REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION (CIVIL) NO.30621 OF 2011

JARNAIL SINGH & OTHERS … PETITIONERS

VERSUS

LACHHMI NARAIN GUPTA & OTHERS …RESPONDENTS

WITH

SPECIAL LEAVE PETITION (CIVIL) NO.31735 OF 2011

SPECIAL LEAVE PETITION (CIVIL) NO.35000 OF 2011

SPECIAL LEAVE PETITION (CIVIL) NO.4831 OF 2012

SPECIAL LEAVE PETITION (CIVIL) NO.2839 OF 2012

SPECIAL LEAVE PETITION (CIVIL) NO.5860 OF 2012

SPECIAL LEAVE PETITION (CIVIL) NO.5859 OF 2012

SPECIAL LEAVE PETITION (CIVIL) NO.30841 OF 2012

SPECIAL LEAVE PETITION (CIVIL) NO.8327 OF 2014

SPECIAL LEAVE PETITION (CIVIL) NO.6915 OF 2014

SPECIAL LEAVE PETITION (CIVIL) NOS.16710-16711 OF 2014

SPECIAL LEAVE PETITION (CIVIL) NO.33163 OF 2014

SPECIAL LEAVE PETITION (CIVIL) NO.23344 OF 2014

SPECIAL LEAVE PETITION (CIVIL) NOS.23339-23340 OF 2014

SPECIAL LEAVE PETITION (CIVIL) NO.21343 OF 2015

CIVIL APPEAL NOS.4562-4564 OF 2017

SPECIAL LEAVE PETITION (CIVIL) NO.25191 OF 2015

CIVIL APPEAL NO.4880 OF 2017

CIVIL APPEAL NOS.4878-4879 OF 2017

SPECIAL LEAVE PETITION (CIVIL) NO.31191 OF 2015

CIVIL APPEAL NOS.4876-4877 OF 2017

CIVIL APPEAL NO.4881 OF 2017

SPECIAL LEAVE PETITION (CIVIL) NO.33688 OF 2015

CIVIL APPEAL NO.4882 OF 2017

CONTEMPT PETITION (CIVIL) NO.314 OF 2016
IN
SPECIAL LEAVE PETITION (CIVIL) NO.4831 OF 2012

CIVIL APPEAL NO.5247 OF 2016

CIVIL APPEAL NO.11817 OF 2016

CIVIL APPEAL NO.11816 OF 2016

CIVIL APPEAL NO.11820 OF 2016

TRANSFER PETITION (CIVIL) NOS.608-609 OF 2017

CIVIL APPEAL NO.4833 OF 2017

CIVIL APPEAL NOS.701-704 OF 2017

CIVIL APPEAL NOS.11822-11825 OF 2016

CIVIL APPEAL NOS.11837-11840 OF 2016

CIVIL APPEAL NOS.11842-11845 OF 2016

CIVIL APPEAL NOS.11829-11832 OF 2016

CIVIL APPEAL NOS.11847-11850 OF 2016

CIVIL APPEAL NO.11828 OF 2016

CONTEMPT PETITION (CIVIL) NO.11 OF 2017
IN
SPECIAL LEAVE PETITION (CIVIL) NO.19765 OF 2015
@ SPECIAL LEAVE PETITION (CIVIL) NOS.19765-19767 OF 2015

CONTEMPT PETITION (CIVIL) NO.13 OF 2017
IN
SPECIAL LEAVE PETITION (CIVIL) NO.19767 OF 2015
@ SPECIAL LEAVE PETITION (CIVIL) NOS.19765-19767 OF 2015

SPECIAL LEAVE PETITION (CIVIL) NO.10638 OF 2017

SPECIAL LEAVE PETITION (CIVIL) NO……. CC NO.6821 OF 2017

SPECIAL LEAVE PETITION (CIVIL) NO.17491 OF 2017

SPECIAL LEAVE PETITION (CIVIL) NO.18844 OF 2017

SPECIAL LEAVE PETITION (CIVIL) NOS.19422-19423 OF 2017

SPECIAL LEAVE PETITION (CIVIL) NO.24681 OF 2017

SPECIAL LEAVE PETITION (CIVIL) NO. OF 2018
DIARY NO.28776 OF 2017

SPECIAL LEAVE PETITION (CIVIL) NO. OF 2018
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DIARY NO.30189 OF 2017

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DIARY NO.33481 OF 2017

SPECIAL LEAVE PETITION (CIVIL) NO.33481 OF 2017

SPECIAL LEAVE PETITION (CIVIL) NO.30942 OF 2017

SPECIAL LEAVE PETITION (CIVIL) NO. OF 2018
DIARY NO.33488 OF 2017

SPECIAL LEAVE PETITION (CIVIL) NO. OF 2018
DIARY NO.34271 OF 2017

SPECIAL LEAVE PETITION (CIVIL) NO. OF 2018
DIARY NO.34520 OF 2017

SPECIAL LEAVE PETITION (CIVIL) NO. OF 2018
DIARY NO.35324 OF 2017

SPECIAL LEAVE PETITION (CIVIL) NO. OF 2018
DIARY NO.35577 OF 2017

SPECIAL LEAVE PETITION (CIVIL) NO. OF 2018
DIARY NO.35818 OF 2017

SPECIAL LEAVE PETITION (CIVIL) NO. OF 2018
DIARY NO.36305 OF 2017

SPECIAL LEAVE PETITION (CIVIL) NO. OF 2018
DIARY NO.36377 OF 2017

SPECIAL LEAVE PETITION (CIVIL) NO.31288 OF 2017

SPECIAL LEAVE PETITION (CIVIL) NO. OF 2018
DIARY NO.38895 OF 2017

SPECIAL LEAVE PETITION (CIVIL) NO. OF 2018
DIARY NO.42413 OF 2017

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DIARY NO.969 OF 2018

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DIARY NO.1042 OF 2018

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DIARY NO.1046 OF 2018

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DIARY NO.1584 OF 2018

SPECIAL LEAVE PETITION (CIVIL) NO. OF 2018
DIARY NO.2677 OF 2018

SPECIAL LEAVE PETITION (CIVIL) NO. OF 2018
DIARY NO.7243 OF 2018

SPECIAL LEAVE PETITION (CIVIL) NO.16469 OF 2018

SPECIAL LEAVE PETITION (CIVIL) NO.18925 OF 2018

SPECIAL LEAVE PETITION (CIVIL) NO. OF 2018
DIARY NO.22349 OF 2018

SPECIAL LEAVE PETITION (CIVIL) NO.22985 OF 2018

J U D G M E N T

R.F. Nariman, J.

1. The present group of cases arises out of two reference orders – the first by a two-Judge Bench referred to in a second reference order, dated 15.11.2017, which is by a three-Judge Bench, which has referred the correctness of the decision in **M. Nagaraj v. Union of India**, (2006) 8 SCC 212, (**"Nagaraj"**), to a Constitution Bench.

2. The controversy in these matters revolves around the interpretation of the following Articles of the Constitution of India:

> "**16. Equality of opportunity in matters of public employment.—**
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> **(4-A)** Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.
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> **(4-B)** Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4-A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be

considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year."

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"**335. Claims of Scheduled Castes and Scheduled Tribes to services and posts.—**The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State:

Provided that nothing in this article shall prevent in making of any provision in favour of the members of the Scheduled Castes and the Scheduled Tribes for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State."

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"**341. Scheduled Castes.—**(1) The President may with respect to any State or Union Territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State or Union territory, as the case may be.

(2) Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification issued under clause (1) any caste, race

> or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification."
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> "**342. Scheduled Tribes.—**(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 tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purposes of this Constitution be deemed to be Scheduled Tribes in relation to that State or Union territory, as the case may be.
>
> (2) Parliament may by law include in or exclude from the list of Scheduled Tribes specified in a notification issued under clause (1) any tribe or tribal community or part of or group within any tribe or tribal community, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification."

3. We have heard wide-ranging arguments on either side for a couple of days, raising several points. However, ultimately, we have confined arguments to two points which require serious consideration. The learned Attorney General for India, Shri K.K. Venugopal, led the charge for reconsideration of **Nagaraj** (supra). According to the learned Attorney General, **Nagaraj** (supra) needs to be revisited on these two points. First, when **Nagaraj** (supra) states that the State has to collect

quantifiable data showing backwardness, such observation would be contrary to the nine-Judge Bench in **Indra Sawhney v. Union of India**, 1992 Supp (3) SCC 217, (**"Indra Sawhney (1)"**), as it has been held therein that the Scheduled Castes and the Scheduled Tribes are the most backward among backward classes and it is, therefore, presumed that once they are contained in the Presidential List under Articles 341 and 342 of the Constitution of India, there is no question of showing backwardness of the Scheduled Castes and the Scheduled Tribes all over again. Secondly, according to the learned Attorney General, the creamy layer concept has not been applied in **Indra Sawhney (1)** (supra) to the Scheduled Castes and the Scheduled Tribes and **Nagaraj** (supra) has misread the aforesaid judgment to apply this concept to the Scheduled Castes and the Scheduled Tribes. According to the learned Attorney General, once the Scheduled Castes and the Scheduled Tribes have been set out in the Presidential List, they shall be deemed to be Scheduled Castes and Scheduled Tribes, and the said List cannot be altered by anybody except Parliament under Articles 341 and 342. The learned Attorney General also argued that **Nagaraj** (supra) does not indicate any test for determining adequacy of representation in service. According to him, it is important that we lay down that the test be the test

of proportion of Scheduled Castes and Scheduled Tribes to the population in India at all stages of promotion, and for this purpose, the roster that has been referred to in **R.K. Sabharwal v. State of Punjab**, (1995) 2 SCC 745 can be utilized. Other counsel who argued, apart from the learned Attorney General, have, with certain nuances, reiterated the same arguments. Ms. Indira Jaising, learned senior advocate, appearing on behalf of one of the Petitioners in C.A. No. 11816 of 2016, submitted that **Nagaraj** (supra) needs to be revisited also on the ground that Article 16(4-A) and 16(4-B) do not flow from Article 16(4), but instead flow from Articles 14 and 16(1) of the Constitution. She further argued that claims of the Scheduled Castes and the Scheduled Tribes are based on a reading of Articles 14, 15, 16, 16(4-A), 16(4-B), and 335 of the Constitution. It was further submitted that a further sub-classification within Scheduled Castes and Scheduled Tribes is impermissible, as has been held in **Indira Sawhney (1)** (supra) and in **E.V. Chinnaiah v. State of A.P.**, (2005) 1 SCC 394 (**"Chinnaiah"**). She argued that the decision in **Nagaraj** (supra) would have the effect of amending the Presidential Order relating to Scheduled Castes and Scheduled Tribes, which would violate Articles 341 and 342 of the Constitution of India, as Parliament alone can amend a Presidential Order. She concluded her argument by

saying that the exercise of reading down a constitutional amendment to make it valid, conducted in **Nagaraj** (supra), was constitutionally impermissible. Shri P.S. Patwalia, learned senior advocate, appearing on behalf of the State of Tripura, reiterated some of the submissions and added that **Nagaraj** (supra) and **Chinnaiah** (supra) cannot stand together, which is why **Nagaraj** (supra) is *per incuriam* as it does not refer to the judgment in **Chinnaiah** (supra) at all.

4. On the other hand, Shri Shanti Bhushan has defended **Nagaraj** (supra) by stating that when **Nagaraj** (supra) speaks about backwardness of the "class", what is referred to is not Scheduled Castes and Scheduled Tribes at all, but the class of posts. Hence, it is clear that backwardness in relation to the class of posts spoken of would require quantifiable data, and it is in that context that the aforesaid observation is made. He also argued, relying upon **Keshav Mills Co. Ltd. v. Commissioner of Income-Tax, Bombay North**, (1965) 2 SCR 908, (**"Keshav Mills"**), that a Constitution Bench judgment which has stood the test of time, ought not to be revisited, and if the parameters of **Keshav Mills** (supra) are to be applied, it is clear that **Nagaraj** (supra) ought not to be revisited. Shri Rajeev Dhavan, learned senior advocate,

has argued before us that **Nagaraj** (supra) has to be understood as a judgment which has upheld the constitutional amendments adding Articles 16(4-A) and 16(4-B) on the ground that they do not violate the basic structure of the Constitution. According to him, since equality is part of the basic structure, and **Nagaraj** (supra) has applied the 50% cut-off criterion, creamy layer, and no indefinite extension of reservation, as facets of the equality principle to uphold the said constitutional amendments, **Nagaraj** (supra) ought not to be revisited. According to the learned senior counsel, “creamy layer” is a matter of applying the equality principle, as unequals within the same class are sought to be weeded out as they cannot be treated as equal to the others. The whole basis for application of the creamy layer principle is that those genuinely deserving of reservation would otherwise not get the benefits of reservation and conversely, those who are undeserving, get the said benefits. According to the learned senior advocate, the creamy layer principle applies to exclude certain individuals from the class and does not deal with group rights at all. This being the case, Articles 341 and 342 are not attracted. Further, Articles 341 and 342 do not concern themselves with reservation at all. They concern themselves only with identification of those who can be called Scheduled Castes and

Scheduled Tribes. On the other hand, the creamy layer principle is applied by Courts to exclude certain persons from reservation made from within that class on the touchstone of Articles 14 and 16(1) of the Constitution of India. He argued that even if it be conceded that creamy layer can fall within Articles 341 and 342, yet the Court's power to enforce fundamental rights as part of the basic structure cannot be taken away. Indeed, **Nagaraj** (supra) was a case pertaining to a constitutional amendment and, therefore, Articles 341 and 342 cannot stand in the way of applying the basic structure test to a constitutional amendment.

5. Shri Rakesh Dwivedi, learned senior advocate, appearing in C.A. No. 5247 of 2016, submitted that the crucial language contained in Article 16(4-A) is that the word "which" would show that Scheduled Castes and Scheduled Tribes have to continue to be "backward". If the expression "the Scheduled Castes and the Scheduled Tribes" in Article 16(4-A) would be read as "the Scheduled Castes and the Scheduled Tribes employees", this would become even clearer. Therefore, according to the learned senior advocate, continued social backwardness of the Scheduled Castes/Scheduled Tribes employees has necessarily to be assessed. While making promotions to higher level

posts, it becomes clear that a Scheduled Caste/Scheduled Tribe employee may have cast off his backwardness when he/she reaches a fairly high stage in a service, for example, the post of Deputy Chief Engineer, at which stage, it would be open for the State to say that having regard to the absence of any backwardness of the Scheduled Caste/Scheduled Tribe employee at this stage, it would be expedient not to reserve anything further in posts above this stage. Shri Naphade, Shri Gopal Sankaranarayanan and other counsel followed suit and broadly supported the arguments of Shri Dhavan and Shri Dwivedi.

6. Since we are asked to revisit a unanimous Constitution Bench judgment, it is important to bear in mind the admonition of the Constitution Bench judgment in **Keshav Mills** (supra). This Court said:

> "[I]n reviewing and revising its earlier decision, this Court should ask itself whether in the interests of the public good or for any other valid and compulsive reasons, it is necessary that the earlier decision should be revised. When this Court decides questions of law, its decisions are, under Article 141, binding on all courts within the territory of India, and so, it must be the constant endeavour and concern of this Court to introduce and maintain an element of certainty and continuity in the interpretation of law in the country. Frequent exercise by this Court of its power to review its earlier decisions on the ground that the view pressed before it later appears to the Court to be

more reasonable, may incidentally tend to make law uncertain and introduce confusion which must be consistently avoided. That is not to say that if on a subsequent occasion, the Court is satisfied that its earlier decision was clearly erroneous, it should hesitate to correct the error; but before a previous decision is pronounced to be plainly erroneous, the Court must be satisfied with a fair amount of unanimity amongst its members that a revision of the said view is fully justified. It is not possible or desirable, and in any case it would be inexpedient to lay down any principles which should govern the approach of the Court in dealing with the question of reviewing and revising its earlier decisions. It would always depend upon several relevant considerations: — What is the nature of the infirmity or error on which a plea for a review and revision of the earlier view is based? On the earlier occasion, did some patent aspects of the question remain unnoticed, or was the attention of the Court not drawn to any relevant and material statutory provision, or was any previous decision of this Court bearing on the point not noticed? Is the Court hearing such plea fairly unanimous that there is such an error in the earlier view? What would be the impact of the error on the general administration of law or on public good? Has the earlier decision been followed on subsequent occasions either by this Court or by the High Courts? And, would the reversal of the earlier decision lead to public inconvenience, hardship or mischief? These and other relevant considerations must be carefully borne in mind whenever this Court is called upon to exercise its jurisdiction to review and revise its earlier decisions. These considerations become still more significant when the earlier decision happens to be a unanimous decision of a Bench of five learned Judges of this Court."

(at pp. 921-922)

7. We may begin with the nine-Judge Bench in **Indra Sawhney (1)** (supra). In this case, the lead judgment is of B.P. Jeevan Reddy, J., speaking on behalf of himself and three other learned Judges, with Pandian and Sawant, JJ., broadly concurring in the result by their separate judgments. Thommen, Kuldip Singh, and Sahai, JJ., dissented. The bone of contention in this landmark judgment was the Mandal Commission Report of 1980, which was laid before Parliament on two occasions – once in 1982, and again in 1983. However, no action was taken on the basis of this Report until 13.08.1990, when an Office Memorandum stated that after considering the said Report, 27% of the vacancies in civil posts and services under the Government of India shall be reserved for the Socially and Economically Backward Classes. This was followed by an Office Memorandum of 25.09.1991, by which, within the 27% of vacancies, preference was to be given to candidates belonging to the poorer sections of the Socially and Economically Backward Classes; and 10% vacancies were to be reserved for Other Economically Backward Sections who were not covered by any of the existing schemes of reservation. The majority judgments upheld the reservation of 27% in favour of backward classes, and the further sub-

division of more backward within the backward classes who were to be given preference, but struck down the reservation of 10% in favour of Other Economically Backward categories. In arriving at this decision, the judgment of Jeevan Reddy, J., referred to and contrasted Article 16(4) with Article 15(4), and stated that when Article 16(4) refers to a backward class of citizens, it refers primarily to social backwardness (*See* paragraph 774). Scheduled Castes and Scheduled Tribes, not being the subject matter before the Court, were kept aside as follows:

> "**781.** At the outset, we may state that for the purpose of this discussion, we keep aside the Scheduled Tribes and Scheduled Castes (since they are admittedly included within the backward classes), except to remark that backward classes contemplated by Article 16(4) do comprise some castes — for it cannot be denied that Scheduled Castes include quite a few castes."

In dealing with the creamy layer concept insofar as it is applicable to backward classes, the last sentence of paragraph 792 also states:

> "**792.** …… (This discussion is confined to Other Backward Classes only and has no relevance in the case of Scheduled Tribes and Scheduled Castes)."

In the summary of the discussion contained in paragraphs 796-797, it is stated, "the test or requirement of social and educational backwardness

cannot be applied to Scheduled Castes and Scheduled Tribes, who indubitably fall within the expression "backward class of citizens"." Jeevan Reddy, J. then went on to state that in certain posts, of specialities and super-specialities, provisions for reservation would not be advisable (*See* paragraph 838). Ultimately, the judgment decided that reservation would apply at the stage of initial entry only and would not apply at the stage of promotion.

8. It is important to note that eight of the nine learned Judges in **Indra Sawhney (1)** (supra) applied the creamy layer principle as a facet of the larger equality principle. In fact, in **Indra Sawhney v. Union of India and Ors.**, (2000) 1 SCC 168 (**"Indra Sawhney (2)"**), this Court neatly summarized the judgments in **Indra Sawhney (1)** (supra), on the aspect of creamy layer as follows:

> "**13.** In *Indra Sawhney* [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] on the question of exclusion of the "creamy layer" from the backward classes, there was agreement among eight out of the nine learned Judges of this Court. There were five separate judgments in this behalf which required the "creamy layer" to be identified and excluded.
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> **14.** The judgment of Jeevan Reddy, J. was rendered for himself and on behalf of three other learned

Judges, Kania, C.J. and M.N. Venkatachaliah, A.M. Ahmadi, JJ. (as they then were). The said judgment laid emphasis on the relevance of caste and also stated that upon a member of the backward class reaching an "advanced social level or status", he would no longer belong to the backward class and would have to be weeded out. Similar views were expressed by Sawant, Thommen, Kuldip Singh, and Sahai, JJ. in their separate judgments.

15. It will be necessary to refer to and summarise briefly the principles laid down in these five separate judgments for that would provide the basis for decision on Points 2 to 5.

16. While considering the concept of "means-test" or "creamy layer", which signifies imposition of an income limit, for the purpose of excluding the persons (from the backward class) whose income is above the said limit, in para 791, the Court has noted that counsel for the States of Bihar, Tamil Nadu, Kerala and other counsel for the respondents strongly opposed any such distinction and submitted that once a class is identified as a backward class after applying the relevant criteria including the economic one, it is not permissible to apply the economic criterion once again and sub-divide a backward class into two sub-categories. The Court negatived the said contention by holding that exclusion of such (creamy layer) socially advanced members will make the "class" a truly backward class and would more appropriately serve the purpose and object of clause (4).

17. Jeevan Reddy, J. dealt with the "creamy layer" under Question 3(*d*) (paras 790, 792, 793 of SCC) and under Question 10 (paras 843, 844). This is what the learned Judge declared: there are sections among the backward classes who are *highly*

advanced, socially and educationally and they constitute the forward section of that community. These advanced sections do not belong to the true backward class. They are (para 790) "as forward as any other forward class member".

> "If some of the members are far too advanced *socially* (which in the context, necessarily means *economically* and, may also mean *educationally*) the connecting thread between them and the remaining class snaps. They would be misfits in the class." (SCC p. 724, para 792).
>
> (emphasis supplied)

The learned Judge said: (SCC p. 724, para 792)

> "After *excluding* them alone, would the class be a compact class. In fact, such exclusion benefits the *truly* backward."
>
> (emphasis supplied)

A line has to be drawn, said the learned Judge, between the forward in the backward and the rest of the backward but it is to be ensured that what is given with one hand is not taken away by the other. The basis of exclusion of the "creamy layer" must *not* be *merely economic, unless* economic advancement is so high that it necessarily means *social* advancement, such as where a member becomes owner of a factory and is himself able to give employment to others. In such a case, his income is a measure of his social status. In the case of agriculturists, the line is to be drawn with reference to the agricultural landholding. While fixing income as a measure, the limit is not to be such as to result in taking away with one hand what is given with the other. The income limit must be such as to

mean and signify social advancement. There are again some offices in various walks of life — the occupants of which can be treated as socially advanced, *without further inquiry*", such as IAS and IPS officers or others in All India services. In the case of these persons, their social status in society rises quite high and the person is *no longer* socially disadvantaged. Their children get full opportunity to realise their potential. They are in no way handicapped in the race of life. Their income is also such that they are above want. It is but logical that children of such persons are not given the benefits of reservation. If the categories or sections above-mentioned are not excluded, the truly disadvantaged members of the backward class to which they belong will be deprived of the benefits of reservation. The Central Government is, therefore, directed (para 793) to identify and notify the "creamy layer" within four months and after such notification, the "creamy layer" within the backward class shall "cease" to be covered by the reservations under Article 16(4). Jeevan Reddy, J. finally directed (see Question 10) that the exclusion of the creamy layer must be on the basis of social advancement and not on the basis of economic interest alone. Income or the extent of property-holding of a person is to be taken as a measure of social advancement — and on that basis — the "creamy layer" within a given caste, community or occupational group is to be excluded to arrive at the *true* backward class. There is to be constituted a body which can go into these questions as follows: (SCC p. 757, para 847)

> "We direct that such a body be constituted both at Central level and at the level of the States within four months from today. … There should be a periodic revision of these lists to *exclude* those who have ceased to be backward or for inclusion of new classes, as the case may be."

(emphasis supplied)

The creamy layer [see para 859, sub-para (3)(*d*)] can be, and must be excluded. Creamy layer has to be excluded and "economic criterion" is to be adopted as an indicium or measure of social advancement [para 860, sub-para (5)]. The socially advanced persons must be excluded [para 861(*b*)]. That is how Jeevan Reddy, J. summarised the position.

18. Sawant, J. too accepted (p. 553 of SCC) that "at least some individuals and families in the backward classes, — however small in number, — gain sufficient means to develop *capacities to compete* with others in every field. That is an *undeniable fact*". (emphasis supplied) Social advancement is to be judged by the "capacity to compete" with forward castes, achieved by the members or sections of the backward classes. Legally, therefore, these persons or sections who reached that level are not entitled any longer to be called as part of the backward class, whatever their original birthmark. Taking out these "forwards" from the "backwards" is "obligatory" as these persons have crossed the Rubicon (pp. 553-54). On the crucial question as to what is meant by "capacity to compete", the learned Judge explained (para 522) that if a person moves from Class IV service to Class III, that is no indication that he has reached such a stage of social advancement but if the person has successfully competed for "higher level posts" or *at least* "near those levels", he has reached such a state.

19. Thommen, J. (paras 287, 295, 296, 323) observed that if some members in a backward class acquire the necessary *financial* strength to raise themselves, the Constitution does not extend to

them the protection of reservation. The creamy layer has to be "weeded out" and excluded, if it has attained a "certain predetermined economic level".

20. Kuldip Singh, J. (para 385) referred to the "*affluent*" section of the backward class. Comparatively "such (*sic* rich) persons in the backward class — though they may not have acquired a higher level of education — are able to move in the society without being discriminated socially". These persons practise discrimination against others in that group who are comparatively less rich. It must be ensured that these persons do not "chew up" the benefits meant for the true backward class. "Economic ceiling" is to be fixed to cut off these persons from the benefits of reservation. In the result, the "means-test" is imperative to skim off the "*affluent*" sections of backward classes.

21. Sahai, J. (para 629) observed that the individuals among the collectivity or the group who may have achieved a "*social status*" or "*economic affluence*", are disentitled to claim reservation. Candidates who apply for selection must be made to disclose the annual income of their parents which if it is beyond a level, they cannot be allowed to claim to be part of the backward class. What is to be the limit must be decided by the State. Income apart, provision is to be made that wards of those backward classes of persons who have achieved a particular *status* in society, be it *political* or *economic* or if their parents are in *higher services* then such individuals must be precluded from availing the benefits of reservation. Exclusion of "creamy layer" achieves a social purpose. Any legislative or executive action to remove such

> persons individually or collectively cannot be constitutionally invalid."

In paragraph 27 of the said judgment, the three-Judge Bench of this Court clearly held that the creamy layer principle sounds in Articles 14 and 16(1) as follows:

> "*(i) Equals and unequals, twin aspects*
>
> **27.** As the "creamy layer" in the backward class is to be treated "on a par" with the forward classes and is not entitled to benefits of reservation, it is obvious that if the "creamy layer" is not excluded, there will be discrimination and violation of Articles 14 and 16(1) inasmuch as *equals* (forwards and creamy layer of backward classes) *cannot be treated unequally*. Again, non-exclusion of creamy layer will also be violative of Articles 14, 16(1) and 16(4) of the Constitution of India since *unequals* (the creamy layer) *cannot be treated as equals*, that is to say, equal to the rest of the backward class. These twin aspects of discrimination are specifically elucidated in the judgment of Sawant, J. where the learned Judge stated as follows: (SCC p. 553, para 520)
>
> > "[T]o continue to confer upon such advanced sections … special benefits, would amount to treating *equals unequally*…. Secondly, to rank them with the rest of the backward classes would … amount to treating the *unequals equally.*"
> >
> > (emphasis supplied)

> Thus, any executive or legislative action refusing to exclude the creamy layer from the benefits of reservation will be violative of Articles 14 and 16(1) and also of Article 16(4). We shall examine the validity of Sections 3, 4 and 6 in the light of the above principle. …"

9. The next judgment with which we are directly concerned is the judgment in **Chinnaiah** (supra). In this case, the validity of the Andhra Pradesh Scheduled Castes (Rationalisation of Reservations) Act, 2000, was challenged, and dismissed by a five-Judge Bench of the Andhra Pradesh High Court by a majority of 4:1. The 15% reservation that was made in favour of the Scheduled Castes was further apportioned among four groups in varying percentages – Group A to the extent of 1%; Group B to the extent of 7%; Group C to the extent of 6%; and Group D to the extent of 1%. In the lead judgment on behalf of the Constitution Bench, Hegde, J. set out three questions for consideration as follows:

> "**12.** From the pleadings on record and arguments addressed before us three questions arise for our consideration:
>
> (*1*) Whether the impugned Act is violative of Article 341(2) of the Constitution of India?
>
> (*2*) Whether the impugned enactment is constitutionally invalid for lack of 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?"

Article 341 was then referred to, in which the Presidential List of Scheduled Castes is to be notified. Any inclusion or exclusion from the said list thereafter can only be done by Parliament under Article 341(2) (*See* paragraph 13). The Court then rejected the splitting up of Scheduled Castes on the basis of backwardness into groups, and distinguished **Indra Sawhney (1)** (supra) (*See* paragraphs 19 to 21). It was then held:

> "**26.** Thus from the scheme of the Constitution, Article 341 and above opinions of this Court in the case of *N.M. Thomas* [(1976) 2 SCC 310 : 1976 SCC (L&S) 227] it is clear that the castes once included in the Presidential List, form a class by themselves. If they are one class under the Constitution, any division of these classes of persons based on any consideration would amount to tinkering with the Presidential List."

Indra Sawhney (1) (supra) was then referred to and distinguished as follows:

> "**38.** On behalf of the respondents, it was pointed out that in *Indra Sawhney case* [1992 Supp (3) SCC 217] the Court had permitted subclassification of

Other Backward Communities, as backward and more backward based on their comparative underdevelopment, therefore, the similar classification amongst the class enumerated in the Presidential List of Scheduled Castes is permissible in law. We do not think the principles laid down in *Indra Sawhney case* (supra) for subclassification of Other Backward Classes can be applied as a precedent law for subclassification or subgrouping Scheduled Castes in the Presidential List because that very judgment itself has specifically held that subdivision of Other Backward Classes is not applicable to Scheduled Castes and Scheduled Tribes. This we think is for the obvious reason i.e. the Constitution itself has kept the Scheduled Castes and Scheduled Tribes List out of interference by the State Governments.

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

40. Furthermore, the emphasis on efficient administration placed by Article 335 of the Constitution must also be considered when the claims of Scheduled Castes and Scheduled Tribes

to employment in the services of the Union are to be considered."

Finally, the Court held:

> "**43.** The very fact that the members of the Scheduled Castes are most backward amongst the backward classes and the impugned legislation having already proceeded on the basis that they are not adequately represented both in terms of clause (4) of Article 15 and clause (4) of Article 16 of the Constitution, a further classification by way of micro-classification is not permissible. Such classification of the members of different classes of people based on their respective castes would also be violative of the doctrine of reasonableness. Article 341 provides that exclusion even of a part or a group of castes from the Presidential List can be done only by Parliament. The logical corollary thereof would be that the State Legislatures are forbidden from doing that. A uniform yardstick must be adopted for giving benefits to the members of the Scheduled Castes for the purpose of the Constitution. The impugned legislation being contrary to the above constitutional scheme cannot, therefore, be sustained.
>
> **44.** For the reasons stated above, we are of the considered opinion that the impugned legislation apart from being beyond the legislative competence of the State is also violative of Article 14 of the Constitution and hence is liable to be declared as ultra vires the Constitution."

In a separate concurring judgment, Sinha, J., after referring to **Indra Sawhney (1)** (supra) and the creamy layer concept in paragraph 95, went on to state:

> "**96.** But we must state that whenever such a situation arises in respect of Scheduled Caste, it will be Parliament alone to take the necessary legislative steps in terms of clause (2) of Article 341 of the Constitution. The States concededly do not have the legislative competence therefor."

It was then concluded:

> "**111.** The Constitution provides for declaration of certain castes and tribes as Scheduled Castes and Scheduled Tribes in terms of Articles 341 and 342 of the Constitution. The object of the said provisions is to provide for grant of protection to the backward class of citizens who are specified in the Scheduled Castes Order and Scheduled Tribes Order having regard to the economic and educational backwardness wherefrom they suffer. The President of India alone in terms of Article 341(1) of the Constitution is authorised to issue an appropriate notification therefor. The Constitution (Scheduled Castes) Order, 1950 made in terms of Article 341(1) is exhaustive."

Thus, the Court struck down the Andhra Pradesh Scheduled Castes (Rationalisation of Reservations) Act, 2000.

10. The judgment in **Chinnaiah** (supra) has been referred by a three-Judge Bench to a larger Bench by an order dated 20.08.2014. This is because, according to the three-Judge Bench, **Chinnaiah** (supra) is contrary to Article 338 of the Constitution of India and **Indra Sawhney (1)** (supra). Since the correctness of **Chinnaiah** (supra) does not arise

before us, we need say no more about this reference which will be decided on its own merits.

11. Close on the heels of this judgment is the judgment in **Nagaraj** (supra). In this case, the addition of Articles 16(4-A) and 16(4-B) were under challenge on the ground that they violated the basic structure of the Constitution. After referring to the arguments of counsel for both sides, the Court held that equality is the essence of democracy and accordingly, part of the basic structure of the Constitution (*See* paragraph 33). The working test in the matter of application of this doctrine was then applied, referring to Chandrachud, J.'s judgment in **Indira Nehru Gandhi v. Raj Narain & Anr.**, 1975 Supp SCC 1 (*See* paragraphs 37 and 38). After dealing with reservation and its extent, the Court then went into the nitty-gritty of the constitutional amendments and held as follows:

> "***Whether the impugned constitutional amendments violate the principle of basic structure?***
>
> **101.** The key question which arises in the matter of the challenge to the constitutional validity of the impugned amending Acts is — whether the constitutional limitations on the amending power of Parliament are obliterated by the impugned

amendments so as to violate the basic structure of the Constitution.

102. In the matter of application of the principle of basic structure, twin tests have to be satisfied, namely, the "width test" and the test of "identity". As stated hereinabove, the concept of the "catch-up" rule and "consequential seniority" are not constitutional requirements. They are not implicit in clauses (1) and (4) of Article 16. They are not constitutional limitations. They are concepts derived from service jurisprudence. They are not constitutional principles. They are not axioms like, secularism, federalism, etc. Obliteration of these concepts or insertion of these concepts does not change the equality code indicated by Articles 14, 15 and 16 of the Constitution. Clause (1) of Article 16 cannot prevent the State from taking cognizance of the compelling interests of Backward Classes in the society. Clauses (1) and (4) of Article 16 are restatements of the principle of equality under Article 14. Clause (4) of Article 16 refers to affirmative action by way of reservation. Clause (4) of Article 16, however, states that the appropriate Government is free to provide for reservation in cases where it is satisfied on the basis of quantifiable data that Backward Class is inadequately represented in the services. Therefore, in every case where the State decides to provide for reservation there must exist two circumstances, namely, "backwardness" and "inadequacy of representation". As stated above, equity, justice and efficiency are variable factors. These factors are context-specific. There is no fixed yardstick to identify and measure these three factors, it will depend on the facts and circumstances of each case. These are the limitations on the mode of the exercise of power by the State. None of these limitations have been removed by the impugned

amendments. If the State concerned fails to identify and measure backwardness, inadequacy and overall administrative efficiency then in that event the provision for reservation would be invalid. These amendments do not alter the structure of Articles 14, 15 and 16 (equity code). The parameters mentioned in Article 16(4) are retained. Clause (4-A) is derived from clause (4) of Article 16. Clause (4-A) is confined to SCs and STs alone. Therefore, the present case does not change the identity of the Constitution. The word "amendment" connotes change. The question is—whether the impugned amendments discard the original Constitution. It was vehemently urged on behalf of the petitioners that the Statement of Objects and Reasons indicates that the impugned amendments have been promulgated by Parliament to overrule the decisions of this Court. We do not find any merit in this argument. Under Article 141 of the Constitution the pronouncement of this Court is the law of the land. The judgments of this Court in *Virpal Singh* [(1995) 6 SCC 684 : 1996 SCC (L&S) 1 : (1995) 31 ATC 813], *Ajit Singh (I)* [(1996) 2 SCC 715 : 1996 SCC (L&S) 540 : (1996) 33 ATC 239 : AIR 1996 SC 1189], *Ajit Singh (II)* [(1999) 7 SCC 209 : 1999 SCC (L&S) 1239] and *Indra Sawhney* [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] were judgments delivered by this Court which enunciated the law of the land. It is that law which is sought to be changed by the impugned constitutional amendments. The impugned constitutional amendments are enabling in nature. They leave it to the States to provide for reservation. It is well settled that Parliament while enacting a law does not provide content to the "right". The content is provided by the judgments of the Supreme Court. If the appropriate Government enacts a law providing for reservation without keeping in mind the parameters in Article 16(4) and Article 335 then this

Court will certainly set aside and strike down such legislation. Applying the "width test", we do not find obliteration of any of the constitutional limitations. Applying the test of "identity", we do not find any alteration in the existing structure of the equality code. As stated above, none of the axioms like secularism, federalism, etc. which are overarching principles have been violated by the impugned constitutional amendments. Equality has two facets — "formal equality" and "proportional equality". Proportional equality is equality "in fact" whereas formal equality is equality "in law". Formal equality exists in the rule of law. In the case of proportional equality the State is expected to take affirmative steps in favour of disadvantaged sections of the society within the framework of liberal democracy. Egalitarian equality is proportional equality."

xxx xxx xxx

"**104.** Applying the above tests to the present case, there is no violation of the basic structure by any of the impugned amendments, including the Constitution (Eighty-second) Amendment Act, 2000. The constitutional limitation under Article 335 is relaxed and not obliterated. As stated above, be it reservation or evaluation, excessiveness in either would result in violation of the constitutional mandate. This exercise, however, will depend on the facts of each case. In our view, the field of exercise of the amending power is retained by the impugned amendments, as the impugned amendments have introduced merely enabling provisions because, as stated above, merit, efficiency, backwardness and inadequacy cannot be identified and measured in vacuum. Moreover, Article 16(4-A) and Article 16(4-B) fall in the pattern of Article 16(4) and as long as the parameters

mentioned in those articles are complied with by the States, the provision of reservation cannot be faulted. Articles 16(4-A) and 16(4-B) are classifications within the principle of equality under Article 16(4)."

The Court then concluded as follows:

"**121.** The impugned constitutional amendments by which Articles 16(4-A) and 16(4-B) have been inserted flow from Article 16(4). They do not alter the structure of Article 16(4). They retain the controlling factors or the compelling reasons, namely, backwardness and inadequacy of representation which enables the States to provide for reservation keeping in mind the overall efficiency of the State administration under Article 335. These impugned amendments are confined only to SCs and STs. They do not obliterate any of the constitutional requirements, namely, ceiling limit of 50% (quantitative limitation), the concept of creamy layer (qualitative exclusion), the sub-classification between OBCs on one hand and SCs and STs on the other hand as held in *Indra Sawhney* [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385], the concept of post-based roster with inbuilt concept of replacement as held in *R.K. Sabharwal* [(1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481].

122. We reiterate that the ceiling limit of 50%, the concept of creamy layer and the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency are all constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse.

> **123.** However, in this case, as stated above, the main issue concerns the "extent of reservation". In this regard the State concerned will have to show in each case the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation. As stated above, the impugned provision is an enabling provision. The State is not bound to make reservation for SCs/STs in matters of promotions. However, if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance with Article 335. It is made clear that even if the State has compelling reasons, as stated above, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling limit of 50% or obliterate the creamy layer or extend the reservation indefinitely.
>
> **124.** Subject to the above, we uphold the constitutional validity of the Constitution (Seventy-seventh Amendment) Act, 1995; the Constitution (Eighty-first Amendment) Act, 2000; the Constitution (Eighty-second Amendment) Act, 2000 and the Constitution (Eighty-fifth Amendment) Act, 2001."

12. We now come to the Constitution Bench judgment in **Ashoka Kumar Thakur v. Union of India**, (2008) 6 SCC 1. In this case, Article 15(5) inserted by the Constitution (Ninety-third Amendment) Act, 2005, was under challenge. Balakrishnan, C.J., after referring to various judgments of this Court dealing with reservation, specifically held that the

"creamy layer" principle is inapplicable to Scheduled Castes and Scheduled Tribes as it is merely a principle of identification of the backward class and not applied as a principle of equality (*See* paragraphs 177 to 186). Pasayat, J., speaking for himself and Thakker, J., stated that the focus in the present case was not on Scheduled Castes and Scheduled Tribes but on Other Backward Classes (*See* paragraph 293). Bhandari, J., in paragraphs 395 and 633 stated as follows:

> "**395.** In *Sawhney (1)* [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] the entire discussion was confined only to Other Backward Classes. Similarly, in the instant case, the entire discussion was confined only to Other Backward Classes. Therefore, I express no opinion with regard to the applicability of exclusion of creamy layer to the Scheduled Castes and Scheduled Tribes."
>
> xxx xxx xxx
>
> "**633.** In *Indra Sawhney (1)* [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385], creamy layer exclusion was only in regard to OBC. Reddy, J. speaking for the majority at SCC p. 725, para 792, stated that "[t]his discussion is confined to Other Backward Classes only and has no relevance in the case of Scheduled Tribes and Scheduled Castes". Similarly, in the instant case, the entire discussion was confined only to Other Backward Classes. Therefore, I express no opinion with regard

> to the applicability of exclusion of creamy layer to the Scheduled Castes and Scheduled Tribes……"

Raveendran, J., in a separate judgment, while referring to **Nagaraj** (supra), held as follows:

> "**665.** The need for exclusion of creamy layer is reiterated in the subsequent decisions of this Court in *Ashoka Kumar Thakur* v. *State of Bihar* [(1995) 5 SCC 403 : 1995 SCC (L&S) 1248 : (1995) 31 ATC 159], *Indra Sawhney* v. *Union of India* [(1996) 6 SCC 506 : 1996 SCC (L&S) 1477] and *M. Nagaraj* v. *Union of India* [(2006) 8 SCC 212]. When *Indra Sawhney* [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] has held that creamy layer should be excluded for purposes of Article 16(4), dealing with "backward class" which is much wider than "socially and educationally backward class" occurring in Articles 15(4) and (5), it goes without saying that without the removal of creamy layer there cannot be a socially and educationally backward class. Therefore, when a caste is identified as a socially and educationally backward caste, it becomes a "socially and educationally backward class" only when it sheds its creamy layer."

The Court ultimately upheld the Constitution (Ninety-third Amendment) Act, 2005, subject to the creamy layer test to be applied to Other Backward Classes. Bhandari, J. held that the amendment was not constitutionally valid so far as "private unaided" educational institutions were concerned.

13. At this stage, it is necessary to deal with the argument that **Nagaraj** (supra) needs to be revisited as it conflicts with **Chinnaiah** (supra). It will be noticed that though **Nagaraj** (supra) is a later judgment, it does not refer to **Chinnaiah** (supra) at all. Much was made of this by some of the learned counsel appearing on behalf of the Appellants. It is important to notice that the majority judgment of Hegde, J. does not refer to the creamy layer principle at all. **Chinnaiah's** judgment (supra) in essence held that the Andhra Pradesh Scheduled Castes (Rationalisation of Reservations) Act, 2000, which it considered, could not further sub-divide Scheduled Castes into four categories, as that would be violative of Article 341(2) of the Constitution of India for the simple reason that it is Parliament alone that can make any change in the Presidential List and not the State Legislatures. That this is the true *ratio* of the judgment is clear from a reading of the paragraphs that have been set out hereinabove. This being the case, as **Chinnaiah** (supra) does not in any manner deal with any of the aspects on which the constitutional amendments in **Nagaraj's** case (supra) were upheld, we are of the view that it was not necessary for **Nagaraj** (supra) to refer to **Chinnaiah** (supra) at all. However, it was further contended that apart

from this *ratio*, **Chinnaiah** (supra) also decided that the sub-classification of Scheduled Castes, created by the Andhra Pradesh Scheduled Castes (Rationalisation of Reservations) Act, 2000, also violated Article 14 of the Constitution of India. This was stated by **Chinnaiah** (supra) to be violative of Article 14 as the same would amount to tinkering with the List, which, as was held, could be done only by Parliament and not by State Legislatures. In our opinion, the true *ratio* of the judgment flows from a construction of Article 341. It is true that the Andhra Pradesh Act in question was also found to be violative of Article 14. We may only state that **Chinnaiah** (supra) dealt with a completely different problem, apart from dealing with a State statute and not a constitutional amendment, as was dealt with in **Nagaraj** (supra).

14. This brings us to whether the judgment in **Nagaraj** (supra) needs to be revisited on the other grounds that have been argued before us. Insofar as the State having to show quantifiable data as far as backwardness of the class is concerned, we are afraid that we must reject Shri Shanti Bhushan's argument. The reference to "class" is to the Scheduled Castes and the Scheduled Tribes, and their inadequacy of representation in public employment. It is clear, therefore, that **Nagaraj**

(supra) has, in unmistakable terms, stated that the State has to collect quantifiable data showing backwardness of the Scheduled Castes and the Scheduled Tribes. We are afraid that this portion of the judgment is directly contrary to the nine-Judge Bench in **Indra Sawhney (1)** (supra). Jeevan Reddy, J., speaking for himself and three other learned Judges, had clearly held, "[t]he test or requirement of social and educational backwardness cannot be applied to Scheduled Castes and Scheduled Tribes, who indubitably fall within the expression "backward class of citizens"." (*See* paragraphs 796 to 797). Equally, Dr. Justice Thommen, in his conclusion at paragraph 323(4), had held as follows:

> "**323.** *Summary*
>
> xxx xxx xxx
>
> (*4*) Only such classes of citizens who are socially and educationally backward are qualified to be identified as backward classes. To be accepted as backward classes for the purpose of reservation under Article 15 or Article 16, their backwardness must have been either recognised by means of a notification by the President under Article 341 or Article 342 declaring them to be Scheduled Castes or Scheduled Tribes, or, on an objective consideration, identified by the State to be socially and educationally so backward by reason of identified prior discrimination and its continuing ill effects as to be comparable to the Scheduled Castes or the Scheduled Tribes. In the case of the Scheduled Castes or the Scheduled Tribes, these

conditions are, in view of the notifications, presumed to be satisfied……"

15. In fact, **Chinnaiah** (supra) has referred to the Scheduled Castes as being the most backward among the backward classes (*See* paragraph 43). This is for the reason that the Presidential List contains only those castes or groups or parts thereof, which have been regarded as untouchables. Similarly, the Presidential List of Scheduled Tribes only refers to those tribes in remote backward areas who are socially extremely backward. Thus, it is clear that when **Nagaraj** (supra) requires the States to collect quantifiable data on backwardness, insofar as Scheduled Castes and Scheduled Tribes are concerned, this would clearly be contrary to the **Indra Sawhney (1)** (supra) and would have to be declared to be bad on this ground.

However, when it comes to the creamy layer principle, it is important to note that this principle sounds in Articles 14 and 16(1), as unequals within the same class are being treated equally with other members of that class. The genesis of this principle is to be found in **State of Kerala & Anr. v. N.M. Thomas and Ors.**, (1976) 2 SCC 310. This case was concerned with a test-relaxation rule in promotions from lower division

clerks to upper division clerks. By a 5:2 majority judgment, the said rule was upheld as a rule that could be justified on the basis that it became necessary as a means of generally giving a leg-up to backward classes. In paragraph 124, Krishna Iyer, J. opined:

> "**124.** A word of sociological caution. In the light of experience, here and elsewhere, the danger of "reservation", it seems to me, is threefold. Its benefits, by and large, are snatched away by the top creamy layer of the "backward" caste or class, thus keeping the weakest among the weak always weak and leaving the fortunate layers to consume the whole cake. Secondly, this claim is overplayed extravagantly in democracy by large and vocal groups whose burden of backwardness has been substantially lightened by the march of time and measures of better education and more opportunities of employment, but wish to wear the "weaker section" label as a means to score over their near-equals formally categorised as the upper brackets. Lastly, a lasting solution to the problem comes only from improvement of social environment, added educational facilities and cross-fertilisation of castes by inter-caste and inter-class marriages sponsored as a massive State programme, and this solution is calculatedly hidden from view by the higher "backward" groups with a vested interest in the plums of backwardism. But social science research, not judicial impressionism, will alone tell the whole truth and a constant process of objective re-evaluation of progress registered by the "underdog" categories is essential lest a once deserving "reservation" should be degraded into "reverse discrimination". Innovations in administrative strategy to help the really untouched,

> *most backward* classes also emerge from such socio-legal studies and audit exercises, if dispassionately made. In fact, research conducted by the A.N. Sinha Institute of Social Studies, Patna, has revealed a dual society among harijans, a tiny elite gobbling up the benefits and the darker layers sleeping distances away from the special concessions. For them, Articles 46 and 335 remain a "noble romance" [As Huxley called it in "Administrative Nihilism" (Methods and Results, Vol. 4 of Collected Essays).], the bonanza going to the "higher" harijans. I mention this in the present case because lower division clerks are likely to be drawn from the lowest levels of harijan humanity and promotion prospects being accelerated by withdrawing, for a time, "test" qualifications for this category may perhaps delve deeper. An equalitarian breakthrough in a hierarchical structure has to use many weapons and Rule 13-AA perhaps is one."

The whole object of reservation is to see that backward classes of citizens move forward so that they may march hand in hand with other citizens of India on an equal basis. This will not be possible if only the creamy layer within that class bag all the coveted jobs in the public sector and perpetuate themselves, leaving the rest of the class as backward as they always were. This being the case, it is clear that when a Court applies the creamy layer principle to Scheduled Castes and Scheduled Tribes, it does not in any manner tinker with the Presidential List under Articles 341 or 342 of the Constitution of India. The caste or

group or sub-group named in the said List continues exactly as before. It is only those persons within that group or sub-group, who have come out of untouchability or backwardness by virtue of belonging to the creamy layer, who are excluded from the benefit of reservation. Even these persons who are contained within the group or sub-group in the Presidential Lists continue to be within those Lists. It is only when it comes to the application of the reservation principle under Articles 14 and 16 that the creamy layer within that sub-group is not given the benefit of such reservation.

16. We do not think it necessary to go into whether Parliament may or may not exclude the creamy layer from the Presidential Lists contained under Articles 341 and 342. Even on the assumption that Articles 341 and 342 empower Parliament to exclude the creamy layer from the groups or sub-groups contained within these Lists, it is clear that Constitutional Courts, applying Articles 14 and 16 of the Constitution to exclude the creamy layer cannot be said to be thwarted in this exercise by the fact that persons stated to be within a particular group or sub-group in the Presidential List may be kept out by Parliament on application of the creamy layer principle. One of the most important

principles that has been frequently applied in constitutional law is the doctrine of harmonious interpretation. When Articles 14 and 16 are harmoniously interpreted along with other Articles 341 and 342, it is clear that Parliament will have complete freedom to include or exclude persons from the Presidential Lists based on relevant factors. Similarly, Constitutional Courts, when applying the principle of reservation, will be well within their jurisdiction to exclude the creamy layer from such groups or sub-groups when applying the principles of equality under Articles 14 and 16 of the Constitution of India. We do not agree with Balakrishnan, C.J.'s statement in **Ashoka Kumar Thakur** (supra) that the creamy layer principle is merely a principle of identification and not a principle of equality.

17. Therefore, when **Nagaraj** (supra) applied the creamy layer test to Scheduled Castes and Scheduled Tribes in exercise of application of the basic structure test to uphold the constitutional amendments leading to Articles 16(4-A) and 16(4-B), it did not in any manner interfere with Parliament's power under Article 341 or Article 342. We are, therefore, clearly of the opinion that this part of the judgment does not need to be revisited, and consequently, there is no need to refer **Nagaraj** (supra) to

a seven-Judge Bench. We may also add at this juncture that **Nagaraj** (supra) is a unanimous judgment of five learned Judges of this Court which has held sway since the year 2006. This judgment has been repeatedly followed and applied by a number of judgments of this Court, namely:

a. **Anil Chandra v. Radha Krishna Gaur**, (2009) 9 SCC 454 (two-Judge Bench) (*See* paragraphs 17 and 18).

b. **Suraj Bhan Meena & Anr. v. State of Rajasthan & Ors.**, (2011) 1 SCC 467 (two-Judge Bench) (*See* paragraphs 10, 50, and 67).

c. **U.P. Power Corporation v. Rajesh Kumar & Ors.**, (2012) 7 SCC 1 (two-Judge Bench) (*See* paragraphs 61, 81(ix), and 86).

d. **S. Panneer Selvam & Ors. v. State of Tamil Nadu & Ors.**, (2015) 10 SCC 292 (two-Judge Bench) (*See* paragraphs 18, 19, and 36).

e. **Chairman & Managing Director, Central Bank of India & Ors. v. Central Bank of India SC/ST Employees Welfare Association & Ors.**, (2015) 12 SCC 308 (two-Judge Bench) (*See* paragraphs 9 and 26).

f. **Suresh Chand Gautam v. State of U.P. & Ors.**, (2016) 11 SCC 113 (two-Judge Bench) (*See* paragraphs 2 and 45).

g. **B.K. Pavitra & Ors. v. Union of India & Ors.**, (2017) 4 SCC 620 (two-Judge Bench) (*See* paragraphs 17 to 22).

Further, **Nagaraj** (supra) has been approved by larger Benches of this Court in:

a. **General Categories Welfare Federation v. Union of India**, (2012) 7 SCC 40 (three-Judge Bench) (*See* paragraphs 2 and 3).

b. **Rohtas Bhankar v. Union of India**, (2014) 8 SCC 872 (five-Judge Bench) (*See* paragraphs 6 and 7).

In fact, the tests laid down in **Nagaraj** (supra) for judging whether a constitutional amendment violates basic structure have been expressly approved by a nine-Judge Bench of this Court in **I.R. Coelho (Dead) by LRs. v. State of Tamil Nadu and Ors.**, (2007) 2 SCC 1 (*See* paragraphs 61, 105, and 142). The entirety of the decision, far from being clearly erroneous, correctly applies the basic structure doctrine to uphold constitutional amendments on certain conditions which are based upon the equality principle as being part of basic structure. Thus, we may make it clear that quantifiable data shall be collected by the State, on the parameters as stipulated in **Nagaraj** (supra) on the inadequacy of representation, which can be tested by the Courts. We may further add that the data would be relatable to the concerned cadre.

18. Dr. Dhavan referred to the judgment in **U.P. Power Corporation Ltd.** (supra), and placed before us the Constitution (One Hundred Seventeeth Amendment) Bill, 2012. This Bill was passed by the Rajya Sabha on 17.12.2012 but failed to get sufficient number of votes in the Lok Sabha and, therefore, could not become an Act. This Bill was tabled close upon the judgment in **U.P. Power Corporation Ltd.** (supra), and would have substituted Article 16(4-A) as follows:

> "(4A) Notwithstanding anything contained elsewhere in the Constitution, the Scheduled Castes and the Scheduled Tribes notified under article 341 and article 342, respectively, shall be deemed to be backward and nothing in this article shall prevent the State from making any provision for reservation in matters of promotions, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes to the extent of the percentage of reservation provided to the Scheduled Castes and the Scheduled Tribes in the services of the State."

The Statement of Objects and Reasons for the said Bill read as follows:

> "The validity of the constitutional amendments was challenged before the Supreme Court. The Supreme Court while deliberating on the issue of validity of Constitutional amendments in the case of M. Nagaraj *v*. UOI & Ors., observed that the concerned State will have to show in each case the existence of the compelling reasons, namely, backwardness, inadequacy of representation and

> overall administrative efficiency before making provision for reservation in promotion.
>
> Relying on the judgment of the Supreme Court in M. Nagaraj case, the High Court of Rajasthan and the High Court of Allahabad have struck down the provisions for reservation in promotion in the services of the State of Rajasthan and the State of Uttar Pradesh, respectively. Subsequently, the Supreme Court has upheld the decisions of these High Courts striking down provisions for reservation in respective States.
>
> It has been observed that there is difficulty in collection of quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment. Moreover, there is uncertainty on the methodology of this exercise."

It will be seen that this Bill contains two things that are different from Article 16(4-A) as already enacted. First and foremost, it clarifies that the Scheduled Castes and the Scheduled Tribes that are notified under Articles 341 and 342 shall be deemed to be backward, which makes it clear that no quantifiable data is necessary to determine backwardness. Secondly, instead of leaving it to the States to determine on a case to case basis whether the Scheduled Castes and the Scheduled Tribes are adequately represented in any class or classes of posts in the services under the State, the substituted provision does not leave this to the discretion of the State, but specifies that it shall be to the extent of the

percentage of reservation provided to Scheduled Castes and Scheduled Tribes in the services of the State. This amendment was necessitated because a Division Bench of this Court in **U.P. Power Corporation Ltd.** (supra) had struck down Section 3(7) of the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 and Rule 8A of the U.P. Government Servants Seniority Rules, 1991, which read as under:

> "**3. *Reservation in favour of Scheduled Castes, Scheduled Tribes and Other Backward Classes***.—
>
> (1)-(6) xxx xxx xxx
>
> (7) If, on the date of commencement of this Act, reservation was in force under government orders for appointment to posts to be filled by promotion, such government orders shall continue to be applicable till they are modified or revoked."
>
> xxx xxx xxx
>
> "**8-A. *Entitlement of consequential seniority to a person belonging to Scheduled Castes or Scheduled Tribes***.—Notwithstanding anything contained in Rules 6, 7 or 8 of these Rules, a person belonging to the Scheduled Castes or Scheduled Tribes shall, on his promotion by virtue of rule of reservation/roster, be entitled to consequential seniority also."

This Court considered **Nagaraj** (supra) in detail and in paragraph 81, culled out various principles which **Nagaraj** (supra) had laid down. We are concerned here with principles (ix) and (x) in particular, which read as under:

> "*(ix*) The concepts of efficiency, backwardness and inadequacy of representation are required to be identified and measured. That exercise depends on the availability of data. That exercise depends on numerous factors. It is for this reason that the enabling provisions are required to be made because each competing claim seeks to achieve certain goals. How best one should optimise these conflicting claims can only be done by the administration in the context of local prevailing conditions in public employment.
>
> (*x*) Article 16(4), therefore, creates a field which enables a State to provide for reservation provided there exists backwardness of a class and inadequacy of representation in employment. These are compelling reasons. They do not exist in Article 16(1). It is only when these reasons are satisfied that a State gets the power to provide for reservation in the matter of employment."

19. We have already seen that, even without the help of the first part of Article 16(4-A) of the 2012 Amendment Bill, the providing of quantifiable data on backwardness when it comes to Scheduled Castes and Scheduled Tribes, has already been held by us to be contrary to the majority in **Indra Sawhney (1)** (supra). So far as the second part of the

substituted Article 16(4-A) contained in the Bill is concerned, we may notice that the proportionality to the population of Scheduled Castes and Scheduled Tribes is not something that occurs in Article 16(4-A) as enacted, which must be contrasted with Article 330. We may only add that Article 46, which is a provision occurring in the Directive Principles of State Policy, has always made the distinction between the Scheduled Castes and the Scheduled Tribes and other weaker sections of the people. Article 46 reads as follows:

> "**46. Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections**.—The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."

This being the case, it is easy to see the pattern of Article 46 being followed in Article 16(4) and Article 16(4-A). Whereas "backward classes" in Article 16(4) is equivalent to the "weaker sections of the people" in Article 46, and is the overall genus, the species of Scheduled Castes and Scheduled Tribes is separately mentioned in the latter part of Article 46 and Article 16(4-A). This is for the reason, as has been pointed

out by us earlier, that the Scheduled Castes and the Scheduled Tribes are the most backward or the weakest of the weaker sections of society, and are, therefore, presumed to be backward. Shri Dwivedi's argument that as a member of a Scheduled Caste or a Scheduled Tribe reaches the higher posts, he/she no longer has the taint of either untouchability or backwardness, as the case may be, and that therefore, the State can judge the absence of backwardness as the posts go higher, is an argument that goes to the validity of Article 16(4-A). If we were to accept this argument, logically, we would have to strike down Article 16(4-A), as the necessity for continuing reservation for a Scheduled Caste and/or Scheduled Tribe member in the higher posts would then disappear. Since the object of Article 16(4-A) and 16(4-B) is to do away with the nine-Judge Bench in **Indra Sawhney (1)** (supra) when it came to reservation in promotions in favour of the Scheduled Castes and Scheduled Tribes, that object must be given effect to, and has been given effect by the judgment in **Nagaraj** (supra). This being the case, we cannot countenance an argument which would indirectly revisit the basis or foundation of the constitutional amendments themselves, in order that one small part of **Nagaraj** (supra) be upheld, namely, that there be quantifiable data for judging backwardness of the Scheduled Castes and

the Scheduled Tribes in promotional posts. We may hasten to add that Shri Dwivedi's argument cannot be confused with the concept of "creamy layer" which, as has been pointed out by us hereinabove, applies to persons within the Scheduled Castes or the Scheduled Tribes who no longer require reservation, as opposed to posts beyond the entry stage, which may be occupied by members of the Scheduled Castes or the Scheduled Tribes.

20. The learned Attorney General also requested us to lay down that the proportion of Scheduled Castes and Scheduled Tribes to the population of India should be taken to be the test for determining whether they are adequately represented in promotional posts for the purpose of Article 16(4-A). He complained that **Nagaraj** (supra) ought to have stated this, but has said nothing on this aspect. According to us, **Nagaraj** (supra) has wisely left the test for determining adequacy of representation in promotional posts to the States for the simple reason that as the post gets higher, it may be necessary, even if a proportionality test to the population as a whole is taken into account, to reduce the number of Scheduled Castes and Scheduled Tribes in promotional posts, as one goes upwards. This is for the simple reason

that efficiency of administration has to be looked at every time promotions are made. As has been pointed out by B.P. Jeevan Reddy, J.'s judgment in **Indra Sawhney (1)** (supra), there may be certain posts right at the top, where reservation is impermissible altogether. For this reason, we make it clear that Article 16(4-A) has been couched in language which would leave it to the States to determine adequate representation depending upon the promotional post that is in question. For this purpose, the contrast of Article 16(4-A) and 16(4-B) with Article 330 of the Constitution is important. Article 330 reads as follows:

> "**330. Reservation of seats for Scheduled Castes and Scheduled Tribes in the House of the People**.—(1) Seats shall be reserved in the House of the People for—
>
> (*a*) the Scheduled Castes;
>
> (*b*) the Scheduled Tribes except the Scheduled Tribes in the autonomous districts of Assam; and]
>
> (*c*) the Scheduled Tribes in the autonomous districts of Assam.
>
> (2) The number of seats reserved in any State or Union territory for the Scheduled Castes or the Scheduled Tribes under clause (1) shall bear, as nearly as may be, the same proportion to the total number of seats allotted to that State or Union territory in the House of the People as the population of the Scheduled Castes in the State or Union territory or of the Scheduled Tribes in the State or Union territory or part of the State or Union

territory, as the case may be, in respect of which seats are so reserved, bears to the total population of the State or Union territory.

(3) Notwithstanding anything contained in clause (2), the number of seats reserved in the House of the People for the Scheduled Tribes in the autonomous districts of Assam shall bear to the total number of seats allotted to that State a proportion not less than the population of the Scheduled Tribes in the said autonomous districts bears to the total population of the State.

Explanation.—In this article and in Article 332, the expression "population" means the population as ascertained at the last preceding census of which the relevant figures have been published:

Provided that the reference in this Explanation to the last preceding census of which the relevant figures have been published shall, until the relevant figures for the first census taken after the year 2026 have been published, be construed as a reference to the 2001 census."

It can be seen that when seats are to be reserved in the House of the People for the Scheduled Castes and Scheduled Tribes, the test of proportionality to the population is mandated by the Constitution. The difference in language between this provision and Article 16(4-A) is important, and we decline the invitation of the learned Attorney General to say any more in this behalf.

21. Thus, we conclude that the judgment in **Nagaraj** (supra) does not need to be referred to a seven–Judge Bench. However, the conclusion in **Nagaraj** (supra) that the State has to collect quantifiable data showing backwardness of the Scheduled Castes and the Scheduled Tribes, being contrary to the nine-Judge Bench in **Indra Sawhney (1)** (supra) is held to be invalid to this extent.

……..…CJI
(Dipak Misra)

……..……J.
(Kurian Joseph)

……..J.
(R.F. Nariman)

……..J.
(Sanjay Kishan Kaul)

……..J.
(Indu Malhotra)

New Delhi;
September 26, 2018.