E.V.Chinnaiah vs State Of Andhra Pradesh And Ors on 5 November, 2004

Bench: N.Santosh Hegde, S.N.Variava, B.P.Singh, H.K.Sema, S.B.Sinha

CASE NO.:
Appeal (civil) 6758 of 2000

PETITIONER:
E.V.Chinnaiah

RESPONDENT:
State of Andhra Pradesh and Ors.

DATE OF JUDGMENT: 05/11/2004

BENCH:
N.Santosh Hegde & S.N.Variava & B.P.Singh & H.K.Sema & S.B.Sinha

JUDGMENT:

JUDGMENT [Alongwith Civil Appeal Nos. 6934 and 7344 of 2000 and 3442/2001] DELIVERED BY:

SANTOSH N.HEGDE, J.

S.B.SINHA, J.

HOTOI KHETOHO SEMA,J.

N. Santosh Hegde, J.

The validity of Andhra Pradesh Scheduled Castes (Rationalisation of Reservations) Act, 2000 (A.P. Act 20 of 2000) was challenged before the High Court of Andhra Pradesh at Hyderabad which came to be dismissed by a five Judge Bench on a majority of 4 : 1, the court having certified the case as being fit for appeal to the Supreme Court, these appeals are now before us after the same was referred to a Constitution Bench by an order of this Court dated 25th June, 2001. The facts necessary for the disposal of these appeals without reference to previous litigations are as follows:-

The State of Andhra Pradesh (the State) appointed a Commission headed by Justice Ramachandra Raju (Retd.) to identify the groups amongst the Scheduled Castes found in the List prepared under Article 341 of the Constitution of India by the President, who had failed to secure the benefit of the reservations provided for Scheduled Castes in the State in admission to professional colleges and appointment

to services in the State.

The Report submitted by the Commission led to certain litigations and a reference being made by the State to the National Scheduled Castes Commission. We will not dilate on these facts since the same are not necessary for the disposal of these appeals. Accepting the Report of Justice Ramachandra Raju Commission (Supra), the State by an Ordinance divided the 57 castes enumerated in the Presidential List into 4 groups based on inter-se backwardness and fixed separate quota in reservation for each of these groups. Thus, the castes in the Presidential List came to be grouped as A, B, C, and D. The 15% reservation for the backward class in the State in the educational institutions and in the services of the State under Article 15(4) and 16(4) of the Constitution of India for the Scheduled Castes were apportioned amongst the 4 groups in the following manner :-

1. Group A - 1%

2. Group B - 7%

3. Group C - 6%

4. Group D - 1% The said Ordinance came to be challenged before the High Court by way of various writ petitions as being violative of Articles 15(4), 16(4), 162, 246, 341(1), 338(7), 46, 335 and 213 of the Constitution of India as also the Constitutional (Scheduled Castes) Order 1950 notified by the President of India and Scheduled Castes and Scheduled Tribes Amendment Act, 1976.

During the pendency of the said writ petitions, the State Government replaced the Ordinance with the Andhra Pradesh Scheduled Castes (Rationalisation of Reservation) Act, 2000 (A.P. Act 20 of 2000) ('the Act') on 2.5.2000. The impugned Act was on the same lines as the Ordinance No. 9 of 1999. Consequently the Act was also challenged and as stated above the petition being dismissed these appeals are now before us.

Mr. P.P. Rao, learned senior counsel led the argument on behalf of the appellants, his arguments were supported and supplemented by Mr. P.S. Mishra, learned senior counsel, Mr. Shiv Pujan Singh and Mr. T. Raja, the other learned counsel appearing for the appellants.

The contentions advanced on behalf of the appellants are that the State Legislature has no competence to make any law in regard to bifurcation of the Presidential List of Scheduled Castes prepared under Article 341(1) of the Constitution, therefore the impugned legislation being one solely meant for sub-dividing or sub-grouping the castes enumerated in the Presidential List, the same suffers from lack of legislative competence.

It is further submitted that once the castes are put in the Presidential List, the said castes become one homogeneous class for all purposes under the Constitution, therefore, there could be no further

division of the said castes in the Scheduled List by any Act of the State Legislature. His further submission was that in the guise of exercising its legislative competence under Entry 41 in List II or Entry 25 of List III the State Legislature cannot exercise its legislative power so as to make a law tinkering with the Presidential List because the said Entries do not permit any law being made in regard to Scheduled Castes. In the guise of providing opportunity to some of the castes in the list of Scheduled Castes the State can not invoke Entry 41 of List II and Entry 25 of List III to divide the Scheduled Castes. According to the learned counsel the impugned enactment does not really deal with the field of Legislation contemplated under the said Entries but in reality is targeted to sub-divide the Scheduled Castes. Alternatively, he submitted the classification or sub-grouping made by the State Legislature amounting to sub-classification or micro classification of the Scheduled Caste is violative of Article 14 of the Constitution of India.

One of the arguments addressed on behalf of the appellant is that allotting a separate percentage of reservation from amongst the total reservation allotted to the Scheduled Castes to different groups amongst the Scheduled Castes amounted to depriving one class of the benefits of such reservation at least partly. It is also argued that the impugned legislation was bad because the Report of the National Commission was not placed before the Legislature as required under Article 338(9) of the Constitution of India.

On behalf of the respondents Shri K.K. Venugopal, learned senior counsel appearing for the State who led the argument on behalf of the respondents, contended Article 341 only empowers the President to specify the castes in the Presidential List and the Parliament to include or exclude from the specified list any caste or tribe and beyond that no further legislative or executive power is vested with the Union of India or the Parliament to decide to what extent the castes included in the Scheduled Castes List should be given the benefit of reservation which according to the learned counsel depended upon their degree of backwardness. His further argument is that the authority to decide to provide reservation or not, and if yes, then the quantum of reservation to be provided is the exclusive privilege of the State. In that process the State will have to keep in mind the extent of backwardness of a group be it other backward class, Scheduled Caste or Scheduled Tribe. Therefore, having found a class of persons within the Scheduled Castes as having been deprived of such benefits the State has the exclusive legislative power to make such grouping for reservation under Articles 15(4) and 16(4) of the Constitution subject, of course, to Articles 245-246 of the Constitution. Since in the instant case there is no allegation that there has been any violation of Articles 245-246, the argument of lack of legislative competence advanced on behalf of the appellant should fail. He further submitted that there is an obligation on the State under Article 16(4) to identify the group of backward class of citizens which in the opinion of the State is not adequately represented in the service under the State and make reservation in their favour for such appointments and under Article 15(4) of the Constitution there is an obligation on the State to make special provisions for the advancement of Scheduled Castes and Scheduled Tribes and what the State has sought to do under the impugned Act was only to make such a provisions to fulfil the constitutional obligation after due enquiry, hence, the allegation of violation of Article 14 cannot be sustained. He strongly relied on the findings of fact recorded in Justice Raju Commission's report which according to him establishes that some particular groups within the Scheduled Castes have cornered all the benefits at the cost of others in the said List, therefore, with a view to see that the

benefit of reservation percolates to the weaker of the weakest it had become necessary to enact the impugned law. The learned counsel submitted that by re- grouping the castes in the Scheduled Caste List there is no reclassification or micro classification as contended by the appellants.

Some other counsels also argued that neither Article 341 nor any other provisions of the Constitution prohibits the State from performing its obligations under Articles 15(4), 16(4) and 16(4A) of the Constitution and categorising the various castes found in the Presidential List of Scheduled Castes based on inter-se backwardness within them. Reference was also made to the Constituent Assembly Debates and Reports to point out that it was the intention of the Constitution makers to confer the power of classification of Scheduled Castes on the President or the Parliament as the case may be under Article 341 of the Constitution. A further classification of the caste within the List if became necessary, the same could be done by the State only under Articles 15(4) and 16(4) of the Constitution.

It was also argued that further classification of the backward class is permissible in view of the judgment of this Court in the case of Indra Sawhney v. Union of India and Ors. 1992 (Supp.3) SCC 217, the principles laid down therein was applicable even to the Scheduled Castes. It was also argued that the enactment was in the form of affirmative action to fulfil the constitutional objects and the courts should not interfere in such efforts of the Legislature. Reliance was also placed on the recommendations made by the National Commission for Scheduled Castes and in its Report a further argument addressed on behalf of the respondents is that even if some castes in the Presidential List of Scheduled Castes get excluded from the benefit of reservation made by the State that by itself would not take the caste out of the List of Scheduled Castes because they will continue to be entitled to other benefits that are being provided by the State to the Scheduled Castes.

In regard to manner in which the constitutional provisions should be interpreted, reliance was placed in the case of Her Majesty the Queen v. Burah, 1878 Vol. III 889 contending that while interpreting the constitutional provisions the court should try to give purposive interpretation rather than restricted meaning.

From the pleadings on record and arguments addressed before us three questions arise for our consideration:-

(1) Whether the impugned Act is violative of Article 341(2) of the Constitution of India?

(2) Whether the impugned enactment is constitutionally invalid for lack of legislation competence?

(3) Whether the impugned enactment creates sub-classification or micro classification of Scheduled Castes so as to violate Article 14 of the Constitution of India?

We will first consider the effect of Article 341 of the Constitution and examine whether the State could, in the guise of providing reservation for the weaker of the weakest, tinker with the Presidential List by sub- dividing the castes mentioned in the Presidential List into different groups. Article 341 which is found in Part XVI of the Constitution refers to special provisions relating to certain classes which includes the Scheduled Castes. This Article provides that the President may with respect to any State or Union Territory after consultation with the Governor thereof by Public Notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State or Union Territory. This indicates that there can be only one List of Scheduled Caste in regard to a State and that List should include all specified castes, races or tribes or part or groups notified in that Presidential List. Any inclusion or exclusion from the said list can only be done by the Parliament under Article 341(2) of the Constitution of India. In the entire Constitution wherever reference has been made to "Scheduled Castes" it refers only to the list prepared by the President under Article 341 and there is no reference to any sub-classification or division in the said list except, may be, for the limited purpose of Article 330, which refers to reservation of seats for Scheduled Castes in the House of People, which is not applicable to the facts of this case. It is also clear from the above Article 341 that except for a limited power of making an exclusion or inclusion in the list by an Act of Parliament there is no provision either to sub-divide, sub-classify or sub-group these castes which are found in the Presidential List of Scheduled Castes. Therefore, it is clear that the Constitution intended all the castes including the sub-castes, races and tribes mentioned in the list to be members of one group for the purpose of the Constitution and this group could not be sub-divided for any purpose. A reference to the Constituent Assembly in this regard may be useful at this stage.

In the Draft Constitution, there was no Article similar to Article 341 as is found in the present Constitution. Noticing the need for creating a list of Scheduled Castes a Draft Article 300A was introduced in the Draft Constitution and while introducing the same Dr. Ambedkar stated the object of introducing the said Article in the following words : -

> "The object of these two articles, as I stated, was to eliminate the necessity of burdening the Constitution with long lists of Scheduled Castes and Scheduled Tribes. It is now proposed that the President, in consultation with the Governor or Ruler of a State should have the power to issue a general notification in the Gazette specifying all the Castes and tribes or groups thereof deemed to be Scheduled Castes and Scheduled Tribes for the purposes of the privileges which have been defined for them in the Constitution. The only limitation that has been imposed is this: that once a notification has been issued by the President, which, undoubtedly , he will be issuing in consultation with and on the advice of the Government of each State, thereafter, if any elimination was to be made from the List so notified or any addition was to be made, that must be made by Parliament and not by the President. The object is to eliminate any kind of political factors having a play in the matter of the disturbance in the Schedule so published by the President." (emphasis supplied) (CAD, Vol. 9, Pg. 1637) A discussion that ensued in regard to the framing of this Article indicates that there was an attempt on the part of some of the Members of the Constituent

Assembly to empower the States also to interfere with the list prepared by the President under the said Article. As a matter of fact an amendment to this effect was also moved by Shri Kuladhar Chaliha, who while moving the said amendment stated thus:-

"That in amendment No. 201 of List V (Eighth Week) in clause (2) of the proposed new article 300B after the words 'Parliament may' the words 'and subject to its decision the State Legislature' be inserted". (CAD, Vol.9,Pg.1638) Speaking on the amendment Shri Chaliha stated :-

"I have always been fighting that the Governor should have power to safeguard the rights of the Tribes. I am glad in some measure this has been conceded. Yet I find certain amount of suspicion in that the State Legislature is neglected. The Drafting Committee has not allowed the State Legislature to have a voice. In order to fill up that lacuna I have said that Parliament may and subject to its decision the State Legislature. Somehow or other I feel you have neglected it. In these you have covered a good deal which you had objected to in the past. The Governor has been given power I am glad to say. The only thing is provincial assemblies have no voice in this. Whatever Parliament says they are bound by it; but if there is anything which consistently with the orders of the Parliament they can do anything, they should be allowed to have the power. That is why I have moved this. However, I am thankful this time that the Drafting Committee has assimilated good ideas and only provincial assemblies have been neglected. However, the Governor is there--that is an improvement-- Parliament is there and the President is there. Therefore, I thank the Drafting Committee for this". (CAD, Vol.9,Pg.1638) Opposing this amendment Shri V.I. Muniswami Pillai said among other things as follows :-

"Sir, I am grateful to the Drafting Committee and also to the Chairman of that Committee for making the second portion of it very clear, that in future, after the declaration by the President as to who will be the Scheduled Castes, and when there is need for including any other class or to exclude anybody or any community from the list of Scheduled Castes that must be by the word of Parliament. I feel grateful to him for bringing in this clause, because I know, as a matter of fact, when Harijans behave independently or asserting their right on some matters, the Ministers in some Provinces not only take note and action against those members, but they bring the community to which that particular individual belongs; and thereby not only the individual, but also the community that comes under that category of Scheduled Castes are harassed. By this provision, I think the danger is removed". (Emphasis supplied) (CAD, Vol.9, Pg. 1639) After the above discussion it is seen that this amendment came to be defeated and the original draft Article was approved by the Constituent Assembly which was renumbered as Article 341 in the present Constitution.

This part of the Constituent Assembly Debate coupled with the fact that Article 341 makes it clear that the State Legislature or its executive has no power of "disturbing" (term used by Dr. Ambedkar) the Presidential List of Scheduled Castes for the State.

It is also clear from the Articles in part XVI of the Constitution that the power of the State to deal with the Scheduled Castes list is totally absent except to bear in mind the required maintenance of efficiency of administration in making of appointments which is found in Article 335.

Therefore any executive action or legislative enactment which interferes, disturbs, re-arranges, re-groups or re- classifies the various castes found in the Presidential List will be violative of scheme of the Constitution and will be violative of Article 341 of the Constitution.

We will now consider whether the Scheduled Castes List prepared by the President under Article 341(1) forms one class of homogeneous group or does it still continue to be a list consisting of different castes, sub-castes, tribes etc. We have earlier noticed the fact that the Constitution has provided for only one list of Scheduled Castes to be prepared by the President with a limited power of inclusion and exclusion by the Parliament. The Constitution intended that all the castes included in the said Schedule would be "deemed to be" one class of persons but arguments have been addressed to the contrary stating that in spite of the Presidential List these castes continue to hold their birth mark and remain to be separate and individual caste though put in one List by the President. It is the contention of the respondents that by merely including them in a List by the President these castes do not become a homogeneous group, therefore, to fulfil the constitutional obligation of providing an opportunity to these castes more so to the weaker amongst them, it is permissible to make a classification within this class, as was made permissible in regard to other backward classes (OBC) by this Court in Indra Sawhney's case (supra). We cannot accept this argument for more than one reason.

It cannot be denied that all the castes included in the Presidential List for a State are deemed to be Scheduled Castes, which means they form a class by themselves.

In State of Kerala and Anr. v. N.M.Thomas and Ors., Mathew, J. discussing the status of the caste found in the Presidential List observed:-

"This shows that it is by virtue of the notification of the President that the Scheduled castes come into being. Though the members of the scheduled castes are drawn from castes, races or tribes, they attain a new Status by virtue of the Presidential notification".

(Emphasis supplied).

Krishna Iyer, J. speaking in the same case with reference to the status of castes included in the Presidential List had this to say :-

> "We may clear the clog of Article 16(2) as it stems from a confusion about caste in the terminology of scheduled castes and scheduled tribes. This latter expression has been defined in Articles 341 and 342. A bare reading brings out the quintessential concept that they are no castes in the Hindu fold but an amalgam of castes, races, groups, tribes, communities or parts thereof found on investigation to be the lowliest and in need of massive State aid and notified as such by the President". (para 135) (Emphasis supplied) According to Justice Krishna Iyer, though there are no castes, races, groups, tribes, communities or parts thereof in Hinduism, the President on investigation having found some of the communities within amalgam as being lowliest and in need of massive State aid included them in one class called the Scheduled Castes. The sequitor thereof is that Scheduled Castes are one class for the purposes of the Constitution.
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> Justice Fazal Ali in the very same case referring to caste enumerated in the list of Scheduled Caste stated thus in paragraph 169 :-
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> "Thus in view of these provisions the members of the scheduled castes and the scheduled tribes have been given a special status in the Constitution and they constitute a class by themselves".

(Emphasis supplied.) Thus from the scheme of the Constitution, Article 341 and above opinions of this Court in the case of N.M. Thomas (supra), it is clear that the castes once included in the Presidential List, form a class by themselves. If they are one class under the Constitution, any division of these classes of persons based on any consideration would amount to tinkering with the Presidential List.

The next question for our consideration is : whether the impugned enactment is within the legislative competence of the State Legislature ? According to the respondent-State, it is empowered to make reservations for the backward classes which include the Scheduled Castes as contemplated under Articles 15(4) and 16(4) of the Constitution. Since the impugned enactment contemplates reservation in the field of education and in the field of services under the State, the State Legislature derives its legislative competence under Entry 41 of List II and Entry 25 of List III of the VII Schedule which are the fields available to the State to make laws in regard to education and services in the State. Therefore, it has the necessary legislative competence to enact the impugned legislation which only provides for reservation to the Scheduled Castes who are the most backward of the backward classes.

The appellants have argued that the impugned Act in reality is not an enactment providing for reservation for the Scheduled Castes in the educational institutions and in the services of the State. They further contended that such reservation has already been provided when the State took a decision to exercise its power under Articles 15(4) and 16(4) and made reservations for the backward

classes in the State. In that process, it had already allotted 15% of the reserved quota in favour of the Scheduled Castes. Therefore, the State had already exercised its constitutional power of making reservations under Articles 15(4) and 16(4). It is further contended that by the impugned Act, the State has only divided the Scheduled Castes in the Presidential List by re-grouping them into four groups. For making such re-grouping of the Scheduled Castes List, the State neither can rely upon Articles 15(4) and 16(4) nor on Entry 41 of List II and Entry 25 of List III of the VII Schedule.

One of the proven methods of examining the legislative competence of an enactment is by the application of doctrine of pith and substance. This doctrine is applied when the legislative competence of a Legislature with regard to a particular enactment is challenged with reference to the Entries in various lists and if there is a challenge to the legislative competence the courts will try to ascertain the pith and substance of such enactment on a scrutiny of the Act in question. (See : Kartar Singh v. State of Punjab). In this process, it is necessary for the courts to go into and examine the true character of the enactment, its object, its scope and effect to find out whether the enactment in question is genuinely referable to the field of legislation allotted to the State under the constitutional scheme.

Bearing in mind the above principle of the doctrine of pith and substance, if we examine the impugned Act then we notice that the Preamble to the Act says that it is an Act to provide for rationalisation of reservations to the Scheduled Castes in the State of Andhra Pradesh to ensure their unified and uniform progress in the society and for matters connected therewith and incidental thereto. The Preamble also shows that the same is being enacted with a view to give effect to Article 38(2) found in Part IV of the Directive Principles of the State Policy of the Constitution. If the objects stated in the enactment were the sole criteria for judging the true nature of the enactment then the impugned enactment satisfies the requirement on application of the doctrine of pith and substance to establish the State's legislative competence, but that is not the sole criteria. As noted above, the Court will have to examine not only the object of the Act as stated in the statute but also its scope and effect to find out whether the enactment in question is genuinely referable to the field of legislation allotted to the State.

On a detailed perusal of Act it is seen that Section 3 is the only substantive provision in the Act, rest of the provisions are only procedural. Section 3 of the Act provides for the creation of 4 groups out of the castes enumerated in the Presidential List of the State. After the re-grouping it provides for the proportionate allotment of the reservation already made in favour of the Scheduled Castes amongst these 4 groups. Beyond that the Act does not provide for anything else. Since the State had already allotted 15% of the total quota of the reservation available for the backward classes to the Scheduled Castes the question of allotting any reservation under this enactment to the backward classes does not arise. Therefore, it is clear that the purpose or the true intendment of this Act is only to first divide the castes in the Presidential List of the Scheduled Castes into 4 groups and then divide 15% of reservation allotted to the Scheduled Castes as a class amongst these 4 groups. Thus it is clear that the Act does not for the first time provide for reservation to the Scheduled Castes but only intends to re-distribute the reservation already made by sub-classifying the Scheduled Castes which is otherwise held to be a class by itself. It is a well settled principle in law that reservation to a backward class is not a constitutional mandate. It is the prerogative of the State concerned if they so

desire, with an object of providing opportunity of advancement in the society to certain backward classes which includes the Scheduled Castes to reserve certain seats in educational institutions under Article 15(4) and in public services of the State under Article 16(4). That part of its constitutional obligation, as stated above, has already been fulfilled by the State. Having done so, it is not open to the State to sub-classify a class already recognised by the Constitution and allot a portion of the already reserved quota amongst the State created sub-class within the List of Scheduled Castes. From the discussion herein above, it is clear that the primary object of the impugned enactment is to create groups of sub-castes in the List of Scheduled Castes applicable to the State and, in our opinion, apportionment of the reservation is only secondary and consequential. Whatever may be the object of this sub- classification and apportionment of the reservation, we think the State cannot claim legislative power to make a law dividing the Scheduled Castes List of the State by tracing its legislative competence to Entry 41 of List II or Entry 25 of List III. Therefore, we are of the opinion that in pith and substance the enactment is not a law governing the field of education or the field of State Public Services.

The last question that comes up for our consideration is : whether the impugned enactment creates sub-classification or micro classification of the Scheduled Castes so as to violate Article 14 of the Constitution.

We have earlier noticed that by the impugned Act the State has regrouped the 59 castes found in the Presidential List into 4 separate groups and allotted them different percentage out of the total reservation made for Scheduled Castes as a class. We have also noticed from Article 341 and the judgment of this Court in N.M. Thomas (supra) all the castes in the Schedule acquire a special status of a class and all the castes in the schedule are deemed to be a class. Under the States reservation policy the backward class consists of other backward class, Scheduled Castes and Scheduled Tribes. Therefore, there is already a classification for the purpose of reservation. In that background the question that arises is whether further classification amongst the class of Scheduled Castes for the very same object of providing reservation is permissible and if so will it stand the test of Article 14.

In The State of Jammu and Kashmir v. Triloki Nath Khosa and Ors., this Court held :

> "29. This argument, as presented, is attractive but it assumes in the Court a right of scrutiny somewhat wider than is generally recognised. Article 16 of the Constitution which ensures to all citizen equality of opportunity in matters relating to employment is but an instance or incident of the guarantee of equality contained in Article 14. The concept of equal opportunity undoubtedly permeates the whole spectrum of an individual's employment from appointment through promotion and termination to the payment of gratuity and pension. But the concept of equality has an inherent limitation arising from the very nature of the constitutional guarantee. Equality is for equals. That is to say that those who are similarly circumstanced are entitled to an equal treatment.
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> 31. Classification, however, is fraught with the danger that it may produce artificial inequalities and therefore, the right to classify is hedged in with salient restraints; or

> else, the guarantee of equality will be submerged in class legislation masquerading as laws meant to govern well marked classes characterized by different and distinct attainments. Classification, therefore, must be truly founded on substantial differences which distinguish persons grouped together from those left out of the group and such differential attributes must bear a just and rational relation to the object sought to be achieved.
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> 51. But we hope that this judgment will not be construed as a charter for making minute and microcosmic classifications. Excellence is, or ought to be, the goal of all good governments and excellence and equality are not friendly bed-fellows. A pragmatic approach has therefore to be adopted in order to harmonize the requirements of public services with the aspirations of public servants. But let us not evolve, through imperceptible extensions, a theory of classification which may subvert, perhaps submerge, the precious guarantee of equality. The eminent spirit of an ideal society is equality and so we must not be left to ask in wonderment: what after all is the operational residue of equality and equal opportunity?
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> 57. Mini-classifications based on micro- distinctions are false to our egalitarian faith and only substantial and straightforward classifications plainly promoting relevant goals can have constitutional validity. To overdo classification is to undo equality. If in this case Government had prescribed that only those degree holders who had secured over 70 per cent marks could become Chief Engineers and those with 60 per cent alone be eligible to be Superintending Engineers or that foreign degrees would be preferred we would have unhesitatingly voided it."

Said decision has been followed by this Court in Food Corporation of India and Ors. v. Om Prakash Sharma and Ors. and other cases.

In Om Prakash Sharma's case (supra) this Court noticed that the Constitution Bench in Triloki Nath Khosa (supra) while deciding the case took care to add that one has always to bear in mind the facts and circumstances of the case in order to judge the validity of a classification. Applying the aforesaid principles the Court is required to interpret the provisions of the impugned Act on the touchstone of Clause (4) of Article 15 and Clause (4) of Article 16 of the Constitution of India. Articles 14, 15 and 16 form a group of provisions guaranteeing equality. Such provisions confer a right of equality to each individual citizen. Article 15 prohibits discrimination. Article 16 confers a right to equality of opportunity for being considered for public employment.

In Akhil Bharatiya Soshit Karamchari Sangh (Railway) represented by its Assistant General Secretary on behalf of the Asson.Etc. v. Union of India and Ors., Krishna Iyer, J. stated:

> "78... Since a contrary view is possible and has been taken by some judges a verdict need not be rested on the view that SCs are not castes, Even assuming they are, classification, if permitted, will validate to the differential rules for promotion. Moreover, Article 16(4) is an exception to Article 16(2) also.

> 22... The success of State action under Art. 16(4) consists in the speed with which result-oriented reservation withers away as no longer a need, not in the everwidening and everlasting operation of an exception (Art. 16(4)) as if it were a super-fundamental right to continue backward all the time ..
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> 37... The first sub-article speaks of equality and the second sub- article amplifies its content by expressly interdicting caste as a ground of discrimination. Article 16(4) imparts to the seemingly static equality embedded in Article 16(1) a dynamic quality by importing equalisation strategies geared to the eventual achievement of equality as permissible State action, viewed as an amplification of Art. 16(1) or as an exception to it. The same observation will hold good for the sub-articles of Article 15..."

We have already held that the members of Scheduled Castes form a class by themselves and any further sub- classification would be impermissible while applying the principle of reservation.

On behalf of the respondents, it was pointed out that in Indra Sahani's case(supra), the court had permitted sub- classification of other backward communities, as backward and more backward based on their comparative under development, therefore, the similar classification amongst the class enumerated in the Presidential List of Scheduled Castes is permissible in law. We do not think the principles laid down in Indra Sahani's case for sub-classification of other backward classes can be applied as a precedent law for sub- classification or sub-grouping Scheduled Castes in the Presidential List because that very judgment itself has specifically held that sub-division of other backward classes is not applicable to Scheduled Castes and Scheduled Tribes. This we think is for the obvious reason, i.e. Constitution itself has kept the Scheduled Castes and Scheduled Tribes List out of interference by the State Governments.

Legal constitutional policy adumbrated in a statute must answer the test of Article 14 of the Constitution of India. Classification whether permissible or not must be judged on the touchstone of the object sought to be achieved. If the object of reservation is to take affirmative action in favour of a class which is socially, educationally and economically backward, the State's jurisdiction while exercising its executive or legislative function is to decide as to what extent reservation should be made for them either in Public Service or for obtaining admission in educational institutions. In our opinion, such a class cannot be sub- divided so as to give more preference to a miniscule proportion of the Scheduled Castes in preference to other members of the same class.

Furthermore, the emphasis on efficient administration placed by Article 335 of the Constitution must also be considered when the claims of Scheduled Castes and Scheduled Tribes to employment in the services of the Union are to be considered.

The conglomeration of castes given in the Presidential Order, in our opinion, should be considered as representing a class as a whole. The contrary approach of the High Court, in our opinion, was not correct. The very fact that a legal fiction has been created is itself suggestive of the fact that the Legislature of a State cannot take any action which would be contrary to or inconsistent therewith. The very idea of placing different castes or tribes or group or part thereof in a State as a

conglomeration by way of a deeming definition clearly suggests that they are not to be sub- divided or sub-classified further. If a class within a class of members of the Scheduled Castes is created, the same would amount to tinkering with the List. Such sub-classification would be violative of Article 14 of the Constitution of India. It may be true, as has been observed by the High Court, that the caste system has got stuck up in the Society but with a view to do away with the evil effect thereof, a legislation which does not answer the constitutional scheme cannot be upheld. It is also difficult to agree with the High Court that for the purpose of identifying backwardness, a further inquiry can be made by appointing a commission as to who amongst the members of the Scheduled Castes is more backward. If benefits of reservation are not percolating to them equitably, measures should be taken to see that they are given such adequate or additional training so as to enable them to compete with the others but the same would not mean that in the process of rationalizing the reservation to the Scheduled Castes the constitutional mandate of Articles 14, 15 and 16 could be violated.

Reservation must be considered from the social objective angle, having regard to the constitutional scheme, and not as a political issue and, thus, adequate representation must be given to the members of the Scheduled Castes as a group and not to two or more groups of persons or members of castes.

The very fact that the members of the Scheduled Castes are most backward amongst the backward classes and the impugned legislation having already proceeded on the basis that they are not adequately represented both in terms of Clause (4) of Article 15 and Clause (4) of Article 16 of the Constitution of India, a further classification by way of micro classification is not permissible. Such classification of the members of different classes of people based on their respective castes would also be violative of the doctrine of reasonableness. Article 341 provides that exclusion even of a part or a group of castes from the Presidential List can be done only by the Parliament. The logical corollary thereof would be that the State Legislatures are forbidden from doing that. A uniform yardstick must be adopted for giving benefits to the members of the Scheduled Castes for the purpose of Constitution. The impugned legislation being contrary to the above constitutional scheme cannot, therefore, be sustained.

For the reasons stated above, we are of the considered opinion that the impugned legislation apart from being beyond the legislative competence of the State is also violative of Article 14 of the Constitution and hence is liable to declared as ultra vires the Constitution.

The appeals are allowed, impugned Act is declared as ultra vires the Constitution.

SEPARATE CONCURRING JUDGMENT S.B. Sinha, J.

The vires of a State Legislation of Andhra Pradesh known as the Andhra Pradesh Scheduled Castes (Rationalisation of Reservations) Act, 2000 (Act 20 of 2000) (for short 'the Act') purported to have been made in terms of Entry 41, List II and Entries 23 and 25, List III of the Seventh Schedule of the Constitution of India was questioned before the High Court. Its validity has been upheld by a Five Judge Bench of the said Court correctness whereof is in question before us.

INTRODUCTION:

The Scheduled Castes and Scheduled Tribes occupy a special place in our Constitution. The President of India is the sole repository of the power to specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of the Constitution be deemed to be Scheduled Castes.

Clause (2) of Article 341 of the Constitution confers power only on the Parliament to include therein or exclude therefrom castes, races or part or group within any caste etc. By reason of the provisions of the said Act the members of the Scheduled Castes specified for the State of Andhra Pradesh had been divided in four different categories and reservations both in public office as also in education had been earmarked in the manner specified therein.

HIGH COURT JUDGMENT:

The validity of the said Act has been upheld by the High Court inter alia on the premise that the State has the exclusive jurisdiction to make reservation in relation to Public Service and Education. It was further held that by reason of the provisions of the said Act the Presidential Order has not been tinkered with.

QUESTIONS:

The questions raised before the High Court were:

"(1) Whether the State's legislative power is curtailed or eclipsed by any provision of the Constitution;

(2) Whether the impugned act is beyond the legislative competence of the State and is violative of Article 341(2);

(3) Whether the impugned act violates Articles 14, 15 and 16 of the Constitution;

(4) Whether the impugned legislation is a colourable piece of legislation; (5) Whether the law declared by the Full Bench operates as res judicata and the State is debarred from enacting the impugned act; and (6) Whether the act is invalid for non-compliance with the provisions of Article 338 of the Constitution.

All answers to the aforementioned questions were rendered in favour of the State.

HIGH COURT JUDGMENT:

The High Court having regard to Articles 15, 16, 38, 39, 41, 46, 335, 338 and legislative powers of the State under Lists II and III of the Seventh Schedule of the

> Constitution opined that no technical meaning should be given to the expression "a caste" as such and further opined that the conglomeration of castes given in the Presidential Order cannot be considered as representing a caste as a whole in view of the fact that it is a deeming definition.

It was observed that an attempt should be made to do away with the evil of the caste system which has got struck up in the society. Referring to Doctrine of Federalism and the necessity of distribution of legislative powers, it was held that States though are not separate sovereigns; neither Union nor States possess untrammeled sovereignty because the legislative, executive and judicial powers in India are divided between the Union and the States. Having regard to the fact that there is no express field of legislation providing for regulation of reservations, it was opined that the State is empowered to provide for reservation in the public services and educational institutions. It was furthermore held that as no citizen has any fundamental right as regard reservation under the constitutional scheme, the State would be well within its power to identify the extent of backwardness of a class of citizens so as give preference to those who may be more backward on account of their social or economic backwardness and, thus, would form a distinct class from the general body of the civil society.

Relying on or on the basis of the purported experience that out of 59 castes specified in the Scheduled Castes for the State of Andhra Pradesh in the Presidential Order, it was held that as the State in discharge of its function or duty bound to provide for upliftment of the educational and social interests of the Scheduled Castes who are most backward classes amongst the Scheduled Castes, the impugned legislation is valid as thereby it was perceived that the benefits of reservation had not been percolating to them equitably so as to rationalize the reservation meant for the Scheduled Castes.

It was further held that the named castes in the Presidential Order would jointly and severally be a Scheduled Caste and issuance of Presidential Order does not denude the State from its legislative competence to make laws and to adopt such policy decision so as to confer the benefit of reservation with regard to admissions to educational institutions and services under the State subject to Article 335 and other provisions of the Constitution. The Scheduled Castes enumerated in the Scheduled Castes Order, it was observed, do not lead to an inference that all of them are equal to each other.

SCHEME OF THE ACT:

> Section 2 sets out the definitions. Section 3 is the charging section enabling reservation to the extent of 1%, 6%, 7% and 1% to be provided for categories A, B, C and D respectively in each of the four categories curved out from the Presidential Order. Section 4 provides for primacy to the provisions of the Act in relation to the matters stated therein. Section 5, however, carves out an exception from the purview of the provisions of the said Act the services and educational institutions coming within the exclusive jurisdiction of the Centre. Section 7 provides for rule making power. Section 8 declares that nothing therein shall be construed as including or excluding from or further classification of the list of Scheduled Castes with respect to

the State.

Pursuant to or in furtherance of the said legislation, the roster points for eligible candidates for public appointments or posts and admission to educational institutions were also recast.

ISSUE:

The short question which arises for consideration is as to whether by reason of the impugned legislation the State has exceeded its legislative power, CONSTITUTIONALITY OF THE ACT:

Equality Clause:

It is true that by reason of Article 341 of the Constitution of India no benefit other than expressly provided for in the Constitution, as, for example, Article 320 or Article 322, had been conferred on a member of Scheduled Caste. It is also not in doubt or dispute that the State has the legislative competence to provide for reservations both in the field of public services as also education. Article 15(4) and Article 335 expressly refer to the Scheduled Castes and Scheduled Tribes. Clause (4) of Article 16 although does not refer to Scheduled Castes or Scheduled Tribes, having regard to the expressions "backward class of citizens" contained therein, it is judicially interpreted that Scheduled Castes and Scheduled Tribes would come within the purview thereof. Scheduled Caste indisputably is treated to be more backward than the backward class people.

By reason of the impugned legislation, the State although had not sought to alter or amend the Scheduled Castes Order made by the President of India, but admittedly, it sub-divided the members of Scheduled Castes in four different categories.

It may not be necessary for us to delve deep into the question as to whether the factual foundation for enacting the said legislation being based on a report of a Court of Inquiry constituted under Section 3 of the Commission of Inquiry Act 1952 known as Justice Raju Report is otherwise laudable or not By reason of the said legislation, each category of citizens whether placed in Category A or Category B or Category C or Category D remains members of most backward class. Indisputably, the policy of reservation or the extent thereof must have a nexus to the broader question as to whether the members of Scheduled Castes are adequately represented in public services or not but by reason of the provisions of the said Act the State accepts that members of each category are not adequately represented in public services and, therefore, the state policy of reservation should be extended to them.

It is, therefore, manifest that the classes of citizens mentioned in the said Act are not only socially, educationally or economically backward, they are also entitled to be provided with the benefits of state's reservation policy.

Equal protection clause mandates that all persons under like circumstances should be treated alike. Article 14 is in many respects similar to Fourteenth Amendment of the American Constitution, the relevant portion whereof reads as follows:

> "...no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any State deprive any person of life liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The equal protection clause contained in Fourteenth Amendment of the American Constitution, however, postulates that it is permissible to distribute a benefit or a burden on, or partly, on the basis of race - to use race as a criterion of selection in distributing a benefit or a burden

- is not necessarily to distribute the benefit or the burden on an "invidious" because there might be a nonracist reason for using race as a criterion of selection. [See Shaw v. Reno, 509 US 630, 642 (1993)] Although in the United States of America, affirmative action based on race is a deeply divisive issue insofar as whereas the proponents thereof regard the continuance of affirmative action as a litmus test over the nation's commitment to racial justice; opponents thereof see it as an unacceptable violation of the ideal of equality of opportunity and the principle that government should treat its citizens in a colour-blind fashion. (See The Affirmative Action Debate, 17 Philosophy & Public Policy 1 (Special Issue, Winter/Spring 1997) (quoting Glenn Loury). Constitution of India, on the contrary, specifically provides for affirmative action. Such affirmative action can be based on a nonracist reason for using race as a criterion of selection.

In a recent decision a question came up before the US Supreme Court in Jennifer Gratz and Patrick Hamacher v. Lee Bollinger (decided on 23rd June, 2003) as regard the validity of guidelines providing for selection method under which every applicant from an underrepresented racial or ethnic minority groups was to be automatically awarded 20 points out of 100 points needed to guarantee admission. The said provision was struck down as being violative of equality protection clause observing:

> "The very nature of a college's permissible practice of awarding value to racial diversity means that race must be considered in a way that increases some applicants' chances for admission. Since college admission is not left entirely to inarticulate intuition, it is hard to see what is inappropriate in assigning some stated value to a relevant characteristic, whether it be reasoning ability, writing style, running speed, or minority race. Justice Powell's plus factors necessarily are assigned some values. The college simply does by a numbered scale what the law school accomplishes in its "holistic review," Grutter, post, at 25; the distinction does not imply that applicants to the undergraduate college are denied individualized consideration or a fair chance to compete on the basis of all the various merits their applications may disclose."

Delivering his minority opinion on his own behalf as also on behalf of Justice Souter, Justice Ginsburg, however, held:

> "Our jurisprudence ranks race a "suspect" category, "not because (race) is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality." Norwalk Core v. Norwalk Redevelopment Agency, 395 F. 2d 920, 931-932 (CA2 1968) (footnote omitted). But where race is considered "for the purpose of achieving equality," id., at 932, no automatic proscription is in order. For as insightfully explained, "the Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination. "United States v. Jefferson County Bd. Of Ed., 372 F.2d 836, 876 (CA5 1966)(Wisdom, J.): see Wechsler, The Nationalization of Civil Liberties and Civil Rights Supp. To 12 Tex.Q. 10,23(1968) (Brown may be seen as disallowing racial classifications that "imply an invidious assessment" while allowing such classifications when "not invidious in implication" but advanced to "correct inequalities"). Contemporary human rights documents draw just this line; they distinguish between policies of oppression and measures designed to accelerate de facto equality. See Grutter, post at 1 (Ginsburg, J. concurring)(citing the United Nations - initiated Conventions on the Elimination of All Forms of Racial Discrimination and on the Elimination of All Forms of Discrimination against Women)."

The minority opinion of Ginsburg, J. appeals to us and is in tune with our Constitutional scheme.

Can having regard to the constitutional scheme, the conglomeration of the members of Scheduled Castes be subjected to further classification is the question.

Article 14 of the Constitution of India aims at equality. It prohibits discrimination in any form. At its worst form, it will be violative of basic and essential feature of the Constitution. [See Maharao Sahib Shri Bhim Singhji v. Union of India and Ors.].

Reasonableness of sub-classification of the Scheduled Castes must be judged on the touchstone of the equality clause.

Having regard to the decision of this Court in Indra Sawhney and Ors. v. Union of India and Ors. [1992 Supp (3) SCC 217], the backward class citizens can be classified in four different categories - (i) more backward, (ii) backward, (iii) Scheduled Caste and (iv) Scheduled Tribe. A contention has been raised that in Indra Sawhney (supra) the Court permitted a classification amongst other backward classes and as such there is no reason as to why the said principle shall not be applied to the members of the Scheduled Castes. In Indra Sawhney (supra) itself this Court categorically stated that it was not concerned with the question as regard members of Scheduled Castes and Scheduled Tribes.

It is relevant to note that question No. 5 formulated by Jeevan Reddy, J. was only in relation to the further division in the backward class into backward and more backward categories. Advisedly, no question was framed as regard division of Scheduled Castes into more backward and backward Scheduled Castes.

There appears to be no good reason for classifying the backward classes of citizens in four categories; as noticed in the judgment of Brother Hegde, J. and furthermore the Scheduled Caste Order and Scheduled Tribe Order provide for conglomeration of castes and tribes and, thus, must be treated as a distinct and separate class for the purpose of the Constitution. We may notice that there is no such express provision in the Constitution in respect of "other backward class".

The preamble to the Constitution proclaims that 'we the people of India' adopt, enact and give to ourselves the Constitution of India to secure to all its citizens justice, liberty and equality. There are a few Articles in Part IV of the Constitution of India like Articles 38, 39 and 47 which aim at securing equality of opportunity and social justice. The State in terms of Articles 14, 15(1) and 15(4) of the Constitution had inter alia made special provisions with regard to admissions in educational institutions for advancement of Scheduled Castes. Article 16(4) likewise enables the State from making any provision for the reservation of appointments or posts in favour of the backward classes under the State. Inevitably, its meaning is influenced by the legal context in which it must operate.

Indisputably, only because the Scheduled Castes and Scheduled Tribes and other socially and economically backward class of citizens are not in a position to compete with the general category candidates, the equality principle has been adopted by way of affirmative action by the State Government in making reservations in their favour both as regard admission in educational institutions and public employment. The doctrine of equality is the fibre with which constitutional scheme is woven.

Our Constitution permits application of equality clause by grant of additional protection to the disadvantaged class so as to bring them on equal platform with other advantaged class of people. Such a class which requires the benefit of additional protection, thus, cannot be discriminated interse i.e. between one member of the said class and another only on a certain presupposition of some advancement by one group over other although both satisfy the test of abysmal backwardness as also inadequate representation in public service.

In a case of this nature, the burden of reasonable classification and its nexus with the object of the legislation is on the State. The State, in my opinion, has not been able to discharge the said burden. Reservation:

> The essence of reservations basically can be sub-divided into three categories: (i) Facilitating access to value posts or resources whereby seats are reserved in the Legislature in Government services and in academic institutions; (ii) Providing for scholarships, land allotments, grants for health care, etc. and (iii) Special protections like prohibiting exploitation of Scheduled Castes by others with a view to promote the educational and economic interests of the weaker sections of the people and in

particular of the Scheduled Castes and Scheduled Tribes who, for centuries, have been deprived of their legitimate due, so that they may be brought to the same platform so as to enable them to compete with the others. In relation to the backwardness arguably reservation in favour of a caste cannot be by itself a ground for grant thereof but may only by one of the several factors for determining the criteria of backwardness under Article 16(4) which provides for the following criteria:

(i) There must be a backward class of citizens.

(ii) The said class in the opinion of the State is not adequately represented on the services of the State.

Provision for reservation can be made only when both the conditions are satisfied.

Constitution of India is not caste blind and, thus, if the citizens belonging to a caste as such be rationally assumed backward, the entire caste can be as such be recognized as Backward Class. Articles 15(2) and 16(2) of the Constitution prohibit discrimination based 'only on Caste' and not 'Caste and something else'.

Determination:

The approach to construe the impugned legislation should not he based on subjective intention of legislation but should be given an objective meaning. The meaning is declared by the courts after the application of relevant interpretative principles so as to construe the constitutionality of a statute having regard to the object the Constitution makers sought to achieve. The Constitution makers inserted Articles 341 and 342 with a view to provide benefits to the members of the Scheduled Castes and Scheduled Tribes as being belonging to a socially, educationally and economically backward class of citizens. Any legislation which would bring them out of the purview thereof or tinker with the order issued by the President of India would be unconstitutional. In Regina (Daly) v. Secretary of State for the Home Department [(2001) 2 AC 532 at 548], Lord Stein observed that in the law context is everything. Constitutional law is a part of the Indian law and being suprema lax its meaning is subject to textual consideration.

As the Constitution itself treats the members of the Scheduled Castes as a single integrated class of most backward citizens, it is not competent for the Legislature of a State to sub-divide them into separate compartments with a separate percentage of reservation for each resulting in discouraging merit as well as the endeavour of individual members to excel - vide Fundamental Duty under Article 51A(j). The operation of reservation policy ought to be in a manner consistent with the objective of promoting fraternity among all citizens, assuring, the dignity of the individual and unity of the Nation.

The aim of the Constitution is to equip each member of the weaker sections with the ability to compete with other citizens with dignity on a level playing field. The pitiable condition of Scheduled Castes is recognized by the Constitution as a national problem. Therefore, the responsibility of improving the lot of Scheduled Castes has been entrusted to the National Commission and the Parliament.

The provisions of Article 330(1)(b)(c) show that the Constitution has treated Scheduled Tribes in the autonomous districts of Assam as a separate category distinct from all other Scheduled Tribes. This clearly indicates that when the Constitution-makers wanted to make a sub-classification of Scheduled Tribes, they have themselves made it in the text of the Constitution itself and have not empowered any Legislature or Government to make such a sub-classification. Except to the extent the Constitution itself makes a sub-classification, there cannot be grouping of Scheduled Castes into different categories for differential treatment. Only exclusion of castes, parts or groups within the castes from the list of Scheduled Castes is contemplated by law made by Parliament, but not sub- classification of Scheduled Castes and that too on the basis of caste.

In Indra Sawhney and Ors. v. Union of India and Ors. [1992 Supp (3) SCC 217] analyzing the caste factor vis-a-vis the necessity for making reservation it was observed:

"Even if one ceases to follow that occupation, still he remains and continues a member of that group. To repeat, it is a socially and occupationally homogeneous class. Endogamy is its main characteristic. Its social status and standing depend upon the nature of the occupation followed by it. Lowlier the occupation lowlier the social standing of the class in the graded hierarchy. In rural India, occupation-caste nexus is true even today. Caste-occupation-poverty' cycle is thus an ever present reality. In rural India, it is strikingly apparent; in urban centres, there may be some dilution. But since rural India and rural population is still the overwhelmingly predominant fact of life in India, the reality remains. All the decisions since Balaji speak of this 'cast-occupation-poverty' nexus. The language and emphasis may vary but the theme remains the same. This is the stark reality notwithstanding all our protestations and abhorrence and all attempts at weeding out this phenomenon. We are not saying it ought to be encouraged. It should not be. It must be eradicated. That is the ideal - the goal. But any programme towards betterment of these sections-classes of society and any programme designed to eradicate this evil must recognise this ground reality and attune its programme accordingly. Merely burying our heads in the sand - Ostrich-like - wouldn't help."

The validity of the Act must be tested on the touchstone of the aforementioned tests.

What in my considered view, is necessary to be kept in mind for determining the validity of the impugned statute would be: (i) whether a member of Scheduled Caste is still backward, (ii) whether

they require special protection so as to invoke equality clause.

In India, States are not separate sovereigns. The respective legislative competence of the Union and the States have although been delineated under Article 246 but the same would be subject to other provisions thereof. The legislature, executive and judicial powers in India are divided between the Union and the States. The States indisputably have been granted legislative competence as regard education (Entry 25, List III) and public employment (Entry 41, List II) but the same is circumscribed by Article 341 of the Constitution of India.

Jeevan Reddy, J. incidentally who wrote the majority judgment in Indra Sawhney (supra) made a reference to his judgment in Narayana Rao and Anr. v. State of A.P. and Anr., AIR 1987 AP 57 wherein the learned Judge opined:

> "94...Article 15(4) or Article 16(4) are not designed to achieve abolition of caste-system-much less to remove the meanness or other evils in the society. They are designed to provide opportunities in education, services and other fields to raise the educational social and economic levels of those lagging behind, and once this is achieved, these Articles must be deemed to have served their purpose. If so. excluding those who have already attained such economic well-being (inter-linked as it is with social and educational advancement) from the special benefits provided under these clauses cannot be called unreasonable or discriminatory or arbitrary much less contrary to the intention of the founding-fathers. It can be reasonably presumed that these people have ceased to be socially if not educationally backward and hence do not require the preferential treatment contemplated by Articles 15(4) and 16(4). Moreover, in the face of the repeated pronouncements of the Supreme Court referred to above, these arguments cannot be countenanced. Not only it does not amount to creating a class within a class, it is a proper delineation of classes..."

Those observations were confined to backward classes and not SCs and STs. The learned Judge in Indra Sawhney (supra) also struck to the said view.

The impugned Act as also the judgment of the High Court are premised on the observations in Indra Sawhney (supra) that there is no constitutional or legal bar for a State in categorizing the backward classes as backward and more backward class. This Court, however, while referring to Article 16(4) of the Constitution stated that it recognized only one class, viz., backward class of citizens in the following terms:

> "At the outset we may state that for the purpose of this discussion, we keep aside the. Scheduled Tribes and Scheduled Castes (since they are admittedly included within the backward classes), except to remark that backward classes contemplated by Article 16(4) do comprise some castes - for it cannot be denied that Scheduled Castes include quite a few castes."

Scheduled Caste, however, is not a caste in terms of its definition as contained in Article 366(24) of the Constitution of India. They are brought within the purview of the said category by reason of their abysmal backwardness. Scheduled Caste consists of not only the people who belong to some backward caste but also race or tribe or part of or groups within castes, races or tribes. They are not merely backward but the backwardmost. A person even does not cease to be a Scheduled Caste automatically even on his conversion to another religion. (See Punit Raj v. Dinesh Dhaudhary, and State of Kerala and Anr. v. Chandramohanan).

It is also relevant to note that the two groups, i.e., socially and educationally backward class and Scheduled Castes were differentiated for the purpose of Clause (4) of Article 15 of the Constitution as therein Scheduled Castes had been recognized, in the nature of things, to be backward but it is also recognized that besides them, there may be other groups of persons who are backward and deserve preferential treatment.

In Indra Sawhney (supra) while applying the 'Means-test' and 'Creamy layer test', it was observed:

> "it is not a question of permissibility or desirability of such test but one of proper and more appropriate identification of a class - a backward class. The very concept of a class denotes a number of persons having certain common traits which distinguish them from the others. In a backward class under Clause (4) of Article 16, if the connecting link is the social backwardness, it should broadly be the same in a given class. If some of the members are far too advanced socially (which in the context, necessarily means economically and, may also mean, educationally) the connecting thread between them and the remaining class snaps. They would be misfits in the class. Alter excluding them alone, would the class be a compact class. In fact, such exclusion benefits the truly backward. Difficulty, however, really lies in drawing the line - how and where to draw the line? For, while drawing the line, it should be ensured that it does not result in taking away with one hand what is given by the other. The basis of exclusion should not merely be economic, unless, of course, the economic advancement is so high that it necessarily means social advancement. Let us illustrate the point. A member of backward class, say a member of carpenter caste, goes to Middle East and works there as a carpenter. If you take his annual income in rupees, it would be fairly high from the Indian standard. Is he to be excluded from the Backward Class? Are his children in India to be deprived of the benefit of Article 16(4)? Situation may, however, be different, if he rises so high economically as to become say a factory owner himself. In such a situation, his social status also rises. He himself would be in a position to provide employment to others. In such a case, his income is merely a measure of his social status."

But we must state that whenever such a situation arises in respect of Scheduled Caste, it will be the Parliament alone to take the necessary legislative steps in terms of Clause (2) of Article 341 of the Constitution. The States concededly do not have the legislative competence therefore.

The State's argument to justify the legislation on the basis of population ratio also would not satisfy the test. The population of 'Relli' which is the most backward category consists of 1.67% only and although hardly any person of that community had been getting the benefits of education, they are placed in Category A wherefor the benefits of reservation being 1%; whereas those belonging to Adi-Andhra having 8.96% of population and where the students belonging to that community have been taking admissions in all disciplines had been placed in Category D had also been provided reservation to the extent of 1%. We do not know on what basis both the categories have been put in the same class.

The legislation may not be amenable to challenge on the ground of violation of Article 14 of the Constitution whence it is intended to giving effect to principles specified under Article 15 or when the differentiation is not unreasonable or arbitrary but when a classification is made which is per se violative of the constitutional provisions, the same cannot be upheld. While reasonable classification is permissible what would be impermissible is micro classification or mini classification.

In Triloki Nath and Anr. v. State of Jammu & Kashmir and Ors. [(1969) 1 SCR 103] it was stated:

> "...The members of an entire caste or community may in the social, economic and educational scale of values at a given time be backward and may on that account be treated as a backward class, but that is not because they are members of a caste or community, but because they form a class. In its ordinary connotation the expression "class" means a homogeneous section of the People grouped together because of certain likenesses or common traits, and who are identifiable by some common attributes such as status, rank, occupation, residence in a locality, race, religion and the like. Rut for the purpose of Article 16(4) in determining whether a section forms a class, a test solely based on caste, community, race, religion, sex, descent place of birth or residence cannot be adopted, because it would directly offend the Constitution."

In State of Uttar Pradesh v. Pradip Tandon and Ors. it was stated:

> "The backwardness contemplated under Article 15(4) is both social and educational. Article 15(4) speaks of backwardness of classes of citizens. The accent is on classes of citizens. Article 15(4) also speaks of Scheduled Castes and Scheduled Tribes. Therefore, socially and educationally backward classes of citizens in Article 15(4) could not be equated with castes. In M. R. Balaji v. State of Mysore ((1963) Supp 1 SCR 439 : and State of A. P. v. P. Sagar this Court held that classification of backwardness on the basis of castes would violate both Articles 15(1) and 15(4).
>
> Broadly stated, neither caste nor race nor religion can be made the basis of classification for the purposes of determining social and educational backwardness within the meaning of Article 15(4). When Article 15(1) forbids discrimination on grounds only of religion, race, caste, caste cannot be made one of the criteria for determining social and educational backwardness. If caste or religion is recognised as

a criterion of social and educational backwardness Article 15(4) will stultify Article 15(1). It is true that Article 15(1) forbids discrimination only on the ground of religion, race, caste, but when a classification taken recourse to caste as one of the criteria in determining socially and educationally backward classes the expression "classes" in that case violates the rule of expressio unius est exclusio alterius. The socially and educationally backward classes of citizens are groups other than groups based on caste.

In Kumari K.S. Jayasree and Anr. v. The State of Kerala and Anr., this Court held:

"...If any classification of backward classes of citizens is based solely on the caste of the citizen it will perpetuate the vice of caste system. Again, if the classification is based solely on poverty it will not be logical. The society is taking steps for uplift of the people. In such a task groups or classes who are socially and educationally backward are helped by the society. That is the philosophy of our Constitution. It is in this context that social backwardness which results from poverty is likely to be magnified by caste consideration. Occupations, place of habitation may also be relevant factors in determining who are socially and educationally backward classes. Social and economic consideration come into operation in solving the problem and evolving the proper criteria of determining which classes are socially and educationally backward. That is why our Constitution provided for special consideration socially and educationally backward classes of citizens as also schedule castes and tribes. It is only by directing the society and the State to offer them all facilities for social and educational uplift that the problem is solved.

In Akhil Bharatiya Soshit Karamchari Sangh (Railway) represented by its Assistant General Secretary on behalf of the Asson. Etc. v. Union of India and Ors., it was opined:

"The President notifies Scheduled Castes not with reference to any caste characteristics, but their abysmal backwardness, as is evident from the scheme of Part XVI. He appoints, under Article 338, a Special Officer whose duty is to investigate into all matters relating to safeguards for the SC & ST. The Constitution provides not merely for adequate representation of SC & ST to services and posts under the Union and States, but also provides for reservation of seats for SC & ST in the legislatures. The cursory study of the articles relating to the status and safeguards of SC & ST puts it beyond doubt that the founding fathers have assigned to them a special place and shown towards them special concern and charged the State with special mandates to redeem these handicapped human sectors from their grossly retarded situation. Indeed, they are not merely backward, but are the backwardmost and cannot be equated with just any other caste in the Hindu fold. It is, therefore, problematic whether Article 16(2) when it refers to equality among castes deals with the Scheduled Castes which, as shown above, may even be made of a plurality of castes or groups or races and may vary from State of State. Also, a caste, subjected

> qua caste, to the most humiliating handicaps may be a backward class although the court will hesitate to equate caste with class except where the degree of dismalness is "dreadful...."

(Emphasis supplied) This Court in Kailash Chand Sharma v. State of Rajasthan and Ors. following Pradip Tandon (supra) held an affirmative action as regards employment of rural residents vis-a-vis the residents in the town is not sustainable under Clause (4) of Article 16.

It is, therefore, manifest that the backward class which may given the benefit of Clause (4) of Article 15 or Article 16 must consist of a homogeneous group - the element of homogeneity being the backwardness characterizing the class. The link or the thread holding the class together, thus, should be the backwardness of its members which can never be supplemented by castes. Classification, thus, may be justified on the ground that it is a backward class but the same may not stand the scrutiny or the equality clause when classification is made on the basis of a backward caste or a section of a backward caste.

Furthermore, Article 16(4) must be read with Article 335 of the Constitution which emphasizes the fact that efficiency of administration cannot be sacrificed which would lead to the conclusion that the same cannot be done to favour less weak sections, i.e., some castes out of the homogeneous class of Scheduled Castes.

The decision of this Court in State of J&K v. Triloki Nath Khosa and Ors., to which a detailed reference has been made in the accompanying judgment of Brother Hegde, J. we may notice that the ratio thereof has distinctly been noticed and factually differentiated in Food Corporation of India and Ors. v. Om Prakash Sharma and Ors., K.R. Lakshman and Ors. v. Karnataka Electricity Board and Ors. [(2001) 1 SCC 442], Kuldeep Kumar Gupta and Ors. v. H.P. State Electricity Board and Ors. [(2001) 1 SCC 475].

In Om Prakash Sharma (supra), this Court noticed that the Constitution Bench in Triloki Nath Khosa (supra) while deciding the case took care to add that one has always to bear in mind the facts and circumstances of the case in order to judge the validity of a classification.

In Kuldeep Kumar Gupta (supra), Pattanaik, J. (as the learned Chief Justice then was) in no uncertain terms observed that in Triloki Nath Khosa (supra) a word of caution has been indicated that the right to classify is hedged in with salient restraints stating:

> "5... Classification must be truly founded on substantial differences which distinguish persons grouped together from those left out of the group and such differential attributes must bear a just and rational relation to the object sought to be achieved and judicial scrutiny extends only to the consideration whether the classification rests on a reasonable basis and whether it bears a nexus with the object in view. It cannot extend to embarking upon a nice or mathematical evaluation on the basis of classification."

In K.R. Lakshman (supra), Pattanaik, J. again observed:

> "5...It is no doubt true that in Triloki Nath Chandrachud, J. had observed that the classification should not be earned too far lest it may subvert, perhaps submerge the precious guarantee of equality..."

In Vijay Lakshmi (supra), M.B. Shah, J. while holding that reservation for women is permissible in terms of Clause (3) of Article 15 of the Constitution stated:

> "8(a).For the policy decision of" classification, we would straightaway refer to the decision rendered by this Court in State of Jammu & Kahsmir v. Shri Triloki Nath Khosa wherein the Court [Chandrachud, J. (as he then was)] succinctly held thus :--
>
> ". . .The challenge, at best reflects the respondent's opinion on promotional opportunities in public services and one may assume that if the roles were reversed, respondents would be interested in implementing their point of view. But we cannot sit in appeal over the legislative judgment with a view to finding out whether on a comparative evaluation of rival theories touching the question of promotion, the theory advocated by the respondents is not to be preferred. Classification is primarily for the Legislature or for the statutory authority charged with the duty of framing the terms and conditions of service; and if, looked at from the standpoint of the authority making it, the classification is found to rest on a reasonable basis, it has to be upheld." (p. 30) It was also observed that discrimination is the essence of classification and does violence to the constitutional guarantee of equality only if it rests on an unreasonable basis and it was for the respondents to establish that classification was unreasonable and bears no rational nexus with its purported object. Further, dealing with the right to equality, the Court (in paras 29 & 30) held thus :--
>
> "29. . . .But the concept of equality has an inherent limitation arising from the very nature of the constitutional guarantee. Equality is for equals. That is to say that those who are similarly circumstanced are entitled to an equal treatment.
>
> 30. Since the constitutional code of equality and equal opportunity is a charter for equals, equality of opportunity in matters of promotion means an equal promotional opportunity for persons who tall, substantially, within the same class." (p. 33) Applying the aforementioned principles, the Court is required to interpret the provisions of the impugned act on the touchstone of Clause (4) of Article 15 and Clause (4) of Article 16 of the Constitution of India.

The Constitution provides for declaration of certain castes and tribes as Scheduled Castes and Scheduled Tribes in terms of Articles 341 and 342 of the Constitution of India. The object of the said provisions is to provide for grant of protection to the backward class of citizens who are specified in the Scheduled Castes Order and Scheduled Tribes Order having regard to the economic and educationally backwardness wherefrom they suffer. The President of India alone in terms of Article

341(1) of the Constitution of India is authorized to issue an appropriate notification therefore. The Constitution (Scheduled Castes) Order, 1950 made in terms of Article 341(1) is exhaustive.

Mr. Venugopal has strongly relied on a decision in NTR University of Health Sciences, Vijayawada v. G. Babu Rajendra Prasad and Anr., for the proposition that the question as to how and in what manner the reservation should be made is a matter of policy of the State and such a policy decision normally would not be open to challenge, but the said observation must be understood in the context of the Presidential Order made under Article 371D application to the State of Andhra Pradesh. Under the Presidential Order, 1974, 85% of the seats were reserved in favour of the local candidates within the University area only and the remaining 15% were reserved for candidates of non-local area. In the instant case, it is not the extent of reservation, but competence of, the State Legislature to make a sub-classification of Scheduled Castes notified initially by the President and subsequently amended by Parliament by law, is in question.

The power of State Legislature to decide as regard grant of benefit of reservation in jobs or in educational institutions to the backward classes is not in dispute. It is furthermore not in dispute that if such a decision is made the State can also lay down a legislative policy as regard extent of reservation to be made for different members of the backward classes including Scheduled Caste. But it cannot take away the said benefit on the premise that one or the other group amongst the members of the Scheduled Castes has advanced and, thus, is not entitled to the entire benefit of reservation. The impugned legislation, thus, must be held to be unconstitutional.

WHAT IS THE REMEDY?

There is one practical aspect of the matter which may not also be lost sight of. The chart produced before us clearly: shows that the members belonging to Relli and Adi-Andhra are hardly educated. What was necessary in the situation was to provide to them scholarships, hostel facilities, special coaching, etc., so that they may be brought on the same platform with the member of other Scheduled Tribes, viz., Madiga and Mala, if not with the other backward classes. It is not in dispute that members belonging to Relli are hardly educated. Only 2% of the members of the said community have studied in secondary school. No one has ever been admitted in any engineering discipline or other professional disciplines. The said facts clearly go to show that providing reservation for them in engineering or medical discipline or in public service would not solve their problem. Without such basic education, the members belonging to the said community would not be getting admission either in the engineering or medical colleges or other professional courses and as such the question of their joining public service may not arise at all. Now, even for the post of Class IV employees, qualification of passing matriculation examination is provided. Unless children of the said community are educated, the provision for both for education as also public service would be a myth for them and ultimately in view of the impugned legislation for all intent and purport, the benefit thereof would go to other categories. The State, in our opinion, should take positive steps in this behalf.

I entirely agree with the opinion of Brother, N. Santosh Hegde, J. that the appeals be allowed.

SEPARATE CONCURRING JUDGMENT H.K. Sema, J.

I had the privilege of going through the erudite judgment prepared by my learned Brother Hegde, J and I respectfully agree with him. However, having regard to the substantial question of law involving as to the interpretation of the Constitution. I thought of putting a few lines of my own in one aspect of the matter.

Article 366(24) defines "Scheduled Castes" means such castes, races or tribes or parts of or groups within such castes, races or tribes as are deemed under Article 341 to be Scheduled Castes for the purposes of this Constitution. This would go to show that by virtue of the Notification of the President the Scheduled Castes come into being as one class of persons regardless of members drawn from castes, races or tribes etc. They attain a homogeneous group by virtue of the Presidential Notification.

In Indra Sawhney and Ors. v. Union of India and Ors. 1992 Supp(3) SCC 217 this Court observed at page 725(SCC) that the discussion of creamy layer is confined to other backward classes only and has no relevance in the case of Scheduled Castes and Scheduled Tribes.

In the case of State of Maharashtra v. Milind and Ors. (2001) 1 SCC 4, it was pointed out by the Constitution Bench of this Court at page 15 SCC:-

> "By virtue of powers vested under Articles 341 and 342 of the Constitution of India, the President is empowered to issue public notification for the first time specifying the castes, races or tribes or part of or groups within castes, races, or tribes which shall, for the purposes of the Constitution be deemed to be Scheduled Castes or Scheduled Tribes in relation to a State or Union Territory, as the case may be. The language and terms of Articles 341 and 342 are identical. What is said in relation to Article 341 mutatis mutandis applies to Article 342. The laudable object of the said articles is to provide additional protection to the members of the Scheduled Castes and Scheduled Tribes having regard to social and educational backwardness from which they have been suffering since a considerable length of time. The words "castes" or "tribes" in the expression "Scheduled Castes" and "Scheduled Tribes" are not used in the ordinary sense of the terms but are used in the sense of the definitions contained in Articles 366(24) and 366(25)."

Thus, the pious object for issuing the Presidential Notification is to afford them special protection having regard to social and educational backwardness. The Presidential Notification under Article 341 of the Constitution as well as the benefits of reservation of appointments or posts which in the opinion of the State, is not adequately represented in the services under the State, is afforded to a class of persons specified in Presidential Notification under Article 341 of the Constitution. The backward class of citizens enshrined in Article 16(4) of the Constitution includes Scheduled Castes and Scheduled Tribes. The whole basis of reservation is to provide additional protection to the members of the Scheduled Castes and Scheduled Tribes as a class of persons who have been

suffering since a considerable length of time due to social and educational backwardness. The protection and reservation is afforded to a homogeneous group. Further classification and/or regrouping the homogeneous groups by State Legislature would tinker with the Presidential Notification issued under Article 341, which is constitutionally impermissible. By the impugned legislation, the State has sought to re-group the homogeneous group specified in Presidential Notification for the purposes of reservation and appointments. It would tantamount to discrimination in reverse and would attract the wrath of Article 14 of the Constitution. It is a trite law that justice must be equitable. Justice to one group at the costs of injustice to other group is another way of perpetuating injustice.