SUPREME COURT OF INDIA

Subhash Chandra

Vs.

Delhi Subordinate Ser.Sel.Board

S.L.P.(Civil)No.24327 of 2005

(S.B.Sinha and Cyriac Joseph,JJ.)

04.08.2009

JUDGMENT

S.B.Sinha, J.

1. Leave granted

2. Interpretation and/ or application of the notifications and/or the circulars issued by the National Capital Territory of Delhi in terms of clause (1) of Article 341 of the Constitution of India is involved herein.

3. It arises out of a judgment and order dated 13.05.2005 passed by a Division Bench of the High Court of Delhi dismissing an appeal preferred from an order passed by a learned Single Judge of the said Court. The writ petition was filed by the appellant society which is registered under the Societies Registration Act, with its objects amongst others `upliftment of Backwards, Scheduled Castes and others of Delhi in education, social and cultural fields and to apply for and get all kinds of facilitation and relaxation and for safeguarding their interest in Government jobs'.

4. The background facts involving filing of this appeal are as follows :

> "The members of Scheduled Casts and Scheduled Tribes have an important place in our constitutional scheme. Article 341 of the Constitution empowers the President to specify the castes, races or tribes or part of or groups within castes, races or tribes with respect to any State or Union Territory for the purposes of the Constitution deemed to be Scheduled Castes in relation to that State or Union Territory as the case may be. Similar provision is contained in Article 342 of the Constitution of India with regard to the members of the Scheduled Tribes. Clause (2) of Article 341 which is relevant for our purpose reads as under:
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> (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."

5. Private respondents and/or their parents are migrants to Delhi. In their native places, they were declared to be the members of the Scheduled Castes.

6. Indisputably, the Ministry of Home Affairs issued a circular on or about 2.5.1975, in terms whereof the manner in which the claim of a person as being belonging to Scheduled Castes or Scheduled Tribes is required to be verified was laid down. Such verification was to be made having regard to the Presidential order specifying the Scheduled Castes and Scheduled Tribes in relation to the concerned State.

In the matter of verification of the caste of migrants, it was laid down:

"1. General (Applications in all cases):-

Where a person claims to belong to a Scheduled Castes and Scheduled Tribes by birth it could be verified:-

(i) That the person and his parents actually belong to the community claimed.

(ii) That this community includes in the Presidential Orders specifying the Scheduled Caste and Scheduled Tribes in relation to the concerned State.

(iii) That the person belongs to that State and to the area within that State in respect of which the community has been scheduled.

(iv) If the person claims to be a Scheduled Caste, he should profess either the Hindu or the Sikh religion.

(v) If the person claims to be a Scheduled Tribe, he may profess any religion."

2. Case of Migration:-

"(i) Where a person migrates from the portion of the State in respect of which his community is scheduled to another part of the same State in respect of which his community is not scheduled he will continue to be deemed to be a member of the Scheduled Caste or the Scheduled Tribe as the case may be in relation to that State.

(ii) Where a person migrates from one State to another, he can claim to belong to a Scheduled Caste or Scheduled Tribe only in relation to the State to which he originally belonged and not in respect of the State to which he has migrated.

7. Yet again, by way of a clarification issued by the National Capital Territory of Delhi dated 22.3.1977, it was, inter alia, stated :

2. As required under Article 341 and 342 of the Constitution, the President has, with respect to every State and Union Territory and where it is State after consultation with the Governor of the concerned State, issued orders notifying various Castes and Tribes as Scheduled Castes and Scheduled Tribes in relation that State or Union Territory from time tome. The inter State area restrictions have been deliberately imposed so that the people belonging to the specific community residing in a specific area, which has been assessed to qualify for Scheduled Castes or Scheduled Tribes status, only benefit from the facility provided for them. Since the people belonging to the same caste but living in different State/Union Territories may not necessarily suffer from the such disabilities, it is possible that two persons belonging to the same caste but living in different State/Union Territories may not both be treated to belong Scheduled Caste/Tribes or vice versa. Thus the residence of a particular person a particular locality assumes a special significance. The residence has not been understood in the literal or ordinary sense of the word. On the other hand it connotes the permanent residence of a person on the date of the notification of the Presidential Order scheduling his caste/tribe in relation to that locality. Thus a person who is temporarily away from his permanent place of abode at the time of the notification of the Presidential Order applicable in his case say for example to earn a living or seek education etc. can also be regarded as Scheduled Caste or a Scheduled Tribe, as the case may be, with regard to his relation to his State U.T. but he cannot be treated as such in relation to the place of his temporary residence notwithstanding the fact that the name of his caste/tribe has been scheduled in respect of that area in any Presidential Order.

8. Despite the same, however, on or about 8.4.1994, yet again a circular letter was issued; the relevant portions whereof read as under :

Subject: Issuing of other Backward Class certificates to migrants from other States/UT. Sir,

"1. In continuation of the DEPT's letter of 36012/22/93- Estt./SCT) dated 15th November, 1993, I am directed to say that it has been represented to this Department that persons belonging to OBCS who have migrated from one State to another for the purpose of employment, education etc. experience great difficulty in obtaining caste certificates from the States from which they have migrated, in order to remove this difficulty it has been decided that the prescribed authority of a State/UT Administration in terms of the DEPT letter aNo.16012/22/93-Estt. (SCT) dated 15th November, 1993 may issue the OBCS certificates to a person who has migrated from another States on the production of a genuine certificate issued to his father by the prescribed authority of the State his father's origin except where the prescribed authority feels that a detailed enquiry is necessary through the state of origin before the issue of the certificate.

2. The certificates will be issued irrespectively of whether the OBC candidate in question is included in the list of OBC pertaining to the State/U.T. to which the person has migrated. The facility does not alter the OBC status of the person in relation to the one at the other State/U.T. The OBC person on migration from the State/U.T. of his origin in another State/U.T. where his caste is not in the OBC list is entitled to the concession/benefits admissible to the OBCS from the state of his origin and Union Government but not from the State where he has migrated.

9. Keeping in view the aforementioned directions issued by the Union Territory, an advertisement was issued by the State Subordinate Selection Board. General instructions issued therein, inter alia, read as under : (2) SC and OBC candidates must furnish certificates issued by the competent authority of Government of NCT of Delhi issued on or before the closing date of receipt of application forms. (Illegible)

10. Questioning the legality and/or validity of the said circular, Shri Kunwar Pal and 22 others, claiming themselves to be entitled to the benefits of the aforementioned Presidential Notification declaring their caste to be Scheduled Castes but keeping in view the nature of verification specified by reason of the aforementioned circulars, filed writ petition in the High Court of Delhi at New Delhi which was registered as Civil Writ Petition No.5061 of 2001 praying, inter alia, for the following reliefs :

"(i) certiorari quashing the entire action of the respondents in not considering the Scheduled Castes certificates of the petitioners (Annexure P3) collectively and stating them not to be valid certificates:

(ii) mandamus directing the respondents to consider and appoint the petitioners to be posts of Assistant Teachers (Primary)-Hindi under reserved categories of Scheduled Castes as per petitioners' Scheduled castes certificates (Annexure P3) Collectively."

11. The Government of National Capital Territory having been served with a notice in the said writ application filed a counter affidavit contending, inter alia, that the notification involved two sets of castes/categories certificate' one in relation to the original inhabitants and the other relating to the migrants and stating :

"In other words candidates belonging to SC/ST/OBC Castes/communities whose state/UT of origin is other than the NCT of Delhi are not at all, eligible for benefit of reservation in the services/posts under the Govt. Of Delhi and the Local/Autonomous Bodies sub-ordinate to the said Government. The benefit of reservation in the services/posts in Government of Delhi and Local/Autonomous bodies is legally available to only those candidates who fall in the first category. The candidates falling in the second category can claim the benefit of reservation in the services/posts under the Central Government as well as Govt. of the state/U.T. of their origin. Such candidates are not, at all, entitled for grant of benefit of reservation in the services/posts under the Government of Delhi and Local/Autonomous bodies subordinate to the said Govt."

12. A learned Single Judge of the said Court, however, upon construction of clause (2) of the circular letter dated 2.5.1975, held as under: A reading of the aforesaid clause, however, shows that the same relates to a person who migrates from one State to another. In the present case the candidates are the progenies of person who had migrated. In my considered view there is a difference between the first generation migrant and the progenies of the said migrant. The benefit may be denied to the first generation migrant on the basis of the said circular but it cannot be denied to his progenies who are born and brought up in the migrated State.

13. Taking note of the fact that Delhi is an amalgam of people from various parts of the country and, thus, the benefit of the aforementioned Presidential notification, may not be extended to those who had migrated from other States, inter alia, raised a question as to what should be the cut off date to determine as to who is a Delhite. Opining that the circular letters had been issued with the object of protecting the rights of the persons who may be away from his State would fall in the category of that State and that only with a view to prevent injustice to such persons that the said circular had been issued. Referring to the decisions in *Marri Chandra Shekhar Rao v. Dean, Seth G.S. Medical College Ors*[1]. and Action Committee on Issue of Caste Certificate to *Scheduled Castes and Scheduled Tribes in the State of Maharashtra anr*[2]. it was held :

In my considered view the aforesaid judgment would not come to the aid to the respondents since the present case is not one of a similar nature. The benefit of reservation is sought by such of the petitioners who are born and brought up in Delhi but whose father or forefathers happened to migrate to Delhi over the last number of years. The writ petitioners before the High Court, however, strongly relied upon the decision of this Court in Ors[3]. and *S.Pushpa Ors. v. Sivachanmugavelu Ors*[4]. Noticing the dictionary meaning of the words `domicile' and `residents', as noticed by this Court in *Union of India Ors. v. Dudh Nath Prasad*[5] the learned Judge was held that widest amplitude for granting benefits of reservations should be given to the said circulars. Holding that there is no rationale as to why the respondents suddenly sought to bring in the restriction now, it was opined : In view of the aforesaid a writ of mandamus is issued to appoint such of the petitioners in the present writ petitions who are born and brought up in Delhi, the caste is notified as a reserved caste in Delhi but the certificate issued to them is on the basis of the certificate issued to their fathers who were the migrants from other States.

14. The Division Bench of the said court dismissed the intra court appeal preferred there against by the Delhi Subordinate Service Selection Board and another, holding :

> "Therefore, it is clear that for States inter se, the matters are considered differently. In the instant case, it is an accepted position that the original petitioners were born in the State of Delhi. Therefore, they are Scheduled Tribes in Delhi and the Tribe/Caste is also recognized in Delhi as a reserved category. There is no dispute that the same

caste to which their parents belonged in other State is also recognized as a reserved category.

15. Mr. U.U. Lalit, learned senior counsel appearing on behalf of the appellants, would contend:

> "(1) a person belonging to a caste notified as Scheduled Castes in one State cannot automatically claim the benefit of any notification specifying a similar caste in another State or Union Territory.
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> (2) Although a distinction lies between a State Civil Service and a Central Civil Service, and inasmuch as in the latter, people from all over the country are entitled to be considered for appointment keeping in view the plain language contained in clause (1) of Article 341 of the Constitution of India, such a benefit cannot be conferred on a person who had migrated from one State to another State/Union Territory.
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> (3) In interpreting such a notification, the High Court should have used the principle of contextual interpretation and not a beneficent legislation."

16. Mr. Mariarputham, learned Senior Counsel appearing on behalf of the Union of India, Mr. Rakesh Kumar Khanna, learned Senior Counsel appearing on behalf of the New Delhi Municipal Corporation and Dr. Krishan Singh Chauhan, learned counsel appearing on behalf of the private respondents, on the other hand, urged :

> "(i) The Central Government being within the administrative control of Union Territory in terms of Article 239 of the Constitution of India is entitled to lay down policies involving Union Territory Services wherefor executive instructions can be issued.
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> (ii) Direction of this nature being in regard to the classes of people who would be eligible to enter into Union Territory Service which is akin to Central Civil Services being for the purpose of achieving the constitutional goal provided for under clause (4) of Article 16 of the Constitution of India is permissible in law. (iii) The State may take such policy decisions which would advance the cause of the backward class as envisaged under clause (4) of Article 16 of the Constitution of India and clause (4) of Article 15 thereof.
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> (iv) Doctrine of protective discrimination envisaged in Article 16 would bring within its ambit all such people who are backward not only in a State or Union Territory but also throughout the length and breadth of the country as envisaged under clause (1) of Article 16 thereof.
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> (v) For the purpose of considering the validity of the circular letters impugned in the writ petitions, the preamble of the Constitution

of India as also the provisions relating to reservation should be allowed to have its full play particularly in view of the binding precedents of this Court in *Chandigarh Administration Anr. vs. Surinder Kumar ors*[6]. and *S. Pushpa ors. vs. Sivachanmugavelu ors*[7].

(vi) Although at one point of time the stand of the Union Territory of Delhi which was impugned in the writ petition before the Delhi High Court by the private respondents was in the light of the law laid down by this Court in Marri Chandra Shekhar Rao (supra) and Action Committee (supra) but in view of the later decisions of this Court in Chandigarh Administration (supra) and S. Pushpa (supra), the Union of India as also the N.C.T. of Delhi must be held to be bound thereby, being law declared under Article 141 of the Constitution of India.

(vii) Migrants from other States who are members of Scheduled Castes and Scheduled Tribes in their State must be allowed to take the benefit of the said status particularly those who had been residing in Delhi for a period of more than five years and those who are born and brought up in Delhi."

17. Ms. Shashi Kiran, learned counsel appearing on behalf of the N.C.T. of Delhi would submit that having regard to the provisions contained in Article 239 of the Constitution of India, the N.C.T. of Delhi has no other option but to follow the directives issued by the Central Government from time to time.

18. In view of the rival contentions of the parties, the questions which arise for our consideration are :

"(1) Having regard to the decisions of this Court in Marri Chandra Shekhar Rao (supra) and Action Committee (supra), the specification of a particular Caste or Tribe to be a Scheduled Caste and Scheduled Tribe being in relation to that State or Union Territory, whether a person on his migration to another State would carry the same status with him?

(2) Whether in view of the decisions of this Court in Action Committee (supra) even where the similar Caste bearing the same name having been declared to be the Scheduled Caste both in the State to which he originally belonged and the State and/or Union Territory to which he has migrated would make any difference in view of the provisions contained in Article 341 of the Constitution of India?

(3) Whether in view of the decisions of the Constitution Bench of this Court in ors. [(2001) 1 SCC 4] and *E.V. Chinnaiah vs. State of A.P. ors*[8]. extension of notification even to a migrant would amount to modification and/or alteration of the notification which is impermissible in law in view of clause (2) of Article 341 and clause (2) of Article 342 of the Constitution of India?

(4) Whether having regard to the provisions contained in Articles 239 and 239AA of the Constitution in relation to Union Territory it is permissible for the Central Government to direct recruitment to the Union Territory Services treating it to be akin to Central Civil Services in view of the decisions of this Court in Chandigarh Administration (supra) and S. Pushpa (supra)?

(5) Whether the ratio laid down by this Court in Chandigarh Administration (supra) and S. Pushpa (supra) having not taken into consideration the binding precedents in Constitution Bench in Milind (supra), Chinnaiah (supra) and ors. [(2001) 6 SCC 571] would constitute binding precedents?"

19. The Constitution of India is suprema lex. The Preamble of the Constitution of India envisages `Sovereign Socialist Secular Democratic Republic'. In terms of Article 1 of the Constitution of India, that is, Bharat, shall be a Union of States as specified in the First Schedule. The First Schedule contains two lists; (1) the list of States, and (2) the list of Union Territories. They together constitute geographical and political territory of India.
The equality clause contained in Articles 14, 15 and 16 constitutes a set of fundamental rights of all persons whether they are citizens of India or not. Whereas in terms of Article 14 of the Constitution of India all persons similarly situated are entitled to enforcement of their fundamental right of equality before the law and equal protection of the laws. Articles 15 and 16 although aim at equality but also provide for certain exceptions.

20. In terms of the aforementioned provisions, enabling provisions have been made so as to enable the State to make any special provision for the advancement of any socially and educationally backward classes of citizens or for Scheduled Castes and Scheduled Tribes as provided for in clause (4) of Article 15 of the Constitution of India and for making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services of the State as provided for in clause (4) of Article 16 thereof.

21. We may at the outset notice the distinction between clause (4) of Article 15 and clause (4) of Article 16 of the Constitution. The words `backward classes' and `Scheduled Castes and Scheduled Tribes' find place in clause (4) of Article 15 but only the words `backward class of citizens' find place in clause (4) of Article 16. It is, however, beyond any doubt or dispute that the term `backward class of citizens' contained in clause (4) of Article 16 includes Scheduled Castes and Scheduled Tribes for all intent and purport. Therefore, the protection sought to be accorded to a section of the citizenry must not only be to backward class but may also be to Scheduled Castes and Scheduled Tribes for whom a special provision can be made. Article 341 of the Constitution of India, which finds place in Part XVI thereof provides for special provisions relating to certain classes of citizens. It reads as under:

"341. Scheduled Castes.- (1) The President may with respect to any State or Union Territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the castes, races or tribes or parts of or groups within

castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State or Union territory, as the case may be.

(2) Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification issued under clause (1) any caste, race or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification. The terms `Scheduled Castes' and `Scheduled Tribes' have been defined in clauses (24) and (25) of Article 266 of the Constitution, which read as under:

(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;

(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. Article 342 in identical terms deals with the cases of members of Scheduled Tribes."

22. Part VIII of the Constitution of India provides for the Union Territories stating that every Union Territory shall be administered by the President acting, to such extent as he thinks fit, through an administrator to be appointed by him with such designation as he may specify. Special provisions with respect to Delhi has been made by inserting Article 239AA to the Constitution; Clause (1) whereof provides that despite coming into force of the Constitution (Sixty-ninth Amendment) Act, 1991, the Union Territory of Delhi shall be called the National Capital Territory of Delhi and shall be administered by an Administrator appointed under Article 239 who shall be designated as the Lieutenant Governor.

23. The President of India promulgated the Constitution (Scheduled Tribes) Order in the year 1950 specifying the Tribes which would be deemed to be the Scheduled Tribes. Similarly, in the year 1951, Constitution (Scheduled Castes) Order was promulgated. The names of several Tribes and Castes were added, deleted and altered subsequently by notifications issued by the President of India from time to time.

24. It may be advantageous to notice the relevant provisions of the Constitution (Scheduled Castes) Order, 1950 and the Constitution (Scheduled Tribes) Order, 1950 made by the President of India in exercise of powers conferred by Article 341(1) and Article 342(1) respectively of the Constitution. In the order first mentioned Clause (2) provides as under:

"2. Subject to the provisions of this Order, the castes, races or tribes or parts of, or groups within, castes or tribes specified in Parts I to XXIV of the Schedule to this order shall, in relation to the States to which those parts respectively relate, be deemed to be Scheduled Castes so far as regards member thereof resident in the localities specified in relation to them in those Parts of the Schedule. Clause (2) of the second mentioned Order reads as under:

2. The Tribes or tribal communities, or part of, or groups within, tribes or tribal communities, specified in Parts I to XXII of the Schedule to this Orders shall, in relation to the State to which those parts respectively relate, be deemed to be Scheduled Tribes so far as regards members thereof residents in the localities specified in relation to them respectively in those Parts of that Scheduled."

25. Indisputably, having regard to clause (2) of Article 341 as also of Article 342 of the Constitution tinkering with the said list is impermissible, save and except by a law made by the Parliament. Concededly, in respect of education or service, there exists a distinction between State Service and State run institutions including Union Territory Services and Union Territory run institutions on the one hand, and the Central Civil Services and the institutions run by the Central Government on the other. Whereas in the case of the former, the reservation whether for admission or appointment in an institution and employment or appointment in the services or posts in a State or Union Territory must confine to the members of the Scheduled Castes and Scheduled Tribes as notified in the Presidential Orders but in respect of All India Services, Central Civil Services or admission to an institution run and founded by the Central Government, the members of Scheduled Castes and Scheduled Tribes and other reserved category candidates irrespective of their State for which they have been notified are entitled to the benefits thereof. It is not denied or disputed that services in the Union Territory is essentially different from All India Services. It is also beyond any controversy that machinery for recruitment is also different. Indisputably again, not only the conditions of recruitment but also conditions of service differ. Before us, it has furthermore been conceded that for the purpose of Union Territory of Delhi no separate notification in respect of Scheduled Tribe has been issued. The Constitution (Scheduled Castes) (Union Territories) Order, 1951, is a Presidential Notification, issued under Article 341 of the Constitution of India specifying Scheduled Castes in relation to the Union Territory of Delhi. However, no such notification exists under Article 342 of the Constitution of India, listing scheduled tribes for the Union Territory of Delhi. The question therefore is, whether in the absence of a Presidential Notification, listing any group of persons as a Scheduled Tribe in Delhi, can by policy, the benefit of reservation in services be accorded to migrant Scheduled Tribes in the Union Territory of Delhi? We may, however, notice that a learned Single Judge of the Delhi High Court had rejected extension of such benefit of reservation to migrant Scheduled Tribes but a Division Bench of High Court applied the ratio of this Court in S. Pushpa (supra) to extend such benefits to members belonging to Scheduled Tribes. The correctness of the said view is also in question before us. It is in the aforementioned context, the constitutional provisions as noticed by us hereto before call for interpretation. When a Caste or a Tribe is designated as a Scheduled Caste or Scheduled Tribe, the members belonging thereto derive a bunch of benefits. Such benefits may not only be confined to admission in educational institutions, appointment in State or Central Civil Services, but also for contesting elections to the seats reserved for them in the Panchayats and Municipalities in lieu of the provisions of 73rd and 74th Amendments to the Constitution. Benefits to the members of the Scheduled Castes and Scheduled Tribes and other backward classes may also be conferred by means of schemes formulated by the Central Government or the State Government.

Article 341 of the Constitution of India does not make any distinction between a State and Union Territory except for the purpose of consultation with the Governor or the Administrator, as the case may be. Such consultation is necessary in view of the fact that it is for the State machinery to identify such Caste or Tribe who had suffered the centuries old ignominy and/ or suffered other disadvantages. It is possible for a State to point out that although a group of people may be belonging to a caste or Tribe which is otherwise backward but having regard to the social and economic advancement made by that group, they should be excluded. Persons belonging to a particular Caste or Tribe may suffer some disadvantages in one State but may not suffer the same disadvantages in the other. Our constitutional scheme, therefore, seeks to identify the social and economic backwardness of people having regard to the State or Union Territory as a unit. The same principle applies even to the minorities as has been laid down by an Eleven Judge Bench of this Court in *T.M.A. Pai Foundation and Ors. v. State of Karnataka and Ors*[9].

26. It is also a trite law that a study has to be undertaken before a section of the people can be identified as being belonging to backward class people. In our constitutional scheme backward class people are divided into three categories, namely, Scheduled Castes, Scheduled Tribes and other backward classes. Scheduled Caste and Scheduled Tribe would be backward but the same would not mean that the converse is true, i.e., all backwards would be members of the Scheduled Castes or Scheduled Tribes. Why we say so is that the reservation in terms of clause (4) of Article 16 of the Constitution of India is fixed on a percentage basis. The advertisement issued by the Delhi Subordinate Services Selection Board clearly shows that the percentage of reservation having regard to the Central Government Rules which are applicable to the National Capital Territory of Delhi would be 7.5% for Scheduled Tribes, 15% for Scheduled Castes and 27.5% for other backward classes. No Scheduled Tribe has been identified in the Union Territory. The Presidential Order in regard to the Scheduled Castes speaks of the residents of Delhi alone. Some of the Castes identified as Scheduled Castes in some other States also find place in the Presidential Order issued for Delhi. What would be the effect is the question.

27. With the aforementioned backdrop in mind, we may notice a few decisions of this Court.
A Constitution Bench of this Court in Marri Chandra Shekhar Rao (supra) had the occasion to consider the question as to whether a member of Gouda community which is recognized as `Scheduled Tribe' in the Constitution (Scheduled Tribes) Order, 1950 would be entitled to admission in a medical institution situated in the State of Maharashtra. This Court noticed the fact that the father of the petitioner therein was an employee in Fertilizer Corporation of India, a public sector undertaking, in the Scheduled Tribes quota and thereafter in the Rashtriya Chemicals and Fertilizers Limited, a Government of India undertaking under the quota reserved for Scheduled Tribes whereafter he was stationed at Bombay. The petitioner therein came to Bombay at the age of nine years. He completed his studies in Bombay; he submitted an application for his admission in the medical institutions run by Bombay Municipal Corporation which was denied in view of Circular dated 22.2.1985 issued by the Government of India. The Circular dated 22.2.1985 issued by the Government of India, inter alia, read as under :

It is also clarified that a Scheduled Caste/Tribe person who has migrated from the State of origin to some other State for the purpose of seeking education, employment etc. will be deemed to be a Scheduled Caste/Tribe of the State of his origin and will be entitled to derive benefits from the State of origin and not from the State to which he has migrated. The question which was posed was the effect of specification by the President of the Scheduled Castes or Scheduled Tribes, as the case may be, for the State or Union territory or part of the State. Noticing that the specification was for the purposes of this Constitution, it was found to be necessary to determine what the expression `in relation to that State' seeks to convey.

28. This Court noticed not only the various provisions of the Constitution but also the earlier decisions governing the field as well as the views of Dr. B.R. Ambedkar in the Constituent Assembly, to hold:

> 22. In that view of the matter, we are of the opinion that the petitioner is not entitled to be admitted to the medical college on the basis of Scheduled Tribe Certificate in Maharashtra. In the view we have taken, the question of petitioner's right to be admitted as being domicile does not fall for consideration. Marri Chandra Shekhar Rao (supra) was followed by another Constitution Bench of this Court in Action Committee (supra). The question posed therein was:
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> Where a person belonging to a caste or tribe specified for the purposes of the Constitution to be a Scheduled Caste or a Scheduled Tribe in relation to State A migrates to State B where a caste or tribe with the same nomenclature is specified for the purposes of the Constitution to be a Scheduled Caste or a Scheduled Tribe in relation to that State B, will that person be entitled to claim the privileges and benefits admissible to persons belonging to the Scheduled Castes and/or Scheduled Tribes in State B? While interpreting clause (1) of Articles 341 and 342, this Court held:
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> What is important to notice is that the castes or tribes have to be specified in relation to a given State or Union Territory. That means a given caste or tribe can be a Scheduled Caste or a Scheduled Tribe in relation to the State or Union Territory for which it is specified. These are the relevant provisions with which we shall be concerned while dealing with the grievance made in this petition. Noticing that the persons belonging to Scheduled Castes/Scheduled Tribes who migrate from their State of origin to another State in search of employment or for educational purposes had experienced great difficulty in obtaining Caste or Tribe Certificates wherefor the Circular letters were issued, this Court held:
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> 14. It is a matter of common knowledge that before and during the British Rule also the social order in India was of graded inequality. During the freedom struggle some of our leaders strived to bring about social integration to give a fillip to the independence movement. The need to bring about equality was strongly felt. After independence when the Constitution was being framed for free India, considerable

emphasis was laid on the need to secure equality. The debates of the constituent Assembly bear testimony to this felt need.

29. This Court also noticing Articles 14, 15(1), 15(4), 16(1), 16(4), 19, Part XVI of the Constitution of India and the decisions governing the field as also Articles 341 and 342 thereof opined that Marri Chandra Shekhar Rao lays down the correct law, holding :

> "15. We may add that considerations for specifying a particular caste or tribe or class for inclusion in the list of Scheduled Castes/Scheduled Tribes or backward classes in a given State would depend on the nature and extent of disadvantages and social hardships suffered by that caste, tribe or class in that State which may be totally non-est in another State to which persons belonging thereto may migrate. Coincidentally it may be that a caste or tribe bearing the same nomenclature is specified in two States but the considerations on the basis of which they have been specified may be totally different. So also the degree of disadvantages of various elements which constitute the input for specification may also be totally different. Therefore, merely because a given caste is specified in State A as a Scheduled Caste does not necessarily mean that if there be another caste bearing the same nomenclature in another State the person belonging to the former would be entitled to the rights, privileges and benefits admissible to a member of the Scheduled Caste of the latter State 'for the purposes of this Constitution'. This is an aspect which has to be kept in mind and which was very much in the minds of the Constitution makers as is evident from the choice of language of Articles 341 and 342 of the Constitution."

30. Whereas Marri Chandra Shekhar Rao (supra) was a case where no notification had been issued for the State of Maharashtra specifying the Caste to which the petitioner therein belonged to; in the case of Action Committee (supra), the question related to a situation where coincidently some Castes were notified in both the States, i.e., a fortuitous circumstance arose therein that some classes had been notified in both the States.

31. In Veena (supra), a Division Bench of this Court in a case arising out of the National Capital Territory of Delhi, noticing Marri Chandra Shekhar Rao (supra) held as under:

> "6. Castes or groups are specified in relation to a given State or Union Territory, which obviously means that such caste would include caste belonging to an OBC group in relation to that State or Union Territory for which it is specified. The matters that are to be taken into consideration for specifying a particular caste in a particular group belonging to OBCs would depend on the nature and extent of disadvantages and social hardships suffered by that caste or group in that State. However, it may not be so in another State to which a person belongs thereto goes by migration. It may also be that a caste belonging to the same nomenclature is specified in two States but the consideration on the basis of which they been specified may be totally different. So the degree of disadvantages of various elements which constitute the date for specification may also be entirely different. Thus, merely because a given caste is specified in one State as belonging to OBCs does not necessarily mean that if there be

another group belonging to the same nomenclature in other State and a person belonging to that group is entitled to the rights, privileges and benefits admissible to the members of that caste. These aspects have to be borne in mind in interpreting the provisions of the Constitution with reference to application of reservation to OBCs. Upon noticing the Circular letter dated 15.11.1993 specifying two model forms of the certificate to be furnished by the OBC candidates seeking benefit of reservations and the form appended thereto, it was held:

A careful reading of this notification would indicate that the OBCs would be recognised as such in the Government of National Capital Territory of Delhi as notified in the Notification dated 20.01.1995 and further for the purpose of verification of claims for belonging to castes/communities in Delhi as per the list notified by the National Capital Territory of Delhi the certificates will have to be issued only by the specified authorities and certificates issues by any other authority could not be accepted. This Court opined: The only additional aspects stated by them in their respective applications or in the Certificates supported thereto is that they belong to OBC categories. Hence, their cases ought to have been considered in the general category as if they do not belong to OBC categories in the circumstances arising in this case. There the candidature of those candidates were directed to be considered as a general category candidate.

32. The said principle was reiterated in *U.P. Public Service Commission, Allahabad vs. Sanjay Kumar Singh reported in*[10], wherein a boy belonging to Scheduled Tribe `Naga' and hailing from Nagaland sought admission in a medical college at Kanpur. This Court upon considering Marri Chandra Shekhar Rao (supra), Action Committee (supra) as also Veena (supra) opined that the appellant therein could not be treated as Scheduled Tribe candidate so as to qualify himself to claim reservation against the vacancy reserved for Scheduled Tribes in public services in the State of U.P.

33. At this juncture, we may also notice two other Constitution Bench decisions of this Court, namely, Milind (supra), Chinnaiah (supra) as also a judgment of this Court in *Shree Surat Valsad Jilla K.M.G. Parishad vs. Union of India ors*[11]. Milind (supra) dealt with a question as to whether the notified Scheduled Tribe being Halba or Halbi as contained in Item No. 19 of the Presidential Order would include Halba-Koshti or not. Indisputably, beginning from the decision of the Nagpur High Court rendered in 1956 in *Sonabai vs. Lakhmibai reported in*[12] several other judgments as also circular letters issued by the State of Maharashtra from time to time, acknowledging that Halba-Koshti come within the definition of Halba and/or Halbi; the Constitution Bench opined that the rule of stare decisis will have no application in a case of this nature. It was opined that addition of Halba-Kosthi in the Presidential Order would amount to amendment thereto which is impermissible in law, stating:

"The jurisdiction of the High Court would be much more restricted while dealing with the question whether a particular caste or tribe would come within the purview of the notified Presidential Order, considering the language of Articles 341 and 342 of the

Constitution. These being the parameters and in the case in hand, the Committee conducting the inquiry as well as the Appellate Authority, having examined all relevant materials and having recorded a finding that respondent No. 1 belong to 'Koshti' caste and has no identity with the 'Halba/Halbi', which is the Scheduled Tribe under Entry 19 of the Presidential Order, relating to State of Maharashtra, the High Court exceeded its supervisory jurisdiction by making a roving and in-depth examination of the materials afresh and in coming to the conclusion that 'Koshtis' could be treated as 'Halbas'. In this view the High Court could not upset the finding of fact in exercise of its writ jurisdiction. Hence, we have to essentially answer the question no. 2 also in the negative. Hence it is answered accordingly. Milind (supra), therefore, is an authority for the proposition that neither practice prevailing in a State nor the decisions of the High Court which are otherwise binding on the State would create a right in a person to obtain the benefit of reservation in the teeth of provisions of Articles 341 and 342 of the Constitution. It was furthermore stated:

35. The arguments advanced before the High Court on behalf of an intervener relying on Articles 162, 256 to 258 and 339(2) of the Constitution of India that instructions issued by the Central Government in the matter have overriding effect over the instructions issued by the State Government, was lightly brushed aside on the ground that this aspect assured little importance in the view taken by the High Court that the State Government was bound by the circulars issued by it. We have already expressed above the view in the light of Articles 341 and 342 of the Constitution that a Scheduled Tribes Order can be amended only by the Parliament. Hence it is not possible to accept that orders/circulars issued by the State Government, which have the effect of amending Scheduled Tribes Order, were binding on the Government or other affected parties."

34. Another Constitution Bench of this Court in Chinnaiah (supra) while considering the question as to whether any sub-classification within a class is permissible having regard to the constitutional provision, answered it, thus:

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

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

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

As regards the question as to whether such a sub-classification is permissible having regard to clause (4) of Article 16 of the Constitution of India, it was held:

43. The very fact that the members of the Scheduled Castes are most backward amongst the backward classes and the impugned legislation having already proceeded on the basis that they are not adequately represented both in terms of Clause (4) of Article 15 and Clause (4) of Article 16 of the Constitution 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. In a separate but concurring judgment, one of us (S.B. Sinha, J.)

opined as under:

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

The said principle had been applied by a Division Bench of this Court in Shree Surat Valsad Jilla K.M.G. Parishad (supra). Recently, a Constitution Bench of this Court in *Ashok Kumar Thakur v. Union of India Ors*[13]. noticed E.V. Chinnaiah (supra)
in the following terms :

65. The learned Senior Counsel further contended that the exclusion of creamy layer has no application to SCs and STs in regard to employment and education. Articles 341, 342, 366(24) and 366(25) of the Constitution would militate against such course of action.

66. It was held in *E.V. Chinnaiah v. State of A.P*[14]. that the SCs and STs form a single class. The observations in Nagaraj case cannot be construed as requiring exclusion of creamy layer in SCs and STs. Creamy layer principle was applied for the identification of backward classes of citizens. And it was specifically held in Indra Sawhney case that the above discussion was confined to Other Backward Classes and has no relevance in the case of Scheduled Tribes and Scheduled Castes. The observations of the Supreme Court in Nagaraj case should not be read as conflicting with the decision in Indra Sawhney case. The observations in Nagaraj case as regards SCs and STs are obiter. In regard to SCs and STs, there can be no concept of creamy layer.

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184. So far, this Court has not applied the creamy layer principle to the general principle of equality for the purpose of reservation. The creamy layer so far has been applied only to identify the backward class, as it required certain parameters to determine the backward classes. Creamy layer principle is one of the parameters to identify backward classes. Therefore, principally, the creamy layer principle cannot be applied to STs and SCs, as SCs and STs are separate classes by themselves. Ray, C.J., in an earlier decision, stated that Scheduled Castes and Scheduled Tribes are not a caste within the ordinary meaning of caste. And they are so identified by virtue of the notification issued by the President of India under Articles 341 and 342 of the Constitution. The President may, after consultation with the Governor, by public notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which for the purpose of the Constitution shall be deemed to be Scheduled Castes or Scheduled Tribes. Once the notification is issued, they are deemed to be the members of Scheduled Castes or Scheduled Tribes, whichever is applicable. In E.V. Chinnaiah concurring with the majority judgment, S.B. Sinha, J. said:

The Scheduled Castes and Scheduled Tribes occupy a special place in our Constitution. The President of India is the sole repository of the power to specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of the Constitution be deemed to be Scheduled Castes. The Constitution (Scheduled Castes) Order, 1950 made in terms of Article 341(1) is exhaustive. The object of Articles 341 and 342 is to provide for grant of protection to the backward class of citizens who are specified in the Scheduled Castes Order and Scheduled Tribes Order having regard to the economic and education backwardness wherefrom they suffer. 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. (emphasis supplied)

185. A plea was raised by the respondent State that categorisation of Scheduled Castes could be justified by applying the creamy layer test as used in Indra Sawhney case which was specifically rejected in para 96 of E.V. Chinnaiah case. It is observed:

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.

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.

The authoritative pronouncement of the Constitution Bench, thus, clearly shows that the proclamation made by the President of India by Scheduled Caste Order is exhaustive. Only the Parliament having regard to the Constitutional Scheme can tinker therewith. 35. We may now notice the decisions of this Court which have taken a somewhat different view.

In Chandigarh Administration (supra), one of the issues related to the effect of the State Reorganisation Act. This Court noticed Marri Chandra Shekhar Rao (supra) as also Action Committee (supra) but proceeded on the premise that Government of India was entitled to issue instructions qua service in the Union Territories and the same were binding on the Union Territory, holding :

The judgments relied upon by the learned counsel for the appellant only decide the constitutional aspect of the Government policy on the subject at a given time while leaving the policy decision as to what benefits are to be conferred on persons belonging to reserved categories with the Government of India. In the present case the Government of India has conveyed its decision on the point vide its circular letter dated 26.8.1986 which has not been modified. Therefore, the instructions contained in the said letter which were admittedly being followed till 7.9.1999, in our view, continue to be in force. There is no reasonable basis to discontinue the said decision with effect from 7.9.1999. No reason or basis has been disclosed for discontinuing the same with effect from the said date.

Indisputably, the Division Bench noticed a decision of this Court in *State of Maharashtra vs. Kumari Tanuja*[15] to opine: 12. In the present case we have noticed

that the Government of India instructions contained in circular dated 26.8.1986 specifically permit that a recognised Scheduled Caste/Schedule Tribe of any other State or Union Territory would be entitled to the benefits and facilities provided for SC/ST in the services in the Union Territory of Chandigarh. This letter is specifically addressed by the Government of India to the Home Secretary, Chandigarh Administration and deals with employment in the Union Territory of Chandigarh. Therefore, there is no reason to ignore the instructions contained in the said letter. It is to be noticed in this behalf that in the rejoinder affidavit filed by the appellant before this Court it is specifically pleaded in para 12 that `at the relevant time, the reservation benefit was being extended to all the candidates belonging to respective communities on the production of valid certificates of castes issued by the State of origin, but on receipt of clarification on 7.9.1999 the reservation benefits are only to be allowed to .... who are bonafide residents of Chandigarh and in whose favour valid certificates have been issued by the competent of Chandigarh Administration. After 7.9.1999 no appointment against reserved posts have been made to the candidates who are not residents of Chandigarh and are not having valid certificates of caste issue by the DM/SDM Chandigarh'. This Court although noticed Marri Chandra Shekhar Rao (supra), Action Committee (supra) and Veena (supra) but did not distinguish the same.

36. We may now notice S. Pushpa (supra). It is a judgment rendered by a three judge Bench of this Court. The fact involved therein was noticed in paragraph 2 of the judgment, from a perusal whereof, it appears that 26 candidates produced community certificates from the Revenue Authority of Pondicherry. This Court proceeded on the basis that as the Administrator while acting under the authority given to him by the President in terms of Article 239 of the Constitution was bound by the directions issued by the Central Government in terms whereof the vacancies occurring in the Union Territory was to be treated as that of Central Civil Services which practice had consistently been followed by the Administration in terms whereof migrant SC/ST candidates were held to be eligible for appointment in the reserved posts in the Pondicherry Administration. It was held that the Marri Chandra Shekhar Rao (supra) would have no application as Union Territory of Pondicherry is not a State, stating :

> "Since all SC/ST candidates which have been recognized as such under the orders issued by the President from time to time irrespective of the State/Union territory, in relation to which particular castes or tribes have been recognized as SCs/STs are eligible for reserved posts/services under the Central Government, they are also eligible for reserved posts/services under the Pondicherry administration. Consequently, all SC/ST candidates from outside the U.T. of Pondicherry would also be eligible for posts reserved for SC/ST candidates in Pondicherry administration. Therefore, right from the inception, this policy is being consistently followed by the Pondicherry administration whereunder migrant SC/ST candidates are held to be eligible for reserved posts in Pondicherry administration."

37. It was furthermore held that in a case of that nature even clause (4) of Article 16 would be attracted, stating:

> 21. Clauses (1) and (2) of Article 16 guarantee equality of opportunity to all citizens in the matter of appointment to any office or of any other employment under the State. Clauses (3) to (5), however, lay down several exceptions to the above rule of equal opportunity. Article 16(4) is an enabling provision and confers a discretionary power on the State to make reservation in the matter of appointments in favour of backward classes of citizens which in its opinion are not adequately represented either numerically or qualitatively in services of the State. But it confers no constitutional right upon the members of the backward classes to claim reservation. Article 16(4) is not controlled by a Presidential Order issued under Article 341(1) or Article 342(1) of the Constitution in the sense that reservation in the matter of appointment on posts may be made in a State or Union territory only for such Scheduled Castes and Scheduled Tribes which are mentioned in the schedule appended to the Presidential Order for that particular State or Union territory. This Article does not say that only such Scheduled Castes and Scheduled Tribes which are mentioned in the Presidential Order issued for a particular State alone would be recognized as backward classes of citizens and none else. If a State or Union territory makes a provision whereunder the benefit of reservation is extended only to such Scheduled Castes or Scheduled Tribes which are recognized as such, in relation to that State or Union territory then such a provision would be perfectly valid. However, there would be no infraction of clause (4) of Article 16 if a Union territory by virtue of its peculiar position being governed by the President as laid down in Article 239 extends the benefit of reservation even to such migrant Scheduled Castes or Scheduled Tribes who are not mentioned in the schedule to the Presidential Order issued for such Union territory. The U.T. of Pondicherry having adopted a policy of Central Government whereunder all Scheduled Castes or Scheduled Tribes, irrespective of their State are eligible for posts which are reserved for SC/ST candidates, no legal infirmity can be ascribed to such a policy and the same cannot be held to be contrary to any provision of law.

Chandigarh Administration (supra) and S. Pushpa (supra) read together, therefore, proceed on the basis that Marri Chandra Shekhar Rao (supra) would have no application in relation to Union Territory. The contention of the respondents in this case is squarely based on these two decisions. Can it be said that Marri Chandra Shekhar Rao does not apply to Union Territory? The answer thereto, in our opinion, is a big emphatic `no'. Both Articles 341 and 342 not only refer to the State but also to the Union Territory . Although Union Territories are administered by the Central Government, yet it is difficult to conceive that socio political aspect can be mixed up with the administrative aspect. Article 341 leads to grant of constitutional rights upon a person whose affinity to a caste/Tribe would attract the Constitution (Scheduled Caste) Order or Constitution (Scheduled Tribe) Order. Once a person comes within the purview of Presidential promulgation, he would be entitled to constitutional and other statutory or administrative benefits attached thereto. In our opinion, such socio political rights created in our Constitution cannot be segregated keeping in view the administrative exigencies.

38. If the principle applied in S. Pushpa (supra) is to be given a logical extension, it will lead to an absurdity, that the Scheduled Castes Order in a State brought under the control of the President under Article 356 could be altered by virtue of a notification issued in pursuance of Article 16(4) of the Constitution. Clause (4) of Article 16 of the Constitution, as noticed hereinbefore, cannot be made applicable for the purpose of grant of benefit of reservation for Scheduled Castes or Scheduled Tribes in a State or Union Territory, who have migrated to another State or Union Territory and they are not members of the Scheduled Castes and Scheduled Tribes. By virtue of Article 341, the Presidential orders made under clause (1) thereof acquire an overriding status. But for Articles 341 and 342 of the Constitution, it would have been possible for both the Union and the States, to legislate upon, or frame policies, concerning the subject of reservation, vis-`-vis inclusion of Castes/Tribes. The presence of Articles 338, 338A, 341, 342 in the Constitution clearly preclude that.

39. We may notice the Scheme and the legal position of the Constitution (Schedule Castes) Orders which is as under: Originally a common Presidential Order was made in respect of States in 1950. Another common Presidential Order was issued in respect of Union territories in 1951. The Union Territories Order continues to be in force. It comprehends three Union Territories including Delhi and Chandigarh. Separate orders have been made in respect of the Union Territories of Pondicherry and Dadra and Nagar Haveli. There is no order in respect of Andaman Nicobar Island. Amendments were made to the Schedule Caste/ Tribe Orders of the States and Union Territories Order of 1951, by an Act of Parliament first in 1956 and later in 1976. besides the above, in the event of States reorganization, Parliament has exercised its power under Article 341 (2) to enact specific Castes/ Tribes that had to be Scheduled Castes and Scheduled Tribes in relation to the reorganized States/Union Territories. The Union Territories Scheduled Castes Order of 1951, amended by an Act of 1956 and later of 1976, and still later, in 1987, reads as follows:

APPENDIX XI THE CONSTITUTION (SCHEDULED CASTES) (UNION TERRITORIES) ORDER, 1951 C.O. 32, dated the 20th September, 1951. In exercise of the power conferred by Clause (1) of Article 341 of the Constitution of India, as amended by the Constitution (First Amendment) Act, 1951, the President is pleased to make the following order namely :

> "This order may be called the Constitution (Scheduled Cates) (Union Territories) Order, 1951. Subject to the provision of this order, the castes, races or tribes or parts of, or groups within, castes or tribes, specified in parts I to III of the Schedule to this Order shall, in relation to the Union Territories to which those parts respectively relate, be deemed to be Scheduled Castes so far as regard members thereof resident in the localities specified in relation to them respectively in those parts of that schedule. Notwithstanding anything contained in paragraph 2, no person who professes a religion different from the Hindu (or Sikh or the Buddhist) Religion shall be deemed to be a member of a Scheduled Castes. Any reference in this order to a Union Territories in part 1 of the Schedule shall be construed as a reference to the territory

constituted as a Union Territory as from the first day of November, 1956, any reference to a Union Territory in part II of the Schedule shall be construed as a reference to the territory constituted as a Union Territory as from the first day of the November, 1966 and any reference to a Union Territory in part III of the Schedule shall be construed as a reference to the territory constituted as a Union Territory as from the day appointed under clause (b) of the Section 2 of the Goa, Daman and Diu Reorganization Act, 1987.

40. Both the Central Government and the State Government indisputably may lay down a policy decision in regard to reservation having regard to Articles 15 and 16 of the Constitution of India but such a policy cannot violate other constitutional provisions. A policy cannot have primacy over the constitutional scheme. If for the purposes of Articles 341 and 342 of the Constitution of India, State and the Union Territory are at par on the ground of administrative exigibility or in exercise of the administrative power, the constitutional interdict contained in clause (2) of Article 341 or clause (2) of Article 342 of the Constitution of India cannot be got rid of.

41. It is well known that what cannot be done directly cannot be done indirectly. (See *Ramdev Food Products Pvt. Ltd. v. Arvindbhai Rambhai Patel and Ors*[16]. Para 73]. When an amendment or alteration is to be brought about by a Parliamentary Legislation, the same purpose cannot be achieved by taking recourse to circular letters. If the Central Civil Services and the Union Territory Services are different, keeping in view the constitutional schemes particularly having regard to the proviso appended to Article 309 of the Constitution of India, the same cannot be done away with only because a Union Territory administratively is administered by the Central Government. Any direction or policy decision, thus, must satisfy the constitutional requirements laid down under Articles 341 and 342 of the Constitution of India. If any other construction is made, a policy decision having regard to the decisions of this Court will have to be treated as a proviso appended to clause (2) of Article 341 of the Constitution of India and would amount to deriding of the Constitution which is impermissible in law. For identification of backward classes, it is necessary to undertake a study in a particular State as to whether the migrants are required to be treated as backward classes. Indisputably, the classes contemplated by Article 16(4) may be wider than those contemplated by Article 15(4). If they are backward classes for the purpose of Article 16(1) and 16(4) and not Scheduled Castes and Scheduled Tribes, they will come within the purview of the reservation for backward classes and not the one which is exclusively meant for Scheduled Castes and Scheduled Tribes within the purview of reservation policy of the States. Moreover enabling provision contained in clause (4) of Article 16 of the Constitution of India can of course be enforced by reason of an executive direction but the same must be made in terms of Article 77 or Article 162 of the Constitution of India. Furthermore, a circular letter does not have the force of law [See *Punjab Water Supply and Sewerage Board, Hoshiarpur v. Ranjodh Singh and Ors*[13]. Para 10]. Article 246 of the Constitution will, thus, have no application where law making power is not resorted to. Executive instructions contained in Article 77 and Article 162 refer to the law making power alone. No material has been placed before the High Court or before us to show that the Scheduled Castes or Scheduled Tribes candidates migrated from another State having regard to their socio

economic position in Delhi were required to be treated as backward classes We are unable to accept the contention that the members of scheduled castes and scheduled tribes notified as such in other States would come within the purview of the backward classes within the meaning of clause (4) of Article 16 of the Constitution of India. If a caste or tribe is notified in terms of the Scheduled Caste Order or Scheduled Tribe Order, the same must be done in terms of clause (1) of Article 341 as also that of 342 of the Constitution of India, as the case may be. No deviation from the procedure laid down therein is permissible in law. If any amendment/alteration thereto is required to be made, recourse to the procedure laid down under clause (2) thereof must be resorted to. Reservations have been made in terms of the policy decision of the Central Government, namely, 7.5% for the members of scheduled tribes, 15% for the members of scheduled castes and 27% for the members of backward classes. If the members of the scheduled castes and scheduled tribes in other States are to be treated as backward classes for Delhi; intensive studies were required to be made in regard to the question whether they would come within the purview of the definition of `backward classes' so as to answer the description of `socially and educationally backward'. It was so held in *Indra Sawhney ors. v. Union of India ors*[13]. thus:

The language of clause (4) makes it clear that the question whether a backward class of citizens is not adequately represented in the services under the State is a matter within the subjective satisfaction of the State. This is evident from the fact that the said requirement is preceded by the words in the opinion of the State. This opinion can be formed by the State on its own, i.e., on the basis of the material it has in its possession already or it may gather such material through a Commission/Committee, person or authority. All that is required is, there must be some material upon which the opinion is formed. Indeed, in this matter the court should show due deference to the opinion of the State, which is in the present context means the executive....

42. There is another aspect of the matter. When reservation for scheduled castes or scheduled tribes had been earmarked, persons answering the description thereto only can be appointed. No recruitment is permissible for a backward class against a scheduled caste or scheduled tribe quota. That itself would be violative of clauses (1) and (4) of Article 16 of the Constitution of India. Furthermore, if a person is to be treated as scheduled caste or scheduled tribe in terms of Article 341 of the Constitution of India, the benefit attached thereto in all other areas must be conferred on him. A person cannot be treated to be a member of scheduled caste for one purpose
and not for another purpose.

43. The law relating to affirmative action and protective discrimination by way of reservation of posts for the members of the Scheduled Castes invoking Clause (4) of Article 16 of the Constitution of India is reflected by constitutionalism, i.e., the provisions of the Constitution of India read with the executive instructions issued by the National Capital Territory of Delhi in this behalf which has the force of law in terms whereof only the classes of persons who would be entitled thereto were determined. By judicial process or otherwise, the said executive instructions which are consistent with the constitutional scheme could not have brought about an altogether different situation as a result whereof those who are residents of

Delhi being belonging to the members of the Scheduled Castes and, thus, entitled to be regarded within the framework of the quota provided for by the Government could not have been deprived therefrom by way of bringing in another class of persons within the purview of the said category of Scheduled Castes who are not entitled to the said benefit. By reason of such an Act, those who are entitled to the benefit of the doctrine of protective discrimination contained in Clause (4) of Article 16 of the Constitution of India had been deprived of their constitutional right. Once it is found that the constitutional violation of this nature has been committed, in our opinion, the Courts would be entitled to apply the principle of strict scrutiny test or closer scrutiny test or higher level of scrutiny. It is commonly believed amongst a section of Academicians that strict scrutiny test in view of the Constitution Bench decision of this Court in Ashok Kumar Thakur (supra) is not applicable in India at all.

Therein reliance has been placed in *Saurabh Chaudri Ors. v. Union of India Ors*[17]. wherein this Court stated :

36. The strict scrutiny test or the intermediate scrutiny test applicable in the United States of America as argued by Shri Salve cannot be applied in this case. Such a test is not applied in Indian courts. In any event, such a test may be applied in a case where a legislation ex facie is found to be unreasonable. Such a test may also be applied in a case where by reason of a statute the life and liberty of a citizen is put in jeopardy. This Court since its inception apart from a few cases where the legislation was found to be ex facie wholly unreasonable proceeded on the doctrine that constitutionality of a statute is to be presumed and the burden to prove contra is on him who asserts the same.

In a concurrent opinion, one of us, S.B. Sinha, J., stated, thus:

92. Mr Nariman contended that provision for reservation being a suspect legislation, the strict scrutiny test should be applied. Even applying such a test, we do not think that the institutional reservation should be done away with having regard to the present-day scenario. Saurabh Chaudri (supra) read as a whole therefor refused to apply the strict scrutiny test in the case of reservation evidently having regard to the Clauses (1) and (4) of Articles 15 and 16 of the Constitution of India. It is noteworthy to point out that the facts of this case did not bear out an ex facie unreasonableness and therefore the court did not employ the strict scrutiny test. The Constitution Bench in Ashok Kumar Thakur (supra), itself, held:

> "252. It has been rightly contended by Mr Vahanvati and Mr Gopal Subramanium that there is a conceptual difference between the cases decided by the American Supreme Court and the cases at hand. In Saurabh Chaudri v. Union of India626 it was held that the logic of strict classification and strict scrutiny does not have much relevance in the cases of the nature at hand...
>
> [Emphasis supplied]
>
> Saurabh Chaudri (supra) itself, therefore, points out some category of cases where strict scrutiny test would be applicable. Ashok Kumar Thakur (supra) solely relies

upon Saurabh Chaudri to clarify the applicability of strict scrutiny and does not make an independent sweeping observation in that regard.

We are of the opinion that in respect of the following categories of cases, the said test may be applied:

> "1. Where a statute or an action is patently unreasonable or arbitrary. [See *Mithu v. Stateof Punjab*[18].
>
> 2. Where a statute is contrary to the constitutional scheme. [See E.V. Chinniah (supra)].
>
> 3. Where the general presumption as regards the constitutionality of the statute or action cannot be invoked.
>
> 4. Where a statute or execution action causes reverse discrimination.
>
> 5. Where a statute has been enacted restricting the rights of a citizen under Article 14 or Article 19 as for example clauses (1) to (6) of Article 19 of the Constitution of India as in those cases, it would be for the State to justify the reasonableness thereof.
>
> 6. Where a statute seeks to take away a person's life and liberty which is protected under Article 21 of the Constitution of India or otherwise infringes the core human right.
>
> 7. Where a statute is `Expropriatory' or `Confiscatory' in nature.
>
> 8. Where a statute prima facie seeks to interfere with sovereignty and integrity of India.
>
> However, by no means, the list is exhaustive or may be held to be applicable in all situations.

In *Anuj Garg Ors. v. Hotel Association of India Ors*[19]. this Court, stated :

46. It is to be borne in mind that legislations with pronounced protective discrimination aims, such as this one, potentially serve as double-edged swords. Strict scrutiny test should be employed while assessing the implications of this variety of legislations. Legislation should not be only assessed on its proposed aims but rather on the implications and the effects. The impugned legislation suffers from incurable fixations of stereotype morality and conception of sexual role. The perspective thus arrived at is outmoded in content and stifling in means. Anr. [(2008) 7 SCC 454], it is stated :

26. An option is given to any party to a dispute. It may be a public utility service provider or a public utility service recipient. The service must have some relation with public utility.

Ordinarily, insurance service would not come within the public utility service. But having regard to the statutory scheme, it must be held to be included thereunder. It is one thing to say that an authority is created under a statute to bring about a settlement through alternate dispute resolution mechanism but it is another thing to say that an adjudicatory power is conferred on it. Chapter VI- A, therefore, in our opinion, deserves a closer scrutiny. In a case of this nature, the level of scrutiny must also be high. (See Anuj Garg v. Hotel Assn. of India.) As we have already stated, in the event the state issues any instruction through circular in the National Capital Territory of Delhi to this effect, the same will deserve strict scrutiny. After following the precedent with respect to strict scrutiny it is pertinent to explore some foundational principles in this regard. At the heart of the applicability of this doctrine in protective discrimination cases, including affirmative action matters, is the challenge before the court to facilitate the translation of the constitutional vision of substantive equality into a practical feature of the polity. The enabling environment must have objectively laid down policy attributes so much so that the targeted benefits are accrued to parts of polity for which they are meant. As the final arbiter on constitutional interpretation, the court is duty bound to delineate the four corners of the legislative policy which is amenable to the constitutional epithets of equality as also to Article 21. The state has to play within the rules set by the court in this regard. It must be borne in mind at this juncture that in reality, various kinds of rights do not operate independently of each other. And importantly, when State puts its weight behind any particular set of rights by showing compelling interest, the courts have to ensure that the transfer or accrual of benefits as a result of the State action does not end up abrogating the competing rights of others to an unnecessary extent. The constitutional grant of power to state in this respect is channeled by the mandate of this court on the front of implementation. First responsibility of the court is to determine whether the ends purported to be sought by the executive are compelling. This process is under the intense gaze of the court because the government is impinging upon somebody else's core constitutional rights and therefore only the most pressing circumstances can justify the government action. The other important responsibility is to inquire and assess that the law is a narrowly tailored means of furthering those governmental interests. Narrow tailoring should satisfy the court that the law capture within its reach just the adequate activity, neither more or less, than is necessary to advance those compelling ends. In the ultimate analysis, the State action must be narrowly drawn in a manner that it can qualify to be the least restrictive alternative available to pursue those ends. Without this inquiry into fit between the ends and the means enables it will not only be difficult for the courts to test the sincerity of the government's claimed objective but also the law may be suffer from the vice of arbitrariness. Article 14 guarantee against uncanalized and arbitrary laws has to be rigorously pursued by the court in this regard. The State in such cases may act not only through a law but also through an executive instrument like circular or even simple practice or convention and the intense gaze of the Court in this behalf is all pervasive. In fact, more inarticulate the State action would be, greater would be the intensity of the scrutiny by the courts. Objectivity, both in terms of quantifiable data and the intended objective, and time bound prescriptions, (preferably with a sunset clause) are two measures which shall keep the State in good stead while discharging the burden under the protective discrimination mandate. The law must showcase overinclusion or underinclusion or whatever other requirement there may be through statistics before moving ahead with the execution of law. In *M. Nagaraj Others v. Union of*

India Others[20], this court employed the doctrine of guided power to suggest that the power of the state to enact such a law or give effect to protective discrimination under Article 16 (4-A) is to be exercised under the guidance of the Court. The doctrine of guided power in that sense has been used as a corollary of strict scrutiny rule. It is a distant relative of continuing mandamus.

Courts must guard against that protective discrimination clauses are not used as pretexts for an invidious purpose. The political compulsions and extraneous vote considerations in the functioning of the legislature are mentioned by a prominent political science scholar, John Hart Ely in his landmark book, Democracy and Distrust. He says that special scrutiny, in particular its demand for an essentially perfect fit, turns out to be a way of 'flushing out' unconstitutional motivation. Justice Sandra Day O'Connor's in Johnson v. California, 543 U.S. 499, 505 (2005) observed that racial classifications raise special fears that they are motivated by an invidious purpose and that strict scrutiny is designed to 'smoke out' illegitimate uses of race by assuring that the executive is pursuing a goal important enough to warrant use of a highly suspect tool.

Protective discrimination may be used to curtail the extremely hard won civil and political rights granted by the Constitution. We have the backdrop of freedom struggle to engage with in this regard. Rights of the accused as part of the fair trial rights, equality rights, right to liberty and personal autonomy and other such rights are to be fiercely protected against any blind policy onslaught of the times. The government must have a overwhelming compelling interest to justify limitations on the freedom of association, free exercise of religion, free speech, right to vote, right to travel et al. Strict scrutiny thus paves the way for a more searching judicial scrutiny to guard against invidious discriminations which could have made by the State against group of people in violation of the constitutional guaranty of just and equal laws. The court must adopt a weighted balancing approach or in other words pursue an even-handed balancing of the interests

44. The only question which survives is as to whether S. Pushpa (supra) constitutes a binding precedent. A decision, as is well known, is an authority for what it decides and not what can logically be deduced therefrom. In S. Pushpa (supra), decisions of the Constitution Benches of this Court in Milind (supra) had not been taken into consideration. Although the case of Chinnaiah (supra) was decided later on, we are bound by the same. It is now a well settled principle of law that a division bench, in case of conflict between a decision of a Division Bench of two Judges and a decision of a larger Bench and in particular Constitution Bench, would be bound by the latter. [See M/s Sardar Associates v. Punjab Sind Bank, CAs @ SLP (C) Nos. 5249-5250 of 2008 decided on 31st July, 2009] This Court in Marri Chandra Shekhar Rao (supra) categorically held that when a person is held to be a member of scheduled caste for one State, he cannot be treated as such in another. In Milind (supra), it was categorically held that the High Court, in exercise of its supervisory jurisdiction, under Article 227 of the Constitution of India, cannot make any roving inquiry for the purpose of finding out as to whether a person belonging to one caste would, for one reason or the other, can be held to be belonging to another caste or tribe which had been notified as scheduled caste or scheduled tribe. It is also well known that a decision rendered in ignorance of a

binding precedent and/or in ignorance of a constitutional provision, would be held to have been rendered per incuriam. In *Harminder Kaur Ors. v. Union of India Ors*[21]. this Court held:

16. A judgment of a Constitution Bench of this Court laying down the law within the meaning of Article 141 of the Constitution of India must be read in its entirely for the purpose of finding out the ratio laid down therein. The Constitution Bench, in no uncertain terms, based its decision on the touchstone of the `equality clause' contained in Articles 14 and 16 of the Constitution of India. Emphasis has been laid at more than one place for making appointments only upon giving an opportunity to all concerned. Appointment through side-door has been held to be constitutionally impermissible. [See also Oriental Insurance Company Limited v. Mohd. Nasir and Another (2009) 6 SCC 280] In Black's Law Dictionary, 8th edition, 2004, it is stated:

> There is at least one exception to the rule of stare decisis. I refer to judgments rendered per incuriam. A judgment per incuriam is one which has been rendered inadvertently. Two examples come to mind: first, where the judge has forgotten to take account of a previous decision to which the doctrine of stare decisis applies. For all the care with which attorneys and judges may comb the case law, errare humanum est, and sometimes a judgment which clarifies a point to be settled is somehow not indexed, and is forgotten. It is in cases such as these that a judgment rendered in contradiction to a previous judgment that should have been considered binding, and in ignorance of that judgment, with no mention of it, must be deemed rendered per incuriam; thus, it has no authority.... The same applies to judgments rendered in ignorance of legislation of which they should have taken account. For a judgment to be deemed per incuriam, that judgment must show that the legislation was not invoked. Louis- Philippe Pigeon, Drafting and Interpreting Legislation 60 (1988) As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some features of the decision or some step in the reasoning on which it is based is found on that account to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided per incuriam, must in our judgment, consistently with the stare decisis rule which is an essential part of our law, be of the rarest occurrence. Rupert Cross J.W. Harris, Precedent in English Law 149 (4th ed. 1991) In an article Final Appellate Courts Overruling Their Own Wrong Precedents: The Ongoing Search For Principle by B.V. Harris published in (2002) 112 LQR 408-427, it is stated:

A decision may be held to be per incuriam where relevant statutory provisions, or binding case law authority, have been overlooked or misinterpreted in arriving at the holding in the precedent.... Considerations Relevant To Deciding whether to Defer to or Overrule Precedent:

The first consideration for a final appellate court called upon, in the exercise of its discretion, to overrule an allegedly wrong precedent of its own, will be whether the precedent can be distinguished on the facts, including changing social and other contexts, or distinguished on the law. If the precedent can be distinguished, overruling will not be necessary. The subsequent appellate court will rather be free to choose not to follow the precedent which can be distinguished Second, the precedent should be considered closely to determine whether the decision was reached per incuriam. A per incuriam precedent may be overruled. Third, the workability of the precedent should be assessed. Evidence of lack of workability may justify overruling. The fourth consideration will be whether any reasons have been advanced in the appeal which were not considered in deciding the precedent. This category could arguably be included in many circumstances, either in the first category as a form of distinguishing, or in the second category if the omission is sufficiently serious to cause the precedent to be per incuriam. All of the first four considerations have traditionally been accepted as exempting subsequent appellate courts from the obligation to follow precedent.

In the context of overruling the two leading precedents {de *Freitas v. Benny*[18] *and Reckley v. Minister of Public Safety and Immigration (No. 2) [1996] A.C.527} which* had held the exercise of the prerogative of mercy to be non-justiciable, Lord Slynn of Hadley in Lewis v. Att. Gen. Of Jamaica [2001] 2 AC 50 at p. 75, stated:

The need for legal certainty demands that they should be very reluctant to depart from recent fully reasoned decisions unless there are strong grounds to do so. But no less should they be prepared to do so when a man's life is at stake, where the death penalty is involved, if they are satisfied that the earlier cases adopted a wrong approach. In such a case rigid adherence to a rule of stare decisis is not justified.

The case of *Attorney General v. Blak* [22]has been referred by SIR Richard Buxob in his article How the Common Law Gets Made: Hedley Byrne and Other Cautionary Tales [(2009) 125 L.Q.R. 60], as decision given per incuriam. Prof.A.W.Brain has prepared a memorandum on the said note. In the particular case in 1961 Blake pleaded guilty to five offences against Official Secrets Act 1911. He had communicated information which he has come to pssess as a member of the Secret Intelligence Service (SIS). He was sentenced o term of 42 years imprisonment. The House of Lords decision stated that Blake wasa member of the security and intelligence. However it is stated by the author that there is no practice of describing the SIS as a security service; it is not concerned with security but with foreign intelliegence, including the sponsorship of espionage and was an offshoot of some sort of the Foreign Office, possibly also being associated with the Cabinet Office or the Prime Minister's Personal Office. Thus there was no details explained as regards to the employment of Blake and it was not clear. The author states that it was a well settled in 1940s that the relationship between a member of the armed services and the crown was non-contractual. However it is stressed that if the nature of employment of Blake was in civil capacity then the application of above observation needs to be considered. But more importantly, what needs to be addressed is that to treat incidental undertakings by members of the armed services as actionable contracts would lead to absurdity. It is also pointed out that the relationship between the Crown and members of the armed services is and long has been regulated by disciplinary proceedings, by failure to promote, or by retirement, not by the private law of

contract or tort. If this position is to be changed by a judicial decision then the court surely needs to attend to the radical nature of such a change. Also it is noted that the signing the Official Secrets Acts created a binding contract relating just to one aspect of Blake's duties, is something which is problematic. Thus author states that the supposed contract case was decided without any careful investigation of the very existence of a binding contract, or of its scope and character, assuming there to have been one. It does not seem to be a good idea to proceed in this way, and at end of day there is therefore a strong case for regarding the decision as having been given per incuriam in their Lordships' attention had never been adequately directed to either the relevant facts or the relevant law. [See A Decision Per Incuriam? -Prof.A.W.Brian Simpson, The Law Quarterly Review, volume 125, July 2009, p.433] We have noticed hereinbefore that the premise on which S. Pushpa (supra) was rendered, namely, Marri Chandra Shekhar Rao (supra), had no application to union territories was not correct.

45. Would we be violating the norms of judicial discipline in ignoring the decision of this Court in Pushpa is the question, having regard to the provisions contained in Article 141 of the Constitution of India? The question is a difficult one. On the one hand, this Court emphasizes the need for speaking in one voice and/or adhering to the doctrine of certainty so as not only to enable this Court but also the High Court and the subordinate courts to know exactly what the law is and, on the other hand, it is now trite that having regard to the binding nature of the doctrine of stare decisis, whether we would be bound by our own decision and to what extent. [See Milind (supra) where in view of constitutional scheme, even doctrine of stare decisis not followed. See also *India Cement Ltd. and Others v. State of Tamil Nadu and Others*[23] and *Synthetics and Chemicals Ltd. and Others v. State of U.P. and Others*[24] In *Central Board of Dawoodi Bohra Community Anr. v. State of Maharashtra Anr*[25]. Lahoti, CJI (as he then was) speaking for a Constitution Bench following its earlier decision in *Union of India v. Raghubir Singh*[26] stating :

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 abovesaid 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 co-equal strength.
>
> (2) A Bench of lesser quorum cannot doubt the correctness of 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) The above rules are subject to two exceptions :

(i) The abovesaid 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 Chief Justice constituting the Bench and such listing. Such was the situation in Raghubir Singh and Ors. and Hansoli Devi and Ors. (supra).

Yet again, recently in *Nagar Palika Nigam v. Krishi Upaj Mandi Samiti Ors*[27]. having regard to the provisions of Order VII Rule 2 of the Supreme Court Rules, 1966, this Court refused to allow the appellant therein to raise the question of vires of a statute as such a contention had not been raised before the High Court. The question came up for consideration before a Three Judge Bench in Ors. [(2008) 10 SCC 1], wherein the necessity to maintain judicial discipline was reiterated, stating :

90. We are distressed to note that despite several pronouncements on the subject, there is substantial increase in the number of cases involving violation of the basics of judicial discipline. The learned Single Judges and Benches of the High Courts refuse to follow and accept the verdict and law laid down by coordinate and even larger Benches by citing minor difference in the facts as the ground for doing so. Therefore, it has become necessary to reiterate that disrespect to constitutional ethos and breach of discipline have grave impact on the credibility of judicial institution and encourages chance litigation. It must be remembered that predictability and certainty is an important hallmark of judicial jurisprudence developed in this country in last six decades and increase in the frequency of conflicting judgments of the superior judiciary will do incalculable harm to the system inasmuch as the courts at the grass root will not be able to decide as to which of the judgment lay down the correct law and which one should be followed.

91. We may add that in our constitutional set up every citizen is under a duty to abide by the Constitution and respect its ideals and institutions. Those who have been entrusted with the task of administering the system and operating various constituents of the State and who take oath to act in accordance with the Constitution and uphold the same, have to set an example by exhibiting total commitment to the Constitutional ideals. This principle is required to be observed with greater rigour by the members of judicial fraternity who have been bestowed with the power to adjudicate upon important constitutional and legal issues and protect and preserve rights of the individuals and society as a whole. Discipline is sine qua non for effective and efficient functioning of the judicial system. If the Courts command others to act

in accordance with the provisions of the Constitution and rule of law, it is not possible to countenance violation of the constitutional principle by those who are required to lay down the law.

> 46. Should we consider Pushpa to be an obiter following the said decision is the question which arises herein. We think we should. The decisions referred to hereinbefore clearly suggest that we are bound by a Constitution Bench decision. We have referred to two Constitution Bench decisions, namely Marri Chandra Shekhar Rao and E.V. Chinnaiah. Marri Chandra Shekhar Rao had been followed by this Court in a large number of decisions including Three Judge Bench decisions. Pushpa, therefore, could not have ignored either Marri Chandra Shekhar Rao or other decisions following the same only on the basis of an administrative circular issued or otherwise and more so when the Constitutional scheme as contained in clause (1) of Articles 341 and 342 of the Constitution of India putting the State and Union Territory in the same bracket.
>
> Following Dayanand (supra), therefore, we are of the opinion that the dicta in Pushpa is an obiter and does not lay down any binding ratio.
>
> 47. For the reasons aforementioned, the impugned judgments cannot be sustained which are set aside accordingly. The appeal and the writ petition are allowed. In the facts and circumstances of the case, there shall be no orders as to costs.

Judgment Referred.

[1]*(1990) 3 SCC 0130*
[2]*(1994) 5 SCC 0244*
[3]*(2004) 1 SCC 0580*
[4]*(2005) 3 SCC 0001*
[5]*(2000) 2 SCC 0020*
[6]*(2004) 1 SCC 0530*
[7]*(2005) 3 SCC 0001*
[8] *(2005) 1 SCC 0394*
[9]*(2002) 8 SCC 0481*
[10]*(2003) 7 SCC 0657*
[11] *(2007) 5 SCC 0360*
[12]*1956 Nagpur LJ 0725*
[13]*(2008) 6 SCC 0001*
[14]*1992 Supp. (3) SCC 0212*
[15]*(1999) 2 SCC 0462*
[16]*(2006) 8 SCC 0726*
[17]*(2003) 11 SCC 0146*
[18]*(1983) 2 SCC 0277*
[19]*(2008) 3 SCC 0001*
[20]*(2006)8SCC212*
[21]*(2009) 7 SCALE 204*
[22]*(1997) Ch D; (1998) Ch 439 CA; and (2001) 1 A.C.268 HL*
[23]*(1990) 1 SCC 0012*

[24]*(1990) 1 SCC 0109*
[25]*(2005) 2 SCC 0673*
[26]*(1989) 2 SCC 0754*
[27]*(2008 AIR SCW 7914*