord. Let
15 me refer it.

16

17 **SANJAY HEGDE:** [INAUDIBLE]

18

19 **SALIL SAGAR:** It was *Chinnaiah*.

20

21 **SANJAY HEGDE:** [INAUDIBLE]

22

23 **SALIL SAGAR:** It was used.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** Leave it at that.. that's okay. There's this passing
26 remark over there in that paragraph.

27

28 **SALIL SAGAR:** Let's My Lord, examine *Chinnaiah*.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** All right. Why don't you do this? You formulate
31 the point. Let's have your formulation first?

32

33 **SALIL SAGAR:** Yes. Whether...

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** Not whether. Whether would be an issue. You
36 are now submitting.

37

1 **SALIL SAGAR:** It's all right, then. Because in the written submission it is written. I have...

2

3 **JUSTICE VIKRAM NATH:** That's the problem. You have borrowed Mr. Hegde's files.
4 Therefore, you have not properly framed it and we have to read it. It should be argued from
5 your [UNCLEAR]

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** Formulate your submission.

8

9 **SALIL SAGAR:** But yes, My Lords may see. Now my submission is the State lacks this
10 legislative components, competence to enact the provision contained in Section 4, Sub-Clause
11 5 of the Act.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** 1 second.

14

15 **SALIL SAGAR:** That is, my submission is at page 33.

16

17 **JUSTICE B.R. GAVAI:** Your submission or Mr. Hegde's submission?

18

19 **SALIL SAGAR:** My Lord may take me as a Hegde.

20

21 **JUSTICE B.R. GAVAI:** Personation.

22

23 **SALIL SAGAR:** Yes. If *Indra Sawhney* can become Indra Gandhi.

24

25 **JUSTICE B.R. GAVAI:** Why not Mr. Sagar become Mr. Hegde?

26

27 **SANJAY HEGDE:** [INAUDIBLE]

28

29 **JUSTICE B.R. GAVAI:** Then after Mr. Swaroop's argument, the matter should've been over.

30

31 **SALIL SAGAR:** It should have been...

32

33 **TUSHAR MEHTA:** Sagar is relying on a deeming provision.

34

35 **SALIL SAGAR:** Obviously.

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** You are saying that the State lacks legislative
2 competence to enact Section 4(5) of the Act.

3

4 **SALIL SAGAR:** Please kindly refer..

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** Now tell us which is the entry under which it will
7 fall?

8

9 **SALIL SAGAR:** It will fall under... my submission would be, it neither falls under 41 nor falls
10 under this 25 of this Schedule 2. Concurrent List. If Your Lordships may kindly refer to page
11 33.

12

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

14

15 **SALIL SAGAR:** Because as per *Chinnaiah*..

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** No, don't. Forget *Chinnaiah*. Because
18 *Chinnaiah* is what we are reconsidering now.

19

20 **SALIL SAGAR:** Yes.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** Right? For us of *Chinnaiah* is not a higher
23 court. In which case we are bound...

24

25 **SALIL SAGAR:** That is a.. that is why I'm...

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** You have to argue it dehors *Chinnaiah*.

28

29 **SALIL SAGAR:** My Lord with respect, if I am saying *Chinnaiah* is correct then I have to
30 justify...

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, but we can't shut our minds, right? We are
33 a bench of seven. We have to now deal with it. It's like arguing a first appeal. In a first appeal
34 before a High Court, you never show that this is the judgment My Lords. You start with the
35 plaint, and you start with the issues you start the written statement, you look at the evidence.
36 First appeal is judgment, the trial court judgment is shown at the end. So it's the same thing
37 in Constitutional matter's, you have to argue on first principle before us.

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SALIL SAGAR: Yes, Your Lordships. My Lords may refer it. My lord, my respectful submission if Your Lordship may kindly refer to page 33, Section 5 of the Act very clearly say that - '50% of the vacancies of the quota reserved for Scheduled Castes indirect recruitment shall be offered to the Valmikis and Mazhabi Sikhs if available at first preference among the Scheduled Caste. The Respondent submits that this amount to an...'

JUSTICE B.R. GAVAI: Rather than reading the submissions, why don't you form...?

CHIEF JUSTICE DY CHANDRACHUD: Just explain it to us, because why do you say it doesn't fall under Entry 41. We got the point that this is unconstitutional because it breaches Article 16 (4).

SALIL SAGAR: I agree.

CHIEF JUSTICE DY CHANDRACHUD: That's a valid point.

SALIL SAGAR: I'm very grateful, My Lord.

CHIEF JUSTICE DY CHANDRACHUD: In the sense, valid in approach, not valid in [UNCLEAR]

SALIL SAGAR: Now I will explain, if we kindly refer to the Act, the Act says, Act has made a subdivision on the basis of the caste. On the basis of the caste, it has been done. Not in order to achieve any other objective like for example, appointment furtherance of Your Lordship may see appointments or a reservation giving another...

CHIEF JUSTICE DY CHANDRACHUD: Can we suggest one thing? Can we suggest one thing? We've got your point, but it brings us back to a central point that this is a reservation on the basis of caste.

SALIL SAGAR: Yes.

CHIEF JUSTICE DY CHANDRACHUD: Now, assuming you're right, we proceed for a moment to test your argument on that you are entirely right. So then, which is the constitutional violation? The violation is of 16 (4), not of legislative competence.

1 **SALIL SAGAR:** Your Lordship..

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** Unless you say that the field is exclusively
4 reserved for Parliament and the Entry 97..

5

6 **SALIL SAGAR:** That would...

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** That you do not say.

9

10 **SALIL SAGAR:** Only because here Your Lordship is reconsidering *Chinnaiah*. I am
11 repeatedly My Lords saying one thing only that the finding given in the *Chinnaiah* in this
12 regard is perfect. Your Lordship is going to consider whether it is wrong or right, or it is as per
13 law. But I... that is why...

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** But I just want to understand why, according to
16 you, is it lacking in legislative competence?

17

18 **SALIL SAGAR:** That's why...

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Just explain, see legislative competence..

21

22 **SALIL SAGAR:** No, My Lords. Legislative competence is otherwise there.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** That's the point..

25

26 **SALIL SAGAR:** It is there if I say.. But it is absolutely at violation of the constitutional
27 mandate under.. If Your Lordship may Article 341 that's why on the next page...

28

29 **JUSTICE B.R. GAVAI:** That has been aptly argued by Mr. Swaroop for last...

30

31 **SALIL SAGAR:** That I understand, I will not be elaborating at all like Mr. Swaroop.

32

33 **JUSTICE B.R. GAVAI:** Same, same. It doesn't mean that if the same thing is said ten times.

34

35 **SALIL SAGAR:** No.

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37 **JUSTICE B.R. GAVAI:** You'll have more value.

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SALIL SAGAR: All right. Then My Lord may consider that...

CHIEF JUSTICE DY CHANDRACHUD: Mr. Sagar, that is a drawing block, the validity of a constitutional provision can be challenged on three counts.

SALIL SAGAR: Yes, My Lord.

CHIEF JUSTICE DY CHANDRACHUD: One, the legislature which enacts the law does not have competence to enact it. Two, it is in violation of part 3.

SALIL SAGAR: Yes.

CHIEF JUSTICE DY CHANDRACHUD: Three, it is in violation if any other..

SALIL SAGAR: On any other Constitutional provision.

CHIEF JUSTICE DY CHANDRACHUD: Any other substantive constitutional prohibition or prohibition. Now, what we are trying to tell you is that you can't mix the first with the second.

SALIL SAGAR: That Your Lordship.. I confine only myself to the...

CHIEF JUSTICE DY CHANDRACHUD: That's right,

SALIL SAGAR: I'm only comparing.. I'll elaborate submissions which My Lords have said this has already been dealt by my learned friend. So therefore, My Lord...

CHIEF JUSTICE DY CHANDRACHUD: What is the next point now, Mr. Sagar?

JUSTICE B.R. GAVAI: Your submission we'll read. Your submission as well as Mr. Hegde's submission. Both we'll read. Your submissions are prior to Mr. Hegde's submissions.

CHIEF JUSTICE DY CHANDRACHUD: Now what is the next point, Mr. Sagar?

SALIL SAGAR: Point is now remains only one. That is again, I'm saying that now let me refer to the *E.V. Chinnaiah's* case. Then I'll close my submissions.

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CHIEF JUSTICE DY CHANDRACHUD: Can you formulate what part of *Chinnaiah* that you are adopting as your argument?

SALIL SAGAR: Yes.

CHIEF JUSTICE DY CHANDRACHUD: So instead of reading *Chinnaiah*, what we would suggest is you can certainly say that I'm adopting the reasoning in *Chinnaiah* as my own. So you just formulate that because that might appeal to us better because.....

SALIL SAGAR: Your Lordship may see, I very respectfully submit that the finding given by the *Chinnaiah* in his judgment regarding this very... if Your Lordship may see that the subdivision made by the State is absolutely the violation of the Article 341 for the simple reasons that it cannot be, it cannot be tinkered with at all to the Presidential list of the Scheduled Caste...

CHIEF JUSTICE DY CHANDRACHUD: This point you have made. Thank you. Thank you. Mr. Sagar. Yes Mr. Hegde?

SALIL SAGAR: I am not allowed to read *Chinnaiah*. No, My Lord there is one....

CHIEF JUSTICE DY CHANDRACHUD: It has been read by seven or eight counsels.

SALIL SAGAR: No, My Lord in this case, there is one paragraph.

CHIEF JUSTICE DY CHANDRACHUD: Mr. Sagar, when you drive, if you've driven a long distance, when you drive there's something called white line fever. You see constantly that white line on the middle of the road. For judges, it's black line fever. You're constantly seeing the printed words. So, that's why you want to be.....

SALIL SAGAR: Your Lordship has read it many a times, no doubt about it. But as a matter of fact, if I Your Lordship may see, I may suggest something. It might come. You never know it. Law is always My Lord has many ramifications where you can't....

CHIEF JUSTICE DY CHANDRACHUD: If you formulate... in a minute if you formulate what in *Chinnaiah* you are trying to emphasize. We'll take it. We have no difficulty.

1 **SALIL SAGAR:** Yes I will, with reference to that, I'll refer only 2-3 paragraphs.

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Sagar, minds are open until the last word in
4 the matter is said. But as the argument progresses, it has to be more and more chiselled and
5 distilled.

6

7 **SALIL SAGAR:** That's all right then.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you. Thank you, Mr. Sagar. Will you
10 formulate
11 your point now?

12

13 **K.S. CHAUHAN:** My Lord, I have 6 submissions My Lord. My Lord with respect, My Lord.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** Chauhan, Dr. Chauhan, can we have a
16 formulation? What is the first point?

17

18 **K.S. CHAUHAN:** First point is My Lord, whether the decision in *E. V. Chinnaiah* is
19 correctly decided or not. My contention is that it is correctly decided. And to supplement this,
20 I have supplementary issues My Lord, whether there could be any political factors in the
21 identification or in the case of provision or not My Lord. To my understanding My Lord, there
22 cannot be any political factor. And then the third is whether the Scheduled Castes are caste or
23 classes. So this is well settled even in *Indra Sawhney* that Scheduled Castes are not castes,
24 they are classes. And the class is always a homogeneous class, you cannot bifurcate it. If you
25 are bifurcating it, then it will be an arbitrary exercise and it will hit by the provisions of Article
26 14.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** Just one second. And bifurcation will violate
29 Article 14. Yes. Then three?

30

31 **K.S. CHAUHAN:** Whether the list of Scheduled Caste prepared by the President in terms of
32 Article 341 of the Constitution of India could be tinkered by the State by enacting a provision
33 under Article 15 and 16 of the Constitution or not.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** We will just reframe your proposition that the
36 State cannot tinker with the list of Scheduled Caste...

37

1 **K.S. CHAUHAN:** Because once the entry...

2

3 **CHIEF JUSTICE DY CHANDRACHUD:**... Notified by the President.

4

5 **K.S. CHAUHAN:** The caste, once it is added to entry, the entry is added to list. Thereafter,
6 State... even the Centre cannot do it. Only Parliament can do it.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** You are absolutely correct on that. Now what's
9 the next point?

10

11 **K.S. CHAUHAN:** Then next point is what is the connecting thread of all these castes? That
12 is very important. Nobody has answered that. The connecting thread is untouchability. For
13 backward classes, the social and backwardness is the only criteria.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** 1 second. The connecting thread, we will say for
16 the notified caste...?

17

18 **K.S. CHAUHAN:** Yes, My Lord.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Is?

21

22 **K.S. CHAUHAN:** Is untouchability, My Lord. And which is abolished by Article 17.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** Just say into brackets, prohibited by Article 17.
25 Right, then?

26

27 **K.S. CHAUHAN:** My last point is that whether the caste-based reservation is permissible?

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** We'll say caste based reservations is not
30 permissible.

31

32 **K.S. CHAUHAN:** Yes, My Lord. So if yes, whether such action is contained to *State of*
33 *Madras versus Champakam Dorairajan*.

34

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

36

1 **K.S. CHAUHAN:** So, to make good this, I want to go to the Constituent Assembly debates,
2 which is in Volume II(b) and page is 124.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** II(b), page?

5

6 **K.S. CHAUHAN:** Page 124. First page it starts.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** Move to it right away. Page 2, *aage jaiye thoda*
9 *sa.*

10

11 **K.S. CHAUHAN:** My Lord, the Constituent Assembly has debated Article 300A and 300B
12 on 17th September 1949.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** PDF page 4?

15

16 **K.S. CHAUHAN:** Volume IV, My Lord. I'm sorry. I'm sorry, I thought the earlier one. That
17 is my submission. At II(b) is my...

18

19 **JUSTICE VIKRAM NATH:** Page 2 contains the Constituent Assembly of India debate.

20

21 **K.S. CHAUHAN:** It is there in the submission also.

22

23 **JUSTICE VIKRAM NATH:** Yes.

24

25 **K.S. CHAUHAN:** My Lord will come to page 2. The object, after the articles. 'The object of
26 these Articles.' This is Dr. Ambedkar's statement before the Constituent Assembly. 'The object
27 of these two Articles, as I stated, was to eliminate the necessity of burdening the Constitution
28 with long list of Scheduled Caste and Scheduled Tribe. It is now proposed that the President...'

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Actually see the last sentence. 'The object...' That
31 is the most important part. Very, very celebrated statement of Dr. Ambedkar. 'The object is to
32 eliminate any kind of political factor, having a play in the matter of the disturbance in the
33 Schedule so published by the President.' That's why you are saying that you can't tinker. Once
34 you notified, Dr. Ambedkar says, you can't tinker. Then it's only the power of Parliament.

35

36 **K.S. CHAUHAN:** Yes, My Lord. Once the list is prepared, My Lord, and the entry is added
37 to the list thereafter, whatever treatment is to be given...

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CHIEF JUSTICE DY CHANDRACHUD: Has to be by parliament.

K.S. CHAUHAN: No, Parliament can do it. That is different thing. But State has to treat every person who is forming part of that list...

CHIEF JUSTICE DY CHANDRACHUD: Similarly.

K.S. CHAUHAN: Similarly. If they are treating them differently, that will be unconstitutional.

CHIEF JUSTICE DY CHANDRACHUD: Fair enough.

K.S. CHAUHAN: And arbitrary exercise, My Lord.

CHIEF JUSTICE DY CHANDRACHUD: Fair enough.

K.S. CHAUHAN: So if we see *Chinnaiah*. *Chinnaiah* has cited ...

CHIEF JUSTICE DY CHANDRACHUD: *Chinnaiah* cites this speech of Dr. Ambedkar.

K.S. CHAUHAN: Yes, My Lord.

CHIEF JUSTICE DY CHANDRACHUD: We have seen that.

K.S. CHAUHAN: Yes, My Lords. And this Mandal, My Lord, the meaning of class and caste was... Then I come to the next point, whether they are class or caste.

CHIEF JUSTICE DY CHANDRACHUD: Yes.

K.S. CHAUHAN: In para of 49 of Mandal.

CHIEF JUSTICE DY CHANDRACHUD: *Indra Sawhney*.

K.S. CHAUHAN: This is Volume V and page is 192. 745. And this is at page 350. Yes.

CHIEF JUSTICE DY CHANDRACHUD: PDF?

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K.S. CHAUHAN: Yes, My Lord. 350.

CHIEF JUSTICE DY CHANDRACHUD: Paragraph?.

K.S. CHAUHAN: This is paragraph 49, My Lord. And it is there in submission also My Lord.

CHIEF JUSTICE DY CHANDRACHUD: No problem. We'll just quickly we'll look at that.

JUSTICE VIKRAM NATH: Meaning of class and caste..

JUSTICE B.R. GAVAI: Paragraph?

K.S. CHAUHAN: Paragraph 49, My Lord

K.S. CHAUHAN: SCC page number is 377 My Lord. 350 is the bold page number. 'Meaning of class and caste - To identify the diversity of meaning of the word class and caste that constitute their inner complexity to formulate the question...'

CHIEF JUSTICE DY CHANDRACHUD: Go to the next paragraph.

K.S. CHAUHAN: Yes, My Lord.

CHIEF JUSTICE DY CHANDRACHUD: Then they give the dictionary.

K.S. CHAUHAN: Then these are dictionary meanings, My Lord.

CHIEF JUSTICE DY CHANDRACHUD: Go ahead, go ahead, go further down.

JUSTICE VIKRAM NATH: Oxford Dictionary...

K.S. CHAUHAN: Then My Lord may come to page... this para 63, My Lord. That is at page 353 My Lord. Article 15... 'Article 15(4), 16 (4) and Article 341 do not speak of caste, but only class. The learned Counsel, particularly those appearing for anti-reservationists, have stressed that if the makers of the Constitution had really intended to take caste or caste as conveying the meaning of socially and educationally backward class. They would have incorporated the said word as caste or caste. In Article 15(4) and Article 340(1) 'as socially and educationally

1 backward caste or caste '.' This was suggested by Justice Pandian, that this should have been
2 the theme of that provision, My Lord.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Dr. Chauhan, go to paragraph 64.

5

6 **K.S. CHAUHAN:** Yes, My Lord. 'The word caste is not used in the Constitution as indicative
7 of any selection of people or community except in relation to Scheduled Caste, which is defined
8 in Article 366 (24). However, they were caste in Article 15(2), 16(2) and 29(2) does not include
9 Scheduled Caste, but it refers to a caste within the ordinary meaning of caste. Then the word
10 Scheduled Caste came into being only after notification of the President under Article 341,' as
11 Mr. Swaroop has contended, My Lord. 'It would be appropriate in this connection to recall re-
12 observation of Justice Fazl Ali.' These Mr. Swaroop has read My Lord, then Justice Matthews,
13 may I read? Paragraph 65, My Lord. In his separate judgment in *Thomas*, expressed that -'It
14 is by virtue of the notification of the President that Scheduled Caste came into being. Reference
15 also may be made to the observation of Justice Krishna Iyer here in *Akhil Bharatiya Soshit*
16 *Karamchari Sangh Vs Union of India*, where he has said - 'Terminological similarities
17 are an illusory guide and we cannot go by verbal [UNCLEAR] route.' It is very doubtful whether
18 the expression caste will apply to Scheduled Caste. At any rate, Scheduled Castes are identified
19 by their tribal denomination. A tribe cannot be equated with the caste. As stated earlier there
20 are sufficient indication in the Constitution to suggest that the Scheduled Caste are not mere
21 caste.'

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** Dr. Chauhan?

24

25 **K.S. CHAUHAN:** Yes?

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** Just read paragraph 82, you know I think after
28 citing all the cases just see how they summarize the discussions. You can actually see
29 paragraph 81 first. 'Though there is tremendous..'

30

31 **JUSTICE VIKRAM NATH:** PDF page 361.

32

33 **K.S. CHAUHAN:** 'Though there is a tremendous ambivalence in a host of judgments
34 rendered by this Court, not even a single judgment has held that class has no relevance to caste
35 at all whenever caste system is prevalent.' To this My Lord, my respectful submission is this,
36 for formulation of that list you can have a caste and the caste is a class for the purpose of
37 entering into that list, once that class that..

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CHIEF JUSTICE DY CHANDRACHUD: There is a little bit of confusion here.

K.S. CHAUHAN: Yes, My Lord.

CHIEF JUSTICE DY CHANDRACHUD: What they are saying is not that a caste can never be a class. What they are saying is, you can't treat a caste as a class unless it satisfies the parameters of social and economic backwardness.

K.S. CHAUHAN: Yes, My Lord.

CHIEF JUSTICE DY CHANDRACHUD: In other words, if a caste satisfies the requirement of social and economic backwardness then it becomes a class. Take any forward community.

K.S. CHAUHAN: Yes, My Lord.

CHIEF JUSTICE DY CHANDRACHUD: We'll not name the community. That community, can that be a class, a backward class for the purpose of... Class for the purpose of 16(4)? No. Why? Because it does not fulfil the parameters of backwardness. So if you see now just read this a little carefully. Para 82. 'Nevertheless it may be stated that caste neither can be the sole criterion, nor can it be equated to class for the purpose of Article 16(4) for ascertaining the social and educational backwardness of any section or group of people so as to bring them within the wider connotation of backward class. Nevertheless, caste in Hindu society becomes a dominant factor or primary criterion in determining the backwardness of a class of citizens. Unless,' - Now, this is very important - 'Unless caste satisfies the primary test of social backwardness as well as the education and economic backwardness which are the established, accepted criteria to identify backward class. A caste per se without satisfying the agreed formulae generally cannot fall within the meaning of backward class of citizens under Article 16(4) save in given exceptional circumstances, such as a caste itself being identifiable with the traditional occupation of the lower strata, indicating the social backwardness.' Now if we apply this test, to the Valmikis and to the Mazhabi Sikhs, they clearly form a class. Because what our Court is trying to say in this para, it's not a general assertion that - 'Look, a caste can never be a class.' They say - 'Before you can come to the conclusion that the caste is a class that caste must satisfy the yardsticks of backwardness, whether it is social, educational or other types of backwardness.'

1 **K.S. CHAUHAN:** My Lord, there is a common.....

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** In this case, it is no one's case that they don't
4 satisfy the *indicia* of backwardness. In fact, your case is like then you also satisfy that *indicia*.

5

6 **K.S. CHAUHAN:** Yes, My Lord.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** So the fact we are dealing today, everybody who
9 is before us, satisfies that *indicia* of backwardness. Because this is a battle between the
10 backward and the backward. It's not a battle between the backward and the forward in this
11 case. So all of you've satisfied the requirement. That's why you are all inserted in the
12 Presidential list in the first place. So it's necessary to understand what para 82 means exactly.

13

14 **K.S. CHAUHAN:** But My Lord with respect, we have to test it from a different angle. Because
15 we have to test it only from the angle of untouchability. Because the caste, suppose 37 castes
16 are there, we are testing on Punjab.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** [UNCLEAR] untouchability alone. It is not that
19 every one of our Scheduled Castes suffered from untouchability in its pristine form. There may
20 have been many Scheduled Castes who did not suffer from the kind of untouchability that we
21 associated with the social spectrum. But they nonetheless suffered discrimination. It may have
22 been a form of untouchability.

23

24 **JUSTICE B. R. GAVAI:** Social backwardness.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Social backwardness. Social ostracism. Not
27 associated with them socially. Confined to very menial occupations.

28

29 **K.S. CHAUHAN:** Justice Ramaswami has written a concurring judgment from State of
30 Karnataka. So we can go to that. We will find My Lord....

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** *Aur kuch hai? Para 95 dekh lijiye zara.*

33

34 **NIDHESH GUPTA:** What is followed to, the Chief Justice is said in so many words by Justice
35 Jeevan Reddy.

36

37 **CHIEF JUSTICE DY CHANDRACHUD:** By Justice?

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NIDHESH GUPTA: Jeevan Reddy. In so many words. Just take para 782, 784. There's so many words, that caste is a backward class once it satisfies these tests.

CHIEF JUSTICE DY CHANDRACHUD: Correct. Just see, that's done. Since that has been read, let's clear it.

NIDHESH GUPTA: Let's see 782 for a moment, My Lord. Just kindly see that.

SHADAN FARASAT: 778 is also exactly on that point. 778.

NIDHESH GUPTA: My Lord, I'll just read three lines. Just come to 778.

CHIEF JUSTICE DY CHANDRACHUD: Just one second. We'll go to it. And page?

NIDHESH GUPTA: My Lords, this is in your PDF, Your Lordships will find this at page 693.

K.S. CHAUHAN: My Lord, may kindly come to page 779, My Lord.

NIDHESH GUPTA: I'll just read two paragraphs. That's all. Kindly come to My Lord PDF 693, Placitum F. Placitum F, My Lords. May I, place it My Lords? Placitum F. 'Any authority entrusted with a task of identifying backward classes may well start with the castes. It can take Caste A, apply the criteria of backwardness evolve by it so to that caste and determine whether it qualifies as a backward class or not. If it does qualify, what emerges is a backward class for the purpose of 16(4). The concept of caste is not, in this behalf, is not confined to cast among Hindus. It extends so and so and so.' Now let's come to para 784 on the next page. Again said even more clearly. Kindly come to 784, the next page.

CHIEF JUSTICE DY CHANDRACHUD: Yes.

NIDHESH GUPTA: 'The only basis for saying that caste should be excluded from consideration altogether while identifying backward class of citizens for the purpose of 16(4), this Clause 2 of 16. This argument, however, overlooks and ignores the true purpose of Clause 2. It prohibits discrimination on any or all of the grounds mentioned therein. The significance of the word 'any' cannot be minimized. Reservation is not being made under Clause 4 in favour of a caste, but a backward class.' Now this is important. 'Once a caste satisfies the criteria of backwardness, it becomes a backward class for the purpose of 16(4). Even that...' This is what

1 is being submitted right now. This answers that, and then the pre-lunch debate, the next line.
2 'Even that is not enough. It must be further be found that the backward class is not adequately
3 represented in the services of the State. In such a situation bar of two [UNCLEAR].' So, to
4 answer what fell from the Ladyship. This is the clear answer. The caste once it satisfies the
5 requirements given here. Social, educational backwardness is a backward class. That's why...

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** It's clear actually, very clear.

8

9 **NIDHESH GUPTA:** Absolutely clear.

10

11 **SHADAN FARASAT:** One more para, if Your Lordships would permit? 778. That also puts
12 it very quietly. 778. 'Indeed, there are very good reasons why the Constitution could not have
13 used the expression caste or caste in Article 16(4) and why the word class was the natural
14 choice in the context. The Constitution was went for the entire country and for all time to come.
15 Non-Hindu religions like Islam, Christianity and Sikhs did not recognize caste as such though
16 as pointed out here and above. Caste did exist, even among these religions to a varying degree.
17 Further, the Constitution is supposed to be a permanent document expected to last several
18 centuries. It must surely have envisaged that in future many classes may spring up answering
19 the test of backwardness requiring the protection of Article 16(4). It therefore follows from the
20 use of the word, the use of the word...

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** 2 and 784 are...

23

24 **K. S. CHAUHAN:** 779 is also important, My Lord.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** One more thing. Very interestingly. I just wanted
27 to show you. We don't read it right now. In earlier parts, in the morning session, I gave that
28 example of the aerospace. That is footnote 143, at page 690. *Air India Vs Nargesh Meerza.*

29

30 **NIDHESH GUPTA:** Yes, well, that's correct.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** What Article 1 and 16(2) prohibit is that
33 discrimination should not be made only and only on the grounds of sex.

34

35 **NIDHESH GUPTA:** That's what 784 says. Here it is not just that. It is also an inadequacy of
36 representation. So the only 16(2) argument is specifically rejected on this ground, what fell
37 from the Lordships in the pre-lunch session.

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KAPIL SIBAL: All these, Para 766, 771, 772 to 778, then 779 and then that 779. That's it.

CHIEF JUSTICE DY CHANDRACHUD: And 784.

KAPIL SIBAL: 82, 84 and 96,97. 796-97 complete. I have it in a note which I'll upload. This has all the quotations. So that it's easy for Your Lordships.

SANJAY HEGDE: Your Lords, just one comment. All these passages are only in the context of reservation for OBCs. Now, OBCs had to be justified at that stage because Mandal was concerned not with Scheduled Castes but with OBCs.

CHIEF JUSTICE DY CHANDRACHUD: But Mr. Hegde, even within the OBCs, the point is that a single caste can become a class provided... We see your point. You're saying -'But no, in the case of SC, because of Article 341...'

SANJAY HEGDE: It is the entire thing altogether. I'll put it in. I just didn't have a moment to...

CHIEF JUSTICE DY CHANDRACHUD: No. We will wrap up. We got the point. Let's Dr. Chauhan continue.

K.S. CHAUHAN: The next issue is the theory of classification. How you can classify? What Mandal has said about classification? Now, every often then, even in these proceedings.

CHIEF JUSTICE DY CHANDRACHUD: So what is the submission, Dr. Chauhan?

K.S. CHAUHAN: My submission is My Lord. They are enabling provision only for the purpose of making classification. But it is not discretionary because it is not discretionary for the State, that they can allow some people the benefit and they can disallow some people that benefit, My Lord. If the person is a forming part in a list My Lord, then they cannot discriminate. And this issue was considered by the eleven judges bench in *Madhav Rao Jiwaji Rao Scindia's* case and even in *Kesavananda Bharati*. 486 paragraph My Lord. The Supreme Court had said -'This is a controlled Constitution, My Lord.'

CHIEF JUSTICE DY CHANDRACHUD: Dr. Chauhan, you've made your point. We are going to put it to the other side and simply put, your point is this, because this is a very valid

1 point. That suppose the State... Now, in this case, it's two castes. Some states says that well out
2 of my 86, I'm identifying only 7.

3

4 **K.S. CHAUHAN:** Yes, My Lord.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** You leave out others who are similarly
7 circumstanced.

8

9 **K.S. CHAUHAN:** Yes, My Lord.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** Can the State do that? Can they say that -'Look,
12 I have say, 25 castes, which fulfil all the parameters of backwardness.'

13

14 **K.S. CHAUHAN:** Yes, My Lord.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** 'Out of the 25 I'll only take 3.'

17

18 **K.S. CHAUHAN:** Yes, My Lord.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Normally, conceptually, an under-inclusive
21 classification is a valid classification.

22

23 **K.S. CHAUHAN:** Yes, My Lord.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** The legislation does not have to deal with
26 everybody to deal with someone, but I'm not sure that can apply over here, because if there
27 are a range of castes which are equally backwards. Can you then say - 'I'll pick out only two.'
28 But that again, that point is perhaps something we should leave when the challenge comes up
29 before the High Court you see, or before the two judge bench or whatever.

30

31 **K.S. CHAUHAN:** With respect, My Lord....

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** I'll give you another example.

34

35 **K.S. CHAUHAN:** Yes?

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** Suppose, in this case, they had picked out only
2 Valmikis.

3

4 **K.S. CHAUHAN:** Yes, yes My Lord.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** And left out Mazhabi Sikhs. Alright?

7

8 **K.S. CHAUHAN:** Yes, My Lord.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** Could the Mazhabi Sikhs not have argued that
11 'we are as backward as the Valmikis, why have you left us? You are only taking the Valmikis'.
12 Or suppose they took up only the Mazhabi Sikhs.

13

14 **K.S. CHAUHAN:** Yes My Lord.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** Can the Valmikis not have argued that - 'look,
17 why are you taking up only the Mazhabi Sikhs? We are similarly situated.'

18

19 **K.S. CHAUHAN:** Yes, yes.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** Which means, therefore, that those are excluded
22 can always challenge that classification under Article 14, on the ground that - 'look we fulfil all
23 the *indicia* of backwardness'. But the State can also rebut it by saying that 'we can classify caste
24 by looking at the extent of backwardness. We want to deal...' - like Justice Gavai said - 'we want
25 to confer benefits on the most backward'.

26

27 **K.S. CHAUHAN:** Yes, My Lord.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** But while conferring benefits in the most
30 backward, you can't ensure that some who are more backward, most backward are only given
31 while the others are left out. Otherwise, this will become a very dangerous trend in your
32 popular appeasement.

33

34 **K.S. CHAUHAN:** Yes,

35

1 **CHIEF JUSTICE DY CHANDRACHUD:** Some State Governments will pick out few
2 castes. Another State Government will pick out another caste. The idea is not to allow you
3 know popular politics to play out in granting of reservations.

4

5 **K.S. CHAUHAN:** That's why Dr. Ambedkar said that there should be no political.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** So even if we don't accept your wider
8 submission, there is undoubtedly, there is some substance in what you people are all pointing
9 out to us and we'll have to tailor it by laying down criteria.

10

11 **K.S. CHAUHAN:** Yes, My Lord. But My Lord may kindly look to *Madhav Rao Jiwaji Rao*
12 *Scindia* judgment My Lord. 2 paragraphs. That is 11 judges bench, My Lord.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** We have dealt with it in Article 370 recently. The
15 article, that is a *privy purse*, no?

16

17 **K.S. CHAUHAN:** Yes, yes, My Lord. Paragraph 117 and 170.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** What is the..?

20

21 **K.S. CHAUHAN:** My Lord, they say that this is 'a power conferred on the President to
22 identify'. But suppose the President doesn't identify, then it will be unconstitutional. He
23 cannot do it. He has a power which is vested, which has to be exercised.

24

25 **JUSTICE B.R. GAVAI:** Power to do....

26

27 **K.S. CHAUHAN:** Power coupled with duty principle, My Lord.

28

29 **JUSTICE B.R. GAVAI:** *Madhav Rao Scindia* is concerned with *privy purse*.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** No, no. This is a *privy purse*, it has nothing to
32 do with Article 341.

33

34 **K.S. CHAUHAN:** My Lord, that is there. From there, we have taken that paragraph 117 and
35 171. Two paragraphs are there. One is by Justice Shah and another is by Justice Hegde, My
36 Lord.

37

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

2

3 **K.S. CHAUHAN:** My Lord, this is volume.. PDF. Volume

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** In *Madhav Rao* what happened was...

6

7 **K.S. CHAUHAN:** Yes, My Lord.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** That the rulers were de-recognised by an
10 Executive Act. Though the Constitution specifically recognized their status as rulers.
11 Therefore, it is struck down on the ground that what the Constitution had done by an express
12 recognition, you could not undo by an Executive Order. Subsequently, they amended the
13 Constitution to abolish *privy purse*. That's why in the second round, before Justice L.M.
14 Sharma, the abrogation of *privy purse* was upheld because it was a constitutional amendment.

15

16 **K.S. CHAUHAN:** That is only for the purpose of principle, My Lord, that is for a different
17 aspect. But the principle which was dealt by this Honourable...

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** *Bataiye kaunsa para?*

20

21 **K.S. CHAUHAN:** My Lord, this is in my sequence of submissions, which we have given My
22 Lord. And this is at page 108, My Lord, the paragraph My Lord.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** Okay, okay. It's not there. It's on the screen,
25 actually. So straight from the screen. Which para?

26

27 **K.S. CHAUHAN:** Para 117, My Lord. My Lord, could I go to page 109? In the top, there is a
28 page 109.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Yeah, yeah, para 117.

31

32 **K.S. CHAUHAN:** 117 will start in the earlier page, My Lord. 'There are many analogous
33 provision in the Constitution which confer upon the President a power coupled with duty. It
34 may refer to, we may refer to two such provisions. The President has under Article 341, 342 to
35 specify Scheduled Caste and Scheduled Tribe, and he has done so. Specification, so made
36 tallies for the members of the Scheduled Caste and Scheduled Tribe. Certain special benefits
37 in the House of People and in the State Legislative Assembly by Article 330 and 332 and of the

1 numerous provisions made in Schedule 5 and Schedule 6. It may be noticed that Scheduled
2 Caste and Scheduled Tribe are specially defined for the purposes of Article, of the Constitution
3 by Article 366 Clause 24 and 366 Clause 25. If...'

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** So what they are saying is, that since the power
6 to, once the President makes a notification, thereafter any deletion has to be by a law made by
7 Parliament. The President can't just issue a notification and delete any entry. That's the point.

8

9 **K.S. CHAUHAN:** Now My Lord, because the principle which was settled in *Indra*
10 *Sawhney* in nine judges bench that this is a classification. Now in *Nagaraj*, this
11 Honourable Court has taken a view this is an enabling provision and a discretionary remedy
12 which has led to scrapping of reservation in promotion, almost all states My Lord. The
13 interpretation should be as per the mandate of the Constitution and whatever... My Lord have
14 laid down in the larger benches, My Lord. But still that enabling provision and discretionary
15 remedy was a part of Article, para 284 by Justice Thommen, My Lord. He was a dissenting
16 judge in that. Only he has used that phrase, which was adopted in *Nagaraj* My Lord. And
17 this is a facet of that only My Lord that we will provide reservation to one caste and we will not
18 provide reservation to the other caste.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Alright, we got the point. Now what's the next
21 point, Dr. Chauhan?

22

23 **K.S. CHAUHAN:** Para 788 of *Indra Sawhney*, that is at, in Volume IV(a) at page 693, My
24 Lord.

25

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

27

28 **RESPONDENT'S COUNSEL:** 693.

29

30 **JUSTICE B. R. GAVAI:** Paragraph 778.

31

32 **K.S. CHAUHAN:** No, no, My Lord 788 My Lord.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** 788?

35

36 **K.S. CHAUHAN:** My Lord, it is at 693 page. 'Further, if one keeps in mind the context in
37 which Article 16(4) was enacted, it would be clear that that assent was upon social

1 backwardness. It goes without saying that in the Indian context social backwardness leads to
2 educational backwardness, and both of them together leads to poverty, which in turn breeds
3 and perpetuates the social and educational backwardness. They feed upon each other
4 constituting a vicious circle, it is known, a well-known fact that till Independence, the
5 administrative apprentice was meant almost exclusively by members of upper caste, Shudras
6 and Scheduled Caste and Scheduled Tribes and others similarly backward...'

7

8 **JUSTICE B.R. GAVAI:** It is already read. This paragraph is already read.

9

10 **K.S. CHAUHAN:** Yes, Sir. No, this has not been read.

11

12 **JUSTICE B.R. GAVAI:** Yes, it has been read.

13

14 **K.S. CHAUHAN:** My Lord, last. Placitum H. 'We are accordingly of the opinion that the
15 backwardness contemplated by Article 16(4) is mainly social background.'

16

17 **JUSTICE B.R. GAVAI:** That has already been read, Mr. Chauhan.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** What they held was SCs and STs don't have to
20 satisfy the tests to a social backwardness because they are socially backward. That's what they
21 have said.

22

23 **K.S. CHAUHAN:** Yes. And the connecting thread is only the untouchability, because...

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** We got that point. We made a note of that.

26

27 **K.S. CHAUHAN:** In the list, My Lord they are... basically, and that is the main condition to
28 enter into that caste.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Therefore, you can't bifurcate.

31

32 **K.S. CHAUHAN:** Yes, That's why...

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** Thank You, Dr. Chauhan. Anything else now.

35

36 **K.S. CHAUHAN:** Just a minute. In *Jarnail Singh*, para 23, 24.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** What are you relying upon that for?

2

3 **K.S. CHAUHAN:** Regarding the untouchability only. **2018, 10, SCC, 396** and this is
4 Volume V.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** PDF, it starts page 908.

7

8 **JUSTICE B.R. GAVAI:** Which paragraph you're referring to?

9

10 **K.S. CHAUHAN:** 23, 24. Could I read, My Lord? 'This brings us to whether the judgment in
11 **Nagraj** needs to be revisited on the other ground that have been argued before us insofar as
12 the State having to show quantifiable data so far as backwardness of the class is concerned.
13 We are afraid that we must reject Mr. Shri Shanthi Bushan's argument. The reference to class
14 is to Scheduled Caste and Scheduled Tribe and their inadequacy of representation in public
15 employment. It is clear, therefore, that **Nagraj** has, in unmistakable terms, stated that the
16 State has to collect quantifiable data showing backwardness of the Scheduled Caste and
17 Scheduled Tribe. We are afraid that this portion of the judgment is directly contrary to the
18 nine judgments in **Indra Sawhney**, one **Jeevan Reddy, J.** speaking for himself.' Then this
19 para is extracted. 'The test of requirement of social and educational backwardness cannot be
20 applied to Scheduled Caste and Scheduled Tribe who in depth fall within the expression
21 backward class of citizens.' Then Justice Soman, though he was dissenting judge, his para is
22 also extracted. 'Only such class of citizen who are socially and educationally backward classes,
23 for the purposes of reservation under Article 15 and Article 16, their backwardness must
24 have...'

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Chauhan, what this paragraph says is that
27 for the SCs and STs, the State need not collect quantifiable data on backwardness because SCs
28 and STs by the way nature are treated as backward by their inclusion in list and Article 341. So
29 to that extent, **Nagaraj** was overruled, saying that quantifiable data on backwardness. That
30 principle does not apply to the SCs/STs.

31

32 **K.S. CHAUHAN:** So, in that way, in Scheduled Caste, they form part of that list My Lord.
33 Then there cannot be a better Scheduled Caste or a worst Scheduled Caste or privileged
34 Scheduled Caste because...

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** You're right, that is the point all of you are
37 making.

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K.S. CHAUHAN: If a cast is attaining some better advantage, then the Parliament is free to exclude that caste, even a part of that caste can be excluded.

CHIEF JUSTICE DY CHANDRACHUD: That's the point which has been made repeatedly.

K.S. CHAUHAN: Yes, yes, My Lord.

CHIEF JUSTICE DY CHANDRACHUD: Thank you, Dr. Chauhan. I think we have time now for Mr. Rao and for Mr. Hedge to [UNCLEAR]

K.S. CHAUHAN: Then I want to place only one important thing, My Lord. There is a research article by Professor Owen M. Fiss and this paragraph 163 is relevant. My Lord may kindly read.

CHIEF JUSTICE DY CHANDRACHUD: Where do we get the article?

K.S. CHAUHAN: This is like in our country... this is PDF page 432, My Lord.

JUSTICE VIKRAM NATH: Volume V?

K.S. CHAUHAN: The Court Master is having it?

JUSTICE VIKRAM NATH: Volume V?

K.S. CHAUHAN: Yes, yes, My Lord.

CHIEF JUSTICE DY CHANDRACHUD: It's okay. He'll pass it in the evening.

K.S. CHAUHAN: So, like in our country My Lord and in the USA also for blacks there is a complaint that rich blacks should not form part of that group and to that he has answered this My Lord. Page 163. 'Moreover' - second line I am reading - 'moreover wholly apart from consideration of administrative convenience, the decision not to exclude the rich black, even one identified..'

1 **CHIEF JUSTICE DY CHANDRACHUD:** This does not cite the US. Do you know the latest
2 judgment of the US? They have said that you cannot use race even as a factor in admissions.
3 They have now gone the other way.

4

5 **K.S. CHAUHAN:** Yes, yes.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** Justice Roberts has said that you cannot use race
8 even as a factor in admissions. They never had quotas.

9

10 **K.S. CHAUHAN:** Yes, yes, My Lord. But, their quota has come after our Constitution, My
11 Lord.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** No, no, they don't have quotas. But now even
14 that has been outlawed by the US Supreme Court. So there are light years away from the
15 position that we have evolved in our Constitution.

16

17 **K.S. CHAUHAN:** No, no, but in their Constitution there is no provision like our reservations,
18 My Lord.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Hegde says that there's been a regression in
21 that sense from our position, in that sense, in the US.

22

23 **K.S. CHAUHAN:** No, no, but in their jurisdiction or their jurisprudence, this reservation or
24 relating provisions or relating principle was evolved because of Dr. Ambedkar and since in our
25 Constitution, this principle was adopted, that's why in '58 they have started adopting this. Our
26 Constitution came in '50 My Lord. So, much later they have adopted that principle.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** They've never adopted quotas and even now,
29 race as a factor has been rejected in the US.

30

31 **K.S. CHAUHAN:** Because they do not have provision in their Constitution, My Lord. In our
32 Constitution, we have only...

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, Mr. Hegde, who wants to argue now? Thank
35 you, Dr Chauhan. Mr. Rao, yes. Thank you Dr. Chauhan.

36

37 **K.S. CHAUHAN:** I am obliged, My Lord.

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A.D.N RAO: My Lord, while deciding *Chinnaiah* , there were 4 appeals before Your Lordships. One was Appeal number 6759 of E.V. Chinnaiah. In that moment Mr. Chinnaiah represented an organisation, he is no more My Lord. But one of the members, I am there also. Yesterday somebody mentioned My Lord that they're representing *Chinnaiah*. Whoever is representing I don't mind... it is a point which has to be canvassed.

JUSTICE B.R. GAVAI: You said that you are representing Chinnaiah.

CHIEF JUSTICE DY CHANDRACHUD: But Mr. Rao says Mr. Chinnaiah is no more. Anyway, it doesn't matter.

A.D.N RAO: Be that as it may My Lord, whoever does it hardly matters. The second party with whom I am representing is My Lord Civil Appeal number 6934.

CHIEF JUSTICE DY CHANDRACHUD: Give that later, tell us the point,

A.D.N RAO: The point My Lord is this. While the Legislature, while enacting laws empowering the backward people, cannot tinker with the list, Presidential list under Article 341.

CHIEF JUSTICE DY CHANDRACHUD: That is a point which is already been made.

A.D.N RAO: Therefore, I'm not reporting that. Second thing, which I wanted to point out , one of the major questions before Your Lordship is whether *Chinnaiah* requires reconsideration and whether *Chinnaiah* was wrong My Lord. We have to look at the judgment of *Chinnaiah* from the point of view of what it was deciding My Lord.

CHIEF JUSTICE DY CHANDRACHUD: Right.

A.D.N RAO: The facts are very necessary. For that, kindly take the judgment My Lord, *Chinnaiah* Judgment My Lord.

CHIEF JUSTICE DY CHANDRACHUD: Actually, the facts were read out to us.

A.D.N RAO: Facts were read out but how Court...

1 **CHIEF JUSTICE DY CHANDRACHUD:** Ramchandra Raju report and everything read
2 out.

3

4 **A.D.N RAO:** My Lord, since that's the major this thing My Lord, I would like to, I beseech
5 Your Lordship, I will not read the entire judgment. There are four or five paragraphs My Lord
6 which I want to show. What were the questions before the court My Lord? Your Lordship may
7 kindly come to My Lord whatever the question... Page 800, My Lord.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** Of Volume V?

10

11 **A.D.N RAO:** I'll give the equal. Yes My Lord, of volume V, My Lord.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Which para do you want us to read?

14

15 **A.D.N RAO:** Para 55 My Lord. This is Justice Sinha. He dealt with the questions. What were
16 the questions before the High Court My Lord. The questions before the High Court were
17 whether the State's legislative power is curtailed or eclipsed by any provisions of the
18 Constitution. Whether the impugned Act is beyond the legislative competence of the State and
19 is violative of Article 341(2); whether the impugned Act violates Article 14, 15 and 16, whether
20 the impugned Legislation is a colourable piece of Legislation. Now, My Lord, Your Lordships
21 may kindly go back to page 409, which is equivalent to 789, para 12. What was before this
22 Court.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** Violative of, yes.

25

26 **A.D.N RAO:** 'From the pleadings on record and arguments addressed,' - this is Justice
27 Santosh Hegde My Lord - 'whether the impugned Act is violative of article 341(2) of the
28 Constitution.'

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** See Item 3. Question 3.

31

32 **A.D.N RAO:** Now My Lord, this is answered in paragraph 26 after discussion and everything.
33 Then My Lord whether the impugned enactment is constitutionally invalid for lack of
34 legislative competence para. 31. Whether the impugned enactment creates subclassification or
35 micro-classification of Scheduled Caste so as to violate Article 14 of the Constitution, which is
36 answered in para. 37 My Lord. No, no, I'm not reading the reasoning My Lord because it has
37 been done and because my first proposition considers all that has been argued My Lord. But

1 there is one thing which I want to point out. As the questions arose what happens to the
2 backward, who are below, who are not dealt with. For instance My Lord, in the State of Andhra
3 Pradesh, what had happened? There were 59 castes My Lord. 59-60 My Lord be that as it.
4 They were divided into four My Lord A,B,C and A, class A My Lord was given, comprising of
5 twelve classes. Category A, comprising of twelve classes were given 1% My Lord.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** Twelve castes or classes?

8

9 **A.D.N RAO:** Twelve classes, My Lord. Twelve castes, My Lord. Then part B , category B
10 comprising of 18 castes, were given 7%; then category C containing 24 castes were given 6%;
11 then category D.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** 24 castes?

14

15 **A.D.N RAO:** Yes 24, My Lord.

16

17 **.CHIEF JUSTICE DY CHANDRACHUD:** 6%

18

19 **A.D.N RAO:** Fourth is 4 castes, given 1%. Now what happens is, earlier who we're getting in
20 the entirety in the 15 My Lord, whether they could compete with it, did not do it. We are not
21 concerned, My Lord. But 15, I suppose I was eligible for the 15%, today by virtue of being
22 classified into class D, I get only 1%. That is 24 castes, will get 1% My Lord.

23

24 **JUSTICE B.R.GAVAI:** No. 24 castes, you said 6%.

25

26 **A.D.N RAO:** 6% My Lord but 50... from 24, 4 castes 1% My Lord. 12 castes 1%.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** Earlier everybody was competing for the
29 entirety of the 24.

30

31 **A.D.N RAO:** Earlier, I could compete for the entire 15% My Lord. So therefore, My Lord, in
32 the light of that this judgment was delivered. That's why I read the questions My Lord, but
33 what were the questions before this Honourable Court? Now, My Lord, what is actually
34 happening is they have tinkered with 341, second portion. You have varied the list.

35

36 **JUSTICE VIKRAM NATH:** They have neither included or excluded.

37

1 **A.D.N RAO:** To say My Lord that we are still there, but we have varied the list.

2

3 **JUSTICE VIKRAM NATH:** They are the same. They have all been given, may be, different
4 percentage of them.

5

6 **A.D.N RAO:** No. But today what happens is. That's why I said. Twelve castes or four castes...

7

8 **JUSTICE VIKRAM NATH:** There could be other reasons also. What is the population ratio?
9 What is their representation in the service?. That's the exercise that has to be undertaken by
10 the Government.

11

12 **A.D.N RAO:** The earlier cases have shown that there's a route to it. If you find somebody has
13 gone above the threshold. Delete them. If you want to bring in new...

14

15 **JUSTICE VIKRAM NATH:** They can't do it. That's what the [UNCLEAR]. But they are
16 trying to maintain a balance between all these castes.

17

18 **JUSTICE B.R. GAVAI:** It's a different matter that for arriving at such a finding, there was
19 no empirical data.

20

21 **A.D.N RAO:** There was nothing.

22

23 **JUSTICE B.R. GAVAI:** So, that will be going to the merits of the matter. It is permissible or
24 not, that's a question of [UNCLEAR].

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Whether as a matter of principle, *Chinnaiah* is
27 right or wrong, we are deciding but the Act may still not pass muster, in the absence of
28 verifiable data in regards to the underrepresentation, et cetera.

29

30 **A.D.N RAO:** This is 2005, then '07. Initially, the ordinance was challenged, which was
31 upheld, which was stuck down. Then the State came here. Then the Legislation came.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** We will ask the other side, anybody dealing with
34 Andhra Pradesh on this side?

35

36 **A.D.N RAO:** No, Mr. Luthra made a statement that we will abide by the judgment, as if they
37 have a choice.

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SHADAN FARASAT: Dr. Muralidhar appeared for Andhra Pradesh and they said, they will abide by it.

A.D.N RAO: They will abide by it, whatever Your Lordships...

CHIEF JUSTICE DY CHANDRACHUD: *Chinnaiah* set aside the Act, all right. So, Chinnaiah held the Act to be unconstitutional. Now, if we, in a separate proceeding, if we come to the conclusion that the judgment in *Chinnaiah* does not lay down the correct principle, that will not *per se* result in the validation of the Act.

A.D.N RAO: That's anyway, My Lord.

CHIEF JUSTICE DY CHANDRACHUD: 1 second. We do not have any appeal pertaining to Andhra Pradesh before us, right?

A.D.N RAO: It has been filed by some of the people who get benefit by this, for I think for which Mr. Venugopal argued.

SANTHOSH KRISHNAN: I appear for the State of Andhra Pradesh, My Lord. The Chief Justice has rightly observed there is nothing by way of an Andhra Pradesh review pending as far as this reference is concerned.

CHIEF JUSTICE DY CHANDRACHUD: We have Andhra Pradesh before us. How are the people from Andhra Pradesh? They are inter regional or [UNCLEAR]

SANTHOSH KRISHNAN: No, My Lord. Actually by way of a PIL, that is in Item 701.22.

CHIEF JUSTICE DY CHANDRACHUD: Yes, Mr. Krishnan.

SANTHOSH KRISHNAN: In Item 701.22, a writ petition has been filed arraying all the states of the country asking for overruling of *Chinnaiah*. That is the only the incidental basis on which Andhra Pradesh is technically before My Lords.

CHIEF JUSTICE DY CHANDRACHUD: In a collateral proceeding, even if we overrule *Chinnaiah*, there will be no impact on the Act, which has been held...

1 **SANTHOSH KRISHNAN:** The act has been struck down, and since the act has been struck
2 down in our own case, we have not reenacted anything in defiance of this Honourable Court's
3 judgement.

4

5 **JUSTICE B.R. GAVAI:** It is open for the State if they want to come for the fresh enactment
6 or not.

7

8 **SANTHOSH KRISHNAN:** Yes.

9

10 **JUSTICE B.R. GAVAI:** And only after fresh enactment comes, individually[UNCLEAR]

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** And that can be subject to a challenge.

13

14 **A.D.N RAO:** Why I am not going that far is. I don't want to come back again saying that in
15 view of Your Lordship, they have reenacted. This was actually a political move.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Rao, we will not comment on the facts of the
18 Andhra Pradesh Act in this proceeding. For the reason that whatever we do is not going to
19 affect the mandamus or the [UNCLEAR] which was issued by this Court or a declaration which
20 was issued by this Court in *Chinnaiah*. Which was there *inter parte*. What we will decide
21 here, the only live case which is before us is Punjab case.

22

23 **SANTHOSH KRISHNAN:** Furthermore, if I can say this...

24

25 **A.D.N RAO:** What happens is, the apprehension is a series of litigations would start now. The
26 enactments would come because this move in the State was only for a political purpose.

27

28 **NITIN MESHRAM:** He was the lead petitioner for Andhra Pradesh.

29

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

31

32 **NITIN MESHRAM:** Under matter [UNCLEAR] registered under the name E.C Chinnaiah,
33 I was the second or third petitioner. Separate petition. My name is there. I am there My Lord
34 from the Andhra Pradesh side to represent the Scheduled Caste. And here I will just deliver a
35 point that whether the backward classes that under 16(4) includes Scheduled Caste or not.
36 That is the only purview of my argument.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** So Mr. Rao, what else now?

2

3 **A.D.N RAO:** The problems which were raised by the court, My Lord as to what happens
4 within the group who are not them. Now Justice Sinha has given certain remedies, which are
5 at page 815. Apart from that a solution can be found out as to how these things, reservations
6 have to be worked out. Yes, My Lord, we are seeing because of the ground situation that some
7 people are garnering, some people are not getting it. They are not getting it because of the
8 socio-political situation that they are not allowed in the village and the census is taken only in
9 the village. This has to be this restricted My Lord, maybe one suggestion. Suggestion, I'm
10 giving it as an officer of the court My Lord, not this thing. Suppose My Lords, what happens
11 today is that a person is getting a reservation. Where suppose the person is getting reservation,
12 he gets reservation at all stages My Lord. For instance, at the admission at the time of school,
13 at the time of college, for instance, he goes into a medical stream My Lord and he gets the
14 reservation. Then in the job, he gets the reservation. This has to be looked into by the
15 Government, as to how it reaches to the bottom, but it can't be that they will tinker with the
16 list.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** There is no tinkering with the list as such..

19

20 **JUSTICE B.R. GAVAI:** There is no tinkering.

21

22 **A.D.N RAO:** No, they have varied the list My Lord. From 15, I've got 1, My Lord.

23

24 **JUSTICE B.R. GAVAI:** It's all in the where in the list?

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** No, the list never gives you a...

27

28 **JUSTICE B.R. GAVAI:** The list never gives you a percentage.

29

30 **A.D.N RAO:** In the Constitution it is provided that SC/ST would get the...how much they
31 would get, My Lord. That has been varied, My Lord.

32

33 **JUSTICE B.R. GAVAI:** No. Nowhere it is provided in the Constitution.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** Where in the Constitution does it say that you
36 get 15.5% reservation? Show us the provision.

37

1 **SANJAY HEGDE:** Adequate representation.

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** Adequate representation.

4

5 **A.D.N RAO:** But today I have been deprived of it.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** But therefore..

8

9 **A.D.N RAO:** The percentage. My percentage has gone down, My Lord.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** But therefore, your argument is on the challenge
12 to the Act *per se* not on, that doesn't have on Chinnaiiah.

13

14 **A.D.N RAO:** Act *per se*, My Lord.

15

16 **JUSTICE B.R. GAVAI:** Act is over and exhausted.

17

18 **A.D.N RAO:** But since we were parties in the original and the judgment is under
19 reconsideration.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** Whatever happens in the judgement does not
22 result in the revival of the Act. Alright, thank you, Mr. Rao.

23

24 **A.D.N RAO:** Can I give a small written submissions. I also appeared in one of the IA's My
25 Lord, filed by a police officer. That IA number is 120962 of 2020. I'll give it to the Court Master,
26 matters in which I'm appearing.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, Mr. Hegde

29

30 **A.D.N RAO:** The others I'm not repeating, My Lord.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** What is the point that you want to make?

33

34 **SANJAY HEGDE:** Just a bit, I do realise that we are at the end of a long and weary hearing,
35 so therefore, I will not bore Your Lordships. I'll go on the sound principle that if you don't
36 make a point you stop boring. Now, here My Lords it's like this, the point that Dr. Chauhan
37 finally came to was, what is the distinction that marks a Scheduled Caste? And the answer

1 given was Untouchability. I want to bring to Your Lordship's notice a judgment in suicide
2 which sets it out substantively and our Constitutional history. It is **1985 supplementary**
3 **SCC** Page 590, My Lords paragraph 7 thereof. It has been uploaded. Please My Lords. Para 7.
4 'Now, it cannot be disputed that this caste system is a feature of the Hindu social structure. It's
5 a social phenomenon peculiar to Hindu society. The division of the Hindu social order by
6 referenced at one time to professional or vocational occupation was moulded into a structural
7 hierarchy which over centuries, crystallized into a stratification where the place of the
8 individual was determined by birth.' My Lords after all that preliminary thing My Lord, let me
9 just come to the second part of J H Hutton. The last line of 594. J' H Hutton, a census
10 commissioner, framed the list of the depressed classes systematically, and that list was made
11 the basis of an order promulgated by the Government, British Government of India called the
12 Government Scheduled Caste Order. The Constitution Scheduled Caste Order is...' Please, My
13 Lords, now, 'During the framing of the Constitution, the Constituent Assembly recognized that
14 Scheduled Castes were a backward section of the Hindu community who were handicapped
15 by the practice of untouchability. And this evil practice of untouchability was not recognized
16 by any other religion, and the question of any Scheduled Caste belonging to a religion other
17 than Hinduism, therefore, did not arise. The Sikhs, however, demanded that some of their
18 backward sections, the Mazhabis, the Ramdasias, the Kabir Panthis and the Sikligars should
19 be included in the list of Scheduled Castes. This demand was accepted on the fact that these
20 sects were originally Scheduled Caste Hindus who had only recently converted to the Sikh faith
21 and had the same disabilities as the Hindu Scheduled Caste. The depressed classes within the
22 fold of Hindu society were therefore made the subject of the original Constitution Scheduled
23 Caste Order subsequently was also amended.' Now, My Lord the point is this, the difference
24 between the three categories. Scheduled Caste necessarily means that everybody has suffered
25 the taint of untouchability. How untouchable that's a different thing. There were some people
26 who were merely not seeable. There were some people who were touchable. There were some
27 people whose money could be touched. Now, all of those were put into one class by the
28 Constitution of India in the Constitutional Law, in the Presidential Order and that is why they
29 were called Scheduled Caste. Now, the caste may be individual.

30

31 **JUSTICE BELA M. TRIVEDI:** From where do you find this?

32

33 **SANJAY HEGDE:** My Lady, I just read this. I read this passage.

34

35 **JUSTICE BELA M. TRIVEDI:** This is in the judgment?

36

1 **SANJAY HEGDE:** In the judgment. And My Lords, there is supporting material also that
2 can be placed. And there are several judgments of this Court which go on the footing that what
3 distinguishes the Scheduled Castes from the other backward castes is the taint of
4 untouchability. Once there is a taint of untouchability, how untouchable were you, the
5 Constitution and the Constitution makers at that point of time decided not to go into that
6 question. They form one homogeneous class and that homogenous class they said that you
7 could possibly include or exclude through Parliamentary enactment, but in no manner, no
8 other manner. So, therefore a court could not add or subtract from it. The executive could not
9 add or subtract nor can the State Legislature tinker with it in any manner whatsoever. That
10 My Lords, is the basis of *Chinnaiah* and the passages at paragraph 26 onwards. That was the
11 basis. Now, the basis that 341(2) stood as a barrier to anybody else tinkering is supported not
12 only by the speech of Dr. Ambedkar, but it is also supported by another Constitution Bench,
13 which is a five judge bench, which is *Bir Singh. Devendarpal* refers to *Bir Singh* but does
14 not appreciate *Bir Singh. 2018, 10, SCC*. If Your Lordship, if I see the question which was
15 posed. My Lordship, we have to cut short time. The question in *Bir Singh* was basically
16 whether if somebody was a Scheduled Caste in one state, but then migrated to a Union
17 Territory would he have, would he have the Scheduled Caste status and in that context, if I
18 can place paragraph 36 onwards where, after noticing these various questions..

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Justice Banumathi dissented. Right?

21

22 **SANJAY HEGDE:** Then there's a slight descent, but not on any end of this.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** Para 36.

25

26 **SANJAY HEGDE:** Para 36. 'The upshot of the aforesaid discussion would lead us to the
27 conclusion that the Presidential Orders issued under Article 341 in regard to Scheduled Caste
28 and under Article 342 in regard to Scheduled Tribes cannot be varied or altered by any
29 authority, including the court. It is Parliament alone which has...'

30

31 **JUSTICE B.R. GAVAI:** More than settled. Not tinkering is more than settled, right from
32 National Committee.

33

34 **SANJAY HEGDE:** Now, My Lords.

35

36 **JUSTICE B.R. GAVAI:** Is the State tinkering with the list. Are they deleting any entry or
37 adding any entry?

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SANJAY HEGDE: Please, My Lords.. I am sorry.

JUSTICE VIKRAM NATH: Somebody else is managing there. We are trying to scroll up and scroll down.

SANJAY HEGDE: Yes, My Lords. So, 36 to 38. It goes on the same footing.

JUSTICE B.R. GAVAI: We all are on the same proposition that no tinkering is allowed by any authority including the court.

SANJAY HEGDE: Now, let's take this further. If I continue to be a Scheduled Caste in the list in name only but no benefits are conferred on me, while benefits are conferred on another Scheduled Caste in that same list? I am effectively rendered with the stigma of a Scheduled caste, but no consequent benefits. That can also happen, in a sense, it's a reverse *pran pratishtha*. That's my caste remains on the list and yes, you are a jatav or.... but for this year, we are taking only Valmikis. Or to use the Maharashtra example, if we say that no mahars will be taken.

CHIEF JUSTICE DY CHANDRACHUD: But therefore this is a challenge not to sub-grouping in principle, but the manner in which the sub-grouping has been carried out. That's why I give them the example. Suppose Punjab said they are taking only the Valmikis. And not the Mazhabis or only the Mazhabis are not the Valmikis. Would that not be ameliorable to charges? Possibly, yes.

SANJAY HEGDE: That would be tinkering, in my respectful submission.

CHIEF JUSTICE DY CHANDRACHUD: There's nothing new now.

SANJAY HEGDE: Let me give Your Lordships an example now.

CHIEF JUSTICE DY CHANDRACHUD: Now we were keen to now put some [UNCLEAR]

JUSTICE B.R. GAVAI: You have assured that you will not repeat anything. But you are repeating the same thing Mr. Swaroop and everybody said..

1 **SANJAY HEGDE:** Please My Lord. One last, one last reason why? Your Lordships should
2 not leave it to the states. Your Lordships noticed Dr. Ambedkar saying that political wise. India
3 is not comprised only of big states like Punjab, Andhra Pradesh or anything. There are a lot of
4 small states and a political decision there, for instance, Your Lordships have seen the recent
5 violence in Manipur. Now, if only one particular community is knocked out, if you leave the
6 power to the hands of individual states without any reference back to the Centre My Lords.
7 Then what we are asking for is effectively a balkanization of this list. You would be setting up
8 one... as you to borrow the Chief Justice's language backward against backward.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** All right. Thank you, got that Thank you. Mr.
11 Meshram, we'll give you two minutes please. Yes, what is the point just formulate it.

12

13 **NITIN MESHRAM:** Yes, that 16 (4) which talks about backward class of citizens My Lord,
14 that does not include Scheduled Castes My Lord I'm aware about the *Indra Sawhney*
15 judgement.

16

17 **JUSTICE B.R. GAVAI:** What is your submission?

18

19 **NITIN MESHRAM:** Yes, My Lord. When the backward classes was included, backward
20 word was included in Article 16, before that the Scheduled Caste reservation was already
21 settled in the Constituent Assembly and therefore...

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** Are you saying that backward classes doesn't
24 include Scheduled Castes?

25

26 **NITIN MESHRAM:** No sir, No My Lord. Therefore, I will take My Lords to the Constituent
27 Assembly debates and with each of you have the documents and this argument has never
28 been..

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** That argument has never been dealt in *Indra*
31 *Sawhney*, it's a larger bench.

32

33 **NITIN MESHRAM:** No, My Lords. This is how nobody in, nowhere in the history of the
34 Supreme Court that argument was built upon by this Court. And therefore, straight away I'll
35 take to this Court on the Minority Subcommittee Report of 1947, Volume IV, compilation...
36 Volume IV(d).

37

1 **JUSTICE VIKRAM NATH:** IV, a,b,c. B?

2

3 **NITIN MESHARAM:** IV(d), D for Delhi, My Lord.

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** There is no d, we don't have.

6

7 **NITIN MESHARAM:** We have sent the email. Yesterday we sent an email.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** You send the email to the Nodal Counsel because
10 only Nodal Counsels are authorised to add to our record.

11

12 **NITIN MESHARAM:** I'll just read it out to My Lord for that purpose. That the sub-committee
13 , then, this is from the B Shiva Rao presented. This is the Minority sub-committee Report, 'The
14 sub-committee then examined the demand put forward by representative of Anglo Indian
15 community but thought it advisable that in question both minorities. Reservation in services,
16 the sub-committee voted on the general proposition that there shall be reservation in the
17 public services for the different communities mentioning group A, B and C of paragraph 3 (3).'
18 My Lord, paragraph 3 (3) pertains to Anglo Indians that is Group A. Group A, Anglo Indians.
19 Parsis, Plains tribesmen in Assam, group B pertains to Indian Christians and Sikhs. And Group
20 C for the Muslims and Scheduled Caste. So now they were considering the reservation for these
21 three groups My Lord, and they have held, it was agreed that the provisions, if any, regarding
22 reservation, word is most important, regarding reservation should appear in a schedule up to
23 the Constitution Act and should have the force of directive of Government policy. The
24 decisions were as follows:

25 1) Agreed by a majority of vote 16:1 that there shall be reservation in services for the Scheduled
26 Castes. This is Article 296, corresponding to Article 335 of the Constitution present day My
27 Lord.

28 2) Agreed by a majority of votes, 9:7, that there shall be reservation in the services for Muslims
29 and so on, so forth.

30

31 And then they have specifically considered one more aspect, that the sub-committee then
32 considered, the question as to whether seats should be reserved even for posts which
33 competition exam... for which competition examinations are held. The decisions were as
34 follows:

35 a) Agreed by a majority of votes, 11:6, that there shall be reservation for Scheduled Castes, in
36 services to which recruitment was made by competitive examination. My Lord, this is Article
37 296 corresponding to 335.

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Now, My Lord, that 296 was differently worded during the time because the reservation was granted based upon the minorities. And that article was worded as...

CHIEF JUSTICE DY CHANDRACHUD: What is the submission that you've got?

NITIN MESHRAM: The submission is that the 16(4) does not apply to the Scheduled Castes, and their reservation comes from 335. Because altogether this aspect was...

CHIEF JUSTICE DY CHANDRACHUD: 335?

NITIN MESHRAM: 335.

JUSTICE B.R. GAVAI: 335 doesn't speak about reservation. It only says that names of the Scheduled Castes and Scheduled Tribes would be taken...

CHIEF JUSTICE DY CHANDRACHUD: It looks into the efficiency of administration. And you know, the danger of making that argument would be that it ceased to be a part of the chapter on fundamental rights.

NITIN MESHRAM: Yes, My Lord. That's what we are just explaining My Lord that what transpired in the Constituent Assembly. This is what I'm exactly proposing, My Lord.

CHIEF JUSTICE DY CHANDRACHUD: Mr. Meshram, you are appearing, for which matter?

NITIN MESHRAM: My Lord, this is the impleadment application. I have filed for the State of Andhra Pradesh, My Lord.

JUSTICE VIKRAM NATH: State of Andhra Pradesh?

NITIN MESHRAM: No, no, My Lord. Not for the State of Andhra Pradesh. One person who was the petitioner in Andhra Pradesh matter in 2019...

CHIEF JUSTICE DY CHANDRACHUD: They are one of the petitioners.

NITIN MESHRAM: In Supreme Court, also I was a petitioner in *Chinnaiah*, My Lord.

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CHIEF JUSTICE DY CHANDRACHUD: Alright.

NITIN MESHRAM: And therefore My Lord we have won that case in *Chinnaiah* My Lord.
So therefore...

CHIEF JUSTICE DY CHANDRACHUD: You are saying reservation for the SCs doesn't
come under 16(4) at all.

NITIN MESHRAM: That is historical truth, My Lord. That is the historical truth, My Lord.
And therefore 296 was worded My Lord....

CHIEF JUSTICE DY CHANDRACHUD: But then why did the Constitution... why was the
Constitution amended to into Clause 4(a), 4(b)?

JUSTICE B. R GAVAI: Then why was the Constitution amended in 1951 to bring sub articles
supporting Article 15?

NITIN MESHRAM: My Lord 16(4) is the original Article.

JUSTICE B.R. GAVAI: 16(4) is, then if your argument is to be accepted, then the
reservation in educational institutions would also go away.

NITIN MESHRAM: My Lord, that was Article 15 Clause violation, Clause 1 of 15 clause
violation My Lord. And that was for the backward classes My Lord, not for the Scheduled
Castes My Lord.

JUSTICE B.R. GAVAI: No, no the [UNCLEAR] of Madras Government was specifically for
Scheduled Castes, which provided 10% reservation in...

CHIEF JUSTICE DY CHANDRACHUD: Communal reservation.

NITIN MESHRAM: Communal. And they said, My Lord in *Champakam* that that is hit
by the discrimination based upon caste. So, therefore that has come, My Lord. But let us
appreciate the fact that this is historical.

1 **JUSTICE B.R. GAVAI:** No, but then what happens to the entire law which has come from
2 **N. M. Thomas** onwards that reservation is in favour of Scheduled Castes, Scheduled Tribes
3 precedent to 64.

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** I thought, these are all flag bearers of the
6 movement for the statute to the Scheduled Castes. We have to today say that **N. M. Thomas**
7 and **Akhil Bharatiya Soshit Sangh**.

8

9 **JUSTICE B.R. GAVAI:** They all will be over ruled. We will be going back to the Devdas and,
10 Devdas this.

11

12 **NITIN MESHRAM:** My Lord, neither **Indra Sawhney** My Lord or the judgments which
13 were rendered before that My Lord they have dealt with this. Even My Lord the **Champakam**
14 did not deal with this My Lord and therefore My Lord 296 was worded, My Lord, that very
15 peculiar.....

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** You've filed your written submissions, right?

18

19 **NITIN MESHRAM:** No, My Lord.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** Then give us a short note. Put it on that.

22

23 **NITIN MESHRAM:** Now My Lord sees Article 16, Clause 3 My Lord. That 16 Clause means
24 10 Clause 3 My Lord, present day 16 Clause 4. There is a debate on this in the Constituent
25 Assembly and whether the backward classes..

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** It can't be confined only to a Constituent
28 Assembly debate. Now, we have a rich body of jurisprudence on 16(4). We can't say that the
29 Scheduled Caste are not within 16(4). This will be extremely delirious to the movement for
30 justice to the Scheduled Caste if even accept this argument. How can we even talk?

31

32 **NITIN MESHRAM:** My Lord, we cannot reverse the truth in this. We cannot reverse the
33 truth, My Lord.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** Very elite judges before us have gone and
36 decided this whole body of law. We are really just pushing the baton, that's all. We don't want

1 to reconsider this law, which has been laid down with such a great vision and a passion for
2 social justice.

3

4 **NITIN MESHRAM:** My Lord, but we cannot reverse the truth. This is the truth that Article
5 335 was inserted in the Constitution means that the discussion took place much before My
6 Lord, much before Article 16, Clause 4, came into effect My Lord. Even My Lord the first
7 Constitution that is settled by the advisors of the Constituent Assembly My Lord, that includes
8 Article 335 My Lord. But that did not include Article 16 Clause 4 My Lord in the present form.
9 My Lord, first, second.....

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** Alright, thank you. We'll give a little time to them
12 now for rejoinder. Yes, Mr..... one second. Now all things good have to come to an end.
13 Anybody wants to make, 1 second, anybody wants to make any submission, please put it down
14 in one page on a piece of paper. We'll consider it.

15

16 **NITIN MESHRAM:** I will circulate a submission.

17

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

19

20 **RESPONDENT'S COUNSEL:** Your Lordships have called for the Counsel for Telangana
21 and Andhra.

22

23 **JUSTICE B.R. GAVAI:** Mr. Rao considered you to be [UNCLEAR]

24

25 **RESPONDENT'S COUNSEL:** The state of Tamil Nadu case is slightly different.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Champak Lal ji. There may be very heavier
28 submission for us. We will give you a minute or so at the end of it after we hear...

29

30 **JUSTICE VIKRAM NATH:** He doesn't want to argue.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** You want to handover something. You don't
33 want to argue.

34

35 **CHAMPAK LAL:** I just want to handover. It's already on board. 9354[UNCLEAR].

36

1 **S. GOWTHAMAN:** With regard to Tamil Nadu. Tamil Nadu has never been touched by
2 anybody.

3
4 **CHIEF JUSTICE DY CHANDRACHUD:** Who are you appearing for?

5
6 **S. GOWTHAMAN:** I'm appearing for 17.3, for a private party who has challenged the act
7 also. Also for an impleading petitioner in 1701.

8
9 **CHIEF JUSTICE DY CHANDRACHUD:** Right, but we are not going to deal with the
10 validity of the Act here.

11
12 **S. GOWTHAMAN:** I am not touching the Act.

13
14 **CHIEF JUSTICE DY CHANDRACHUD:** We will be restoring. Yours is a transfer petition.
15 Right? Transferred writ petition.

16
17 **S. GOWTHAMAN:** This is a writ petition.

18
19 **CHIEF JUSTICE DY CHANDRACHUD:** Who has filed the writ petition?

20
21 **SHEKHAR NAPHADE:** [INAUDIBLE]

22
23 **JUSTICE VIKRAM NATH:** Who is the Petitioner Counsel in that case?

24
25 **S. GOWTHAMAN:** I am the Petitioner Counsel. The Local Counsel could not be here. I
26 would take Your Lordships.

27
28 **CHIEF JUSTICE DY CHANDRACHUD:** What is your contention?

29
30 **S. GOWTHAMAN:** Two aspects. With regard to *E. V. Chinnaiah*. Para. 85, I will just take
31 Your Lords.

32
33 **CHIEF JUSTICE DY CHANDRACHUD:** Just formulate it.

34
35 **S. GOWTHAMAN:** That cannot be a class. Your Lordship was consistently saying that that
36 can be a class. My Lord, there cannot be a class within a class. Actually, they themselves a class
37 and what happens is...

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CHIEF JUSTICE DY CHANDRACHUD: There not be a class within a class.

S. GOWTHAMAN: There cannot be a class within a class. Because the entire people, if themselves are class and Your Lordships will see...

CHIEF JUSTICE DY CHANDRACHUD: That's what [UNCLEAR] said and *Chinnaiah* relied upon. There can't be a micro classification.

S. GOWTHAMAN: That is what. I'm just trying to say in a different format, because what happens here in Tamil Nadu is My Lord. Your Lordship will see, there are 7 castes out of 76. 7 castes out of 76, namely Arunthathiyar, Chakkiliyan, Madari, Mardika, Pagadai ...

CHIEF JUSTICE DY CHANDRACHUD: Wait, wait. We have seen the names.

S. GOWTHAMAN: This 6, 7 class. This 7 class has been classified as Arunthathiyar and have been given already for the past 15 years, they are being given 3% in priority. They will be the first person to be considered in the SEBC. As my learned senior Hegde told...

JUSTICE B.R. GAVAI: 3% out of?

S. GOWTHAMAN: 18. There will not be any chance...

JUSTICE B.R. GAVAI: 3% out of how many?

S. GOWTHAMAN: Out of 18, if there is only one percentage in a post, assuming for a minute. If there is only one post for a minute for a SC. If there is one post for SC, if there is one post for SC, I'm just trying to say if there is one post for SC that will be given only for SCA, that is SC Arunthathiyar and it will be carried for next two, three years. Even assuming if...

CHIEF JUSTICE DY CHANDRACHUD: We are not considering the validity of the Act at all here. We may not adjudge that matter at all. You have liberty to file a petition for that in the High Court under 226 .

S. GOWTHAMAN: I just wanted to read this if Your Lordship permit me to read 85 for a minute. 'As the Constitution itself treats the member of the Scheduled Caste as a single

1 integrated class of the most backward citizens, it is not competent for the legislation of State
2 to subdivide them into a separate compartment with a separate percentage.'

3

4 **JUSTICE B.R. GAVAI:** That has been read to us so many times.

5

6 **S. GOWTHAMAN:** Actually I'm just trying to bring before Your Lordship is out of 76...

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** We don't mind listening to you provided you
9 make a good point. That's what today is now. We are 15 minutes short of concluding the
10 hearing. Tomorrow is miscellaneous. So...

11

12 **S. GOWTHAMAN:** That is what I'm just trying to say, they have formulated 7 as a subclass.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** But that's what we told you. We are not going
15 into the validity of the Act here. We can't go into the validity of Act and assent a proper contest.

16

17 **RESPONDENT'S COUNSEL:** In that case, I am appearing for Constitution Scheduled Caste
18 Amendment Act 2021 enacted...

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Appearing for sir?

21

22 **RESPONDENT'S COUNSEL:** I am appearing for 702.10, writ petition.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** That's alright. But we are not going to answer the
25 validity of each individual act here. This is a challenge to the validity to the correctness of
26 *Chinnaiah* is what is question before us.

27

28 **S. GOWTHAMAN:** That will have a direct bearing on it.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Sorry?

31

32 **PETITIONER'S COUNSEL:** So far Tamil Nadu petitions are concerned my learned friends
33 are arguing writ petitions, those petitions were sought to be transferred here and the Lordships
34 have heard this matter.

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** Send them back. Send them back to the High
37 Court

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PETITIONER'S COUNSEL: Yes, My Lord, that's what we have said.

CHIEF JUSTICE DY CHANDRACHUD: We'll have to send you back to the High Court.

RESPONDENT'S COUNSEL: The Scheduled Caste Amendment Act actually passed by the similarly placed communities in the same [UNCLEAR] Itself said that the State Government has no powers My Lord.

RESPONDENT'S COUNSEL: My Lord, I'd like to appear for an intervenor. I've already placed my there is only one submission that I wish to bring to Your Lordship's notice, just 1 minute on that. I wish to submit that the list which is there under 341 is not merely a list of identification. With great respect My Lords, the term that they will be deemed to be Scheduled Caste for the purposes of the Constitution, My Lord, is actually a conferment of an identity which My Lord has been conferred through the mechanism of a Presidential Order. Once that happens, My Lord, all rights, privileges, et cetera That are flowing under the Constitution would be available to them as a class.

CHIEF JUSTICE DY CHANDRACHUD: Absolutely, that's correct.

RESPONDENT'S COUNSEL: So it's a Constitutional class

CHIEF JUSTICE DY CHANDRACHUD: That's the argument which everybody has made on this side.

RESPONDENT'S COUNSEL: I'd like to make only one aspect of My Lord I'm trying to pitch it a little higher than the mere fact that it's a list of identification and then this can be then bifurcated.

CHIEF JUSTICE DY CHANDRACHUD: You're emphasising for the purposes of the Constitution. So every benefit which inures to the SCs.

RESPONDENT'S COUNSEL: Deeply obliged. Then everything applies to them *en masse* equally. It can't be that a particular because they lose, they lose their independent, distinct identity. They become identified an entity under 341. My Lords, that's the submission I made in that writing submissions.

1 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, thank you. Yes, Mr. Attorney General.

2

3 **GURMINDER SINGH:** Yes, Grateful My Lords. Just two things which have been brought
4 up by the other side in the arguments. I'll briefly touch MY Lord. Your Lordships have heard
5 a lot on these issues. First, of course, is My Lord, that it is a homogeneous class because they
6 are all born together. Which factually and legally would be incorrect, because the inclusion in
7 the first order in 1950 may be a contemporaneous birth , but subsequently the addition
8 deletion by the Parliament ensures that any other caste can be brought onto the list under 341
9 at a different time. So most certainly My Lord, being born in the list together will not give them
10 a homogeneity which the other side seeks to plead. I'm. Just cutting it very short. Now My
11 Lord, the issue then is regarding the presence of the word tribal in both 341 and 342 and Your
12 Lordship had correctly pointed out not though I noted it on that time that 'some castes may
13 have people who belong to a tribe, and some may be non-tribal Scheduled Castes'. So
14 therefore, My Lord both have been included and whatever is relevant and whichever defines
15 the caste more can be brought into play My Lord. That is my short submission. Your Lordship
16 may have already given the gist of it during the rebuttal to them. Then My Lord, the status of
17 word 'deemed' I had thought of it last night. The word deemed is very clear, because as Your
18 Lordships pointed out that 'by mere inclusion in the list your caste birthmark does not get
19 obliterated and there is a possibility that tomorrow you may be excluded from the list'. So
20 therefore, your caste, which is by birth, will never change but your deemed status of a
21 Scheduled Caste for the purposes of benefits under the constitution, can change.

22

23 **GURMINDER SINGH:** So you cannot permanently designate somebody as a Scheduled
24 Caste under the Constitution. That is my humble submission. The status of Scheduled Caste
25 under the Constitution is not permanent and as long as that caste exists on the list under 341,
26 a deemed status gets attached to it, which can be removed the moment the caste is out. My
27 Lord that is what at least I could gather in my research My Lord. Then an issue which has
28 engaged Your Lordships is regarding caste and class My Lord. The question had fallen from
29 Your Lordships. The paragraphs My Lord from *Indra Sawhney* My Lord which have been
30 read, My Lord there's no need to repeat them. Your Lordships have extensively looked into it.
31 Now there are those other paragraphs, My Lord in *Indra Sawhney*,

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** But the argument is that *Indra Sawhney*, the
34 caste, they say, could be a class in the context of the socially and educationally backward
35 classes.

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37 **GURMINDER SINGH:** That's right, My Lord.

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CHIEF JUSTICE DY CHANDRACHUD: So that if a particular caste satisfies the *indicia* of social backwardness it can become a socially and educationally backward class. Argument is that this will not hold true, or this will hold true with a difference, in the case of the Scheduled Caste because in Scheduled Caste does not have to satisfy the *indicia* of social backwardness.

GURMINDER SINGH: Quite right.

CHIEF JUSTICE DY CHANDRACHUD: Any caste once it is designated as a Scheduled Caste, is presumed to have the *indicia* of social backwardness because there's a preexisting enquiry which takes place. Therefore, they said that -'Look, unlike the backward classes, the entirety of the grouping of Scheduled Caste is one homogeneous group.' That is their argument.

GURMINDER SINGH: That is their argument, My Lord. Done. What Your Lordships have seen, My Lord, that a class is not necessarily defined by a caste. A backward class of people may have to be identified with strong reference to their caste, but merely possessing a caste will not classify them as backward. On the reverse My Lord, a Scheduled Caste, there is a presumption of backwardness already.

CHIEF JUSTICE DY CHANDRACHUD: So therefore the Scheduled Castes are a class?

GURMINDER SINGH: My Lord, yes. Scheduled Castes are a class.

CHIEF JUSTICE DY CHANDRACHUD: But is an individual Scheduled Caste can be equated with a caste, with a class?

GURMINDER SINGH: Yes. So, therefore, the ingredients of backwardness would have to be satisfied still the relative backwardness which we are urging under 16(4). That's right.

CHIEF JUSTICE DY CHANDRACHUD: You do not have to satisfy the *indicia* of backwardness at all.

GURMINDER SINGH: Only for the purpose of most backward within the backward.

1 **CHIEF JUSTICE DY CHANDRACHUD:** No, but before you reach that question, the
2 argument really is that once you are a Scheduled Caste, you are presumed to satisfy the *indicia*
3 of backwardness. Therefore the entirety of the grouping of Scheduled Castes constitutes one
4 class. And how can there be a class within a class? That is the argument.

5

6 **GURMINDER SINGH:** That is the argument. But what we are dealing with, My Lord, in the
7 present matter is a class within a class only as Your Lordships have said, it is forward backward
8 versus backward backward. Let us take it like that, My Lord.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** I'm not sure whether a class within a class is
11 what, 16(4) permits?

12

13 **GURMINDER SINGH:** My Lords, that's what I'll just come to in half a minute. Now, as long
14 as the ingredients of quantifiable data of non-representation in the services is met, the State
15 can make a special provision of reservation for that particular class,

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Provided it is a class.

18

19 **GURMINDER SINGH:** Provided it as a class. So, therefore, the creation of a class.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** And how can you then create one caste as a
22 class?.

23

24 **GURMINDER SINGH:** Not caste as a class, My Lord. Not caste as a class. The criteria would
25 only be backwardness. Therefore, I'm saying under 16(4), unlike 15(4)....

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** But every entry in the presidential list satisfies
28 the *indicia* of backwardness.

29

30 **GURMINDER SINGH:** That's true, My Lord.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** So there is no question of them saying that it
33 becomes a class because it satisfies the *indicia* backwardness. Everybody has the *indicia* of
34 backwardness. Therefore everybody is together, bunched together as a class.

35

36 **GURMINDER SINGH:** Quite right, My Lord. If we read 15(4) and 16(4), My Lord just before
37 I come to that, I've given 5d My Lord volume. Your Lordship may only refer to three

1 judgments, My Lord. Two of the vintage of 1960s and the other is of 1994, My Lord. I'll just
2 read, My Lord two paragraphs I want to. refer to My Lord 5(d) if Your Lordships can kindly
3 have a look, My Lord. First judgment is **Action Committee on issue of Caste certificate**
4 **versus union 94 5 SCC 244**, Kindly have para 3 My Lord of this judgment. I'll give the
5 paragraphs, My Lord. They can be read. That is on 341, so therefore I'm not dwelling much on
6 it.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** What is the citation of **Action Committee**?

9

10 **GURMINDER SINGH:** Action Committee citation is **1994, Volume V, SCC, page 244.**

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** At para 3?

13

14 **GURMINDER SINGH:** At para 3 and para 16.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** Let's see that. No, there's nothing here, really.

17

18 **GURMINDER SINGH:** No, this is only regarding the power of the Parliament, Therefore....

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Para 16?

21

22 **GURMINDER SINGH:** 'We may add considerations for specifying a particular caste or tribe
23 or class for inclusion in the list of Scheduled Castes.'

24

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

26

27 **GURMINDER SINGH:** Para 16 is - 'We may add that considerations for specifying a
28 particular caste or tribe or class for inclusion in the list of Scheduled Caste/Scheduled Tribes,
29 or backward classes in a given state would depend on the nature and extent of disadvantages
30 and social hardships suffered by that caste, tribe or class in that state, which may be totally
31 non-exist in another state to which the person belonging there.'

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Referring to migration.

34

35 **GURMINDER SINGH:** That's right. So they say. 'Coincidentally, it may be that a caste or a
36 tribe bearing the same nomenclature is specified to in two states, but the considerations on
37 the basis of which they have been specified may be totally different.' So same caste may occur

1 in two states, but the reason of inclusion may be different. So, as 'therefore, merely because a
2 given caste is specified in state a, as Scheduled Caste does not necessarily mean that if there
3 be another caste bearing the same nomenclature in the other state, the person belonging to
4 the former would be entitled to the rights, privileges and benefits admissible to a member of
5 the Scheduled Caste of the latter state for the purposes of this constitution.' So then Dr.
6 Ambedkar's quote is there. My Lord may read it not. I'm not wasting Your Lordship's time.
7 Second judgment, in which this class and caste difference is highlighted, Your Lordship would
8 see at the running page 19 onwards. I'm only pointing to para 14 of the second judgment.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** What is the citation?

11

12 **GURMINDER SINGH:** Citation is *AIR, 1964, Supreme Court 1823*.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** This is Justice Ahmadi's judgment?

15

16 **GURMINDER SINGH:** *R. Chitrallekha*.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** *R. Chitrallekha. AIR, 64?*

19

20 **GURMINDER SINGH:** *1964, AIR, Supreme Court, page 1823*. It starts from page 19
21 onwards. And I'm referring to para 14 of the same, which would occur on page 27 of this
22 compilation.

23

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

25

26 **GURMINDER SINGH:** 'Lastly, it is contended that though the High Court did not quash
27 the order of the Government embodied in Exhibit C. It held that it was not a perfect
28 classification and also indicated its mind that the Government should have adopted the caste
29 test as well as the residence test in making the classification. If the observations of the learned
30 judge, the arguments proceed proceeds are not corrected, the State may be bound by such
31 observations in the manner when it finally prescribes the criteria for ascertaining the
32 backward class under 15(4)...'

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** Let's go on the next page, come to the next page.

35

36 **GURMINDER SINGH:** Come to the next page, second line. 'It is therefore, manifest.

37

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

2

3 **GURMINDER SINGH:** 'It is therefore manifest that the Government has a temporary
4 measure pending an elaborate study has to take into consideration only the economic
5 condition and occupation of the family concerned as the criteria for backward classes within
6 the meaning of 15(4) of the Constitution. The order does not take into consideration the caste
7 of an applicant as one of the criteria for backwardness. Learning Counsel does not attack the
8 validity of the said order, but in the High Court conflicting arguments were advanced in
9 support of the order as well as against it. The High Court heavily relied upon the decision of
10 this post in *M. R. Balaji* and came to the conclusion that the scheme adopted by the State
11 was...'

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** You can skip a little bit and what does our court
14 hold here?

15

16 **GURMINDER SINGH:** Yes. Then Your Lordships see, 'it was also observed that the decision
17 of *Balaji* says that caste basis is undoubtedly irrelevant nay an important basis in determining
18 of classes of backward Hindus. But it should not be made the sole basis. It concludes that a
19 part of the discussion with the following observation, but I earnestly hope that soon the state
20 will make some more appropriate classification, lest its bona fides should be questioned'. So
21 therefore, My Lord the learned counsel contends that these observations are not supported by
22 the decision of *Balaji* that they were in conflict with the observations made therein, We shall
23 therefore, consider the exact scope of observations in the said decision. The 68% of the seats
24 and this is My Lord on merits Your Lordship may come to the next page, the last six lines of
25 this paragraph. 'Besides, if the caste of the group of citizens was made the sole basis for
26 determining the social backwardness of the said group, that test would inevitably break down
27 in relation to many sections of Indian society which do not recognise castes in the conventional
28 sense known to Hindu society. That is why we think that though caste in relation to Hindus
29 may be a relevant factor to consider in determining the social backwardness of the groups or
30 classes of citizens, it cannot be made the sole or the dominant test in this behalf'. So therefore,
31 My Lord class is different from caste. Caste can be one of the factors, but not the sole
32 determining factor and this is again in para 20 and 21 on page 31. May I My Lord? This
33 interpretation will carry out the intention of the Constitution expressed in the aforesaid
34 articles. 'It helps the really backward classes instead of promoting the interest of individuals
35 or groups who they belong to a particular caste. A majority whereof is socially and
36 educationally backward really belonged to a class which is socially and educationally
37 advanced. To illustrate, take a caste in a state where there is numerically the largest therein. It

1 may be that, though a majority of the people in that caste are socially and educationally
2 backward, and the effective minority may be socially and educationally far more advanced
3 than the other small sub-caste, the total number of which is far less than the said minority. If
4 we interpret the expression classes as castes, the object of the Constitution will be frustrated
5 and the people who do not deserve any adventitious aid may get it to the exclusion of those
6 who really deserve it. This anomaly will not arise if, without equating caste with class, caste is
7 taken as only one of the considerations to ascertain whether a person belongs to a backward
8 class or not. On the other hand, if the entire sub-caste, by and large, is backward, it may be
9 included in the Scheduled Caste by following the appropriate procedure laid down by the
10 Constitution'. They make it very clear way back in '64.

11

12 **JUSTICE B.R. GAVAI:** Now after *Indra Sawhney...*

13

14 **GURMINDER SINGH:** That's right. So therefore, backwardness is a totally separate criteria
15 which would determine the carving out of a class and caste will be one of the determining
16 factors. 21 also say so, My Lord, we do not intend to lay down any inflexible rule for the
17 government to follow. The laying down of the criteria for ascertainment of social and
18 educational backwardness it not proceeds on the same lines. Let me not waste Your Lordships
19 time. Now, the other thing My Lord on similar lines is *State of Andhra Pradesh Vs A.P*
20 *Sagar* My Lord **1968 AIR Supreme Court**, page 1379. Starts from page 48. I am referring
21 to paragraph 6 only My Lord which is on page 51. 'The list, prepared on the basis of
22 reservations for socially and educationally backward classes is indisputably a list, community
23 wise. On behalf of the petitioners, it was contended in the High Court that the government of
24 Andhra Pradesh has adopted the same list of backwardness of classes which were struck down
25 by the High Court in *T. Sukhdev's* case, with some slight modifications and the new list also,
26 having made reservation in favour of the castes and not classes. It infringed the guarantee
27 under Article 15(1). On behalf of the state, it was urged that the caste is one of the relevant
28 tests in determining backwardness and cannot be ignored in determining the socially and
29 educationally backward classes. If a group has been classified as backward on other relevant
30 considerations, the classification is not liable to be challenged as invalid on the ground that
31 for the purpose of classifying the designation of a caste is given. The High Court held that the
32 earlier geo was so and so.

33

34 Then next paragraph My Lord, in the context in which it occurs, the expression class means a
35 homogeneous section of people grouped together because of certain likeness or common traits
36 and who are identifiable by some common attributes like status, rank, occupation, residence
37 in a locality, race, religion, and the like, in determining whether a particular section forms a

1 class, caste cannot be ignored altogether. But in determining of a class, a test solely based upon
2 caste or community cannot also be accepted. Now this, in a way, answers Your Lordships
3 query. By Clause 1 of Article 15 prohibits the state from discriminating. This Your Lordship
4 would read. Now last My Lord because it's intriguing me and if Your Lordships are going to go
5 into that question, can Your Lordships just have 15(4) and 16(4) with me My Lord? It'll take
6 two minutes. The language My Lord employed in these articles -- My Lords have it? 15(4) My
7 Lord. Nothing in this article or in Clause 2 of Article 29 shall prevent the state from making --
8 My Lord this is pretty much common, apart from the fact that the earlier words are missing -
9 - Any special provision for the advancement of. So My Lord in 15(4) and 16(4) any special
10 provision is provided My Lord. Till here there is a commonality. Of any socially and
11 educationally backward classes of citizens or for the Scheduled Castes and the Scheduled
12 Tribes. Now My Lords what we need to just see here is number one, just a slight take on what
13 Your Lordships had given the qualification to the word any, because there is no comma after
14 citizens, we will have to read 'any' for all the three classes. That is my humble submission. It
15 says any socially and educationally backward classes or citizen, or for the Scheduled Caste and
16 Scheduled Tribes. So the choice is given to the state to choose any of these categories for the
17 conferring of...

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** No, but you know actually, it's like this. No, it
20 may not be correct. If you break it down it will be like this. Nothing in this article or in Clause
21 2 of Article 29 shall prevent the state from making any special provision:

22 a) for the advancement of any socially and educationally backward class of citizens; or

23 b) for the Scheduled Castes and Scheduled Tribes.

24 Because if the for the advancement of any were to apply to the Scheduled Castes and Scheduled
25 Tribes also, then it would really like any special provision for the advancement of...

26

27 **GURMINDER SINGH:** Colon. It would come here My Lord.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** Any socially and educationally backward class of
30 citizens or for making any special provisions for the advancement of...

31

32 **GURMINDER SINGH:** It has to be advancement of, colon.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** For the Scheduled Castes and Scheduled Tribes.

35

1 **GURMINDER SINGH:** My Lords would kindly see if the colon comes, as Your Lordships
2 are suggesting after 'advancement of' would be more appropriate because advancement is a
3 common objective. Advancement is not limited only to socially and educationally.

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** But then what, no, no, then how will the Clause
6 b read? For the advancement of, for the Scheduled Caste and Scheduled Tribe? You can't have
7 a for twice. You can't have a for twice. So obviously that earlier for indicates that there are two
8 fors. One for is for is the advancement of any socially educationally backward class of citizens,
9 and the second or for the Scheduled Castes and Scheduled Tribes.

10

11 **GURMINDER SINGH:** My Lords they're saying if it comes after provision.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Right, because there are two fors, which shows
14 that there are two subjects there. One, the first subject is for the advancement of any socially
15 and educationally backward classes of citizens. And the second for is, for the Scheduled Castes.
16 So any special provisions for the Scheduled Castes and Scheduled Tribes.

17

18 **GURMINDER SINGH:** So that interpretation which Your Lordships are suggesting would
19 mean that the word "advancement of" are not being used for Scheduled Castes.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** No.

22

23 **GURMINDER SINGH:** Because then Your Lordships are attaching it only to socially and
24 educationally backward.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Right. Any special provision for the Schedule
27 Caste.

28

29 **GURMINDER SINGH:** That's what I am saying. Advancement of is common to both.
30 According to...

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** What is common is any special provision and
33 after any special provision applies to the first part for the SEBCs as well as for these Scheduled
34 Castes and Scheduled Tribes.

35

36 **GURMINDER SINGH:** I think that the advancement of is also common to both.
37 Advancement of is guaranteed because then...

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CHIEF JUSTICE DY CHANDRACHUD: Can't be because then the 'for' will be repeated in a sentence twice, which is grammatically incorrect.

GURMINDER SINGH: 'For' is replaced by 'of'.

JUSTICE B.R. GAVAI: 'For' is repeated twice.

GURMINDER SINGH: Of any socially or educationally backward class of citizens.

CHIEF JUSTICE DY CHANDRACHUD: The common feature is nothing in this article or in Clause 2 of Article 29 shall prevent the state from making any special provision. That is common. Special provision for what? First for the advancement of any socially and educational backward class of citizens. Or the second is for the Scheduled Caste or Tribe.

GURMINDER SINGH: Then the proposed interpretation will go My Lords.

JUSTICE B.R. GAVAI: *Indra Sawhney* also says that for Scheduled Caste, education backwardness is not necessary.

GURMINDER SINGH: No, only the backwardness, all right. But advancement is the purpose of this article. If we take advancement away...

CHIEF JUSTICE DY CHANDRACHUD: From the moment you say special advancement, it is for advancement.

GURMINDER SINGH: Very well. That was what comes to my mind. Why? Because when I read 16(4), Your Lordships would now see 16(4)'s language. Nothing in this article shall prevent the state from making any provision for. Here, instead of advancement, it is limited only to reservation. It says provision for the reservation of. Then appointments or posts in favour of. Now comes the category My Lord. Any backward class of citizens, I stop here My Lord. Now instead of what is given above, if Your Lordship would see the difference there is that the word used is the Scheduled Castes and the Scheduled Tribes. It had fallen from Your Lordships why the word 'the'? So in 15(4), the benefit can be given to a category identifying it as the Scheduled Caste which deserves the benefit, while under 16(4) the Scheduled Castes and Scheduled Tribes have not been distinguished from backward classes in the manner of

1 making a class which is entitled to these benefits. My Lord may kindly see again. The language
2 of 15(4) is or for the Scheduled Castes and the Scheduled Tribes.

3

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

5

6 **GURMINDER SINGH:** So there Your Lordships had said why the word 'the' is coming is
7 because they want to give it to a particular caste, but in 16(4) the discretion of the state has
8 been enhanced and expanded. .

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** In favour of any backward class.

11

12 **GURMINDER SINGH:** Any backward class where they say that the identification is your
13 problem.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** But the question is whether the Scheduled Caste
16 in the entirety are a backward class citizen or can you further micro-classify, so as to include
17 every caste there as a backward class.

18

19 **GURMINDER SINGH:** Can't be because why it can't be under ...

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** Their argument is SCs as an entire
22 conglomeration of class is the backward class.

23

24 **GURMINDER SINGH:** Yes. So therefore...

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Every entry within that backward class cannot
27 be again classified as a backward class.

28

29 **GURMINDER SINGH:** That is their argument But therefore, the collection and
30 implementation of this clause based upon the data, if Your Lordship would see now, after what
31 I've read, which, in the opinion of the state is not adequately represented in the services under
32 the state. If backwardness is presumed in the favour of Scheduled Castes, then they don't even
33 need data. Then they don't even need the state with...

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** You still require data on adequate
36 representation.

37

1 **GURMINDER SINGH:** Even adequate representation....

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** Adequacy of representation require data for the
4 Scheduled Caste also.

5

6 **GURMINDER SINGH:** That is right. So therefore check and balance.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** But you don't require quantifiable data on
9 backwardness for the Scheduled Caste.

10

11 **GURMINDER SINGH:** Right, right. So, therefore, the check and balance is there in Article
12 16(4) itself. But the discretion in what argument I'm trying to make is under 16(4), the
13 constitution has given a far larger discretion to the state because it does not lay down the
14 fetters that it has to be a Scheduled Caste or a Scheduled Tribe. It can be any backward class.
15 And we are aware that the state has made in the past special provisions for areas which have
16 been ravaged by floods, for Kargil victims, in the appointments of the state government to say
17 that they are disadvantaged. My Lord suppose a particular village is hit by a pandemic and
18 most bread earners in that village die.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Cyclone.

21

22 **GURMINDER SINGH:** The state, in its opinion, can say they are disadvantaged. They need
23 promotion as far as the state services are concerned. So people belonging to a particular class
24 within that area being treated as disadvantage would be given special provisions. So the power
25 is much vaster. Much bigger, much larger.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** All right. Thank you Mr. Attorney General.

28

29 **SHADAN FARSAT:** Two minutes My Lords I will take. Just two submission. My Lords,
30 firstly that insofar only Your Lordships prima facie view is that backwardness cannot be gone
31 into only inadequate representation. May I just try on that? Just one minute. My Lords **Indra**
32 **Sawhney** on two levels, tries to define backwardness. First analysis, is to identify you as a
33 backward and My Lords then the paragraphs which were read out to Your Lordships, within
34 that whoever has been identified as backward, caste being one of the factors, you define who's
35 more backward and less backward. I am saying My Lords, first analysis of identification of
36 backwards surely will not apply to SC/ST because they are presumed under the Constitution

1 to be backward by being there in 341. But that second analysis equally applies to My Lords to
2 SC/STs, that's my respectful submission. If Your Lordships read...

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** That the more backward in the...

5

6 **SHADAN FARSAT:** That's right. So it's on both the counts of more backward and inadequate
7 representation reading from *Indra Sawhney*. That's first submission. Second one is they
8 are accepting that under 16 (4), the power is to grant reservation, not to grant at all, or the
9 degrees of grant. I can grant 5% to SC, I can grant 10%, I can grant 15%. My Lords, surely if I
10 have the bigger power to grant, not to grant and the extent to grant then, the smaller power
11 within it to whether can I distribute it amongst different groups should be included in that. It
12 can't be it's all or nothing. If I have the larger power, I must necessarily have the smaller power
13 My Lords that's the second submission. And finally Your Lordships had asked in the morning,
14 what happened to the Usha Mehra Committee? My Lords on that, really speaking the answer
15 is, in one word, nothing. Because it was sent to the government and this is the answer from
16 the concerned minister in the Parliament, and they are saying that they are still contemplating
17 it as of 2021. I've also checked recent status. This can also be put up on the screen, if that's...
18 this is known as answer in Parliament on 2021, the states of AP and Telangana while
19 forwarding a copy of the resolution passed by the assembly have requested for sub-
20 categorisation of Scheduled Castes. A national conference to examine what issue headed by
21 Justice Usha Mehra had been set up in its report of 2008 had recommended amendment of
22 341 of the Constitution to provide for sub-categorisation and de- sub-categorisation of
23 Scheduled Caste. Government has decided to seek views of the major stakeholders. The state
24 governments, the UTs on recommendation of NCSCST. The state duties were last reminded
25 on 9-12-2019. Moreover, the matter is presently *sub judice* in the Supreme Court, So that's
26 where things stand, nothing happened. There was a private members bill moved in 2018, but
27 that was an OBC sub-categorisation, so that's my understanding. I'm grateful.

28

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

30

31 **KAPIL SIBAL:** There's a problem My Lords on the submission that this is homogeneous,
32 we'll assume for the purpose of argument it is homogeneous. Naturally distribution has to be
33 proportionately. It's as simple as that My Lords. If you say that Scheduled Castes are
34 distinguished backwards on the grounds of untouchability, then each is untouchable and then
35 on the basis of population, you'll have to distribute, otherwise it will be violative of 14. It's an
36 argument that defeats itself.

37

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

2

3 **KAPIL SIBAL:** You can't say that it is homogeneous. Everybody has the same attribute of
4 backwardness. Therefore, everybody must be treated equally. Then, where does the state gets
5 the power to give X to Y and Y to somebody else? This percentage to him and that percentage
6 to somebody else? *Ex facie* it is bad. Two My Lords, it is treated as a class for the purposes of
7 identification. The concept of class is in the context of identification, not for the purposes of
8 granting representations in services.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** But then 16(4) also uses the word 'class'.

11

12 **KAPIL SIBAL:** Correct, My Lord. Therefore, class, in the context of identification under 341,
13 class, for the purposes of reservation under 16(4) are two different concepts constitutionally.
14 My Lords if you say it is identified as a class, then you assume that there is no difference
15 between each one of them that is identified. If you assume that, then you can't give
16 representation to one and not to the other. If you don't assume, then each one is a class either
17 way. I hope I've made myself clear My Lords?

18

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

20

21 **KAPIL SIBAL:** You can't have it both ways. So My Lord when in 341, you identify, you
22 identify different categories of caste in one identified schedule. It identifies the Scheduled
23 Caste that is caste in the schedule. That caste, that class is subsumed, castes are subsumed in
24 class, and each one is a class on its own. It has to be. And therefore My Lord it's included and
25 a separate reservation can be given. That's the only way, My Lords. Otherwise, the argument
26 that I am being deprived, but you're not being deprived if you argue that this is homogeneous
27 and everybody is the same. The argument means it's all untouchability. Everybody is
28 attributed with untouchability. But if that's the attribute, you can't discriminate. So therefore,
29 it is contrary to the very submissions they have made. Point number three, My Lords, 16(1) if
30 you notice, says there shall be equality of opportunity for all citizens in matters relating to
31 employment. These are also citizens. There should be equality of opportunity. Then 16(4) says
32 nothing in this article shall prevent the state from making any provision. In other words, even
33 if you say that they belong to the same class, nothing prevents you to give a special treatment
34 if they are inadequately represented. Either you fall under 16(1), you're entitled. If you don't
35 fall under 16(1), 16(4) gives you ample power to do what you like as long as any backward class
36 not adequately represented. Each caste is a class for the simple reason that it represents a
37 certain attribute of backwardness, a certain separate attribute of backwardness in the context

1 of its own special position in societal hierarchy in the particular state where it is present. And
 2 that class, therefore, is the entitlement, as a matter of law, constitutional law, to special
 3 representation, provided they are not adequately represented. And then My Lords the last
 4 point is, and I won't say anything more, I've given to Your Lordships those passages which is
 5 in note 1(l). Note 1(l) are all the paragraphs of **Indra Sawhney** that refers to all this. Really,
 6 there is nothing more than I wish to say, My Lords. That's all I wanted to. That's all.

7
 8 **NIDHESH GUPTA:** And the answer in 16(4), I'll just take two minutes. My Lords if it were,
 9 let's take the sequitur of saying that when 16(4) says any backward class, then you take
 10 Scheduled Caste as a category by itself. That's the argument. So Scheduled Caste is one
 11 category, Scheduled Tribe and SEBC. Now then, let's see the sequitur of that. Then it means
 12 that the discretion given to the status for in favour of any Scheduled Caste or Scheduled Tribe
 13 or SEBC as a conglomerate, it renders the subsequent words, namely number one, which is
 14 inadequately represented. So what will happen is that the state finds that Scheduled Caste on
 15 a entirety has got 25%. Why? Because two castes out of that have got all of them. But it can't
 16 do anything. It can't do anything for any of the other castes because the Scheduled Caste as a
 17 category is adequately represented. Therefore, if this argument is accepted, that class means
 18 Scheduled Caste as a whole, then merely because two or three castes in the Schedule Castes
 19 find adequate, fill up the entire lot, nothing can be done by the state My Lords. Then as well
 20 from My Lord Justice Gavai earlier, you have to read it with the words adequate, not
 21 inadequately represented. That has to mean it can't be, Scheduled Caste can't be a class in itself,
 22 in the sense of one conglomerate. Otherwise, where is the discussion My Lords? I ask myself,
 23 where is the discussion? The Government finds, the state finds that the Scheduled Caste in
 24 entirety have got 25%. That means they are helpless. The three crucial words are, "any, which,
 25 opinion and not adequately represented", which show the discretion being given. Point
 26 number one. Point number two My Lords, **Indra Sawhney** also refers to this My Lord, this
 27 aspect I'll just, just note the para, 781 where they say, they say we may state that for the purpose
 28 of the discussion, we keep aside Scheduled Tribes and Castes since they are admittedly
 29 included within backward classes. So Schedule Castes and then the rationale give
 30 n thereafter, which I read earlier My Lords, squarely applies here also. Otherwise the whole
 31 meaning becomes redundant. One caste within that is not being deleted under 341, they get
 32 everything and the state is helpless. That would result in a perversity is my most respectful
 33 submission. Then a submission was made that **Ashok Thakur** has said creamy layer, etc.
 34 applies. Creamy layer is not a concept which can be applied here. That in my written
 35 submission it's there. Para 183 and 186 of **Ashok Thakur** says. So on the premise that creamy
 36 layer is not a principle of equality, which **Jarnail Singh** has clarified completely. **Jarnail**
 37 **Singh** says it is a facet of Article 14 and therefore that part of **Ashok Thakur** is no longer

1 relevant. Lastly, I'll put a short note. I have two, three other things to say on this. Give a short
2 note. But if this is accepted, then the whole discussion being given here under 16(4) is
3 completely lost.

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you. Mr. Gupta. Mr. Hansaria.

6

7 **VIJAY HANSARIA:** Just two minutes. As far as Arunthathiyar is concerned, my learned
8 friends have said they are represented. Now *Janardhana* committee has formed only in
9 category D. As a matter of fact, they are represented, which are scavengers work. In other
10 cases, 2%, 3% there the 15% population and they are there. Your Lordships are not going into
11 it. But since my learned friends raised this issue, the.....

12

13 **JUSTICE B.R. GAVAI:** We are not going into that.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** We are not going to go into the individual act.

16

17 **VIJAY HANSARIA:** Very well My Lords.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** *Chaman Lal ji.*

20

21 **K.S. CHAUHAN:** With respect only one thing My Lords. We have data relating to
22 backwardness. This backlog. More than 50% posts are vacant. We have data. Should we place?

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** Not an issue here at all. Not necessary. Thank
25 you Dr. Chauhan.

26

27 **GURMINDER SINGH:** There is an article in 5(d) which gives definitions to all these very
28 comprehensively, but it has no judicial sanctions so I didn't quote it. But Your Lordships may,
29 for reference have a look at it.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you. The last part, the most pleasant part
32 to thank all of you for such erudite arguments on both sides. Thank you.

33

34 **SHRADDHA DESHMUKH:** Extremely grateful My Lord for the opportunity.

35

36 **S. GOWTHAMAN:** In this case I would like to submit only one thing My Lords.

37

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

2

3 **S. GOWTHAMAN:** The Punjab Act enacted under Article 245 and 246, the Punjab Act of
4 2006. While enacting the Act with respect to Scheduled Caste, they have to obtain the
5 consultation with the NCSC as provided under Article, Clause 9 of 338, which they have not
6 obtained under consultation. Therefore, that is unconstitutional act.

7

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

9

10 **RESPONDENT COUNSEL:** Just one suggestion My Lords....

11

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

13

14 **CHAMAN LAL:** [UNCLEAR]

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** *Chaman Lal ji aapne jo kehna hai, woh aap*
17 *likhit swaroop mein keh dijiye.*

18

19 **CHAMAN LAL:** We have suffered untouchability.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** Five judge bench, who is appearing in the five
22 judge, the curative in the -- that is rendered infructuous as a result of the judgement in ***Navtej***
23 ***Johar.***

24

25 **COUNSEL:** We had in fact circulated a letter.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** We will say, "The curative petition has been
28 rendered infructuous by the judgement which has been delivered by this court in ***Navtej***
29 ***Singh Johar.***"

30

31 **RESPONDENT COUNSEL:** One submission My Lords, the sufferers voice has to be
32 recognised by this....

33

34

35

36

END OF DAY'S PROCEEDINGS