Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

Civil Appeal No. 2600 of 2022
(@ SLP (Civil) No.19574 of 2021)

PATTALI MAKKAL KATCHI

.... Appellant(s)

Versus

A. MAYILERUMPERUMAL & ORS.

.... Respondent (s)

With

Civil Appeal No. 2601 of 2022
(@ SLP (Civil) No. 19378 of 2021)

Civil Appeal No. 2602 of 2022
(@ SLP (Civil) No.19916 of 2021)

Civil Appeal No. 2603 of 2022
(@ SLP (Civil) No.19776 of 2021)

Civil Appeal No. 2604 of 2022
(@ SLP (Civil) No.19582 of 2021)

Civil Appeal No. 2605 of 2022
(@ SLP (Civil) No.5077 of 2022 @ Diary No.28073 of 2021)

Civil Appeal No. 2606 of 2022
(@ SLP (Civil) No.19568 of 2021)

Civil Appeal No. 2607 of 2022
(@ SLP (Civil) No.19401 of 2021)

Civil Appeal No. 2608 of 2022
(@ SLP (Civil) No.19683 of 2021)

Civil Appeal No. 2609 of 2022
(@ SLP (Civil) No. 20167 of 2021)

Civil Appeal No. 2610 of 2022
(@ SLP (Civil) No.21069 of 2021)

Civil Appeal No. 2611 of 2022
(@ SLP (Civil) No.21070 of 2021)

Civil Appeal Nos. 2612-2642 of 2022
(@ SLP (Civil) Nos.2312-2342 of 2022)

J U D G M E N T

L. NAGESWARA RAO, J.

Leave granted.

1. The Tamil Nadu Special Reservation of seats in Educational Institutions including Private Educational Institutions and of appointments or posts in the services under the State within the Reservation for the Most Backward Classes and Denotified Communities Act, 2021 was declared as unconstitutional by the High Court of Madras, Madurai Bench by a judgment dated 01.11.2021. The correctness of the said judgment is challenged in these appeals.

I. Background

2. Communal representation in public services existed in the Madras Presidency prior to the Constitution of India coming into force. The Madras High Court declared G.O. Ms. No. 3437 dated 21.11.1947, by which communal representation was provided, as unconstitutional.The said judgment of the High Court was upheld by this Court in ***State of Madras v. Srimathi Champakam Dorairajan***[1]. This Court held that the classification made in the said G.O. proceeded on the basis of religion, race and caste and constituted a violation of the fundamental rights guaranteed under Article 29(2) of the Constitution of India. On 18.06.1951, Article 15(4) was inserted by the Constitution (First Amendment) Act, 1951, enabling the State to make any special provision for advancement of socially and educationally backward classes. Consequent to the judgment of this Court, G.O. Ms. No. 2432 dated 27.09.1951 was issued by the Madras State adopting a 20-point roster, with three seats reserved for Scheduled Castes and Scheduled Tribes and five for Backward Classes, amounting to 15 per cent reservation for Scheduled Castes and Scheduled Tribes together and 25 per cent for Backward Classes. On 30.12.1954, G.O. Ms.

1 1951 SCR 525

No. 2643 was issued increasing reservation for Scheduled Castes and Scheduled Tribes combined to 16 per cent and Backward Classes to 25 per cent. By G.O. Ms. No. 353 dated 31.01.1957, the State Government made a sub-classification amongst Backward Classes. 'Most Backward Communities' were identified and educational concessions were extended to them. There were 58 communities in the list of 'Most Backward Communities', with Vanniakula Kshatriyas listed at serial No. 1.

3. The State Government appointed a Backward Class Commission under the Chairmanship of Shri A.N. Sattanathan, by G.O. Ms. No. 842 dated 13.11.1969 "to make a scientific and factual investigation of the conditions of backward classes in the State and recommend specific measures of relief for their advancement". The Commission submitted its report in November, 1970, recommending reservation of 33 per cent of posts under the State Government for Backward Classes as well as of seats in professional and educational institutions. After considering the recommendations of the said Commission, the State Government, by G.O. Ms. No. 695 dated 07.06.1971, enhanced the existing reservation for Backward Classes from 25 per cent to 31 per cent and that for Scheduled Castes and Scheduled Tribes from 16 per cent to 18 per cent with respect to

seats in all kinds of educational institutions under Government, local body and aided managements and posts for recruitment to public services. On 01.02.1980, the reservation quota for Backward Classes was enhanced to 50 per cent for appointment to posts in services and admissions to educational institutions under the State Government.

4. Later, the Tamil Nadu Second Backward Classes Commission was appointed by the Government on 13.12.1982. The said Commission was headed by Shri J.A. Ambasankar, I.A.S. (retd.). A study was conducted by the Commission to determine the level of backwardness on the basis of various indicators of social and educational backwardness bearing points, with each community assessed being awarded a score from a total of 15 points. According to the Chairman, such of those communities which have secured 8, 9 and 10 points should be grouped as 'A', those with 11, 12 and 13 points should be placed in group 'B' and those with 14 and 15 points should be categorised as group 'C'. The Chairman of the Commission recommended compartmental reservation on the basis of the different groupings and provided mechanism for implementation of the same. 14 members of the Commission differed from the views expressed by the Chairman of the Tamil Nadu Second Backward Classes Commission.

5. On 30.07.1985, the State Government issued G.O. Ms. No. 1564 notifying 201 communities as Backward Classes throughout the State of Tamil Nadu for the purposes of Articles 15(4) and 16(4) of the Constitution. G.O. Ms. Nos. 1566 and 1567 were also issued on the same day, classifying 39 communities as 'Most Backward Classes' (MBCs) and 68 communities as 'Denotified Communities' (DNCs), respectively. The Vanniakula Kshatriya community was placed at sl. no. 26 in the list of MBCs. On 28.03.1989, separate reservation of 20 per cent, out of the available 50 per cent for Backward Classes, was provided for MBCs and DNCs together and the remaining 30 per cent set aside for Backward Classes. Later, on 22.06.1990, one per cent separate reservation was provided to Scheduled Tribes in public services and educational institutions. Thus, from 1990, 30 per cent reservation was provided for Backward Classes, 20 per cent for MBCs and DNCs, 18 per cent for Scheduled Castes and 1 per cent for Scheduled Tribes, totalling to 69 per cent.

6. Act No. 45 of 1994, *i.e.*, the Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of seats in Educational Institutions and of appointments or posts in the Services under the State) Act, 1993 (hereinafter, the "**1994 Act**") was enacted to provide for reservation in admissions to educational institutions in the State and for appointments in the

services under the State. 'Backward Classes of citizens' are defined under Section 3(a) thereof as "the class or classes of citizens who are socially and educationally backward, as may be notified by the Government in the *Tamil Nadu Government Gazette*, and includes the Most Backward Classes and the Denotified Communities". Section 4 provides that reservation in respect of annual permitted strength in educational institutions for 'Backward Classes of citizens' and for persons belonging to Scheduled Castes and Scheduled Tribes shall be 69 per cent. According to Section 5, 69 per cent of appointments or posts in the services under the State shall be reserved for 'Backward Classes of citizens', Scheduled Castes and Scheduled Tribes. The allocation of percentage of reservation for Backward Classes, MBCs and DNCs, Scheduled Castes and Scheduled Tribes remained unchanged. Additionally, by Section 7 of the 1994 Act, the Government reserved power to classify or sub-classify, by notification, the 'Backward Classes of citizens' for the purposes of the 1994 Act, on the basis of reports of the Tamil Nadu Backward Classes Commission constituted on 15.03.1993. On 19.07.1994, by G.O. Ms. No. 28, the Government of Tamil Nadu, under Section 3(a) of the 1994 Act, notified 143 communities as Backward Classes, 41 communities as MBCs and 68 communities as DNCs. By the Constitution (Seventy-sixth

Amendment) Act, 1994, which received the assent of the President on 31.08.1994, the 1994 Act was placed in the Ninth Schedule of the Constitution, as Entry 257-A.

7. The validity of the 1994 Act was challenged by way of writ petitions filed in this Court. The said writ petitions were disposed of by this Court on 13.07.2010 in ***S.V. Joshi v. State of Karnataka***[2], after taking note of the fact that the exercise of collecting quantifiable data to justify the reservation under the 1994 Act, pursuant to judgments of this Court in ***M. Nagaraj v. Union of India***[3] and ***Ashoka Kumar Thakur v. Union of India***[4], had not been undertaken. Further, the State Government was directed to place quantifiable data before the Tamil Nadu Backward Classes Commission, on the basis of which amongst other things, the Commission would decide the quantum of reservation. No opinion was expressed on the validity of the 1994 Act. Consequent to the judgment of this Court in ***S.V. Joshi*** (supra), by G.O. Ms. No. 50 dated 11.07.2011, the Government of Tamil Nadu decided to continue to implement reservation of 69 per cent as provided in the 1994 Act. It is mentioned therein that a report of the Tamil Nadu Backward Classes Commission was submitted to the Government on 08.07.2011 and subsequently placed before the

2 (2012) 7 SCC 41
3 (2006) 8 SCC 212
4 (2008) 6 SCC 1

Cabinet, which was satisfied about the justification for continuation of reservation of 69 per cent.

8. Thereafter, Writ Petition No.365 of 2012 was filed under Article 32 of the Constitution challenging the 1994 Act, which is pending consideration before this Court. On 21.03.2012, by G.O. (Ms) No. 35, the Government prescribed additional terms of reference to the Tamil Nadu Backward Classes Commission, requesting the Commission to examine and recommend upon the demand made by various communities to provide for internal reservation, within the reservation provided to MBCs and DNCs. There is a reference in the said G.O. to a writ petition filed before the High Court of Madras as well as representations made by members of the Vanniakula Kshatriya community and other communities, seeking internal reservation for each of these communities within the 20 per cent reservation for MBCs and DNCs. On 13.06.2012, a report was submitted by the Tamil Nadu Backward Classes Commission, chaired by Justice M.S. Janarthanam (retd.) of the Madras High Court. The Chairman recommended internal reservation of 10.5 per cent for the Vanniakula Kshatriyas, with the remaining six members of the Commission submitting a dissent note.

9. The Tamil Nadu Backward Classes Commission was reconstituted by G.O. (MS) No. 52 dated 08.07.2020 and Justice

M. Thanikachalam (retd.) of the Madras High Court, was appointed as the Chairman. One of the terms of reference prescribed to the Backward Classes Commission was to examine and recommend upon the demand made by various communities to provide for internal reservation within the reservation provided for MBCs. In addition thereto, another Commission was constituted by G.O. (MS) No. 99 dated 21.12.2020, for the purpose of collection of caste-wise quantifiable data and was headed by Justice A. Kulasekaran (retd.) of the Madras High Court. The Government recognized that the caste-wise data collected by the Ambasankar Commission was more than three decades old and there was an urgent need to collect caste and tribe wise data "as on date". It was stated in the said G.O. that the Commission was constituted in response to the demands of various political parties and community organizations.

10. A letter was written on 18.02.2021 by the Government to Justice M. Thanikachalam, Chairman of the Tamil Nadu Backward Classes Commission, to give his opinion regarding the possibility of providing internal reservation amongst the communities listed as MBCs and DNCs within the 20 per cent reservation made available to them. Justice M. Thanikachalam promptly responded on 22.02.2021, recommending sub-categorization

amongst the MBCs and DNCs based on the proportion of their population. Immediately thereafter, on 24.02.2021, a bill for special reservation within the 20 per cent reserved for MBCs and DNCs was placed before the State Legislative Assembly. On the same day, the bill was passed and it received the assent of the Governor on 26.02.2021. By the 2021 Act, reservation of seats in educational institutions, including private educational institutions, and reservation in appointment or posts in the services under the State were provided in the following manner: ten and a half per cent for 'Part-MBC (V) Communities', seven per cent for 'Part-MBC and DNC Communities' and two and a half per cent for 'Part-MBC Communities'. In terms of the Schedule annexed to the 2021 Act, 'Part-MBC(V)' consists of Vanniakula Kshatriya community (including Vanniyar, Vanniya, Vannia Gounder, Gounder or Kander, Padayachi, Palli and Agnikula Kshatriya), 'Part-MBC and DNC' comprise 25 communities from the MBCs and 68 DNCs and the remaining 22 communities of MBCs come under the category of 'Part-MBC'.

11. Writ petitions were filed in the High Court of Madras assailing the constitutional validity of the 2021 Act. The High Court framed the following points for consideration:

> "*(i) Whether the State Legislature has competency to make the impugned Act after 102nd Constitutional*

Amendment Act, 2018 and before 105th Constitutional Amendment Act, 2021?
(ii) Whether an Act placed under the Ninth Schedule of the Constitution of India can be varied without amending the said Act?
(iii) Whether the State Government had the power to take any decision with regard to Backward Classes in the teeth of the Constitutional provisions, more particularly, Article 338-B of the Constitution of India?
(iv) Whether the State has power to provide reservation based on caste?
(v) Whether reservation can be provided without any quantifiable data on population, socio educational status and representation of the backward classes in the services?
(vi) Whether the impugned Act providing reservation of 10.5% to MBC(V), without any quantifiable data, is in violation of Articles 14, 15 and 16 of the Constitution of India?
(vii) Whether the sub-classification of MBC into three categories can be done solely based on adequate population data, in the absence of any objective criteria?"

12. The High Court answered points (i) to (iii) by holding that the State Legislature has no competence to enact the 2021 Act. The High Court further found that the internal reservation made only on the basis of caste is violative of the Constitution. Answering points (v) to (vii), the High Court was of the opinion that there was no quantifiable data relating to the population, socio-economic status and representation of the backward classes in the services. Finally, on the basis of such conclusions,

the 2021 Act was declared *ultra vires* the provisions of the Constitution.

13. We have heard Dr. Abhishek Manu Singhvi, Mr. P. Wilson, Mr. Rakesh Diwedi, Mr. Mukul Rohatgi, Mr. C.S. Vaidyanathan, Mr. M. N. Rao and Mr. Radhakrishnan, learned Senior Counsel appearing for the Appellants and Dr. Rajeev Dhawan, Mr. R. Balasubramanian, Mr. K. M. Vijayan, Mr. S. Nagamuthu, Mr. Gopal Sankaranarayanan, Mr. V. Prakash, Mr. Jaideep Gupta and Mr. Colin Gonsalves, learned Senior Counsel appearing for the Respondents.

II. Reference to a larger Bench

14. At the outset, it is necessary to deal with the preliminary submission made by some Senior Counsel appearing for the State of Tamil Nadu for reference of these appeals to a Constitution Bench.

15. Dr. Abhishek Singhvi, Mr. Rakesh Dwivedi and Mr. Mukul Rohatgi, learned Senior Counsel appearing for the State of Tamil Nadu, submitted that the case involves interpretation of constitutional provisions and therefore, it is appropriate that these appeals are heard by a Constitution Bench. Mr. P. Wilson, learned Senior Counsel appearing for the State and Mr. C.S. Vaidyanathan and Mr. M. N. Rao, learned Senior Counsel

appearing for the Appellants in Civil Appeals arising from SLP (C) No. 19378 of 2021 and SLP (C) No. 19574 of 2021, respectively, stated that there is no necessity of referring this matter to a larger Bench.

16. Dr. Singhvi submitted that challenge to the 1994 Act is pending consideration before a Constitution Bench of this Court. He further stated that adjudication of the dispute in these appeals would involve interpretation of the Constitution (One Hundred and Fifth Amendment) Act, 2021 (hereinafter, the "**105th Amendment Act**"). According to Dr. Singhvi, this Court would have to decide whether the 105th Amendment Act is clarificatory and dates back to the introduction of Article 342-A. It is advisable that the said issue is decided by a larger Bench. Mr. Dwivedi, supplementing the submissions of Dr. Singhvi, referred to the findings of the High Court in the impugned judgment on the lack of legislative competence of the State Legislature in enacting the 2021 Act with respect to Section 31-B of the Constitution. He stated that the words "repeal or amend" appearing in Article 31-B would have to be construed by this Court in these appeals to reach a determinative finding. On this ground, he urged for these appeals to be decided by a larger Bench.

17. Appearing on behalf of the Respondents, Dr. Rajeev Dhawan and Mr. Gopal Sankaranarayanan emphatically argued that no ground has been made out for referring these appeals to a larger Bench. Dr. Dhawan argued that the adjudication of the dispute in these appeals does not involve interpretation of any provision in the Constitution. Mr. Sankaranarayanan submitted that reference to a Constitution Bench is made only when the Court is satisfied that a substantial question of law as to interpretation of the Constitution is involved, the determination of which is necessary for disposal of the case. He placed reliance on two judgments of this Court in ***Abdul Rahim Ismail C. Rahimtoola v. State of Bombay***[5] and ***Shrimanth Balasaheb Patil v. Speaker, Karnataka Legislative Assembly***[6]. As both the stated conditions are not satisfied in the present case, he stated that there is absolutely no need for reference to a larger Bench.

18. The *vires* of Rule 3 of the Indian Passport Rules, 1950 and Section 3 of the Indian Passport Act (34 of 1920) fell for consideration before this Court in ***Abdul Rahim Ismail C. Rahimtoola*** (supra). An argument was advanced in that case that the matter should be referred to a Bench of five Judges as a constitutional question was raised. While referring to an earlier

5 (1960) 1 SCR 285
6 (2020) 2 SCC 595

judgment of this Court in ***Ebrahim Vazir Mavat v. State of Bombay***[7], this Court held that the question of the impugned provision and rule being in violation of Articles 19(1)(d) and 19(1)(e) had already been decided by this Court and therefore, it cannot be said that any substantial question of law arises on the interpretation of a constitutional provision. The request for reference, was therefore, rejected.

19. In ***Shrimanth Balasaheb Patil*** (supra), this Court refused to refer the dispute therein to a Constitution Bench on the ground that there was no substantial question of law as to the interpretation of the Constitution, the determination of which was necessary for the disposal of the case. This Court was of the opinion that the existence of substantial question of law does not weigh on the stakes involved in the case, rather, it is determined by the impact that the question would have on the final determination of the case.

20. Article 145(3) of the Constitution provides that any case involving substantial question of law as to the interpretation of the Constitution should be heard by a minimum number of five Judges. However, we are not in agreement with the submission of Dr. Singhvi that the question of whether the 105th Amendment Act is clarificatory involves interpretation of the 105th

7 1954 SCR 933

Amendment Act. Relying upon the parliamentary debates, Dr. Singhvi submitted that the amendment has been brought only for the purpose of clarifying the Constitution (One Hundred and Second Amendment) Act, 2018 and, therefore, the 105th Amendment Act should be deemed to have come into force from 15.08.2018, *i.e.*, the date from which Article 342-A was given effect. There is no necessity of interpreting the 105th Amendment Act for the purpose of deciding the question raised by Dr. Singhvi relating to the retrospectivity of the said amendment.

21. The other point to be dealt with is the submission made by Mr. Dwivedi on the question of interpretation of Article 31-B of the Constitution. His submission is that the High Court erred in holding that the State of Tamil Nadu did not have legislative competence to enact a separate legislation varying the provisions of the 1994 Act, placed in the Ninth Schedule, on the ground that it falls foul of Article 31-B of the Constitution. The submission of Mr. Dwivedi is that the words "repeal or amend" in Article 31-B have to be interpreted to determine whether by virtue of the said constitutional provision, the State lacked legislative competence to enact a *sui generis* law on a subject similar or ancillary to that of a statute placed in the Ninth Schedule. Article 31-B has been construed by this Court in ***The***

Godavari Sugar Mills Ltd. v. S. B. Kamble[8], ***Shri Ram Ram Narain Medhi v. State of Bombay***[9], ***Sajjan Singh v. State of Rajasthan***[10], ***Ramanlal Gulab Chand Shah v. State of Gujarat***[11], ***State of Orissa v. Chandrasekhar Singh Bhoi***[12] and ***State of Maharashtra v. Madhavrao Damodar Patil***[13]. In view of the above judgments, which are discussed later, it is not necessary for this Court to refer these appeals to a larger Bench.

III. Legislative competence of the State Legislature in enactment of the 2021 Act

A. *Effect of the Constitution (One Hundred and Second Amendment) Act, 2018 and the Constitution (One Hundred and Fifth Amendment) Act, 2021*

22. The impugned 2021 Act was passed on 26.02.2021. Relevant provisions of the Constitution as introduced by the Constitution (One Hundred and Second Amendment) Act, 2018 (hereinafter, the "**102nd Amendment Act**"), brought into force with effect from 15.08.2018, and as amended by the 105th Amendment Act (italicized), which came into force from 15.08.2021 in terms of the notification dated 15.09.2021 issued

8 (1975) 1 SCC 696
9 1959 Supp (1) SCR 489
10 (1965) 1 SCR 933
11 (1969) 1 SCR 42
12 (1969) 2 SCC 334
13 (1968) 3 SCR 712

by the Ministry of Social Justice and Empowerment, are as below:

> **Article 338-B. National Commission for Backward Classes.**-
> (1) There shall be a Commission for the socially and educationally backward classes to be known as the National Commission for Backward Classes.
> xxx
> (9) The Union and every State Government shall consult the Commission on all major policy matters affecting the socially and educationally backward classes.
>
> *Provided that nothing in this clause shall apply for the purposes of clause (3) of article 342A.*
>
> **Article 342-A. Socially and educationally backward classes.-**
>
> (1) The President may with respect to any State or Union territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify *the socially and educationally backward classes in the Central List which shall for the purposes of the Central Government* be deemed to be socially and educationally backward classes in relation to that State or Union territory, as the case may be.
>
> (2) Parliament may by law include in or exclude from the Central List of socially and educationally backward classes specified in a notification issued under clause (1) any socially and educationally backward class, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.
>
> *Explanation.- For the purposes of clauses (1) and (2), the expression "Central List" means the list of*

socially and educationally backward classes prepared and maintained by and for the Central Government.

(3) Notwithstanding anything contained in clauses (1) and (2), every State or Union territory may, by law, prepare and maintain, for its own purposes, a list of socially and educationally backward classes, entries in which may be different from the Central List.

Article 366. Definitions.-

xxx

(26C) "socially and educationally backward classes" means such backward classes as are so deemed under article 342A for the purposes of the Central Government or the State or Union territory, as the case may be.

23. The High Court observed that the majority opinion of this Court in ***Dr Jaishri Laxmanrao Patil v. Chief Minister***[14] concluded that the powers of the State Legislatures to identify backward classes have been ousted and the power to modify the list of socially and educationally backward classes (SEBCs) stood vested in the Parliament, after insertion of Article 342-A in the Constitution by the 102nd Amendment Act. The High Court rejected the contention on behalf of the State that the 105th Amendment Act restored the power of the States to identify and notify backward classes. The High Court was of the view that the 2021 Act came into existence on 26.02.2021, whereas the 105th Amendment Act was enacted on 19.08.2021. Thus,

14 (2021) 8 SCC 1

according to the High Court, the impugned legislation, which was brought into effect prior to the enactment of the 105th Amendment Act, was unconstitutional in view of the majority opinion in ***Dr Jaishri Laxmanrao Patil*** (supra).

24. It was contended on behalf of the State by Dr. Singhvi that the 2021 Act does not identify, exclude or include any community in relation to the list of backward classes. The said exercise was already done by G.O. Ms. No. 28 dated 19.07.1994 under the 1994 Act. What is instead sought to be done by the 2021 Act is sub-classification of the MBCs and allocation of 10.5 per cent reservation for the Vanniakula Kshatriya community within the 20 per cent earmarked for MBCs and DNCs, which is not barred to be undertaken by the State by virtue of the 102nd Amendment Act. Though a writ petition challenging the 1994 Act is pending consideration, there has been no interim order staying the operation of the said legislation. He proceeded to submit that the 105th Amendment Act is essentially clarificatory in nature. After the judgment of this Court in ***Dr Jaishri Laxmanrao Patil*** (supra), the Parliament, in exercise of its constituent power, recognised the imminent need of clarification of Articles 338-B, 342-A and 366(26C) of the Constitution and sought to make amendments to reflect what, according to Dr. Singhvi, was always the intention behind these provisions, *i.e.*,

for the States to continue to hold and exercise the power of identification of backward classes for reservation to educational institutions and services under the States. To emphasize this claim, Dr. Singhvi took the Court through the Statement of Objects and Reasons of the 105th Amendment Act as well as some of the debates and speeches in both houses of the Parliament on the Constitution (One Hundredth and Twenty-seventh Amendment) Bill, 2021. He further sought to impress upon this Court that the only real and operative change brought about by the 105th Amendment Act is the addition of clause (3) to Article 342-A, which is essentially a procedural requirement on a State / Union Territory to prepare and maintain a list of SEBCs for its own purposes. He relied upon the judgment of this Court in ***K.S. Paripoornan v. State of Kerala***[15] to assert that the 105th Amendment Act, being a clarificatory amendment dealing predominantly with procedure and not a substantive amendment, will have retrospective affect. Further, support was sought from this Court's judgment in ***Shri Prithvi Cotton Mills Ltd. v. Broach Borough Municipality***[16] to plead that while undoubtedly the Parliament had the power to enact both the 102nd Constitution Amendment Act and the 105th Constitution Amendment Act, the latter sought to clarify the circumstances

15 (1994) 5 SCC 593
16 (1969) 2 SCC 283

which gave rise to the Court's interpretation of the former and would, thus, be retrospective.

25. In the alternative, Mr. Dwivedi argued that the judgment of this Court in ***Dr Jaishri Laxmanrao Patil*** (supra) only excluded the specification of SEBCs by the States under the 102nd Amendment Act. If a community was already included in the State's list of SEBCs, which had been saved by the said judgment in exercise of the Court's powers under Article 142 till the notification of the List by the President,, there was no bar on the State to provide for sub-classification.

26. The contention put forth on behalf of the Respondents by Mr. Sankaranarayanan was that the State did not have legislative competence to identify SEBCs on 26.02.2021, the date the 2021 Act came into force. He submitted that the 102nd Constitutional Amendment Act was in force on 26.02.2021, according to which SEBCs can be specified for the purposes of the Constitution only by the President, according to the majority opinion of this Court in ***Dr Jaishri Laxmanrao Patil*** (supra). He supported the judgment of the High Court and contended that the State lacked legislative competence to identify a particular community for allocating 10.5 per cent reservation within the MBCs. On the subject of the 105th Amendment Act, it was argued that the said amendment is unquestionably prospective.

Wherever it had been the intention of the Parliament to give retrospective effect to constitutional amendments, it was specifically mentioned in the relevant amendment. Our attention was drawn to the Constitution (First Amendment) Act, 1951, by which changes to Article 19(2) were given retrospective effect from the date of commencement of the Constitution and Article 31-B was inserted containing a validating provision, thereby making it applicable prior to the date of the amendment to all laws made before such date and notwithstanding any judgment. We were also directed to Article 329-A, which excluded applicability of laws made prior to the Constitution (Thirty-ninth) Amendment Act, 1975 to specified elections and also validated such elections which may have been declared to be void under law or any order made by any court, before such commencement. Lastly, the Constitution (Eighty-fifth Amendment) Act, 2001 was pointed out whereby the changes to Article 16(4-A) were given retrospective effect from 17.06.1995. It was submitted that, unlike the cited instances, there is not even a slight indication in the 105th Amendment Act that it was intended to be retrospective in operation.

27. Countering the submission made on behalf of the Appellants as to the 105th Amendment Act being clarificatory in

nature, it was further argued by Mr. Sankaranarayanan that a judgment of this Court cannot be clarified by the Parliament, as the Supreme Court is the final arbiter with respect to interpretation of the Constitution. He cited ***Janapada Sabha Chhindwara v. Central Provinces Syndicate Ltd.***[17] and a judgment of the U.S. Supreme Court in ***Plaut v. Spendthrift Farm Inc.***[18], amongst others, to elaborate on the limitations on the power of the Legislature to 'clarify' an interpretation of law rendered by this Court. He further submitted that the 105th Amendment Act cannot be treated to be a validating provision, as there has been no 'invalidation' of the 102nd Amendment Act. With the 102nd Amendment Act holding force at the time of enactment of the 2021 Act, he asserted that earmarking 10.5 per cent to one community is tantamount to identifying a community for the benefit of reservation, which can be done only by the President as per the 102nd Amendment Act and therefore, the 2021 Act is an impermissible exercise on the part of the State Legislature. He was vehement in his argument that a statute which is void *ab initio* for lack of legislative competence cannot be validated by a subsequent amendment and placed reliance on ***Saghir Ahmad v. State of U.P.***[19],

17 (1970) 1 SCC 509
18 514 U.S. 211 (1995)
19 (1955) 1 SCR 707

M.P.V. Sundararamier & Co. v. State of A.P.[20] and ***Deep Chand v. State of Uttar Pradesh***[21]. Dr. Dhawan, joining Mr. Sankaranarayanan in asserting that the 105th Amendment Act is prospective in operation, contested the claim of the Appellants, on the 105th Amendment Act being clarificatory and at the same time removing the basis of the judgment of this Court in ***Dr Jaishri Laxmanrao Patil*** (supra), as contradictory. According to Dr. Dhawan, the amendment could either be clarificatory of the Parliament's intention or purport to remove the basis of this Court's judgment, but could not be both.

28. On the issue of the 105th Amendment Act, we are unable to agree with the contention of the Appellants that the said amendment is clarificatory and dates back to the introduction of Article 342-A. The Respondents were right in submitting that the Parliament had expressly specified the retrospectivity of an amendment, whenever it intended to give any amendment retrospective effect. As such we do not intend to scrutinize the Statement of Objects and Reasons of and the parliamentary debates on the Constitution (One Hundredth and Twenty-seventh Amendment) Bill, 2021, as it is well established and also reiterated in the majority decision in ***Dr Jaishri Laxmanrao Patil*** that where provisions of a statute are ambiguous, the first

20 1958 SCR 1422
21 1959 Supp (2) SCR 8

attempt should be to find meaning in the statute itself, failing which the court may turn to external aids. We have not been called upon to interpret the 105th Amendment Act and nor do we find any vagueness as regards when the 105th Amendment Act has come into effect. The 105th Amendment Act cannot be said to be a validating amendment, as admittedly the 102nd Amendment Act has not been invalidated by this Court. We do not find it necessary to deal with the judgments cited by the Respondents on the impermissibility of clarification of a judgment of this Court by the Parliament, as even the Appellants do not contend that the 105th Amendment Act was made to clarify the judgment of this Court in ***Dr Jaishri Laxmanrao Patil*** (supra).

29. Rule 350-A of the Rules framed by the Broach Borough Municipality, by which a rate on land was fixed at a percentage of the valuation based upon capital value, was declared *ultra vires* Section 73 of the Bombay Municipal Boroughs Act, 1925 in ***Patel Gordhandas Hargovindas v. Municipal Commissioner, Ahmedabad***[22]. The Legislature of Gujarat passed the Gujarat Imposition of Taxes by Municipalities (Validation) Act, 1963, validating the rates so imposed. The said validating legislation was challenged before this Court in ***Shri***

22 (1964) 2 SCR 608

Prithvi Cotton Mills Ltd. (supra). This Court was of the opinion that the defect pointed out by the judgment in ***Patel Gordhandas Hargovindas*** (supra), being that Section 73 had not authorised the levy of a tax but that of a “rate”, which had acquired a special meaning in legislative practice as held by this Court, was cured by the validating legislation. The Court upheld the validating statute on the ground that a new meaning to the expression "rate" was legislatively ascribed, thus putting out of action the effect of the decisions of the courts to the contrary. The Appellants cannot take aid of this judgment to argue that the 105th Amendment Act has to be given retrospective effect, since the 105th Amendment Act cannot be treated as a validating amendment as no part of the 102nd Amendment Act has been invalidated. The contention of the Appellants that the 105th Amendment Act, being an amendment relating to procedure, has to be construed as retrospective along the lines of ***K.S. Paripoornan*** (supra), is misconceived. Identifying certain communities which are to be deemed as SEBCs for the purposes of the Central Government and the States, respectively, cannot be said to be a matter of procedure. The procedural aspect of the 102nd Amendment Act and the 105th Amendment Act is only the manner of publication of the lists of SEBCs, whereas the substantive element of the said amendments is identifying and

recognising certain communities as SEBCs. Thus, we see no force in the submission of the Appellants that the 105th Amendment Act is clarificatory in nature and has to be given retrospective effect from the date on which the 102nd Amendment Act came into effect.

30. At the time of enactment of the 2021 Act, there is no doubt therefore, that the 102nd Amendment Act held force. The majority in ***Dr Jaishri Laxmanrao Patil*** (supra) was of the view that identification of SEBCs and their inclusion in a list to be published under Article 342-A can be done only by the President, after the insertion of Articles 366(26C) and 342-A. The list of SEBCs to be notified by the President under Article 342-A shall be the only list for the purposes of the Constitution. It was concluded in the said judgment that the change brought about by the 102nd Amendment Act, especially under Article 342-A, was only with respect to the process of identification of SEBCs and their list. It was categorically held that the power to frame policies and legislation with regard to all other matters, *i.e.*, the welfare schemes for SEBCs, setting up of institutions, grants, scholarships, extent of reservation and special provisions under Articles 15(4), 15(5) and 16(4) are entirely with the State Government in relation to its institutions and its public services. It was further clarified that the extent of reservation, the kind of

benefits, the quantum of scholarships, the number of schools which are to be specially provided under Article 15(4) or any other beneficial or welfare scheme conceivable under Article 15(4) can all be achieved by the State through its legislative and executive powers. Recognising that the President was yet to prepare and publish a list under Article 342-A(1), the Court held that a comprehensive list should be published expeditiously and in exercise of its powers under Article 142 of the Constitution, the Court directed till the time of the publication of such list, the SEBC lists prepared by the States would continue to be operative.

31. Backward Classes, MBCs and DNCs have been identified for reservation in educational institutions and for public employment by G.O. Ms. No. 28 dated 19.07.1994 under the 1994 Act. 30 per cent reservation was provided for Backward Classes and 20 per cent for MBCs and DNCs together. The Vanniakula Kshatriya community has consistently featured in the list of MBCs since 1957 and was also included in the list of MBCs in G.O. Ms. No. 28 dated 19.07.1994, pursuant to the 1994 Act. By the 2021 Act, 10.5 per cent out of 20 per cent reservation for MBCs and DNCs was earmarked for the Vanniakula Kshatriya community. Identification of the Vanniakula Kshatriyas as a community within the MBCs was not the subject-matter of the

2021 Act, as this exercise had already been completed pursuant to the 1994 Act. Under the 2021 Act, sub-classification of the MBCs and DNCs and apportionment of a particular percentage of reservation is for the purpose of determining the extent of reservation for communities within the MBCs and DNCs, which is a permissible exercise of power by the State Government, according to the majority judgment in ***Dr. Jaishri Laxmanrao Patil*** (supra). What the 102nd Amendment prohibits the State from undertaking is identifying a caste as SEBC or including or excluding a community from the list notified by the President. We are not in agreement with the contention of the Respondents that determining the extent of reservation for a community amongst the list of Most Backward Classes amounts to identification. In view thereof, the High Court has committed an error in holding that the 2021 Act is violative of Article 342-A.

B. *Permissibility of sub-classification amongst backward classes*

32. Placing reliance on the judgment of this Court in ***E.V. Chinnaiah v. State of A.P.***[23], the High Court held that all castes including the sub-castes, races, tribes mentioned in the list are to be members of one group for the purpose of the Constitution and cannot be further sub-divided so as to give

23 (2005) 1 SCC 394

more preference to a miniscule portion thereof. The High Court also observed that as per ***E.V. Chinnaiah*** (supra), all the castes included in the Schedule under Article 341 of the Constitution would be 'deemed to be' one class of persons.

33. On behalf of the Appellants, it was contended that the High Court committed an error in relying upon ***E.V. Chinnaiah*** (supra), which pertained to the interpretation of Articles 341 and 342, to come to the conclusion that classification is not permissible even in respect of backward classes. It was argued that it is clear from ***Indra Sawhney v. Union of India***[24] that sub-classification of backward classes is permissible. Stress was also laid on the fact that the correctness of ***E.V. Chinnaiah*** (supra) has been referred for consideration by a larger Bench in ***State of Punjab v. Davinder Singh***[25]. It was urged that the permissibility of sub-classification amongst backward classes as has been done in the 2021 Act cannot be contested. Reasonableness of sub-classification is a separate question to be determined by this Court.

34. On the other hand, Dr. Rajeev Dhawan and Mr. R. Balasubramanian submitted that backward classes can be sub-divided into backward and more backward classes in accordance with ***Indra Sawhney*** (supra), but further

24 1992 Supp (3) SCC 217
25 (2020) 8 SCC 1

differentiation of MBCs is not permissible as it would amount to micro-classification, as correctly held by the High Court.

35. The Andhra Pradesh Scheduled Castes (Rationalisation of Reservations) Act, 2000 was challenged before the High Court of Andhra Pradesh. 57 castes enumerated in the Presidential list of Scheduled Castes were categorised into four groups based on *inter se* backwardness and separate quotas were fixed in reservation for each of these groups by the State of Andhra Pradesh. A five-Judge Bench of the High Court by a majority of 4:1 dismissed the writ petitions. In ***E.V. Chinnaiah*** (supra), the main contention of the appellants therein before this Court was that the State lacked legislative competence in enacting the said legislation which, according to the appellants, was solely meant for subdividing or subgrouping the castes enumerated in the Presidential list, as under Article 341(2) bifurcation of the Presidential list can be done only by the Parliament. Alternatively, it was submitted that this subgrouping amounted to micro-classification of the Scheduled Castes, in violation of Article 14 of the Constitution. Three questions were framed by this Court in ***E.V. Chinnaiah*** (supra), as listed below:

> "*(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 legislative competence?*

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

36. In ***E.V. Chinnaiah*** (supra), this Court was of the opinion that Article 341 made it clear that the State, either by legislative or executive action, had no power of "disturbing" the Presidential list of Scheduled Castes and therefore, any executive or legislative act of the State which interferes, disturbs, rearranges, regroups or reclassifies various castes in the Presidential list is violative of Article 341 and the scheme of the Constitution. Further, it was held that castes identified by the President under Article 341 formed a class in themselves and any division of these classes based on any consideration would amount to tinkering with the Presidential list. As the primary object of the impugned enactment in that case was to create groups of sub-castes in the list of Scheduled Castes, this Court concluded that the State does not have legislative competence to divide the Scheduled Castes, by tracing its claim to Entry 41 of List II and Entry 25 of List III. Insofar as the contention of sub-classification of Scheduled Castes is concerned, this Court rejected the contention of the respondents therein that the ratio of ***Indra Sawhney*** (supra) applied to the facts of ***E.V. Chinnaiah*** (supra). It was pointed out that sub-

classification dealt with by ***Indra Sawhney*** (supra) related only to 'Other Backward Classes' and not Scheduled Castes as the judgment in ***Indra Sawhney*** (supra) itself had expressly held that subdivision of 'Other Backward Classes' is not applicable to Scheduled Castes and Scheduled Tribes, the reason for which, according to this Court in ***E.V. Chinnaiah*** (supra), was that the Constitution itself had kept the Lists of Scheduled Castes and Scheduled Tribes out of interference by the State Governments.

37. A close scrutiny of ***E.V. Chinnaiah*** (supra) would make it clear that the High Court was wrong in relying upon the said judgment to hold that sub-classification of backward classes is beyond the legislative competence of the State. ***E.V. Chinnaiah*** (supra) primarily relates to the power of the State legislature in categorising the Scheduled Castes identified under Article 341 into four groups, the effect of which was held to be modification of the Presidential list, which Article 341 precluded the States from doing. As was clearly expressed by this Court in ***E.V. Chinnaiah*** (supra), the issue of sub-classification of backward classes was dealt with in ***Indra Sawhney*** (supra) and it is pertinent for us to refer to the following paragraphs authored by Jeevan Reddy, J., after referring to observations of

Chinnappa Reddy, J. in ***K.C. Vasanth Kumar v. State of Karnataka***[26]:

> "***802***. *We are of the opinion that there is no constitutional or legal bar to a State categorising the backward classes as backward and more backward. We are not saying that it ought to be done. We are concerned with the question if a State makes such a categorisation, whether it would be invalid? We think not. Let us take the criteria evolved by Mandal Commission. Any caste, group or class which scored eleven or more points was treated as a backward class. Now, it is not as if all the several thousands of castes/groups/classes scored identical points. There may be some castes/groups/classes which have scored points between 20 to 22 and there may be some who have scored points between eleven and thirteen. It cannot reasonably be denied that there is no difference between these two sets of castes/groups/classes. To give an illustration, take two occupational groups viz., goldsmiths and vaddes (traditional stone-cutters in Andhra Pradesh) both included within Other Backward Classes. None can deny that goldsmiths are far less backward than vaddes. If both of them are grouped together and reservation provided, the inevitable result would be that goldsmiths would take away all the reserved posts leaving none for vaddes. In such a situation, a State may think it advisable to make a categorisation even among other backward classes so as to ensure that the more backward among the backward classes obtain the benefits intended for them. Where to draw the line and how to effect the sub-*

26 1985 Supp SCC 714

classification is, however, a matter for the Commission and the State — and so long as it is reasonably done, the Court may not intervene. In this connection, reference may be made to the categorisation obtaining in Andhra Pradesh. The Backward Classes have been divided into four categories. Group A comprises "Aboriginal tribes, Vimukta jatis, nomadic and semi-nomadic tribes etc." Group B comprises professional group like tappers, weavers, carpenters, ironsmiths, goldsmiths, kamsalins etc. Group C pertains to "Scheduled Castes converts to Christianity and their progeny", while Group D comprises all other classes/communities/groups, which are not included in Groups A, B and C. The 25% vacancies reserved for backward classes are sub-divided between them in proportion to their respective population. This categorisation was justified in Balram [(1972) 1 SCC 660 : (1972) 3 SCR 247] . This is merely to show that even among backward classes, there can be a sub-classification on a reasonable basis.

803. *There is another way of looking at this issue. Article 16(4) recognises only one class viz., "backward class of citizens". It does not speak separately of Scheduled Castes and Scheduled Tribes, as does Article 15(4). Even so, it is beyond controversy that Scheduled Castes and Scheduled Tribes are also included in the expression "backward class of citizens" and that separate reservations can be provided in their favour. It is a well-accepted phenomenon throughout the country. What is the logic behind it? It is that if Scheduled Tribes, Scheduled Castes and Other Backward Classes are lumped together, OBCs will take away all the vacancies leaving Scheduled Castes and Scheduled Tribes high*

and dry. The same logic also warrants categorisation as between more backward and backward. We do not mean to say — we may reiterate — that this should be done. We are only saying that if a State chooses to do it, it is not impermissible in law."

Sawant, J. was also of the opinion that sub-classification of backward and more backward classes would be permissible, provided that separate quotas are provided for each of them. It is crystal clear from the judgment of ***Indra Sawhney*** (supra) that backward classes can be sub-classified. Whether the sub-classification under the 2021 Act is reasonable will be addressed subsequently but no doubt can be entertained about the permissibility of sub-classification amongst backward classes.

38. By drawing strength from ***E.V. Chinnaiah*** (supra), the High Court was of the firm view that there cannot be any sub-division of castes including sub-castes, races and tribes mentioned in the Presidential list. In ***E.V. Chinnaiah*** (supra), it was held that castes once included in the Presidential list form a class by themselves and any division of these classes or persons based on any consideration would amount to tinkering with the Presidential list. According to the plural opinion in ***Dr Jaishri Laxmanrao Patil*** (supra), the list of SEBCs with respect to States was to be notified by the President, after due consultation with the National Commission for Backward Classes under

Article 342-A. Admittedly, this was not done till the time of enactment of the 2021 Act. As stated earlier, exercising powers under Article 142 of the Constitution, this Court in ***Dr Jaishri Laxmanrao Patil*** (supra) directed that till the publication of the list of SEBCs by the President, the SEBC lists prepared by the States would continue to hold the field. Thus, even on consideration of the law laid down in ***E.V. Chinnaiah*** (supra), it is clear from the above that a Presidential list for SEBCs did not come into existence and the question of sub-division of the said list by way of the 2021 Act does not arise. Therefore, the finding of the High Court in this regard is erroneous.

C. *Bar on Competence under Article 31-B of the Constitution*

39. The constitutionality of the 2021 Act was assessed by the High Court under Article 31-B of the Constitution. The High Court observed that a statute placed in the Ninth Schedule shall continue to be in force, till it is amended or repealed. In the present set of facts, the High Court was of the view that without amending the 1994 Act, which provides for undivided 20 per cent reservation to MBCs and DNCs together, the State lacked the legislative competence to provide internal reservation to one community from amongst that group of communities by way of a separate but similar legislation. Reference was drawn to

amendments made by the State of Tamil Nadu to statutes placed in the Ninth Schedule, which were also included in the Ninth Schedule.

40. Dr. Singhvi, referring to Section 7 of the 1994 Act, submitted that the scheme of reservation under the 2021 Act was not a new scheme over and above the reservation provided for under the 1994 Act. Section 7 of the 1994 Act expressly provided for classification and sub-classification of the 'Backward Classes of citizens' by the State by notification, for the purposes of the said statute. It was pointed out by Dr. Singhvi that the power under Section 7 had been exercised by the State earlier as well in enacting the Tamil Nadu Backward Class Christians and Backward Class Muslims (Reservation of Seats in Educational Institutions Including Private Educational Institutions and of Appointments or Posts in the Services Under the State) Act, 2007 (hereinafter, the "**2007 Act**"), whereunder three and a half per cent reservations were granted to 'Backward Class Muslims' from the 30 per cent reserved for Backward Classes under the 1994 Act and which continues to be in force till date. Accordingly, Dr. Singhvi contended that the High Court was incorrect in its treatment of the 2021 Act as a special statute varying the provisions of the 1994 Act.

41. Mr. Dwivedi proffered arguments on a different aspect of this issue. He submitted that the High Court completely misunderstood the scope of Article 31-B. While Article 31-B provided protection to statutes placed within the Ninth Schedule against challenge in terms of Part III of the Constitution, it cannot be interpreted to restrict the plenary powers of legislation under Article 246 and alter the federal distribution of powers. Additionally, he urged that Article 31-B did not prescribe any procedure for amendment or repeal of a statute in the Ninth Schedule and therefore, the High Court's observation on amending statutes also being placed in the Ninth Schedule was only evidence of the procedure adopted with respect to certain amending statutes and not a requirement of every amending statute. Assuming that this Court was not inclined to accept that the 2021 Act was in exercise of Section 7 of the 1994 Act, even then the 2021 Act in its own right is a valid piece of legislation, without the protection of Article 31-B as the incurred consequence. To support his submissions, he placed reliance on judgments of this Court in ***Sri Ram Ram Narain Medhi*** (supra), ***Chandra Sekhar Singh Bhoi*** (supra), ***Godavari Sugar Mills Ltd.*** (supra) and ***UCO Bank v. Dipak Debbarma***[27].

27 (2017) 2 SCC 585

42. Countering these submissions, the Respondents contended that a statute placed in the Ninth Schedule becomes part of the Constitution and cannot be amended or added to by the State Legislature. Mr. Balasubramanian argued that the 2021 Act is in conflict with the 1994 Act inasmuch as the 1994 Act provides for composite reservation of 20 per cent for MBCs and DNCs whereas under the 2021 Act, 10.5 per cent has been delineated for one community from amongst the communities comprising MBCs and DNCs.

43. Article 31-B prescribes that no statute placed in the Ninth Schedule shall be void on the ground that it is inconsistent with, takes away or abridges any right conferred under Part III of the Constitution. The statute placed in the Ninth Schedule shall continue in force, subject to the powers of the competent Legislature to repeal or amend it. According to this Court in ***Godavari Sugar Mills Ltd.*** (supra), the object of Article 31-B, which was inserted by the Constitution (First Amendment) Act, 1951, is to give a blanket protection to the acts and regulations specified in the Ninth Schedule and the provisions of those acts and regulations against any challenge to those acts, regulations or the provisions thereof on the ground that they are inconsistent with or take away or abridge any of the rights conferred by Part III of the Constitution. The result is that

howsoever violative of the fundamental rights may be the provisions of an act or regulation, once the act or regulation is specified in the Ninth Schedule it would not be liable to be struck down on that score. This immunity against the above challenge would be available notwithstanding any judgment, decree or order of any court or tribunal to the contrary. The effect of Article 31-B, however, is not to prevent challenge, to an enactment on the ground that it is beyond the legislative competence of the Legislature which enacted it. It is also plain from the language of the Article that the specification of an act or regulation would not prevent the competent legislature to repeal or amend it. This Court was of the further opinion that:

> "***16.*** *The protection of Article 31B can also not be extended to a new provision inserted as a result of amendment on the ground that it is ancillary or incidental to the provisions to which protection has already been afforded by including them in the Ninth Schedule. Article 31B carves out a protected zone. It has inserted Ninth Schedule in the Constitution and gives immunity to the Acts, Regulations and provisions specified in the said schedule from being struck down on the ground of infringement of Fundamental Rights even though they are violative of such rights. Article 31B thus excludes the operation of Fundamental Rights in matters dealt with by those Acts, Regulations and provisions. Any provision which has the effect of making an inroad into the guarantee of Fundamental Rights in the very nature of things should be construed very*

strictly, and it would not, in our opinion, be permissible to widen the scope of such a provision or to extend the frontiers of the protected zone beyond what is warranted by the language of the provision. No Act, Regulation or provision would enjoy immunity and protection of Article 31B unless it is expressly made a part of the Ninth Schedule. The entitlement to protection being confined only to the Acts, Regulations and provisions mentioned in the Ninth Schedule, it cannot be extended to provisions which were not included in that schedule. This principle would hold good irrespective of the fact whether the provision to which entitlement to protection is sought to be extended deals with new substantive matters or whether it deals with matters which are incidental or ancillary to those already protected."

While dealing with the findings of the High Court in the impugned judgment therein, made on the basis of an earlier decision of this Court in ***Ramanlal Gulab Chand Shah*** (supra), this Court in ***Godavari Sugar Mills*** (supra) observed that a legislation, which is incidental or ancillary to a statute protected under Article 31-B, can be assailed on the ground of inconsistency with Part III of the Constitution.

44. In our view, the 2021 Act cannot be said to be suffering from the vice of lack of legislative competence, merely because it deals with matters associated with or ancillary to the 1994 Act. Classification of backward classes has been made by the 1994 Act, which was placed under the Ninth Schedule. It is clear from

the judgments referred to above that the State has the power to amend or repeal a statute which has been placed under the Ninth Schedule. It is settled law that any amendment made to a statute placed under the Ninth Schedule does not get protection under Article 31-B, unless the said amendment is also included in the Ninth Schedule. Having scrutinised the above judgments on the objective of Article 31-B, we are unable to see how Article 31-B operates as a hurdle for the State to enact statutes on matters ancillary to the 1994 Act. Article 31-B does not place any fetter on the power of the State to legislate on such matters nor does it prescribe any mandatory requirement for such legislations to be included within the Ninth Schedule, as has been understood by the High Court. The consequence of the 2021 Act not being placed in the Ninth Schedule is that it can be assailed as being violative of the fundamental rights enshrined under Part III of the Constitution, which the Appellants have fairly admitted. It is worthwhile for us to reiterate the authoritative pronouncement of a five-Judge Bench of this Court in ***Maharaj Umeg Singh v. State of Bombay***[28], relevant portion of which is reproduced below:

> "**13.** ... *The legislative competence of the State Legislature can only be circumscribed by express prohibition contained in the Constitution itself and*

28 (1955) 2 SCR 164

unless and until there is any provision in the Constitution expressly prohibiting legislation on the subject either absolutely or conditionally, there is no fetter or limitation on the plenary powers which the State Legislature enjoys to legislate on the topics enumerated in the Lists 2 and 3 of the Seventh Schedule to the Constitution. It was conceded on behalf of the petitioners that the topic of legislation which was covered by the impugned Act was well within List 2 of the said schedule and the vires of the impugned Act could not be challenged on that ground..."

As no express prohibition stems from Article 31-B on the powers of the State Legislature to legislate on matters incidental to statutes placed within the Ninth Schedule, we are not in agreement with the finding of the High Court that the State Legislature lacked legislative competence to enact the 2021 Act on account of Article 31-B.

45. The 2021 Act determined the extent of reservation for communities which had already been identified and categorised by the 1994 Act. Assuming that the State Legislature carried out an amendment to the 1994 Act, the said amendment would not have received the protection under Article 31-B. The question that remains to be answered is whether the determination of internal reservation for already identified communities by a separate legislation can be said to be in conflict with the 1994 Act. This Court is of the considered view that detailing the

extent of reservation for communities which have already been identified as MBCs and DNCs cannot be said to be contrary to the 1994 Act. The preamble of the 1994 Act states that in view of requests from various political parties and social forums representing backward classes to consider the ramifications of the judgment of this Court in ***Indra Sawhney***, the State Government had decided that the existing level of 69 per cent reservation in admission to educational institutions in the State and services under the State shall be continued. Determination of extent of reservation for specific communities within the 'Backward Classes of citizens' was not the subject matter of the 1994 Act.

46. The conclusion of the High Court that determining the extent of reservation amongst the 'Backward Classes of citizens' can be done only by amending the 1994 Act in view of Article 31-B is unsustainable. It is made clear that it was open to the State to have amended the 1994 Act. At the same time, it cannot be said that the State Legislature lacked competence to enact a legislation for determining the extent of reservation amongst the MBCs and DNCs.

D. *Effect of the 1994 Act receiving Presidential Assent under Article 31-C of the Constitution*

47. As the 1994 Act received the assent of the President of India, the High Court was of the opinion that the same cannot be varied by the State Government. It was contended on behalf of the Appellants that the High Court was completely wrong in holding that the State does not have the competence to enact the 2021 Act on the ground that it has not received the assent of the President of India. It was pointed out by Mr. Dwivedi that the 1994 Act had received assent of the President under Article 31-C as it was enacted for giving effect to the policy of the State towards securing principles laid down in Part IV of the Constitution, in particular, under Article 38, clauses (b) and (c) of Article 39 and Article 46. The 1994 Act contained an express declaration to this effect in Section 2 thereof. He argued that the State is at liberty to decide whether a statute should receive the protection of Article 31-C. Mr. Singhvi submitted that as the impugned legislation is pursuant to the mandate of Section 7 of the 1994 Act, which had received the assent of the President, it is not necessary for the State to have reserved the 2021 Act for consideration of the President, by relying upon judgments of this Court in ***Arnold Rodricks v. State of Maharashtra***[29] and ***Rajiv Sarin v. State of Uttarakhand***[30].

29 (1966) 3 SCR 885
30 (2011) 8 SCC 708

48. Mr. Vaidyanathan relied upon a judgment of this Court in ***State of Kerala v. Peoples Union for Civil Liberties***[31] as well as judgments of the High Court of Bombay in ***Dattatray Yedu Thombre v. State of Maharashtra***[32] and ***Citizens of Deulgaon Raja v. State of Maharashtra***[33] and a judgment of the High Court of Madhya Pradesh in ***Rasal Singh v. State of M.P.***[34] to submit that assent of the President is not required for enacting a statute with respect to a matter which is within the purview of List II of Seventh Schedule of the Constitution and further, that amendment to a statute, which had received the assent of the President, can be carried out with the assent of the Governor, as long as provisions of the amending statute do not fall within the mischief of Article 254. Mr. Vaidyanathan contended that assent of the President had not been sought while granting separate reservation provided to the 'Backward Class Muslims' under the 2007 Act and to the Arunthathiyars, within the 18 per cent reserved for Scheduled Castes, under the Tamil Nadu Arunthathiyars (Special Reservation of seats in Educational Institutions including Private Educational Institutions and of appointments or posts In the services under the State within the Reservation for the Scheduled Castes) Act, 2009.

31 (2009) 8 SCC 46
32 2019 SCC Online Bom 4408
33 2002 SCC Online Bom 735
34 1978 SCC Online MP 12

49. Laws giving effect to the policy of the State towards securing principles laid down in clauses (b) and (c) of Article 39 of the Constitution are saved from challenge as being inconsistent with Articles 14 and 19 of the Constitution, as per Article 31-C. Where such law is made by the State Legislature, it shall not receive the benefit under Article 31-C unless it receives the assent of the President. The 1994 Act received the assent of the President as it was made for securing the Directive Principles under Article 38, clauses (b) and (c) of Article 39 and Article 46. The High Court proceeded to hold that the 2021 Act has varied the provisions of the 1994 Act, which could not have been done by the Governor.

50. As already stated, the 2021 Act deals with matters which are incidental or ancillary to those contained in the 1994 Act and the State is competent to legislate on such matters. It is for the State to decide whether a legislation, which is not repugnant to any law made by the Parliament on the same subject matter, should receive the assent of the President or not. If the assent of the President is not sought, the consequence is that the statute made by the State is susceptible to challenge as being violative of Article 14 or Article 19. However, it cannot be said that the State cannot legislate on subject matters, ancillary to that of an earlier

statute which has received the assent of the President, or that it is mandatory for the State Government to seek the assent of the President for a legislation which the State is otherwise competent to enact. In ***Indra Sawhney*** (supra), Jeevan Reddy, J., writing for himself and three other judges, conclusively clarified that Article 16(1) is a facet of Article 14 and just as Article 14 permits reasonable classification, so does Article 16(1), which means that appointment and / or posts can be reserved in favour of a class under clause (1) of Article 16. For assuring equality of opportunity, it may well be necessary in certain situations to treat unequally situated persons unequally. It was further noted that Article 16(4) is an instance of such classification, put in to place the matter beyond controversy. Where the State finds it necessary – for the purpose of giving full effect to the provision of reservation to provide certain exemptions, concessions or preferences to members of backward classes, it can extend the same under clause (4) itself. Pandian, J. while tracing the legislative history of Article 15(4), observed that the object of Article 15(4), introduced by the Constitution (First Amendment) Act, 1951, was to bring Articles 15 and 29 in line with Articles 16(4), 46 and 340 and to make it constitutionally valid for the State to reserve seats for backward class of citizens, Scheduled Castes and Scheduled Tribes in

public educational institutions as well as to make other special provisions as may be necessary for their advancement. From these observations and findings, it is clear that States are empowered to make reservation for backward classes under Articles 15(4) and 16(4). We see no force in the submissions of Mr. Vijayan, who attempted to convince this Court that the State Legislature's source of power for enacting the 2021 Act cannot be traced to any Entry in the Lists under the Seventh Schedule of the Constitution.

51. As referenced while dealing with the competence of the State to enact the 2021 Act *vis-à-vis* Article 31-B, this Court in ***Maharaj Umeg Singh*** (supra) has unequivocally clarified that no fetter can be implied on the power of the State to legislate, unless it is expressly prohibited under the Constitution. Without any such express bar under Article 31-C, the State's competence to enact the 2021 Act with the Governor's assent cannot be faulted with nor can the State be compelled by the courts to reserve the 2021 Act for assent of the President. In view of our conclusion, we do not deem it necessary to deal with the judgments relied upon by the Appellants.

IV. <u>Caste-based classification</u>

52. Internal reservation of 10.5 per cent for the Vanniakula Kshatriyas was challenged by the writ petitioners before the

High Court as being violative of Articles 14, 15 and 16 of the Constitution. Their contention, that internal reservation was only on the basis of caste which amounted to discrimination to the other communities, was accepted by the High Court.

53. The point that arises for our consideration is whether the internal reservation of 10.5 per cent provided for the Vanniakula Kshatriyas is on the basis of caste alone and whether the High Court is right in holding that such classification on the basis of caste is impermissible. This Court in ***K.C. Vasanth Kumar*** (supra) defined and described caste as below:

> *"What then is a caste? Though caste has been discussed by scholars and jurists, no precise definition of the expression has emerged. A caste is a horizontal segmental division of society spread over a district or a region or the whole State and also sometimes outside it. Homo Hierarchicus is expected to be the central and substantive element of the caste-system which differentiates it from other social systems. The concept of purity and impurity conceptualises the caste system .... There are four essential features of the caste-system which maintained its homo hierarchicus character: (1) hierarchy; (2) commensality; (3) restrictions on marriage; and (4) hereditary occupation. Most of the castes are endogamous groups. Inter-marriage between two groups is impermissible. But 'Pratilom' marriages are not wholly known."*

In ***Indra Sawhney*** (supra), Jeevan Reddy, J. observed that caste is nothing but a social class — a socially homogeneous class. Jeevan Reddy, J. then proceeded to answer the question relating to identification of backward classes. He was of the considered view that there is no recognised method for identification of backward classes. He held that caste can be the starting point for identifying backward classes, and wherever they are found, the criteria evolved for determining backwardness can be applied to see whether they satisfy the criteria.

54. It is clear from the above that caste can be the basis for providing reservation, but it cannot be the sole basis. At present we are concerned with sub-classification. As stated, it has been held in ***Indra Sawhney*** (supra) that there is no constitutional or legal bar to a State categorising backward classes as backward and more backward. In the present case, sub-classification for providing internal reservation to a particular community, *i.e.*, the Vanniakula Kshatriyas, will also be governed by the same principle, namely, while caste can be the starting point for providing internal reservation, it is incumbent on the State Government to justify the reasonableness of the sub-classification and demonstrate that caste has not been the only basis. We are not at present dealing with the inquiry of other factors relied on by the State Government to justify internal

reservation for the Vanniakula Kshatriyas. We propose to deal with that point subsequently. At present, we have answered the question relating to caste being the starting basis for providing reservation and for sub-classification of backward classes so as to provide for internal reservation.

V. Scrutiny of the report of Thanikachalam, J. and constitutional validity of the 2021 Act

55. According to the High Court, there was no quantifiable data available with the State of Tamil Nadu as on the date of enactment of the 2021 Act, which would support their exercise of enabling powers under Articles 15(4) and 16(4) of the Constitution. The High Court was of the view that sub-classification of MBCs and DNCs into three categories for apportionment of reservation under the 2021 Act has been done without any objective criteria and aside from the population figures of 1983, no data was available on (i) the degree of backwardness of the classes for sub-classification; (ii) inadequate representation of these sub-classes; and (iii) efficiency of the administration. Additionally, the High Court has relied on the judgments of this Court in ***Indra Sawhney*** (supra), ***Jarnail Singh v. Lachhmi Narain Gupta***[35] and ***Dr Jaishri Laxmanrao Patil*** (supra) to hold that the 2021 Act, being an attempt to provide proportionate representation, is against the

35 (2018) 10 SCC 396

law laid down by this Court, as it is settled law that adequate representation is not proportionate representation. It was concluded by the High Court that sub-classification would be permissible only on the ground that "a class is far far backward than the advanced sections of that class", however, the classification under the 2021 Act was not based on any intelligible differentia as there was nothing on record to show that the other 115 communities were more advanced than the Vanniakula Kshatriyas using any yardstick. Therefore, the classification was made only on the basis of caste, which is unsustainable in law.

56. Mr. Rao, Mr. Vaidyanathan and Mr. Wilson relied on the reports of the Sattanathan Commission and the Ambasankar Commission to show that the condition of the Vanniakula Kshatriyas, in terms of their presence and numbers across Tamil Nadu, their typical occupations and their social and educational status had been assessed meticulously. Emphasis was laid on the manner in which the Ambasankar Commission had conducted their assessment, wherein socio, educational and economic survey of the entire populace of Tamil Nadu was undertaken by employing 2500 personnel and going door-to-door to collect particulars of around five crore people over a period of two years, with a view to find out and identify

backward classes entitled to enjoy the reservation benefits for admission into educational institutions and professional colleges and for appointments or posts in the services under the State. It was further submitted that the report of the Janarthanam Commission was based on the Ambasankar Commission Report, which had collected extensive quantifiable data. The Janarthanam Commission had undertaken a feasibility analysis of castes and communities demanding internal reservation and applied a formula for finding out the feasibility factor of each such community. Only after concluding that none of the other castes / communities, demanding internal reservation within the 20 per cent reservation granted to MBCs and DNCs, satisfied the test of viability or feasibility for internal reservation, the Janarthanam Commission had recommended 10.5 per cent internal reservation for the Vanniakula Kshatriyas. The Appellants also pointed out that the Janarthanam Commission had studied the representation of Vanniakula Kshatriyas in professional courses for academic years 2006-07 to 2010-11 and in Tamil Nadu Government Services as on 01.08.2010 to demonstrate their inadequate share of enjoyment of reservation benefits, which was far below the proportion of their population to the total population. Accordingly, it was urged by the Appellants that the impugned judgment of the High Court had

not applied its mind to the reports and the extensive findings on the basis of the data collected and evaluated. Contesting the impugned judgment, it was further argued by Mr. Radhakrishnan that the High Court had not embarked on a limited scrutiny, as is the mandate of this Court in ***Barium Chemicals Ltd. v. Company Law Board***[36] for instances where the subjective opinion of the State is involved, and that the High Court should have restricted itself to examine whether there was data available on the basis of which the State Government had formed its opinion. These submissions were forcefully controverted by the Respondents, on grounds discussed hereinafter.

57. The preamble of the 2021 Act refers to the recommendation of the Chairman, Tamil Nadu Backward Classes Commission for providing 10.5 per cent reservation to the Vanniakula Kshatriya community within 20 per cent. The Chairman of the Commission sought support from the recommendations made by the Janarthanam Commission to recommend internal reservation in favour of the Vanniakula Kshatriyas. To appreciate the submissions on whether the findings of the various Reports are supported by data, it is necessary to deal with the recommendations of the Tamil Nadu

36 1966 Supp SCR 311

Backward Classes Commission, headed by Justice Janarthanam and the letter of Justice Thanikachalam. Given that the Sattanathan Commission and the Ambasankar Commission were not requested to address the issue of provision of internal reservation to specific communities within the MBCs and DNCs, the reports of these Commissions are not relevant for our discussion.

58. Before we commence our evaluation of the reports of the Janarthanam Commission and of Justice Thanikachalam, it is necessary to briefly outline the contours of judicial review of a Commission's report providing recommendations pertaining to backward classes. As identification of backward classes and grant of reservation are measures under Articles 15(4) and 16(4) of the Constitution, such measures have to pass constitutional scrutiny. While the report of a Commission has to be looked into with deference, it cannot be said that evaluation pertaining to violation of any constitutional principle or non-consideration of any constitutional requirement is beyond the reach of judicial oversight. This Court in ***State of A.P. v. U.S.V. Balram***[37] categorially laid down that judicial scrutiny is permissible to enquire into whether the conclusions arrived at by the Commission are supported by the data and materials referred to

37 (1972) 1 SCC 660

in its report. In ***Indra Sawhney*** (supra), the test laid down in ***Barium Chemicals*** (supra) was endorsed with respect to judicial review of the subjective opinion of the State in matters relating to reservation. Subsequently, this Court has cautioned against the re-evaluation of the factual material on record[38]. Having considered the above judgments, we say with certainty that it is within the domain of the courts to scrutinise the factual material and data collected by a Commission and assess whether the conclusions of the Commission are justified by such material.

59. By G.O. (Ms) No. 35 dated 21.03.2012, the Government of Tamil Nadu requested the Tamil Nadu Backward Classes Commission to submit a report on the demands made by various communities for internal reservation within the reservation provided for MBCs and DNCs, apart from other terms of reference prescribed. The Backward Classes Commission consisted of 7 members, with Justice Janarthanam chairing the Commission. The other members of the Commission, except the Chairman, expressed their concern that adequate time was not given to them to deliberate on an important issue relating to internal reservation. It was pointed out by the majority in their report that as on 2011-12, updated caste-based statistics were

38 B.K. Pavitra v. Union of India (2019) 16 SCC 129

not furnished to them. The majority members observed that their term was coming to an end in July, 2012 and it would not be proper for them to submit a report, especially when the parliamentary elections were anticipated. A suggestion was made by the members to provide an interim reply to the Government requesting that updated caste-based census data should be collected and placed before the Commission. Prof D. Sundaram, a member of the Commission, submitted a separate note, in which, along with other recommendations, he stated that there was a need for assessment of quantifiable data by a statistical expert, which should be collated in the current survey on castes. He further suggested a wider consultation with vice-chancellors of universities, directors of institutes, chairmen and members of various recruitment commissions and agencies both at the Centre and State level and all stakeholders of the communities and classes, bureaucrats in various departments, more particularly of the personnel and administrative reforms departments. He also emphasised that the representations preferred by other communities from amongst the Backward Classes for internal reservation need to be examined.

60. The Chairman of the Backward Classes Commission submitted his report on 24.05.2012, recommending internal reservation of 10.5 per cent in favour of Vanniakula Kshatriyas.

In his report, there is a reference to 50 representations received by the Commission from various castes / communities seeking internal reservation in educational institutions as well as appointments to public posts. 30 representations were made by communities within the MBCs, out of which, 8 were from Vanniakula Kshatriyas, 5 from Meenavars, 1 each from Thotiya Naicker, Maruthuvar, Navithar, Salavai Thozhilalar and Erra Gollar, seeking internal reservation on the basis of individual castes / communities. The Commission gathered the population data of all castes and communities listed as MBCs and DNCs from the Ambasankar Commission Report submitted to the Government in 1985 and other material furnished by the Government to consider the feasibility of the requests for internal reservation. It was mentioned in the report that the total population from the State of Tamil Nadu representing all castes and communities during 1983 was 4,99,90,943. The population of the MBCs and DNCs was 1,23,17,745. The population of the Vanniakula Kshatriyas was 65,04,855, which came up to 13.012 per cent of the total population. The Chairman of the Commission worked out the percentage of internal reservation from the population figures, which formed the basis of the feasibility analysis conducted. On the basis of a formula that was adopted by the Chairman, the feasibility factor

of the Vanniakula Kshatriyas was 10.562 per cent. The other communities / castes seeking internal representation were found to be not entitled for the benefit as they did not satisfy the test of feasibility for making internal reservation, falling about or below two and a half per cent on the basis of their population proportionate to the population of MBCs and DNCs together. The report further stated that preparation of roster for working out reservation would become complicated, if representations by other communities asking for internal reservation were to be accepted.

61. By taking into account the population of the Vanniakula Kshatriyas as enumerated in the report of the Ambasankar Commission in 1985, the Chairman recommended internal reservation to the Vanniakula Kshatriyas in proportion to their population, *i.e.*, 10.5 per cent. The Chairman further referred to the admissions of students belonging to the Vanniakula Kshatriya community in professional courses such as engineering, medicine, veterinary science, agriculture and law for the academic years 2006-07 to 2010-11 and found that the seats secured to engineering courses was not proportionate to their population. Insofar as public employment is concerned, representation of Vanniakula Kshatriyas in the State services averaged across Group-A, Group-B, Group-C and Group-D, as on

01.08.2010, was 8.67 per cent, which was also below 10.5 per cent, *i.e.*, the percentage of internal reservation earmarked by the Chairman. The Chairman was of the view that providing internal reservation to the Vanniakula Kshatriyas would not amount to conferring undue advantage on them nor would it unduly affect the entitlement of reservation benefits of the other castes and communities listed as MBCs and DNCs.

62. As stated, the Tamil Nadu Backward Classes Commission was re-constituted on 08.07.2020, with Justice Thanikachalam as the Chairman, along with six members and two ex-officio members. In response to the Government's request on 18.02.2021 to send views on internal reservation to be provided for communities listed in MBCs and DNCs, Justice Thanikachalam, by way of letter dated 22.02.2021, recommended 10.5 per cent reservation for Vanniakula Kshatriyas, seven per cent for DNCs and some MBCs and two and a half per cent for the remaining MBCs. In the said letter, a reference was made to the recommendation of Justice Janarthanam for grant of 10.5 per cent internal reservation to Vanniakula Kshatriyas. Without providing any reasons, Justice Thanikachalam made adverse comments on the dissent of the other members by stating that such opinion was based on extraneous reasons, which were irrelevant and not germane to

the consideration of issues under the additional terms of reference issued in 2012. Justice Thanikachalam was of the view that the recommendation of Justice Janarthanam, though being the minority opinion, was unassailable. However, noting that the terms of reference of the Janarthanam Commission required the Commission to consider representation for internal reservation of various communities and not just major communities, Justice Thanikachalam recommended, in addition to the 10.5 per cent reservation for the Vannikula Kshatriyas, allocating seven per cent reservation to a grouping of communities, comprising DNCs along with certain communities within MBCs bearing names similar to DNCs and fishermen communities and Vannar communities within MBCs, and allocating two and a half per cent to the remaining communities within MBCs. It is worthwhile to reiterate that at the time, no report had been submitted by the Kulasekaran Commission, which was appointed by the Government on 21.12.2020 for collection of quantifiable data on castes, communities and tribes in the State of Tamil Nadu "as on date".

63. As contested by Mr. Nagamuthu and Mr. Balasubramanian, it is clear that the report of Justice Janarthanam, relied upon by Justice Thanikachalam, is a minority view. The views of the plurality, *i.e.*, the remaining six members of the Tamil Nadu

Backward Classes Commission were contrary to the views expressed by Justice Janarthanam. The majority opinion clearly mentioned that the data that was available before them was outdated. They highlighted the importance of collection of caste-wise data to enable them to give an opinion on internal reservation. That apart, the majority members expressed the inappropriateness of submitting the report in haste, just before the ensuing parliamentary elections in 2012. Justice Thanikachalam committed an error in brushing aside the opinion of the majority members on the ground that it was riddled with extraneous reasons. Without justifying the lack of updated data cited by the majority as a ground for being unable to comment on grant of internal reservation, Justice Thanikachalam blindly followed the recommendation of Justice Janarthanam, by stating that his view is unassailable. It is to be noted that the recommendation of internal reservation for the Vannikula Kshatriyas is by way of a letter signed only by Justice Thanikachalam and does not enclose the views of the remaining members of the Tamil Nadu Backward Classes Commission. There is nothing in the said letter to even suggest that Justice Thanikachalam, after due deliberation with the remaining members of the Commission, has put forth recommendations on

internal reservation, which have the backing of the remaining members, or at the least, the approval of the majority.

64. Providing internal reservation of 10.5 per cent from the 20 per cent made available to MBCs and DNCs would definitely be to the detriment of other communities, in the absence of any exercise undertaken or any findings arrived at to demonstrate that members of the Vanniakula Kshatriya community are unable to compete with the remaining communities within the MBCs and DNCs. No data or material is referred to in the letter by Justice Thanikachalam on the representation of the remaining communities within the MBCs and DNCs in educational institutions or public employment, which could support the severe restriction in the extent of reservation made available to these communities, who had been entitled to avail the benefit of 20 per cent reservation *en masse* till the enactment of the 2021 Act. The following paragraph from ***Dr Jaishri Laxmanrao Patil*** (supra), as relied upon by Mr. V. Prakash, is relevant to the present context:

> "***520.*** *The word "adequate" is a relative term used in relation to representation of different caste and communities in public employment. The objective of Article 16(4) is that backward class should also be put in mainstream and they are to be enabled to share power of the State by affirmative action. To be part of public service, as accepted by the society of today, is to attain social status and play a role in governance. The*

governance of the State is through service personnel who play a key role in implementing government policies, its obligation and duties. The State for exercising its enabling power to grant reservation under Article 16(4) has to identify inadequacy in representation of backward class who is not adequately represented. For finding out adequate representation, the representation of backward class has to be contrasted with representation of other classes including forward classes. It is a relative term made in reference to representation of backward class, other caste and communities in public services."

There was no independent evaluation by resorting to known methods for recommending internal reservation by Justice Thanikachalam, who simply approved the minority report submitted by Justice Janarthanam.

65. It is relevant to note that Justice Janarthanam in his report relied upon the population figures of the Vanniakula Kshatriyas from the year 1985. His recommendation was on the basis of the figures taken from the report of the Ambasankar Commission, submitted in 1985. Reference made to admissions to engineering colleges and appointment to public posts pertained to the years 2006-07 to 2010-11 and 2010, respectively. A decision taken for providing reservation which would impact the rights of members of as many as 115 communities should be on the basis of contemporaneous inputs and not outdated and antiquated data[39]. Any study by the

39 Ram Singh v. Union of India (2015) 4 SCC 497

Commission should be with regard to the present status since the object is to take affirmative actions in present or in future to address the needs of a particular community[40]. In this particular case, the data that was relied on for the purpose of recommending internal reservation to the Vanniakula Kshatariyas is from 1985. The State Government, at the time of appointing the Kulasekaran Commission to collect quantifiable data on castes, communities and tribes in the State of Tamil Nadu, including migrants domiciled therein, expressly recognized the need for collection of such data as the data collected by the Ambasankar Commission had become more than three decades old. We are in agreement with the objection of the Respondents, that there was no contemporaneous data available to Justice Thanikachalam or even Justice Janarthanam, on the basis of which recommendations for internal reservation could have been made.

66. It is observed that the proportion of the population of the Vanniakula Kshatriyas to the total population of MBCs and DNCs, termed as the feasibility formula, was the sole criterion which was considered by Justice Janarthanam to recommend internal reservation for the Vanniakula Kshatriyas. The representations made by other communities within the MBCs seeking internal

40 Dr Jaishri Laxmanrao Patil (*supra*)

reservation were not considered feasible by Justice Janarthanam on the sole basis of the proportion of their population to the total population of the MBCs and DNCs together. This Court is of the opinion that percentage of population of the Vanniakula Kshatriyas proportionate to the total population of the MBCs and DNCs cannot be the sole criterion for providing internal reservation. Adequacy of representation is different from proportionate representation, although proportion of population of the relevant community to the total population may be one of the relevant factors in determining adequacy. In ***Indra Sawhney***, it was held as under: -

> "***807***. *We must, however, point out that clause (4) speaks of adequate representation and not proportionate representation. Adequate representation cannot be read as proportionate representation. Principle of proportionate representation is accepted only in Articles 330 and 332 of the Constitution and that too for a limited period. These articles speak of reservation of seats in Lok Sabha and the State legislatures in favour of Scheduled Tribes and Scheduled Castes proportionate to their population, but they are only temporary and special provisions. It is therefore not possible to accept the theory of proportionate representation though the proportion of population of backward classes to the total population would certainly be relevant. Just as every power must be exercised reasonably and fairly, the power conferred by clause (4) of Article 16 should also be exercised in a*

fair manner and within reasonable limits — and what is more reasonable than to say that reservation under clause (4) shall not exceed 50% of the appointments or posts, barring certain extraordinary situations as explained hereinafter. From this point of view, the 27% reservation provided by the impugned Memorandums in favour of backward classes is well within the reasonable limits. Together with reservation in favour of Scheduled Castes and Scheduled Tribes, it comes to a total of 49.5%. In this connection, reference may be had to the Full Bench decision of the Andhra Pradesh High Court in V. Narayana Rao v. State of A.P. [AIR 1987 AP 53 : 1987 Lab IC 152 : (1986) 2 Andh LT 258] , striking down the enhancement of reservation from 25% to 44% for OBCs. The said enhancement had the effect of taking the total reservation under Article 16(4) to 65%."

Accordingly, we accept the contention of Dr. Dhawan that the internal reservation recommended in the report of Justice Janarthanam and approved by Justice Thanikachalam, based only on population, cannot be sustained in view of the law laid down by this Court.

67. The data placed by Mr. Gonsalves, on behalf of one of the Respondents, with reference to the Tamil Nadu Second Backward Classes Commission (Ambasankar Commission), appears to indicate that unlike the other 115 communities in the same class of MBCs and DNCs, many of whom have been bereft of any benefit of affirmative action, the Vanniakula Kshatriyas

had higher representation in public employment and educational institutions. For the years 1980-1983, 25 communities from 48 communities identified as MBCs and 66 out of 68 communities identified as DNCs did not get admission into MBBS course. Students belonging to the Vanniyar community secured 104 seats in medical course, with an admission to population ratio of 1:62547. 87 students out of these 104 were admitted on the basis of reservation whereas 17 students were admitted on their own merit. The Respondents also placed certain data obtained under the Right to Information Act, 2005 (hereinafter, the "**RTI Act**") pertaining to the academic years 2019-2020 and 2020-2021. While the total seats available for admission to undergraduate medical course for the year 2019-2020 in the State of Tamil Nadu were 4,193 with 20 per cent seats reserved for MBCs and DNCs amounting to 960 seats, students from the Vanniyar community had secured 515 seats, which is around 57 per cent of the total seats reserved for MBCs and DNCs. Citing from the Ambasankar Report, it was submitted that with respect to engineering, law and veterinary science courses as well, students from the Vanniyar community fared far better than other communities within the MBCs and DNCs, many of whom did not get any seats in these courses for the period from 1980 to 1983.

Representation of Vanniyars in public posts in the Government of Tamil Nadu for the years 1980 to 1983, according to the Ambasankar Commission Report, was much better in comparison to persons belonging to the other communities within the MBCs and DNCs. Particulars provided of staff members in Anna University for the years 2018 to 2020, obtained under the RTI Act, appear to paint a picture of better access and representation of members of the Vanniyar community over their compatriots belonging to other communities within MBCs and DNCs. We are informed that 520 MLAs belonging to the Vanniyar caste have been elected to the Tamil Nadu Legislative Assembly between 1952 to 2021, averaging to about 35 MLAs in each Assembly and forming 15 per cent of the strength of the House. More than 90 persons from the Vanniyar caste have been elected to the Lok Sabha in the same period, which is also about 15 per cent of the total number of MPs in Lok Sabha from Tamil Nadu. Several individuals from the Vannikula Kshatriya community have held posts of Ministers at the Centre as well as in the State Government and have also been appointed as Judges of the High Court. We are further informed that numerous trusts have been established, which cater to the betterment of members,

and educational needs of students in particular, from the Vanniyar community.

68. We have referred to this data only to emphasize that the findings in the letter of Justice Thanikachalam had to be suitably supported by independent studies and assessment of relevant data. We make it clear that the aforesaid observations do not prevent the State, if it so decides, from undertaking suitable exercises for collecting pertinent, contemporaneous data to determine how demands for internal reservation within the Backward Classes can be justly addressed.

69. Having dealt with the recommendations from Justice Thanikachalam, which form the basis for the 2021 Act, the question which requires to be considered next is whether the 2021 Act is unconstitutional, being violative of Article 14 of the Constitution. The preamble of the 2021 Act refers to the representation made by the Vanniakula Kshatriyas for a separate quota of reservation on the ground that they could not compete with the other communities in the list of MBCs and DNCs, which was referred to the Backward Classes Commission. The preamble further refers to the recommendations made by the Chairman of the Backward Classes Commission (Justice Thanikachalam), where to facilitate distributive social justice, apart from the 10.5 per cent reservation for Vanniakula

Kshatriyas, the other communities within the MBCs and DNCs were recommended to be grouped into two categories on the proportion of their population. Accepting the suggestions made by the Chairman, Backward Classes Commission, the 2021 Act was promulgated to ensure equitable distribution of the 20 per cent reservation provided to the MBCs and DNCs under the 1994 Act.

70. That there is no relevant, contemporaneous material which was examined by the Chairman, Backward Classes Commission before submitting his report in support of the claim of the Vanniakula Kshatriyas, has been dealt with in detail in the preceding paragraphs. Is the State right in contending that the classification of the Vanniakula Kshatriyas made by the 2021 Act for separate reservation is reasonable? The Appellants, relied on ***Chiranjit Lal Chowdhuri v. Union of India***[41], to urge that the presumption is in favour of constitutionality of the 2021 Act and the burden is upon those who attack the legislation to demonstrate that constitutional principles had been clearly transgressed. Further, support was sought from ***Ajay Kumar Singh v. State of Bihar***[42] to contend that the State is in the best position to determine what kind of special provision should be made in favour of a particular class, having regard to the

41 1950 SCR 869
42 (1994) 4 SCC 401

relevant facts and circumstances, and deference must be shown to legislative judgment. The Respondents contested the above submissions on the ground that the classification made under the 2021 Act amounts to discriminating equals. Reliance was placed on ***Col. A.S. Iyer v. V. Balasubramanyam***[43] to argue that an anxious and sustained attempt to discover some basis for classification will deprive Article 14 of the equality dispensation. In the absence of any rationale for treating the Vanniakula Kshatriyas differently, the differentiation and allocation of percentages was entirely arbitrary and falls foul of Article 14.

71. Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another if as regards the subject matter of the legislation their position is substantially the same. This brings in the question of classification. As there is no infringement of the equal protection rule, if the law deals alike with all of a certain class, the legislature has the undoubted right of classifying persons and placing those whose conditions are substantially similar under the same rule of law, while applying different rules to persons differently situated. The classification should never be arbitrary, artificial or evasive. It must rest always upon real and substantial distinction bearing a reasonable and just

43 (1980) 1 SCC 634

relation to the thing in respect to which the classification is made; and classification made without any reasonable basis should be regarded as invalid[44]. The whole doctrine of classification is based on discrimination without reason and discrimination with reason and on the well-known fact that the circumstances which govern one set of persons or objects may not necessarily be the same as those governing another set of persons or objects so that the question of unequal treatment does not really arise as between persons governed by different conditions and different sets of circumstances[45].

72. Discrimination is the essence of classification. Equality is violated if it rests on unreasonable basis. The concept of equality has an inherent limitation arising from the very nature of the constitutional guarantee. Those who are similarly circumstanced are entitled to an equal treatment. Equality is amongst equals. Classification is, therefore, to be founded on substantial differences which distinguish persons grouped together from those left out of the groups and such differential attributes must bear a just and rational relation to the object sought to be achieved. Our Constitution aims at equality of status and opportunity for all citizens including those who are socially, economically and educationally backward. Articles

44 State of West Bengal v. Anwar Ali Sarkar 1952 SCR 284
45 Kathi Raning Rawat v. State of Saurashtra 1952 SCR 435

15(4) and 16(4) bring out the position of backward classes to merit equality. Special provisions are made for the advancement of backward classes and reservation of appointments and posts for them to secure adequate representation. These provisions are intended to bring out the content of equality guaranteed by Articles 14, 15(1) and 16(1). However, it is to be noted that equality under Articles 15 and 16 could not have a different content from equality under Article 14[46]. Differentia which is the basis of classification must be sound and must have reasonable relation to the object of the legislation. If the object itself is discriminatory, then explanation that classification is reasonable having rational relation to the object sought to be achieved is immaterial[47].

73. As stated *supra*, the object of the 2021 Act is to achieve equitable distribution of the benefit of 20 per cent reservation provided to MBCs and DNCs. At the cost of repetition, at the time of enactment of the 2021 Act, 116 castes were to be found in the cumulative lists of MBCs and DNCs. Choosing a particular caste and providing a special reservation of 10.5 per cent out of the 20 per cent to such caste is discriminatory, in the absence of any sound differentiation from communities who are similarly situated and were, therefore, grouped together for the purposes

46 State of Kerala v. N.M Thomas (1976) 2 SCC 310
47 Subramanian Swamy v. Director, Central Bureau of Investigation (2014) 8 SCC 682

of receiving the benefits of 20 per cent reservation. While the State Government has the competence to classify the Vanniakula Kshatriyas or any other community or group of communities within backward classes as a particular class for the grant of special measures, there should be a reasonable basis for categorising such communities into a different section from the rest of the communities within the MBCs and DNCs, on grounds which cannot be superficial or illusory.

74. The justification on behalf of the State is that sufficient material was gathered by the Tamil Nadu Backward Classes Commission to show that there was inadequate representation, disproportionate to the population of the Vanniakula Kshatriyas, thereby culminating in the 2021 Act, which aimed to achieve equitable distribution of reservation amongst MBCs and DNCs. A perusal of the discussion in the earlier paragraphs would disclose that the letter from the Chairman, Backward Classes Commission is on the basis of antiquated data, without any assessment of the relative backwardness and representation of the Vanniakula Kshatriyas and their ability to compete with the remaining 115 communities within the MBCs and DNCs. Additionally, recommendations therein are solely based on population. To differentiate a particular class / category from others, there should be a substantial distinction which clearly

demarcates that class / category. In the instant case, we see no justification for how the Vanniakula Kshatriyas can be treated as a different class and meted out preferential treatment, being one amongst the 116 communities, who have all been considered on the same footing till the enactment of the 2021 Act and were, therefore, eligible to claim the benefit of undivided 20 per cent reservation. Population being cited as the sole factor to support this classification is in the teeth of the judgments of this Court in ***Indra Sawhney*** (supra) and ***Jarnail Singh*** (supra). Accordingly, we hold that the classification sought to be made under the 2021 Act is unreasonable and, therefore, the 2021 Act is violative of Articles 14, 15 and 16, as there is no substantial basis for differentiating the Vanniakula Kshatriyas and granting them separate reservation.

VI. <u>Non-compliance with Article 338-B(9) of the Constitution</u>

75. Mr. Sankaranarayanan argued that providing internal reservation is a major policy matter, which should have been undertaken by the State only with the consultation of the National Commission for Backward Classes. As, admittedly, there was no consultation, the 2021 Act is void. Article 338-B(9) provides that the Union and the State Government shall consult the Commission on all major policy matters affecting

the SEBCs. A proviso was inserted by the 105th Amendment Act, by which it was specified that clause (9) of Article 338-B would not be applicable to lists of SEBCs that are prepared and maintained by the States. However, the 2021 Act was brought into force prior to the 105th Amendment Act. Having concluded that the 105th Amendment Act was prospective in its operation, it necessarily follows that the State was required to have consulted the Commission on major policy matters prior to the 105th Amendment Act. There cannot be any dispute regarding internal reservation being provided to a specific community qualifying as a major policy decision. The point that falls for consideration is the consequence of non-consultation by the State Government with the National Commission for Backward Classes before providing internal reservation. Given the language of the provision and its interpretation in ***Dr Jaishri Laxmanrao Patil*** (supra), there need not be a detailed discussion about Article 338-B(9) being mandatory. The requirement of consultation with an expert constitutional body is indeed mandatory and it would be fatal to disregard the provision. However, non-consultation by the State Government with the National Commission would not take away the competence of the State Government to enact the 2021 Act. Legislative competence can only be circumscribed by express

prohibition contained in the Constitution itself[48] and Article 338-B(9) does not stop the State from enacting a legislation in furtherance of a major policy matter but states that the State Government shall consult the Commission on such matters.

76. The consequence of disregarding a mandatory consultation provision would normally render the legislation void as it is in breach of an obligatory requirement to consult an expert constitutional body. However, we refrain from going into this issue in view of our earlier conclusion that the 2021 Act does not withstand scrutiny under Articles 14, 15 and 16 of the Constitution.

VII. Conclusion

77. To conclude, we hold that there is no bar on the legislative competence of the State to enact the 2021 Act and on the different grounds urged with respect to this issue, we are of the view that:

(i) The 105th Amendment Act being prospective in operation, it is the 102nd Amendment Act which held the field at the time of enactment of the 2021 Act.

(ii) As the 2021 Act dealt with sub-classification and apportionment of certain percentage of reservation for the purpose of determining the extent of reservation of

48 M.P. Cement Manufacturers' Association v. State of M. P. (2004) 2 SCC 249

communities within the MBCs and DNCs, it is a permissible exercise of power by the State Government under Article 342-A of the Constitution in terms of the judgment of this Court in ***Dr Jaishri Laxmanrao Patil*** (supra). Prior to the 105th Amendment Act, what was prohibited for the State to carry out under Article 342-A is the identification of SEBCs, by inclusion or exclusion of communities in the Presidential list of SEBCs. It is clear that the exercise of identification of MBCs and DNCs had been completed by the State pursuant to the 1994 Act.

(iii) There is no bar to the sub-classification amongst backward classes, which has been expressly approved in ***Indra Sawhney*** (supra). Even considering the judgment in ***E.V. Chinnaiah*** (supra), which dealt with the sub-classification of Scheduled Castes identified in the Presidential list under Article 341 and held that any sub-division of Scheduled Castes by the State would amount to tinkering with the Presidential list, the State's competence in the present case to enact the 2021 Act is not taken away on this ground as, admittedly, the Presidential list of SEBCs is yet to be published, making the question of tinkering with such list redundant.

(iv) Placing of the 1994 Act under the Ninth Schedule cannot operate as a hurdle for the State to enact legislations on matters ancillary to the 1994 Act. Legislative competence of the State Legislature can only be circumscribed by express prohibition contained in the Constitution itself and Article 31-B does not stipulate any such express prohibition on the legislative powers of the State.

(v) Detailing the extent of reservation for communities already identified as MBCs and DNCs, which is the thrust of the 2021 Act, cannot be said to be in conflict with the 1994 Act, as determination of extent of reservation for various communities was not the subject matter of the 1994 Act.

(vi) The 1994 Act, having received the assent of the President under Article 31-C, does not prohibit the State Legislature from enacting a legislation with the approval of the Governor on matters ancillary to the 1994 Act, as Article 31-C does not place any fetter on the legislative powers of the State. The State cannot be compelled to seek the assent of the President for a legislation granting internal reservation, when it is empowered to provide reservation and other special measures for backward classes, by way of legislation as well as executive orders, under Articles 15(4) and 16(4) of the Constitution.

On the issue of caste-based classification, ***Indra Sawhney*** (supra) has, in precise and unambiguous terms, stated that caste can be the starting point for identifying backward classes, but it cannot be the sole basis. Accordingly, while caste can be the starting point for providing internal reservation, it is incumbent on the State Government to justify the reasonableness of the decision and demonstrate that caste is not the sole basis. As regards the letter of Justice Thanikachalam, Chairman of the Tamil Nadu Backward Classes Commission, which forms the basis of the 2021 Act, we find that the Government has committed an error in accepting the recommendations therein for the following reasons:

(i) Recommendations have been based on the report of the Chairman of the Janarthanam Commission, which had relied on antiquated data, and there is a clear lapse on the part of Justice Thanikachalam in having readily dismissed the reservations expressed by the majority members of the Janarthanam Commission, who had observed that in the absence of updated caste-wise data, recommendations on internal reservation could not be fruitfully made.

(ii) Apart from approving the report of the Chairman of the Janarthanam Commission with respect to internal reservation for the Vanniakula Kshatriyas and making

additional recommendations on the grouping of the remaining communities for specific percentages of reservation, the letter from Justice Thanikachalam does not refer to any analysis or assessment of the relative backwardness and representation of the communities within the MBCs and DNCs.

(iii) Population has been made the sole basis for recommending internal reservation for the Vanniakula Kshatriyas, which is directly in the teeth of the law laid down by this Court.

Finally, on the 2021 Act, we are of the opinion that there is no substantial basis for classifying the Vanniakula Kshatriyas into one group to be treated differentially from the remaining 115 communities within the MBCs and DNCs, and therefore, the 2021 Act is in violation of Articles 14, 15 and 16. We uphold the judgment of the High Court on this aspect. Given our conclusion on the 2021 Act being *ultra vires* Articles 14, 15 and 16 of the Constitution, we have refrained from delving into the issue of non-compliance by the State Government with the consultation requirement prescribed under clause (9) of Article 338-B at the time of enactment of the 2021 Act.

78. We make it clear that we have not expressed any opinion on the merits of the writ petition challenging the 1994 Act, pending consideration before this Court, or, for that matter,

challenges to any other legislation which may have been referred to herein and our findings are strictly confined to the issues which have come up for our consideration in relation to the 2021 Act.

79. The Appeals are disposed of accordingly.

.....J.
[L. NAGESWARA RAO]

.....J.
[B. R. GAVAI]

New Delhi,
March 31, 2022