**IN THE SUPREME COURT OF INDIA**

**CIVIL APPELLATE JURISDICTION**

**SLP (Civil) NO. 35900 OF 2016**

**[Arising out of M.P. H.C. order dated 30.4.2016**

**in W.P (C) No. 12306 of 2012]**

In the matter of:

**Madhya Pradesh Anusuchit Jati/ Janjati**

**Adhikari Evam Karamchari Sangh** **...Petitioner/Appellants**

**Versus**

**Sh. Anil Kumar Singh & Ors.** **...Respondents**



---

**WRITTEN SUBMISSIONS ON BEHALF OF THE PETITIONER**

**BY SR. ADV. MS. INDIRA JAISING**

---

**WRITTEN SUBMISSIONS ON BEHALF OF THE PETITIONERS**

**BY SR. ADV. MS. INDIRA JAISING**

---

## I. ISSUES RAISED IN THE REFERENCE

**1.** Two issues are raised in the reference order dated November 14, 2017. The reference order reads as:

> *"**1.** The questions posed in these cases involve the interpretation of Articles 16(4), 16(4A) and 16(4B) of the Constitution of India in the backdrop of mainly three Constitution Bench decisions – (1) **Indra Sawhney and others v. Union of India and others (1992) Supp 3 SCC 217, (**2) **E.V Chinnaiah v. State of A.P. and others (2005) 1 SCC 394** and (3) **M. Nagaraj and others v. Union of India and others. (2006) 8 SCC 212**. One crucially relevant aspect brought to our notice is that **Nagaraj** (supra) and **Chinnaiah** (supra) deal with the disputed subject namely backwardness of the SC/ST but **Chinnaiah** (supra) which came earlier in time has not been referred to in **Nagaraj** (supra). The question of further and finer interpretation on the application of Article 16(4A) has also arisen in this case. Extensive arguments have been advanced from both sides. The petitioners have argued for a re-look of **Nagaraj** (supra) specifically on the ground that test of backwardness ought not to be applied to SC/ST in view of **Indra Sawhney** (supra) and **Chinnaiah** (supra). On the other hand, the counsel for the respondents have referred to the cases of **Suraj Bhan Meena and Another v. State of Rajasthan and others (2011) 1 SCC 467**; **Uttar Pradesh Power Corporation Limited v. Rajesh Kumar and others (2012) 7 SCC 1**; **S. Panneer Selvam and others v. State of Tamil Nadu and others (2015) 10 SCC 292**; **Chairman and Managing Director, Central Bank of India and others v. Central Bank of India SC/ST Employees Welfare Association and others (2015) 12 SCC 308** and **Suresh Chand Gautam v. State of Uttar Pradesh and others (2016) 11 SCC 113** to contend that the request for a revisit cannot be entertained ad nauseam. However, apart from the clamour for revisit, further questions were also raised about application of the principle of creamy layer in situations of competing claims within the same races, communities, groups or parts thereof of SC/ST notified by the President under Articles 341 and 342 of the Constitution of India."*

**2.** It is respectfully submitted that this Hon'ble Court ought not go in the above-mentioned question namely whether the '*creamy layer*' should be excluded from the applicability to Article 16(4A) of the Constitution for the reason that the said question has not been raised by any of the

petitioners or the respondents in the several appeals/ petitions in this court. In any event, ***Ashoka Kumar Thakur v. Union of India, (2008) 6 SCC 1*** has held that the concept of '*creamy layer*' does not apply to Scheduled Castes and Scheduled Tribes:

***K.G. Balakrishnan, CJ***

> *"**178**. N.M. Thomas case [(1976) 2 SCC 310: 1976 SCC (L&S) 227] does not state that "creamy layer" principle should apply to SCs and STs. In K.C. Vasanth Kumar case [1985 Supp SCC 714] the "creamy layer" was used in the case of backward caste or class. …*
>
> *"**182**. **In none of these decisions it is stated that the "creamy layer" principle would apply to SCs and STs.** In Indra Sawhney case [1992 Supp (3) SCC 217: 1992 SCC (L&S) Supp 1: (1992) 22 ATC 385] it is specifically stated that the "creamy layer" principle will not apply to STs and SCs. In Nagaraj case [(2006) 8 SCC 212] in paras 110 and 120 and finally in paras 121, 122 and 123, it is only stated that when considering questions of affirmative action, the larger principle of equality such as 50% ceiling (quantitative limitation) and "creamy layer" (quantitative exclusion) may be kept in mind**. In Nagaraj case [(2006) 8 SCC 212] it has not been discussed or decided that the creamy layer principle would be applicable to SCs/STs. Therefore, it cannot be said that the observations made in Nagaraj case [(2006) 8 SCC 212] are contrary to the decision in Indra Sawhney case** [1992 Supp (3) SCC 217: 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] ."*
>
> *"**183**. **Moreover, the "creamy layer" principle is <u>not</u> yet applied as a principle of equality or as a general principle to apply for all affirmative actions.** The observations made by Chinnappa Reddy, J. in K.C. Vasanth Kumar case [1985 Supp SCC 714] are relevant in this regard. The learned Judge observed as under: (SCC p. 763, para 72)*
>
> > *"72. … One cannot quarrel with the statement that social science research and not judicial impressionism should form the basis of examination, by courts, of the sensitive question of reservation for backward classes. Earlier we mentioned how the assumption that efficiency will be impaired if reservation exceeds 50%, if reservation is extended to promotional posts or if the carry forward rule is adopted, is not based on any scientific data. One must, however, enter a caveat to the criticism that the benefits of reservation are often snatched away by the top creamy*

*layer of backward class or caste. That a few of the seats and posts reserved for backward classes are snatched away by the more fortunate among them is not to say that reservation is not necessary. This is bound to happen in a competitive society such as ours. Are not the unreserved seats and posts snatched away, in the same way, by the top creamy layer of society itself? Seats reserved for the backward classes are taken away by the top layers amongst them on the same principle of merit on which the unreserved seats are taken away by the top layers of society.""*

*"**186**. Moreover, right from the beginning, the Scheduled Castes and Scheduled Tribes were treated as a separate category and nobody ever disputed identification of such classes.* ***So long as "creamy layer" is not applied as one of the principles of equality, it cannot be applied to the Scheduled Castes and Scheduled Tribes. So far, it is applied only to identify the socially and educationally backward classes. We make it clear that for the purpose of reservation, the principles of "creamy layer" are not applicable for Scheduled Castes and Scheduled Tribes."***

***Pasayat and Thacker, JJ*** *(concurring)*

*"**293**. Though in M. Nagaraj case [(2006) 8 SCC 212] some observations of general nature have been made so far as the applicability of the principles to the Scheduled Castes and Scheduled Tribes are concerned, really that case did not concern with the Scheduled Castes and Scheduled Tribes. Similar is the position here. The focus on the identity test in M. Nagaraj case [(2006) 8 SCC 212] is unexceptionable. …*

[Emphasis Supplied]



## II. HISTORY OF JUDICIAL PRONOUNCEMENTS ON THE SUBJECT OF RESERVATIONS IN PROMOTIONS OF SCHEDULED CASTES AND SCHEDULED TRIBES

**3.** It is submitted that reservation in promotion was held to be not desirable in a nine-judge bench of this Hon'ble Court in ***Indra Sawhney v. Union of India (1992) Suppl. 3 SCC 217*** ("***Indra Sawhney***"**).** The relevant extract reads as:

*"**858**. … (7)* ***Article 16(4) does not permit provision for reservations in the matter of promotion.*** *This rule shall,*

*however, have only prospective operation and shall not affect the promotions already made, whether made on regular basis or on any other basis. We direct that our decision on this question shall operate only prospectively and shall not affect promotions already made, whether on temporary, officiating or regular/permanent basis. It is further directed that wherever reservations are already provided in the matter of promotion — be it Central Services or State Services, or for that matter services under any Corporation, authority or body falling under the definition of 'State' in Article 12 — such reservations may continue in operation for a period of five years from this day. Within this period, it would be open to the appropriate authorities to revise, modify or re-issue the relevant rules to ensure the achievement of the objective of Article 16(4). If any authority thinks that for ensuring adequate representation of 'backward class of citizens' in any service, class or category, it is necessary to provide for direct recruitment therein, it shall be open to it to do so. (Ahmadi, J expresses no opinion on this question upholding the preliminary objection of Union of India). It would not be impermissible for the State to extend concessions and relaxations to members of reserved categories in the matter of promotion without compromising the efficiency of the administration."*

*[Emphasis Supplied]*

**4.** However, in order to remove the basis on which ***Indra Sawhney***, so held, the Parliament enacted the Constitution (Seventy-seventh Amendment) Act, 1995 which inserted Article 16 (4-A) of the Constitution. It reads as:

"***Article 16 Equality of opportunity in matters of public employment.*** *……*

*[(**4A**) 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"*

**5.** It is submitted that subsequently a five-judge bench of this Hon'ble Court in ***M. Nagaraj v. Union of India, (2006) 8 SCC 212*** ("***M. Nagaraj***"), while upholding the validity of the Constitution's 77th, 81st, 82nd and 85th Amendments, has held that Article 16 (4-A) is subject to certain riders, namely, *'backwardness* and *inadequacy of representation* and *overall efficiency of the State administration'* under Article 335. The relevant extract reads as:

*"**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] ."*

***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.*

[Emphasis Supplied]



## III. PRELIMINARY SUBMISSIONS ON WHY *M. NAGARAJ* NEEDS RECONSIDERATION

**6.** It is submitted that Articles 16(4A) and 16(4B) do not flow from Article 16(4) as held ***M. Nagaraj***, but instead flows from Article 14 and Article 16(1) that is Equality before law and Equality of opportunity in matters of public employment.

**7.** It is submitted that the two expressions "controlling factors" and "compelling reasons" do not appear anywhere in the Constitution of India. Moreover, they are not interchangeable and hence the word "or" between them is misplaced. It is submitted that one namely, 'controlling factor' may refer to the question of absolute quantum of reservations as held in ***MR. Balaji v. State of Mysore, AIR 1963 SC 649*** and ***Indra Sawhney***, while the other namely, 'compelling reason' refers to the adequacy of representation mentioned in Article 16(4) and the necessity required for reservations to be made for SCs/STs or OBCs. "Backwardness" is an eligibility factor for making reservations for other backward classes'. 'Backwardness' is mentioned in Article 16 (4) but not Articles 16(4A) and 16(4B) in the classes in relation to SCs and STs.

**8.** It is submitted that "backwardness" is a question of eligibility and not a "controlling factor" as the court seems to suggest in ***M. Nagaraj***. In the case of SCs and STs, the issue of eligibility does not arise by virtue of Article 16(4) but by virtue of Articles 341and 342, whereas the question of eligibility to get reservations does arise for OBCs in that they have to prove their 'backwardness' with reference to Article 340.

**9.** It is submitted that the mere fact that SCs/STs and OBCs may be referred to as "Backward classes" in Article 16(4) does mean that they are governed by the same constitutional regime in the matter of promotion or in the matter of eligibility of reservations in recruitment or promotions.

**10.** It is submitted that "backwardness" for "OBCs" has to be established by quantifiable data under Article 340 as a condition of making reservations for them, whereas no such question arises for SCs and STs since they are identified under Articles 341 and 342.

**11.** It is submitted that the question of adequacy of representation is a question of *quantum* of reservations considered 'adequate' and is therefore a question of percentage of reservations which in any case is made having regard to the distribution of SCs and STs or OBCs in the general population and in public employment.

**12.** Hence, it is submitted that no proof of backwardness by quantifiable data is required by the State in relation to SCs and STs while making promotions in initial recruitment or in promotions for SCs and STs. Being SC and ST is *per se* proof of 'backwardness'. The nature of the backwardness contemplates social and political link to their caste and tribe status and not merely of their economic status. Moreover, the concept of "creamy layer" does not apply to SCs and STs as held in ***Indra Sawhney*** and in ***Ashoka Kumar Thakur v. Union of India, (2008) 6 SCC 1***.

**13.** Hence, it is submitted that the proof of backwardness is neither a 'controlling factor' nor a 'compelling reason' in relation to the need for making reservations for SCs and STs in the initial recruitment or in promotions, whereas the proof of backwardness is required for making reservations in recruitment for OBCs. It is further submitted that excluding the "creamy layer" in the matter of reservations for SCs and STs simply does not arise and hence it is neither a 'controlling factor' nor a 'compelling reason' for them and as section of them cannot be excluded from the benefits of reservation or promotion on that ground.

## IV. DETAILED ARGUMENTS

### A. Reservations in promotions for SCs and STs are not the 'exception' to the guarantee of equality: Articles 16(4A) and 16(4B) do not flow from Article 16(4), but instead flows from Article 14 and Article 16(1)

**14.** It is submitted that the entitlement to reservations in public employment are intended to give effect to the guarantee of equality under Article 14 of the Constitution. Article 14 reads as:

> ***14. Equality before law****: The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth*

**15.** It is submitted that Articles 15 and 16 are two different facets the right to equality guaranteed under Article 14. Moreover, Articles 14, 15 and 16 should be read together as a compendious equality code.

**16.** It is submitted that a seven-judge bench of this Hon'ble Court in ***State of Kerala v. N.M. Thomas, (1976) 2 SCC 310*** *("**N.M. Thomas**")* has iterated the afore-mentioned principle and held that:

**A.N. Ray, CJ**:

> ***21. Articles 14, 15 and 16 form part of a string of constitutional guaranteed rights. These rights supplement each other.*** *Article 16 which ensures to all citizens equality of opportunity in matters relating to employment is* ***an incident of guarantee of equality contained in Article 14. Article 16(1) gives effect to Article 14.*** *Both Articles 14 and 16(1) permit reasonable classification having a nexus to the objects to be achieved. Under Article 16 there can be a reasonable classification of the employees in matters relating to employment or appointment."*
>
> *"**44. Our Constitution aims at equality of status and opportunity for all citizens including those who are socially, economically and educationally backward.*** *The claims of members of Backward Classes require adequate representation in legislative and executive bodies. If members of Scheduled Castes and tribes, who are said by this Court to be Backward Classes, can maintain minimum necessary requirement of administrative efficiency, not only representation but also preference may be given to them to enforce equality and to eliminate inequality.* ***Article 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 reservations of appointments and posts for them to secure adequate representation. These provisions will bring out the content of equality guaranteed by Articles 14, 15(1) and 16(1).*** *The basic concept equality is equality of opportunity for appointment. Preferential treatment for members of Backward Classes with due regard to administrative efficiency alone can mean equality of opportunity for all citizens.* ***Equality under Article 16 could not have a different content from equality under Article 14****. Equality of opportunity for unequals can only mean aggravation of inequality. Equality of opportunity admits discrimination with reason and prohibits discrimination without reason. Discrimination with reasons means rational classification for differential treatment having nexus to the constitutionally permissible object. Preferential representation for the Backward Classes in services with due regard to administrative efficiency is permissible object and Backward Classes are a rational classification recognised by our Constitution. Therefore, differential*

*treatment in standards of selection are within the concept of equality."*

***K.K. Mathew, J*** *(concurring)*

*"**78**. I agree that Article 16(4) is capable of being interpreted as an exception to Article 16(1) if the equality of opportunity visualized in Article 16(1) is a sterile one, geared to the concept of numerical equality which takes no account of the social, economic, educational background of the members of Scheduled Castes and scheduled tribes.* ***If equality of opportunity guaranteed under Article 16(1) means effective material equality, then Article 16(4) is not an exception to Article 16(1). It is only an emphatic way of putting the extent to which equality of opportunity could be carried viz., even up to the point of making reservation.****"*

***V.R. Krishna Iyer, J (****concurring*)

*"**136.** The next hurdle in the appellant's path relates to Article 16(4).* ***To my mind, this sub-article serves not as an exception but as an emphatic statement, one mode of reconciling the claims of backward people and the opportunity for free competition the forward sections are ordinarily entitled to.*** *In the language of Subba Rao, J. (as he then was), in Devadasan [AIR 1964 SC 179 : (1964) 4 SCR 680, 700 : (1965) 2 LLJ 560] .*

> *"**The expression 'nothing in this article' is a legislative device to express its intention in a most emphatic way that the power conferred thereunder is not limited in any way by the main provision but falls outside it. It has not really carved out an exception, but has preserved a power untrammelled by the other provisions of the article**."*
>
> ***True, it may be loosely said that Article 16(4) is an exception but, closely examined, it is an illustration of constitutionally sanctified classification.*** *Public services have been a fascination for Indians even in British days, being a symbol of State power and so a special article has been devoted to it. Article 16(4) need not be a saving clause but put in due to the over-anxiety of the draftsman to make matters clear beyond possibility of doubt (see, for instance, CIT v. Shaw Wallace & Co. [59 IA 206 : AIR 1932 PC 138] )."*

***137**. "reservation" based on classification of backward and forward classes, without detriment to administrative standards (as*

*this Court has underscored) is but an application of the principle of equality within a class and grouping based on a rational differentia, the object being advancement of backward classes consistently with efficiency.* ***Article 16(1) and (4) are concordant. This Court has viewed Article 16(4) as an exception to Article 16(1). Does classification based on desparate backwardness render Article 16(4) redundant? No. Reservation confers pro tanto monopoly, but classification grants under Article 16(1) ordinarily a lesser order of advantage. T****he former is more rigid, the latter more flexible, although they may overlap sometimes. Article 16(4) covers all backward classes; but to earn the benefit of grouping under Article 16(1) based on Articles 46 and 335 as I have explained, the twin considerations of terrible backwardness of the type harijans endure and maintenance of administrative efficiency must be satisfied."*

*"139.* ***It is platitudinous constitutional law that Articles 14 to 16 are a common code of guaranteed equality, the first laying down the broad doctrine, the other two applying it to sensitive areas historically important and politically polemical in a climate of communalism and jobbery****."*

***S. Murtaza Fazal Ali, J***

*"****158****. It is no doubt true that Article 16(1) provides for equality of opportunity for all citizens in the services under the State. It is, however, well-settled that the doctrine contained in Article 16 is a hard and reeling reality, a concrete and constructive concept and not a rigid rule or an empty formula.* ***It is also equally well-settled by several authorities of this Court that Article 16 is merely an incident of Article 14, Article 14 being the genus is of universal application whereas Article 16 is the species and seeks to obtain equality of opportunity in the services under the State. The theory of reasonable classification is implicit and inherent in the concept of equality for there can hardly be any country where all the citizens would be equal in all respects. Equality of opportunity would naturally mean a fair opportunity not only to one section or the other but to all sections by removing the handicaps if a particular section of the society suffers from the same. It has never been disputed in judicial pronouncements by this Court as also of the various High Courts that Article 14 permits reasonable classification. But what Article 14 or Article 16 forbid is hostile discrimination and not reasonable classification. In other words, the idea of classification is implicit in the concept of equality because equality means equality to all and not merely to the advanced and educated sections of the society.*** *It follows,*

*therefore, that in order to provide equality of opportunity to all citizens of our country, every class of citizens must have a sense of equal participation in building up an egalitarian society, where there is peace and plenty, where there is complete economic freedom and there is no pestilence or poverty, no discrimination and oppression, where there is equal opportunity to education, to work, to earn their livelihood so that the goal of social justice is achieved. Could we, while conferring benefits on the stronger and the more/advanced sections of the society, ignore the more backward classes merely because they cannot come up to the fixed standards? Such a course, in my opinion, would lead to denial of opportunity to the backward classes resulting in complete annihilation of the concept of equality contained in Articles 14 and 16.* ***The only manner in which the objective of equality as contemplated by the founding fathers of our Constitution and as enshrined in Articles 14 and 16 can be achieved is to boost up the backward classes by giving them concessions, relaxations, facilities, removing handicaps, and making suitable reservations so that the weaker sections of the people may compete with the more advanced and in due course of time all may become equals and backwardness is banished for ever. This can happen only when we achieve complete economic and social freedom.*** *In our vast country where we have diverse races and classes of people, some of whom are drowned in the sea of ignorance and illiteracy, the concept of equality assumes very important proportions. There are a number of areas in some States like Kashmir, Sikkim, hilly areas of U.P., Bihar and the South, where due to lack of communications or transport, absence of proper educational facilities or because of old customs and conventions and other environmental reasons, the people are both socially and educationally backward. Could we say that the citizens hailing from these areas should continue to remain backward merely because they fall short of certain artificial standards fixed by various institutions? The answer must be in the negative. The directive principles enshrined in our Constitution contain a clear mandate to achieve equality and social justice. Without going into the vexed question as to whether or not the directive principles contained in Part IV override the fundamental rights in Part III there appears to be a complete unanimity of judicial opinion of this Court that the directive principles and the fundamental rights should be construed in harmony with each other and every attempt should be made by the Court, to resolve any apparent inconsistency. The directive principles contained in Part IV constitute the stairs to climb the high edifice of a socialistic State and the fundamental rights are the means through which one can reach the top of the edifice. I am fortified in my view by several decisions of this Court to which I will refer briefly.*

...

***Clause (4) of Article 16 of the Constitution cannot be read in isolation but has to be read as part and parcel of Article 16(1) and (2).*** *Suppose there are a number of backward classes who form a sizeable section of the population of the country but are not properly or adequately represented in the services under the State the question that arises is what can be done to enable them to join the services and have a sense of equal participation. One course is to make a reasonable classification under Article 16(1) in the manner to which I have already adverted in great detail. The other method to achieve the end may be to make suitable reservations for the backward classes in such a way so that the inadequate representation of the backward classes in the services is made adequate.* ***This form of classification which is referred to as reservation, is, in my opinion, clearly covered by Article 16(4) of the Constitution which is completely exhaustive on this point. That is to say clause (4) of Article 16 is not an exception to Article 14 in the sense that whatever classification can be made can be done only through clause (4) of Article 16. Clause (4) of Article 16, however, is an explanation containing an exhaustive and exclusive provision regarding reservation which is one of the forms of classification. Thus clause (4) of Article 16 deals exclusively with reservation and not other forms of classification which can be made under Article 16(1) itself. Since clause (4) is a special provision regarding reservation, it can safely be held that it overrides Article 16(1) to that extent and no reservation can be made under Article 16(1).*** *It is true that there are some authorities of this Court that clause (4) is an exception to Article 16(1) but* ***with due respect I am not in a position to subscribe to this view for the reasons that I shall give hereafter****."*

*"185.* ***In the first place if we read Article 16(4) as an exception to Article 16(1) then the inescapable conclusion would be that Article 16(1) does not permit any classification at all because an express provision has been made for this in clause (4). This is, however, contrary to the basic concept of equality contained in Article 14 which implicitly permits classification in any form provided certain conditions are fulfilled. Furthermore, if no classification can be made under Article 16(1) except reservation contained in clause (4) then the mandate contained in Article 335 would be defeated****."*

[Emphasis Supplied]

**17.** It is submitted that Justice VR Krishna Iyer in ***Javed Niaz Beg v. Union of India, (1980) Supp SCC 155*** has articulated the general character of equality under the Constitution to state that equality is a dynamic and not a formal concept. The relevant extract reads as:

> ***1.*** *… Equality before the law is the kernel of our constitutional order. But equality is not a static, rigid, formal or pedantic concept. A sensitized social scientist will easily agree that equality is dynamic, flexible, creative and developmentally sensitive, especially in the Third World conditions like ours. Once this imaginative approach is adopted, the submission of counsel will lose all force. Indeed, it will be counter-productive of the equality on which it is formally founded, as we will presently indicate.*

**18.** The same principle is iterated by this Hon'ble Court in ***Vijay Lakshmi v. Punjab University and ors., (2003) 8 SCC 440*** while deciding on the issue of reservations of posts in women's college/hostel for women only. The relevant extract of the judgment reads as:

> ***"4.*** *For deciding the issue, we would refer to* ***established propositions of law interpreting Articles 14 to 16****, which are:*
>
> *• Article 14 does not bar rational classification.*
>
> *• Reasonable discrimination between female and male for an object sought to be achieved is permissible.*
>
> *• Question of unequal treatment does not arise if there are different sets of circumstances.*
>
> *• Equality of opportunity for unequals can only mean aggravation of inequality.*
>
> *• Equality of opportunity admits discrimination with reasons and prohibits discrimination without reason. Discrimination with reasons means rational classification for differential treatment having nexus with constitutionally permissible objects. It is now an accepted jurisprudence and practice that the concept of equality before the law and the prohibition of certain kinds of discrimination do not require identical treatment. Equality means the relative equality, namely, the principle to treat equally what are equal and unequally what are unequal. To treat unequals differently according to their inequality is not only permitted but required (Re St. Stephen's College v. University of Delhi [(1992) 1 SCC 558] .)*
>
> *• Sex is a sound basis for classification.*
>
> *• Article 15(3) categorically empowers the State to make special provision for women and children.*
>
> *•* ***Articles 14, 15 and 16 are to be read conjointly****.*
>
> [Emphasis Supplied]

**19.** It follows from this that reservations are not the "*exception*" to the guarantee of equality, but in fact give effect to guarantee of equality for SC and ST and OBCs. It is submitted that Article 16(4A) is a facet of Article 14 and 16(1) and is intended both of which form a compendious code.

**20.** It is submitted that the same principle was iterated in ***Indra Sawhney*** which held that Article 16(4) is a fundamental right and a facet of Article 16(1) and further that Article 16(1) is a facet of Article 14. The Court, as held by Jeevan Reddy J. (for Kania C.J., Venkatachalaiah, Ahmadi JJ and himself), also held that Article 16(4) *are not enabling provisions but are intended to give the effect on right to equality and impose mandatory duty on the state.* The relevant extract reads as:

> ***741.*** *.... In our respectful opinion, the view taken by the majority in Thomas [(1976) 2 SCC 310, 380 : 1976 SCC (L&S) 227 : (1976) 1 SCR 906] is the correct one. We too believe that Article 16(1) does permit reasonable classification for ensuring attainment of the equality of opportunity assured by it.* ***For assuring equality of opportunity, it may well be necessary in certain situations to treat unequally situated persons unequally. Not doing so, would perpetuate and accentuate inequality. Article 16(4) is an instance of such classification, put in to place the matter beyond controversy.*** *The "backward class of citizens" are classified as a separate category deserving a special treatment in the nature of reservation of appointments/posts in the services of the State. Accordingly,* ***we hold that clause (4) of Article 16 is not exception to clause (1) of Article 16. It is an instance of classification implicit in and permitted by clause (1).*** *The speech of Dr Ambedkar during the debate on draft Article 10(3) [corresponding to Article 16(4)] in the Constituent Assembly — referred to in para 693 — shows that a substantial number of members of the Constituent Assembly insisted upon a "provision (being) made for the entry of certain communities which have so far been outside the administration", and that draft clause (3) was put in in recognition and acceptance of the said demand. It is a provision which must be read along with and in harmony with clause (1). Indeed, even without clause (4), it would have been permissible for the State to have evolved such a classification and made a provision for reservation of appointments/posts in their favour. Clause (4) merely puts the matter beyond any doubt in specific terms.*
>
> ***742****. Regarding the view expressed in Balaji [1963 Supp 1 SCR 439: AIR 1963 SC 649] and Devadasan [T. Devadasan v. Union of*

*India, (1964) 4 SCR 680 : AIR 1964 SC 179 : (1965) 2 LLJ 560] , it must be remembered that at that time it was not yet recognised by this Court that Article 16(1) being a facet of Article 14 does implicitly permit classification. Once this feature was recognised the theory of clause (4) being an exception to clause (1) became* ***untenable****. It had to be accepted that clause (4) is an instance of classification inherent in clause (1). Now, just as Article 16(1) is a facet or an elaboration of the principle underlying Article 14, clause (2) of Article 16 is also an elaboration of a facet of clause (1). If clause (4) is an exception to clause (1) then it is equally an exception to clause (2). Question then arises, in what respect if clause (4) an exception to clause (2), if 'class' does not means 'caste'. Neither clause (1) nor clause (2) speak of class. Does the contention mean that clause (1) does not permit classification and therefore clause (4) is an exception to it. Thus, from any point of view, the contention of the petitioners has no merit.*

[Emphasis Supplied]

**21.** Further, P.B. Sawant, J. in his concurring view in ***Indra Sawhney***, observed as under:

***428.*** *With the majority decision of this Court in State of Kerala v. N.M. Thomas [(1976) 2 SCC 310, 380 : 1976 SCC (L&S) 227 : (1976) 1 SCR 906] having confirmed the minority opinion of Subba Rao, J in T. Devadasan v. Union of India [T. Devadasan v. Union of India, (1964) 4 SCR 680 : AIR 1964 SC 179 : (1965) 2 LLJ 560] the settled judicial view is that* ***clause (4) of Article 16 is not an exception to clause (1) thereof, but is merely an emphatic way of stating what is implicit in clause (1)****.*

[Emphasis Supplied]

**22.** Further, R. Pandian, J. in his concurring view in ***Indra Sawhney***, observed in para 243(1) and (6) as under:

*"****243****. In Summation:*

***(1) Article 16(4) of the Constitution is neither an exception nor a provisio to Article 16(1)****. It is exhaustive of all the reservations that can be made in favour of backward class of citizens.* ***It has an overriding effect on Article 16(1) and (2)."***

***(6) The power conferred on the State under Article 16(4) is one coupled with a duty and, therefore, the State has to exercise that power for the benefit of all those, namely, backward class for whom it is intended****."*

[Emphasis Supplied]

**23.** It is submitted that ***M. Nagaraj*** has followed the minority decision of ***Indra Sawhney*** and hence is *per incuriam*.

**24.** The minority view taken in ***Indra Sawhney*** as relied upon by ***M. Nagaraj*** reads as:

> ***TK Thommen J.:***
> ***"284.*** *… It is an enabling provision conferring a discretionary power on the State; … It is in the nature of an exception or a proviso to the general rule of equality"*
>
> ***R.M. Sahai J.:***
> ***563.*** *… The one is substantive equality and the other is protective equality. Article 16(1) is a fundamental right of a citizen whereas Article 16(4) is an obligation of the State. The former is enforceable in a court of law, whereas the latter is "not constitutional compulsion" but an enabling provision. Whether Article 16(4) is "in substance, an exception" …One is mandatory and operates automatically whereas the other comes into play on identification of backward class of citizens and their inadequate representation.*
>
> **Kuldip Singh, J.:**
> **383.** *… On these issues I entirely agree and adopt the reasoning and the conclusions reached by R.M. Sahai, J …*

**25.** This view is contrary to the observation in the majority judgment of B.P. Jeevan Reddy, J. in ***Indra Sawhney*** in the last line of paragraph 792:

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

**26.** It is submitted that the provision of Article 16(4) or (16(4-A) are part of Part III of the Constitution, hence these provisions have rightly been classified as classification in ***Indra Sawhney*** which has relied on ***N.M. Thomas*** of a 7-judge bench. Hence, the judgment in ***M. Nagaraj*** is per incuriam since it relies on a minority judgement and for that reason also should be referred to a larger bench.

**27.** It is submitted that **P.S. Krishnan**'s book titled '*Social Exclusion and Justice in India*' published by Routledge in the year 2018 on Pages 160-161 may be referred to:

> *"… Justice is social, economic and political. Of these, social justice is of special significance for the SCs, STs and BCs, as I shall explain below.*

*Equality is spelt out as equality of status and equality of opportunity. Equality of status harks back to the past and the correction required therein. Equality of opportunity refers to the future. The SCs, STs and BCs have suffered inequality of status in different ways and in different degrees. Therefore, equality of status, correcting the historical asymmetry is significant for them. But equality of status will only correct the past. The future depends on equality of opportunity, which has been denied to these three categories in different ways and in different degrees, by various means like denial of land/equal share of land and other resources and denial of access to education. Therefore, equality of opportunity is of practical significance for them. Fraternity places emphasis on the dignity of the individual. The caste system, which was and continues to be a mechanism to facilitate the monopolization of resources and advantages by limited sections of the society and imposition of labour and inferior services on different sections of the majority of the population, also negated the dignity of individuals belonging to the latter.*

*The extreme manifestation of this denial of dignity is "untouchability" suffered by SCs. There are different degrees and forms of denial of dignity short of "untouchability" which the masses of the other two categories have suffered from through the operation of the caste system. Therefore, social justice, social equality and social dignity are important aspects of human rights in India as laid down by the Constitution and these are of the greatest significance for the victims of the traditional social order.*

*The term "social justice", which is highly evocative and comprehensive, need to be clearly understood. It is often taken by educated people of metropolitan India to pertain to matters like prevention of premature marriage, abolition of evil customs like dowry, Sati, promotion of widow remarriage etc. while these have their own significance, in the Indian context and in the context of SCs, STs and BCs, social justice is a much more comprehensive concept embracing economic liberation (being agricultural wage-labourers in rural India and casual wage-labourers in urban India, as the largest proportion of SC workers are, is not economic freedom), educational parity with Socially Advanced Classes (SACs) at all stages and levels of education, social dignity and real equality of opportunity in all fields at all levels for SCs, STs and BCs including minorities belonging to these three categories (SCRM, STRM, BCRM).*

*Social justice involves justice for those categories of people who have been denied justice by the inherited social system of India. The denial of justice to them permeates all aspects of life, economic,*

*educational, cultural and even socio-linguistic. Similarly, social equality which is related to equality of status requires equalization of the deprived classes, in units of castes, tribes, communities, and other social groups, with the advanced castes in all parameters of life and existence, economic, educational, cultural and in terms of living conditions and real opportunities of life. Only when social justice and social equality are ensured in this comprehensive form covering all aspects of life can we establish a regime of equality in the nation as mandated by the Constitution in a rich profusion of articles which expand and specify the concept of social justice and social equality."*

**28.** Hence, it is submitted that promotions with consequential seniority for SCs and STs are a logical extension of guarantee of equality of opportunity and reservations at the recruitment level.

**29.** It is submitted that the ruling in ***M. Nagraj*** that reservations are based on Article 16 (4) seems to suggest that they are an exception to the rule of Equality. It is submitted that the said observation is contrary to the law declared by larger benches to the effect that Article 16(4) is not an exception to the rule of equality but a facet of equality.

**B. <u>Claims of Scheduled Castes and Scheduled Tribes are primarily based on Article 335 read with Articles 14, 15, 16, 16(4A) and 16(4B)</u>**

**30.** It is submitted that the entitlement to reservations in employment including promotions flows from Article 335 read with Articles 14, 15, 16 and 16(4A) and 16(4B). Article 335 reads as follows:

***Art. 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.*

**31.** It is submitted that reservations in employment are "claims" that the SC and ST communities have in the matter of equal and adequate representations in the matter of employment in the state.

**C. <u>Backwardness need not be proved for Scheduled Castes and Scheduled Tribes as there are different processes for identification between SCs/STs and OBCs</u>**

**32.** It is submitted that SCs and STs on one hand and OBCs on the other hand are two separate categories under the Constitution. Moreover, it is submitted that the constitutional scheme for identification of these categories is dramatically different from each other and is laid out into two separate categories. Thus, no court or authority, nor any State can devise a different process of identification than that provided in the Constitution.

**33.** It is submitted that SCs and STs are defined in Articles 366(24) and 366(25), which read as:

> *"**Art. 366 (24) "Scheduled Castes"** means such castes, races or tribes or parts of or groups within such castes, races or tribes as are deemed under article 341 to be Scheduled Castes for the purposes of this Constitution;"*
>
> ***"Art. 366 (25) "Scheduled Tribes"** means such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under article 342 to be Scheduled Tribes for the purposes of this Constitution;"*

**34.** Further, it is submitted that ***Article 341*** empowers the President after consultation with the Government of the State by public notification to 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. Article 341 read as:

> *"**Article 341. Scheduled Caste***
> *(1) The President may with respect to any State [or Union territory], and where it is a State, after consultation with the Governor thereof, **<u>by public notification</u>**, <u>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</u>, 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."*

[Emphasis Supplied]

**35.** It is submitted that *the* ***Constitution Scheduled Caste Order 1950*** is the public notification as issued and amended from time to time by the President to include castes comes within the ambit of Article 341 of the Constitution.

**36.** Similarly, ***Article 342*** empowers the President after consultation with the Government of the State by public notification to 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. Article 342 read as:

*"**Article 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."*

[Emphasis Supplied]

**37.** It is submitted that *the* ***Constitution Scheduled Tribe Order 1950*** is the public notification as issued and amended from time to time by the President to include castes comes within the ambit of Article 342 of the Constitution.

**38.** Therefore, it is submitted that under Articles 341 and 342, the process of identification of SCs and STs is undertaken exclusively by the Union of India in consultation with the State Governments. Hence, the power to identify SCs and STs is with the Union of India alone. It is submitted that under Article 341(2) and Article 342(2) the Parliament may by law include in or exclude from the list of SCs and STs. Hence it is submitted that no authority other than Union of India acting through the President

of India or through the Parliament can identify, include or exclude Scheduled Castes and Scheduled Tribes from the list of Presidential Order.

**39.** As contrasted with the above constitutional scheme, the process of identifying socially and educationally backward classes (also known as OBCs) is contained in Article 340 of the Constitution.

**40.** It is submitted that under Article 340, the President may by order appoint a Commission consisting of such persons as he thinks fit to investigate the conditions of socially and educationally backward classes within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove such difficulties. Article 340 reads as:

> ***"Article 340. Appointment of a Commission to investigate the conditions of backward classes.***
> *(1) The President may by order appoint a Commission consisting of such persons as he thinks fit to investigate the conditions of socially and educationally backward classes within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove such difficulties and to improve their condition and as to the grants that should be made for the purpose by the Union or any State and the conditions subject to which such grants should be made, and the order appointing such Commission shall define the procedure to be followed by the Commission.*
> *(2) A Commission so appointed shall investigate the matters referred to them and present to the President a report setting out the facts as found by them and making such recommendations as they think proper.*
> *(3) The President shall cause a copy of the report so presented together with a memorandum explaining the action taken thereon to be laid before each House of Parliament."*
>
> [Emphasis Supplied]

**41.** The State may also appoint a Commission to investigate into the conditions of socially and educationally backward classes for the purposes of giving reservations to SC and ST, we are in this case not concerned with socially and educationally backward classes as in the case of OBCs.

**D. <u>Further sub-classification within Scheduled Castes and Scheduled Tribes is not allowed</u>**

**42.** It is submitted that the Mandal Commission was appointed by the President to make the investigation of backwardness for the OBCs and not for SCs and STs, pursuant to which two memorandums dated August and September 1991 were issued giving reservations to "other backward classes" in other public services. The said memorandum was challenged in ***Indra Sawhney***. The said judgment laid down the criteria of identification of socially and educationally backward classes other than SCs and STs for the purpose of Article 16(4). The said judgment has no application to reservations for SCs and STs, at initial recruitment or at promotion level.

**43.** It is submitted that Justices Kania, Ahmadi, Jeevan Reddy, Venkatachaliah in their majority opinion in ***Indra Sawhney*** have held that SCs and STs are admittedly and no doubt 'backward' for the purposes of Article 16(4) and guidelines being laid down for the State to identify backward classes do not apply and are not relevant for SC/STs. The relevant extract reads as:

> *"**781.** At the outset, we may state that for the purpose of this discussion, <u>we keep aside the Scheduled Tribes and Scheduled Castes (since they are admittedly included within the backward classes)</u>, 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.*
>
> [Emphasis Supplied]

**44.** It is submitted that this Hon'ble Court in ***Indra Sawhney*** has held that a classification can be based on 'backwardness' between OBCs but not in SC-STs. The relevant paras read as:

> "***796-797*** *...(e) It is not correct to say that the backward class contemplated by Article 16(4) is limited to the socially and educationally backward classes referred to in Article 15(4) and Article 340. <u>It is much wider. 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"</u>. The accent in Article 16(4) appears to be on social backwardness. Of course, social, educational and*

*economic backwardness are closely intertwined in the Indian context. The classes contemplated by Article 16(4) may be wider than those contemplated by Article 15(4).”*

“***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. …This is merely to show that even among backward classes, there can be a sub-classification on a reasonable basis.”*

[Emphasis Supplied]

**45.** It is submitted that in ***E.V. Chinniah, (2005) 1 SCC 394,*** where the question arose whether the State can sub-classify in backward and most backward classes in SC-STs, the five-judge bench of this Hon’ble Court held that the state had no power to do so. The relevant extracts read as:

*“**41**. …**definition clearly suggests that they are not to be sub-divided or sub-classified further**. **If a class within a class of members of the Scheduled Castes is created, the same would amount to tinkering with the List. Such sub-classification would be violative of Article 14 of the Constitution of India.** It may be true, as has been observed by the High Court, that the caste system has got stuck up in the Society but with a view to do away with the evil effect thereof, a legislation which does not answer the constitutional scheme cannot be upheld**. It is also difficult to agree with the High Court that for the purpose***

***of identifying backwardness, a further inquiry can be made by appointing a commission as to who amongst the members of the Scheduled Castes is more backward.*** *If benefits of reservation are not percolating to them equitably, measures should be taken to see that they are given such adequate or additional training so as to enable them to compete with the others but the same would not mean that in the process of rationalizing the reservation to the Scheduled Castes the constitutional mandate of Articles 14,15 and 16 could be violated.*

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

***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 of India, a further classification by way of micro classification is not permissible. Such classification of the members of different classes of people based on their respective castes would also be violative of the doctrine of reasonableness. Article 341 provides that exclusion even of a part or a group of castes from the Presidential List can be done only by the Parliament. The logical corollary thereof would be that the State Legislatures are forbidden from doing that. A uniform yardstick must be adopted for giving benefits to the members of the Scheduled Castes for the purpose of Constitution. The impugned legislation being contrary to the above constitutional scheme cannot, therefore, be sustained.*

***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 declared as ultra vires the Constitution.*

[Emphasis Supplied]

**46.** It is submitted that Justice Sinha in separate but concurring judgment in ***E.V Chinniah*** further distinguished between other backward classes, Scheduled Castes and Scheduled Tribes into following words:

"***76.*** *Having regard to the decision of this Court in Indra Sawhney v. Union of India backward class citizens can be classified in four different categories –(i) more backward, (ii) backward, (iii) Scheduled Caste, and (iv) Scheduled Tribe. A*

*contention has been raised that in Indra Sawhney the Court permitted a classification amongst Other Backward Classes and as such there is no reason as to why the said principle shall not be applied to the members of the Scheduled Castes. In Indra Sawhney itself this Court categorically stated that it was not concerned with the question as regards members of Scheduled Castes and Scheduled Tribes. (SCC para 792 at p. 725). It is relevant to note that Question 5 formulated by Jeevan Reddy, J. was only in relation to the further division in the backward classes into backward and more backward categories. Advisedly, no question was framed as regards division of Scheduled Castes into more backward and backward Scheduled Castes.*

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

[Emphasis Supplied]

**47.** Therefore, it is submitted that this Hon'ble Court has held that the SC/ST categories cannot be sub-classified between backward and most backward. It is essential to iterate here that it is the President of India alone can determine backwardness and include SCs and STs in the list issued under Articles 350 and 341 and no State or court can interfere with that list by making further divisions.

**48.** Therefore, it is submitted that no authority other than the President of India through a Presidential order can notify a caste or a tribe to be SC or ST under Articles 341 and 342 respectively and once it is so notified the caste or tribe is deemed to be 'backward' for the purpose of Article 16(4) and consequentially for the purpose of Articles 16(4-A) and 16(4-B).

**49.** It submitted that that Article 16 (4A) makes no mention of the requirement to identify backwardness as a pre-condition to making reservations in promotion for the SCs and STs. This is with good reason namely that backwardness is already indicated by virtue of being in the Presidential list. There is no mention of promotions for OBCs in Article

16(4-A). Hence to import the requirement of investigating by quantifiable data the backwardness of SC and ST as a pre-condition for promotion is contrary to the constitutional scheme and amounts to importing the process of identification of OBCs into the identification of SC and STs. The said requirement is therefore ultra vires Articles 341 and 342 of the constitution.

**50.** Even though ***M. Nagraj*** has itself *acknowledged* that Article 16 (4A) applies only to SC-STs and stands '*carved out*' of Article 16(4). The relevant extract from ***M. Nagraj*** reads as follows:

> *"**86**. Clause (4-A) follows the pattern specified in clauses (3) and (4) of Article 16. Clause (4-A) of Article 16 emphasises the opinion of the States in the matter of adequacy of representation. It gives freedom to the State in an appropriate case depending upon the ground reality to provide for reservation in matters of promotion to any class or classes of posts in the services. The State has to form its opinion on the quantifiable data regarding adequacy of representation. Clause (4-A) of Article 16 is an enabling provision. It gives freedom to the State to provide for reservation in matters of promotion. Clause (4-A) of Article 16 applies only to SCs and STs. The said clause is **carved out** of Article 16(4). Therefore, clause (4-A) will be governed by the two compelling reasons—"backwardness" and "inadequacy of representation", as mentioned in Article 16(4). If the said two reasons do not exist then the enabling provision cannot come into force. The State can make provision for reservation only if the above two circumstances exist. Further, in Ajit Singh (II) [(1999) 7 SCC 209 : 1999 SCC (L&S) 1239] this Court has held that apart from "backwardness" and "inadequacy of representation" the State shall also keep in mind "overall efficiency" (Article 335). Therefore, all the three factors have to be kept in mind by the appropriate Government in providing for reservation in promotion for SCs and STs.*

**51.** Here, the expression "*carved out*" in the above observation in ***M. Nagaraj*** indicates that the scope of Article 16(4) is wider than the scope of Article 16(4-A). It is for this reason that the expression "*backward classes*" in 16(4) includes both SC and ST and OBC. It is submitted that this however is not true. It is submitted that Article 16(4A) is not 'carved out' of Article 16(4) but rather it is a facet of Article 16(1) and is intended to further the guarantee of equality in Articles 14, 15 and 16 and the three articles form a compendious code as also held in ***Indra Sawhney*** *and* ***E.V. Chinnaih***. It is for this reason, ***M. Nagraj*** is per incuriam as it

treats reservations in promotions of SCs and STs as exception and not as part of equality.

**52.** It is therefore submitted that ***M. Nagraj*** fails to notice the difference between the process of identification of SCs/STs on the one hand and OBCs on the other under the Constitutional regime under Articles 341, 342 and 340. ***M. Nagaraj*** has hence fallen into the error of holding that backwardness has to be established on the basis of quantifiable data as a pre-condition for making reservations in promotion for SCs and STs.

**53.** Therefore, it is submitted that no authority other than the President of India through a Presidential order can notify a caste or a tribe to be SC or ST under Articles 341 and 342 respectively and once it is so notified the caste or tribe is deemed to be 'backward' for the purpose of Article 16(4) and consequentially for the purpose of Articles 16(4-A) and 16(4-B).

**54.** To this extent, ***M. Nagaraj*** is per incuriam and requires to be reconsidered and overruled.

**E. *M. Nagaraj has the effect of amending the Presidential order***

**55.** It is further submitted that since ***M. Nagaraj*** failed to note that the President of India alone can determine backwardness of SCs and STs and State or court cannot interfere with that list by making further divisions. ***M. Nagaraj*** has the effect of amending the Presidential order.

**56.** The SC-ST categories cannot be further sub-classified between backward and most backward or those identified as '*backward*' by 'quantifiable data' and those not identified with 'quantifiable data' as 'backward'. They are by virtue of inclusion in the list of Scheduled Castes under Article 341 and Scheduled Tribe under Article 342 are backward, entitled to the benefit of reservation in promotion as a group without any proof of backwardness. It is not permissible to further divide them into backward and not backward as held in ***E.V Chinnaiah***. To do so, would have the effect of amending the Presidential order which will have no authority or power to do. They are all equally entitled to the

benefit of Articles 16(4A) and 16(4B), without any further proof of backwardness.

**57.** It is submitted that Justice Sinha in a separate but concurring judgment in ***E.V Chinniah v. State of Andhra Pradesh, (2005) 1 SCC 394*** (***"E.V Chinniah")*** has held that:

> "***84*** *...The Constitution-makers inserted Articles 341 and 342 with a view to provide benefits to the members of the Scheduled Castes and Scheduled Tribes as belonging to a socially, educationally and economically backward class of citizens. Any legislation which would bring them out of the purview thereof or tinker with the order issued by the President of India would be unconstitutional in R. (Daly) v. Secy. of State for the Home Deptt. (AC at p. 548) Lord Stein observed that in the law context is everything? Constitutional law is a part of the Indian Law and being human superma lex its meaning is subject to textual consideration.*
>
> ***85****. As the Constitution itself treats the members of the Scheduled Castes as a single integrated class of most backward citizens, it is not competent for the legislature of a State to subdivide them into separate compartments with a separate percentage of reservation of each resulting in discouraging merit as well as the endeavour of individual members to excel – vide fundamental duty under Article 51-A(f). The operation of reservation policy ought to be in a manner consistent with the objective of promoting fraternity among all citizens, assuring the dignity of the individual and unity of the nation.*
>
> ***92.*** *The impugned Act as also the judgment of the High Court are premised on the observations in Indra Sawhney that there is no constitutional or legal bar for a State in categorising the backward classes as backward and more backward class. This court, however, while referring to Article 16(4) of the Constitution stated that it recognised only one class viz. backward class of citizens in the following terms: SCC p.716, para 781)*
>
> > *'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.'*
>
> ***93.*** *Scheduled Caste, however, is not a caste in terms of its definition as contained in Article 366(24) of the Constitution. They are brought within the purview of the said category by reason of*

*their **abysmal backwardness**. Scheduled Caste consists of not only the people who belong to some backward caste but also race or tribe or part of a groups within castes, races or tribes. **They are not merely backward but the backwardmost. A person even does not cease to be a Scheduled Caste** automatically even on his conversion to another religion. (See Punit Rai v. Dinesh Chaughary and State of Kerala v. Chandramohanan.)*

***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."*

[Emphasis Supplied]

**58.** Similarly, it is submitted that a bench of five judges of this Hon'ble Court in ***State of Maharashtra v. Milind*, (2001) 1 SCC 4 ("*Milind case*")** has held that it is not permissible to hold inquiry and let in evidence to decide or declare that any tribe or tribal community or part of or group within any tribe or tribal community is included in the general name even though it is not specifically mentioned in the entry concerned in the Constitution (Scheduled Tribes) Order, 1950. In this case, the court interpreted Articles 341 and 342 and laid down the object as to provide additional protection to SC/ STs and to avoid any dispute as to who constitutes a SC/ ST. The relevant extract reads as:

***"11.** By virtue of powers vested under **Articles 341 and 342** of the Constitution of India, **the President is empowered to issue public notification** for the first time specifying the castes, races or tribes or part of or groups within castes, races, or tribes which shall, for the purposes of the Constitution be **deemed to be Scheduled Castes or Scheduled Tribes** in relation to a State or Union Territory, as the case may be. The language and terms of Articles 341 and 342 are identical. What is said in relation to Article 341 mutatis mutandis applies to Article 342. **The laudable** object of the said articles is to **provide additional protection to the members of the Scheduled Castes and Scheduled Tribes having regard to social and educational backwardness from which they have been suffering since a considerable length of time**...In this view, a caste is a Scheduled Caste or a tribe is a Scheduled Tribe only if they are included in the President's Orders issued under Articles 341 and 342 for the purpose of the Constitution. Exercising the powers vested in him, the President has issued the Constitution (Scheduled Castes) Order, 1950 and the Constitution (Scheduled Tribes) Order, 1950."*

[Emphasis Supplied]

**59.** It is submitted that this Hon'ble Court in the ***Milind case*** further held that the State Governments or any other authority or courts or Tribunals are not vested with any power to modify or vary the President's Orders and only the Parliament can do so by law, in the following words:

> *"**12. Plain language and clear terms of these articles show** (1) the President under clause (1) of the said articles may with respect to any State or Union Territory and where it is a State, after consultation with the Governor, by public notification specify the castes, races or tribes or parts of or groups within the castes, races or tribes which shall for the purposes of the Constitution be deemed to be Scheduled Castes/Scheduled Tribes in relation to that State or Union Territory as the case may be; (2) under clause (2) of the said articles, **a notification issued under clause (1) cannot be varied by any subsequent notification except by law made by Parliament**. In other words, **Parliament alone is competent by law to include in or exclude a caste/tribe from the list of Scheduled Castes and Scheduled Tribes specified in notifications issued under clause (1) of the said articles**. In including castes and tribes in Presidential Orders, the President is authorised to limit the notification to parts or groups within the caste or tribe depending on the educational and social backwardness. It is permissible that only parts or groups within them be specified and further to specify castes or tribes thereof in relation to parts of the State and not to the entire State on being satisfied that it was necessary to do so having regard to social and educational backwardness. **The States had opportunity to present their views** through Governors when consulted by the President in relation to castes or tribes, parts or groups within them either in relation to the entire State or parts of State. It appears that the **object of clause (1) of Articles 341 and 342** was to **keep away disputes** touching whether a caste/tribe is a Scheduled Caste/Scheduled Tribe or not for the purpose of the Constitution. Whether a particular caste or a tribe is Scheduled Caste or Scheduled Tribe as the case may be, within the meaning of the entries contained in the Presidential Orders issued under clause (1) of Articles 341 and 342, is to be determined looking to them as they are. **Clause (2) of the said articles does not permit any one to seek modification of the said orders by leading evidence that the caste/Tribe (A) alone is mentioned in the Order but caste/Tribe (B) is also a part of caste/Tribe (A) and as such caste/Tribe (B) should be deemed to be a Scheduled Caste/Scheduled Tribe as the case may be**. It is only Parliament that is competent to amend the Orders issued under Articles 341 and 342. As can be seen from the entries in the*

*schedules pertaining to each State whenever one caste/tribe has another name it is so mentioned in the brackets after it in the schedules. In this view it serves no purpose to look at gazetteers or glossaries for establishing that a particular caste/tribe is a Scheduled Caste/Scheduled Tribe for the purpose of Constitution, even though it is not specifically mentioned as such in the Presidential Orders. Orders once issued under clause (1) of the said articles, cannot be varied by subsequent order or notification even by the President except by law made by Parliament.* ***Hence it is not possible to say that State Governments or any other authority or courts or Tribunals are vested with any power to modify or vary the said Orders.*** *If that be so, no inquiry is permissible, and no evidence can be let in for establishing that a particular caste or part or group within tribes or tribe is included in Presidential Order if they are not expressly included in the Orders. Since any exercise or attempt to amend the Presidential Order except as provided in clause (2) of Articles 341 and 342 would be futile, holding any inquiry or letting in any evidence in that regard is neither permissible nor useful."*

[Emphasis Supplied]

**60.** Furthermore, this Hon'ble Court in the ***Milind case*** referred to the Constitutional Assembly Debates on Articles 341 and 342 to hold that the object of these articles is to eliminate any kind of political factors having a play in the matter of the disturbance in the schedule so published by the President and thus no one including the State Governments and courts can modify such list except the Parliament:

*"**14.** In the **debates of Constituent Assembly** (Official Report, Vol. 9) while moving to add new Articles 300-A and 300-B after Article 300 (corresponding to Articles 341 and 342 of the Constitution), **Dr B.R. Ambedkar explained** as follows:*

*"The **object of these two articles**, as I stated, was to eliminate the necessity of burdening the Constitution with long lists of Scheduled Castes and Scheduled Tribes. It is now proposed that the President in consultation with the Governor or ruler of a State should have the power to issue a general notification in the Gazette specifying all the castes and tribes or groups thereof deemed to be Scheduled Castes and Scheduled Tribes for the purpose of these privileges which have been defined for them in the Constitution. The only limitation that has been imposed is this: that once a notification has been issued by the President, which, undoubtedly, he will be issuing in consultation with and on the advice of the Government of each State, thereafter, if any elimination was to be made from the list so notified or any*

*addition was to be made that must be made by Parliament and not by the President. The object is to eliminate any kind of political factors having a play in the matter of the disturbance in the schedule so published by the President.""*

*"**15**...**Courts cannot and should not expand jurisdiction to deal with the question** as to whether a particular caste, sub-caste; a group or part of tribe or sub-tribe is included in any one of the entries mentioned in the Presidential Orders issued under Articles 341 and 342 particularly so when in clause (2) of the said article, it is expressly stated that the said Orders cannot be amended or varied except by law made by Parliament. The power to include or exclude, amend or alter Presidential Order is expressly and exclusively conferred on and vested with Parliament and that too by making a law in that regard... **Allowing the State Governments or courts or other authorities or Tribunals to hold inquiry as to whether a particular caste or tribe should be considered as one included in the schedule of the Presidential Order, when it is not so specifically included, may lead to problems**. In order to gain advantage of reservations for the purpose of Article 15(4) or 16(4) several persons have been coming forward claiming to be covered by Presidential Orders issued under Articles 341 and 342. This apart, when no other authority other than Parliament, that too by law alone can amend the Presidential Orders, **neither the State Governments nor the courts nor Tribunals** nor any authority can assume jurisdiction to hold inquiry and take evidence to declare that a caste or a tribe or part of or a group within a caste or tribe is included in Presidential Orders in one entry or the other although they are not expressly and specifically included. **A court** cannot alter or amend the said Presidential Orders for the very good reason that it has no power to do so within the meaning, content and scope of Articles 341 and 342..."*

*"**31**... Fourthly, if the view of the High Court is accepted, it **will lead to absurd, unjust and ex facie illegal results running contrary to Articles 341 and 342 of the Constitution**..."*

[Emphasis Supplied]

**61.** It is submitted that the judgment in ***M. Nagraj*** is per incuriam to the extent that it failed to notice that Article 16(4) refers to '**any** backward classes' which would include SCs, STs and OBCs whereas Article 16(4-A) refers only to SCs and STs. Having referred to the fact that the said Article 16(4-A) is confined to promotions for SC and ST only, no further inquiry is called for to establish their backwardness or quantifiable data in relation to backwardness. Moreover, it is submitted that the

court in ***M Nagaraj*** failed to notice the decisions of the Supreme court in ***Milind case*** and ***E.V. Chinnaih***.

**62.** Therefore, it is submitted that there is no warrant for the conclusion that the State must come to the conclusion that there is backwardness by "*quantifiable data*" in relation to SCs and STs as a precondition to making reservations for promotions for SCs and STs. To do so, would be to alter the list of SC and ST as enumerated in the Presidential order and would be sitting in judgment over backwardness which has already been determined by the President.

**63.** Hence the requirement of quantifiable data for the purpose of promotion in ***M. Nagaraj case*** must be confined to OBCs only and to the extents it applies to SCs and STs, it must he held to be wrongly decided.



***F. Quantifiable data if any is for adequacy of representing not for backwardness, is to determine by percentage fixed and percentage of posts occupied***

**64.** It is submitted that while it may be necessary to have quantifiable data to measure adequacy or inadequacy of representation in public employment of SCs and STs, it is neither possible nor constitutionally necessary to measure backwardness of SC and ST since they are "deemed to be backward" under the Constitution of India. The quantification of inadequacy is evident from the number of backlog vacancies that remain unfilled and the fact that the required figure of 33% representation as required by the Rule is not achieved. No further quantification is needed. Once the percentage of required representation is fixed, the only question to be determined is whether the said percentage of representation is achieved in public employment. If it is not achieved, there is inadequate representation.

**65.** Thus, it is submitted that on a harmonious construction of Articles 16(1), 16(4) and Article 16(4-A), and Article 340 and 341 and 342, it must be held that there is no constitutional requirement of measuring backwardness of SC and STs as a pre-condition to making reservations in promotions and M. Nagaraj goes counter to the

judgments as also the plain reading of the aforementioned Articles in the Constitution.

**G. *M.* Nagaraj is per incuriam**

**66.** It is submitted that the judgment in ***M. Nagaraj*** cannot be treated as a precedent as there was no discussion of the provisions in the Constitution relating to SCs and STs and the binding precedents of larger benches. In ***Punjab Land Development and Reclamation Corpn. Ltd. v. Presiding Officer, Labour Court*, (1990) 3 SCC 682,** this Hon'ble Court has elaborated on the principle of per-incuriam and relevant paragraph reads as:

> ***"40.*** *We now deal with the question of per incuriam by reason of allegedly not following the Constitution Bench decisions.* ***The Latin expression per incuriam means through inadvertence. A decision can be said generally to be given per incuriam when this Court has acted in ignorance of a previous decision of its own or when a High Court has acted in ignorance of a decision of this Court. It cannot be doubted that Article 141 embodies, as a rule of law, the doctrine of precedents on which our judicial system is based****. In Bengal Immunity Company Ltd. v. State of Bihar [(1955) 2 SCR 603 : AIR 1955 SC 66 : (1955) 6 STC 446] , it was held that the words of Article 141, "binding on all courts within the territory of India", though wide enough to include the Supreme Court, do not include the Supreme Court itself, and it is not bound by its own judgments but is free to reconsider them in appropriate cases. This is necessary for proper development of law and justice. …"*
>
> [Emphasis Supplied]

**H. Domino effect of *M. Nagaraj***

**67.** The decision in **M. Nagaraj case** has been followed in subsequent judgements leading to the striking down of rules of reservations in promotions for SC-STs on the ground data no data on backwardness and inadequacy of representation was produced by the State concerned. Hence, the ratio of these judgments namely, ***Suraj Bhan Meena (ST) v. State of Rajasthan*, (2011) 1 SCC 467, *Uttar Pradesh Power Corporation Limited v. Rajesh Kumar, (2012) 7 SCC 1, S. Paneer Selvam v. State of Tamil Nadu, (2015) 10 SCC 292, Suresh***

***Chand Gautam v. State of Uttar Pradesh, (2016) 11 SCC 113*** will also be shaken.

**68.** It is submitted that vide a two-judge bench this Hon'ble Court in ***Suraj Bhan Meena (ST) v. State of Rajasthan***, **(2011) 1 SCC 467**, has held that Notifications dated 28/12/2002 and 25/4/2008 issued by the State of Rajasthan providing for consequential seniority and promotion to the members of the SC and ST communities was unconstitutional as the State failed to undertake the exercise of measuring backwardness of SC-STs by means of collecting quantifiable data. The relevant extracts reads as:

> *"**10.** In **M. Nagaraj** case [(2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013: AIR 2007 SC 71] , this Court while upholding the constitutional validity of the Constitution (Seventy-seventh Amendment) Act, 1995 and the Constitution (Eighty-fifth Amendment) Act, 2001, clarified the position that it would not be necessary for the State Government to frame rules in respect of reservation in promotion with consequential seniority, but in case the State Government wanted to frame such rules in this regard, then it would have to satisfy itself by quantifiable data, that there was backwardness, inadequacy of representation in public employment and overall administrative inefficiency and unless such an exercise was undertaken by the State Government, the rule relating to reservation in promotion with consequential seniority could not be introduced."*
>
> "***66.** The position after the decision in **M. Nagaraj** case [(2006) 8 SCC 212: (2007) 1 SCC (L&S) 1013] is that reservation of posts in promotion is dependent on the inadequacy of representation of members of the Scheduled Castes and Scheduled Tribes and Backward Classes and subject to the condition of ascertaining as to whether such reservation was at all required."*
>
> [Emphasis Supplied]

**69.** Similarly, this Hon'ble Court in ***Uttar Pradesh Power Corporation Limited v. Rajesh Kumar, (2012) 7 SCC 1***, the constitutional validity of Rule 8-A passed pursuant to S. 3(7) of the U.P. Public Services (Reservation of SCs, STs and Other BCs) Act, 1994 that provided that reservation in promotions which was in force by virtue of govt. orders as on date of commencement of the 1994 Act would continue to be applicable till such govt. orders were modified or revoked, was challenged. In the year 2002, prior to the decision in ***M. Nagaraj***, the State Govt. (without resorting to any such requirements as laid down

in M. Nagaraj case) had introduced Rule 8A with retrospective effect from 17-6-1995 providing for consequential seniority in promotions for SCs-STs. The Court held that such rule was unconstitutional as the State had failed to undertake an exercise of collecting quantifiable data measuring backwardness, inadequate representation and impact on efficiency. The relevant extracts reads as:

> *"**80.** In the conclusion portions, in paras 123 and 124, it has been ruled thus: (**M. Nagaraj case** [(2006) 8 SCC 212: (2007) 1 SCC (L&S) 1013: AIR 2007 SC 71], SCC pp. 278-79)*
>
> *"**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."*
>
> ***"86.** We are of the firm view that a fresh exercise in the light of the judgment of the Constitution Bench in **M. Nagaraj** [(2006) 8 SCC 212: (2007) 1 SCC (L&S) 1013 : AIR 2007 SC 71] is a categorical imperative. The stand that the constitutional amendments have facilitated the reservation in promotion with consequential seniority and have given the stamp of approval to the Act and the Rules cannot withstand close scrutiny inasmuch as the Constitution Bench has clearly opined that Articles 16(4-A) and 16(4-B) are enabling provisions and the State can make provisions for the same on certain basis or foundation. The conditions precedent have not been satisfied. **No exercise has been undertaken**. What has been argued with vehemence is that it is not necessary as the concept of reservation in promotion was already in vogue. We are unable to accept the said submission, for when the provisions of the Constitution are treated valid with certain conditions or riders, it becomes incumbent on the part of the State to appreciate and apply the test so that its amendments can be tested and withstand the scrutiny on parameters laid down therein."*

[Emphasis Supplied]

**70.** It is submitted that on account of the constitutional requirement of ***M. Nagraj*** for quantifiable data on backwardness, this court has struck down reservations in promotions in Rajasthan and in UP. These cases indicate the impact of the said requirement of quantifiable data on backwardness of SC-STs.

**71.** It is submitted that this Hon'ble Court in ***Rohtas Bhankar v. Union of India, (2014) 8 SCC 872***, which takes a different view, as there is no mention of the requirement of the need for quantifiable data as proof of backwardness in the matter of promotions under Article 16(4A).

## I. Reference to a larger bench is made out

**72.** It is submitted that for reasons stated above, this Hon'ble Court should refer ***M. Nagaraj*** for reconsideration to a larger bench.

**73.** It is submitted that this Hon'ble Court has summarised the principles on which a reference can be made to a larger bench in ***Supreme Court Advocates on record Association and anr. v. Union of India, (2016) 5 SCC 1***. The relevant extract of the judgment is as follows:

> ***673. There is absolutely no dispute or doubt that this Court can reconsider (and set aside) an earlier decision rendered by it.*** *But what are the circumstances under which the reconsideration can be sought? This Court has debated and discussed the issue on several occasions as mentioned above and* ***the broad principles that can be culled out from the various decisions suggest that:***
>
> ***673.1.*** *If the decision concerns an* ***interpretation of the Constitution****, perhaps the bar for reconsideration might be lowered a bit (as in Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225 (Thirteen-Judge Bench)). Although the remedy of amending the Constitution is available to Parliament, not all amendments are easy to carry out. Some amendments require following the procedure of ratification by the States. Nevertheless, where a constitutional issue is involved, the necessity of reconsideration should be shown beyond all reasonable doubt, the remedy of amending the Constitution always being available to Parliament.*

***673.2.*** *If the decision concerns the imposition of a tax, then too the bar might be lowered a bit since the tax burden would affect a large section of the public. However, the general principles for requiring reconsideration do not necessarily fall by the wayside.*

***673.3.*** *If the decision* ***concerns the fundamental rights of the people****,* ***then too the bar might be lowered for obvious reasons****. However again, the general principles for requiring reconsideration must be adhered to.*

***673.4.*** *In other cases, the Court must be* ***convinced that the earlier decision is plainly erroneous and has a baneful effect on the public; that it is vague or inconsistent or manifestly wrong****.*

***673.5.*** *If the decision only concerns two contending private parties or individuals, then perhaps it might not be advisable to reconsider it. Each and every error of law cannot obviously be corrected by this Court.*

***673.6.*** *The power to reconsider is not unrestricted or unlimited, but is confined within narrow limits and must be exercised sparingly and under exceptional circumstances for* ***clear and compelling reasons****. Therefore, merely because a view different from or contrary to what has been expressed earlier is preferable is no reason to reconsider an earlier decision. The endeavour of this Court must always be to ensure that the law is definite and certain and continuity in the interpretation of the law is maintained. In this regard, Union of India v. Raghubir Singh, (1989) 2 SCC 754 (Five-Judge Bench)] presents an interesting picture. Section 23(2) of the Land Acquisition Act, 1894 (as amended in 1984) was interpreted by this Court on 14-2-1985 in K. Kamalajammanniavaru v. Land Acquisition Officer, (1985) 1 SCC 582. That decision was overruled six months later on 14-8-1985 in Bhag Singh v. UT of Chandigarh, (1985) 3 SCC 737]. That decision was in turn overruled on 16-5-1989 in Union of India v. Raghubir Singh, (1989) 2 SCC 754 (Five-Judge Bench)] and the law laid down in K. Kamalajammanniavaru v. Land Acquisition Officer, (1985) 1 SCC 582 was reiterated. It is this uncertainty and absence of continuity in the law that is required to be avoided.*

***673.7.*** ***An earlier decision may be reconsidered if a material provision of law is overlooked [How is this to be ascertained?] or a fundamental assumption is found to be erroneous or if there are valid and compulsive or compelling reasons or if the issue is of fundamental importance to national life.*** *However, it might not be wise to overrule a decision*

*if people have changed their position on the basis of the existing law. This is because it might upset the legitimate expectation of persons who have made arrangements based on the earlier decision and also because the consequences of such a decision might not be foreseeable.*

***673.8.*** *Whether a decision has held the field for a long time or not is not of much consequence. In Bengal Immunity Co. Ltd. v. State of Bihar, (1955) 2 SCR 603: AIR 1955 SC 661 (Seven-Judge Bench)] a recent decision delivered by the Constitution Bench was overruled; in Pradeep Kumar Biswas v. Indian Institute of Chemical Biology, (2002) 5 SCC 111 (Seven-Judge Bench) a decision holding the field for a quarter of a century was overruled.*

***673.9.*** *Significantly, this Court has taken note of and approved the view that the changing times might require the interpretation of the law to be re-adjusted keeping in mind the 'infinite and variable human desires' and changed conditions due to 'development with the progress of years.' The interpretation of the law, valid for one generation may not necessarily be valid for subsequent generations. This is a reality that ought to be acknowledged as has been done by this Court in Maganlal Chhaganlal and by Chief Justice Dickson of the Canadian Supreme Court in The Queen v. Beauregard.[462] Similarly, the social context or 'contemporary social conditions or modern conceptions of public policy' cannot be overlooked. Oliver Wendell Holmes later a judge of the Supreme Court of the United States put it rather pithily when he said that:*

*'But the present has a right to govern itself so far as it can; and it ought always to be remembered that historic continuity with the past is not a duty, it is only a necessity.'*

[Emphasis Supplied]

**74.** It is further submitted that in order to challenge the said ruling, it is submitted that the matter be referred to the Chief Justice to be placed before a larger quorum of judges. Reference to a larger bench has been spelt out by this Hon'ble Court in ***Central Board of Dawoodi Bohra Community v. State of Maharashtra, (2005) 2 SCC 673,*** the relevant extracts of which reads as:

***12.*** *Having carefully considered the submissions made by the learned Senior Counsel for the parties and having examined the law laid down by the Constitution Benches in the above said decisions, we would like to sum up the legal position in the following terms:*

*(1) The law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or coequal strength.*

*(2) [**Ed.**: Para 12(2) corrected vide Official Corrigendum No. F.3/Ed.B.J./21/2005 dated 3-3-2005.] A Bench of lesser quorum cannot disagree or dissent from the view of the law taken by a Bench of larger quorum.* ***In case of doubt all that the Bench of lesser quorum can do is to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger quorum than the Bench whose decision has come up for consideration. It will be open only for a Bench of coequal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of coequal strength, whereupon the matter may be placed for hearing before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law the correctness of which is doubted.***

*(3) [**Ed.**: Para 12(3) corrected vide Official Corrigendum No. F.3/Ed.B.J./7/2005 dated 17-1-2005.] The above rules are subject to two exceptions: (i) the above said rules do not bind the discretion of the Chief Justice in whom vests the power of framing the roster and who can direct any particular matter to be placed for hearing before any particular Bench of any strength; and (ii) in spite of the rules laid down hereinabove, if the matter has already come up for hearing before a Bench of larger quorum and that Bench itself feels that the view of the law taken by a Bench of lesser quorum, which view is in doubt, needs correction or reconsideration then by way of exception (and not as a rule) and for reasons given by it, it may proceed to hear the case and examine the correctness of the previous decision in question dispensing with the need of a specific reference or the order of the Chief Justice constituting the Bench and such listing. Such was the situation in Raghubir Singh [(1989) 2 SCC 754] and Hansoli Devi [(2002) 7 SCC 273].*

[Emphasis Supplied]

**75.** Hence, it is submitted that the judgment in ***M. Nagaraj*** is per incuriam and should be referred to a larger bench.



**SETTLED BY:**

INDIRA JAISING,
Sr. Advocate

**DRAWN BY:**

AJITA SHARMA (Advocate
SUNIL FERNANDES (Advocate)

**FILED BY:**

[**SHASHI KIRAN**]
Advocate on Record
New Delhi-110024