IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 775 OF 2014

1. Mr. Yash Pramesh Rana of Mumbai
Indian Inhabitant residing at C/1003,
Silver Leaf Society, Akurli Road,
Kandivali (E), Mumbai – 400 101.

2. Mr. Avirat Suhas Gaikwad of Mumbai,
Indian Inhabitant residing at A/61,
Mulund Sai Co-operative Housing Society,
Mhada Colony, Mulund (E),
Mumbai – 400 081.

3. Sayori Sadanand Patil, of Mumbai
Indian Inhabitant residing at 19A/405,
Bimbisar Nagar, Goregaon (E),
Mumbai – 400 063.

4. Mr. Jagtap Nitin Maruti of Mumbai
Indian Inhabitant Residing at
Plot No. 6/Q/5 Shivaji Nagar-II,
Govandi, Mumbai – 400 043.

5. Mr. Prathamesh Premnath Salgaonkar,
Of Mumbai Indian Inhabitant residing at
208/26, Swa Sadan CHS,
Sector-2, Charkop, Kandivali (West),
Mumbai – 400 067.

6. Mr. Praveen Hanumant Farande
Of New Mumbai, Indian Inhabitant residing at
Osho Purushottam,
Plot No. 23/24, Room No. 402,
Sector-35, Kamothe, New Mumbai.

7. Mr. Ravikumar M. Vanjara, of Thane
Indian Inhabitant,
Residing at A/203, Regency Apartments,
Near Vijaya Bank Akashi Road,
Virar (W)-401 303.

8. Mr. Tejas Kiritkumar Rathod of Mumbai
Indian Inhabitant, residing at 304,
Shreeram Jayram CHS Ltd.,
Near Balbharati School, S. V.Road,
Kandivali (W), Mumbai – 400 067.

9. Mr. Sankhe Raj Nandakumar, of Mumbai
Indian Inhabitant, residing at 405,
Abhinav Vasant CHS Ltd., Vazira
Nagar, Borivali (West), Mumbai.

10. Mr. Sankhe Tej Nandkumar of Mumbai
Indian Inhabitant, residing at 405,
Abhinav Vasant CHS Ltd.,
Vazira Nagar, Borivali (West),
Mumbai.

11. Mr. Swapneel U. Trimbake, of Mumbai
Indian Inhabitant, residing at K/4,
Saidham Building, Majas Road,
Jogeshwari (East), Mumbai – 400 060.

12. Mr. Pankaj Vinayak Thik, of Mumbai,
Indian Inhabitant, residing at
Room No. 2, Hirasingh Rawat Chawl,
Jivalapada, Borivali (East),
Mumbai – 400 066.

13. Mr. Neel Sunil Raut, of Mumbai
Indian Inhabitant, residing at 256,
Wavtewadi, Pimpalwadi,
Near St. Peter High School,
Virar (East)
Dist. Thane 401305.

14. Ms. Asmita Vilas Shivalkar of Mumbai,
Indian Inhabitant Residing at
Asgar Manzil, 3rd floor, Room No. 4,
J. B. Wadia Road, Parel,
Bhoiwada, Mumbai 400 012.

15. Ms. Samiksha Milind Save, of Mumbai
Indian Inhabitant, residing at 267-C,
At Kurgaon, Post. Kundan, Tal. Palghar,
Dist. Thane 401 502.

16. Ms. Rucha Dhananjay Panchal of
Mumbai, Indian Inhabitant
residing at B-5/1,
Sunder Nagar,
Malad (West),
Mumbai 400 064.

17. Ms. Pratiksha Ramesh Gharat of Mumbai,
Indian Inhabitant residing at
Nalimbi, Post Rayate Tal. Kalyan,
Dist. Thane 421 301.

18. Ms. Pooja Ashok Mangaonkar of Mumbai,
Indian Inhabitant residing at
Bharati Housing Society,
2/23, 90 Ft. Road, Tilak Nagar,
Sakinaka, Mumbai 400 072.

19. Mr. Sagar HARESH Makwana of Mumbai,
Indian Inhabitant residing at 6B,
2nd Floor, Adarsh Bhuvan,
Shree Nagar Society,
M. G. Road, Goregaon (West),
Mumbai 400 062.

20. Ms. Janhavi Abhay Dudwadkar of
Mumbai, Indian Inhabitant residing at
E-404, Ashray Co-op. Housing Society,

Manish Park, Pump House,
Andheri (East), Mumbai – 400 093.

21. Ms. Meghna Kirtikumar Mandalia of Mumbai,
Indian Inhabitant residing at
Flat No. 4, Chetan Building,
Vallabhbhai Road, Vile Parle (West),
Mumbai 400 056.

22. Mr. Nishant Devendra Panchal of Mumbai,
Indian Inhabitant residing at 32,
Jyoti Nagar Co-op. Housing Society,
Off. R.T.O. Road, Near Four Bungalows,
Andheri (West), Mumbai 400 053.

23. Ms. Khushboo Ashok Kasavkar of Mumbai,
Indian Inhabitant residing at B-104,
Neelyog Apts. M. G. Cross Road No. 4,
Kandivali (West), Mumbai – 400 067.

24. Ms. Ashwini Shashikant Kamble of Mumbai,
Indian Inhabitant residing at 4/161,
18, Sankalp Siddhi,
Near Tardeo Bridge P. B. Marg,
Mumbai 400 007.

25. Mr. Mihir Nareshkumar Rathod of Mumbai,
Indian Inhabitant residing at Shantikunj,
Flat No. 10, 15th Road, Khar (West),
Mumbai 400 052.

26. Runali Ashok Kamble of Mumbai
Indian Inhabitant residing at A-404,
Shri Hari Co-op. Housing Society Ltd.,
R.T. O. Lane, Four Bungalows,
Andheri (West), Mumbai 400 053. ..... **Petitioners**

Versus

1. State of Maharashtra through

Dept of Social Welfare & Special Assistant
Govt. of Maharashtra, Mantralaya,
Mumbai
(Notice be served through Government Pleader,
Original Side, High Court, Bombay.

2. Shree Vileparle Kelvani Mandal's
Dwarkadas J. Sanghvi College of Engineering,
having their office at Plot No. U-15,
JVPD Scheme, Bhakti Vedanta Swami Marg,
Vile Parle (West), Mumbai – 400 056. ..... **Respondents**

Dr. Birendra Saraf a/w. Mr.Aseem S.Naphade and Ms.Farhana Khan i/b. Mr.Kalpesh J. Nansi for the petitioners.
Mr. Girish Godbole, the learned Special Counsel a/w. Milind More, Additional GP, Ms. Shruti Tulpule, Mr.Kaustubh Thipsay, Mr.Rahul Soman for the Respondent No.1/State.
Mr. S.K.Srivastav a/w. Ms. Manoramma Mohanty, Ms.Ambika P. Singh, Ms.Kavita Srivastav Sharan i/b. M/s. S.K.Srivastav & Co. for respondent no.2.

Coram:- A.A. SAYED,
DAMA SESHADRI NAIDU &
P.D. NAIK, JJJ.

Reserved on : 29th November 2019

Pronounced on : 29th May 2020

JUDGMENT [PER DAMA SESHADRI NAIDU, J]

Introduction:

Emancipation through Education:

A boy began the battle. It was in 1856. Branded by birth as a Dalit, he wanted to join a school in Bombay Presidency. It raised a storm, a storm of indignation and

disbelief. And that boy's battle for admission has changed the course of Indian educational history. But the battle has not ceased, it seems. It continues in one form or another—in the arena of courts, though.

2. It was in June 1856 that boy applied for admission into a government school in Dharwar, Bombay Presidency. The incident had created a furore in the administration; that ultimately attracted the attention of the rulers. The East India Company was forced to formulate an educational policy. That policy mandated that if the schools were maintained by the government, the 'classes of its subjects' were to be given admission without any distinction of caste, religion, and race. But that policy did not translate into action. Until 1872, education remained the privilege of the few. That year, Mahatma Phule contested the discrimination in access to education before the Hunter Commission. Then came the Caste Disabilities Act of 1872, the first enactment in that direction.[1]

3. From then on, we have travelled far, but not far enough. Still access to education depends, among other things, on the student's economic strength. Socially and economically speaking, the weaker the student is, the farther he is from quality education. Here is a case that concerns the right of, again, a few down-trodden students for recompense on their educational expenditure.

Facts:

4. There are 26 petitioners. They were all students then, pursuing their

1K. C. Chalam, *Caste-based Reservations and Human Development in India*; (Sage Publications, 2007) 94

engineering under-graduation courses in the second respondent college. That college ("Sanghvi College") is a Gujarati Linguistic Minority institute—a non-aided professional institution. As a linguistic minority institution, Sanghvi College has its own admission procedure. Every academic year, the college admits students, monitored by a Government-appointed Committee. That Committee—Pravesh Niyantran Committee—is headed by a retired High Court Judge.

5. To get admitted into any engineering college in the State of Maharashtra, the student must take a Common Entrance Test ("CET") held by the State Government. Once the ranks are determined in the CET, it is open for the students to participate in a Common Admission Procedure ("CAP") held by the Government and secure admission in one of the colleges that are part of this CAP. On the other hand, certain other institutions—for example, minority institutions—have not become part of the CAP; instead, they have their own admission procedure, approved by Pravesh Niyantran Committee. Students who do not desire to participate in CAP may apply to any of these colleges having their own admission procedure and secure admission. True, even these students, too, must have, as a precondition, secured rank in CET.

6. Sanghvi College is one such institute with its own admission procedure. And the petitioners had their admission into this college, without their participating in CAP.

7. In the last few years, the Government has implemented the policy of fee

reimbursement to SC, ST, and OBC students pursuing their professional courses in Maharashtra. But by a Government Resolution ("GR"), dt.27/02/2013, the Government restricted this benefit of fee reimbursement to only those SC, ST, and OBC students that had taken admission through the CAP.

8. Assailing the GR, dt.27.02.2013, the petitioners have filed this Writ Petition.

Procedural History:

9. On 27th March 2019, a Division Bench, to which one of us (Dama Seshadri Naidu J) is a party, took up the matter for hearing. It noticed that coequal Division Benches of this Court, either at Bombay or at other Benches, have decided identical disputes—fee reimbursement—but have taken contrary stands. Thus, the Division Bench has noticed judicial cleavage among coequal Benches.

10. To be explicit, a Division Bench of this Court at Nagpur in *Bhupendra v. Union of India* (WP No.4822 of 2013) has upheld a similar scheme but applied it prospectively. That is, it has refused to apply the restrictions in the scheme to the students who had secured admission by then.

11. Later, two co-equal Benches of this Court at Bombay, have taken a contrary stand. Granted, *Bhupendra* was not brought to the notice of those Division Benches. First, in *Association of Management of Unaided Engineering Colleges v. State of Maharashtra*, decided on 09th September 2014; and later in

Bapu Supadu Thorat v. State of Maharashtra, decided on 20th March 2015. The latter one has held the impugned GR as patently discriminatory.

12. To have this precedential tangle resolved, the Division Bench requested the Hon'ble the Chief Justice to place it before a Bench of appropriate strength. That is how this Full Bench has come to be constituted.

Relief Sought:

13. The facts do fall in a narrow compass. The writ petition concerns the denial of fee reimbursement to one category of students who have secured admission through a different—albeit Government approved—method. But for this difference in the method of admission, the denied students share the same characteristics with the benefited students. So let us put in perspective the relief the petitioners sought.

The petitioners want the Court

(a) to quash the Government Resolution, dt.27.02.2013;

(b) to direct the Government to reimburse "the education fees" and "the examination fees" (already paid or yet to be paid by the students) to the petitioners.

What Drives the Dispute?

(a) GR, dt.27.02.2013:

14. The Government Resolution, dt.27.02.2013, deals with the "reimbursement of the Tuition Fee to the students of SC, ST, DT, VJNT, SBC and OBC taking admission in the Government recognised institution under

Higher & Technical Education Department, and others. The GR concerns the Academic Year (AY) 2012-13.

15. Courses under Higher and Technical Education include diplomas, degrees, and post-graduate degrees in Engineering. Among other things, the GR allows 100% reimbursement of tuition fees and exam fees to the students of SC, ST, DT, NT, VJNT and SBC; and 50% reimbursement for OBC students. They must be studying in the "State recognised Private Unaided and Permanently Non-Aided Professional Institutions." For VJNT, NT, SBC, and OBC students, the annual income of their parents "should be below Rs.4.50 lakh."

16. Indeed, SC, ST, DT, NT, VJNT, SBC, and OBC students admitted in the merit quota under the open category, too, are eligible under this scheme. Their getting admitted under the quota of their respective castes is no pre-condition. But, across the board, this Scheme is available only to the students "admitted under the Government Quota." The students' academic performance matters; if they fail in an examination, they lose the benefit. Of much significance are these two conditions:

> (1) "This benefit for Diploma/Degree and P.G. Degree shall be given to the students who are admitted under the Government Centralised Admission Process (CAP);
>
> (2) "The students taking admissions in Deemed Universities are not eligible for this Scheme."

17. To understand the scope of controversy, we may refer to similar GRs

the Government issued from time to time about the same issue: fees reimbursement:

(b) GR, dt.03.02.2012:

> This GR was for the AY 2011-12.
>
> (6) This benefit for diploma/degree and PG Degree related to Technical Education shall be given to the students who are admitted under CAP.
>
> (9) Students taking admission in Deemed Universities are not eligible for this Scheme.

(c) GR, dt.11.10.2012:

18. This GR, it seems, retrospectively applied to AYs 2006-07 to 2011-12, until the students admitted in these years completed their "academic tenure."

> (5) This benefit for diploma/degree and PG Degree related to Technical Education shall be given to the students who are admitted under CAP.
>
> (7) Students taking admission in Deemed Universities are not eligible for this Scheme.

(d) GR, dt.01.11.2003:

19. It seems to be a policy circular on implementing the scholarship scheme of Government of India. It contains no restrictions.

The Admission Policy and Legitimacy:

20. In *T.M.A. Pai Foundation v State of Karnataka*[2], through a Bench of 11 Judges, the Apex Court has held that right to open, administer, manage, conduct an educational institution is a fundamental right. It has also held that the Government Un-Aided and Aided Educational Institutions may take a reasonable

2(2002) 8 SCC 481

surplus. Then, in *Islamic Academy of Education v State of Karnatka*[3], a Constitution Bench has 'explained' the case-holding of *TMA Pai Foundation*. It has held that though the right to establish and manage an educational institution is a fundamental right, the process of admissions must be transparent. For this, the students should appear for a CET.

21. Thereafter, a Constitution Bench of 7 Judges in *P.A. Inamdar v State of Maharashtra*[4] has revised the admission mechanism. The Court required the States to establish Committees to be presided over by retired Judges of High Courts: one is the Admission Regulation Committee (Pravesh Niyantran Samiti) and the other Fee Fixation Committee. To give a statutory shape to the Supreme Court's judicial dictum, the State of Maharashtra has enacted Maharashtra Educational Institutions (Regulation of Fee) Act, 2011, besides taking certain quasi-legislative measures.

22. By these Judgments—*TMA Pai*, *Islamic Academy*, and *P. A. Inamdar*—the Apex Court has directed the educational institutions in every State to have students admitted through the CAP. All students must appear in CAP. The CAP can be conducted either by the State Government concerned or Association of Private Aided or Un-Aided Educational Institutions in that particular State.

23. The Supreme Court rendered *Pai Foundation* on 31.10.2002. As held in *P. A. Inamdar*, the Union of India, various State Governments, and the

32004 (6) SCALE 573
4(2005) 6 SCC 537

Educational Institutions each understood the majority judgment in its own way. The State Governments embarked upon enacting laws and framing the regulations, governing the educational institutions in consonance with their own understanding of *Pai Foundation*. This led to litigation in several courts. And that has paved the way to *Islamic Academy*, a Constitution Bench's 'clarificatory' judgment.

24. One of the four questions *Islamic Academy* formulated was whether private unaided professional colleges could admit students by evolving their own method of admission. By explaining *Pai Foundation*, it has held:

> (1) In professional institutions, as they are unaided, there will be full autonomy in their administration, but the principle of merit cannot be sacrificed, as excellence in profession is in the national interest.
>
> (2) Without interfering with the autonomy of unaided institutions, the Government can secure the object of merit-based admissions by insisting on the recognition of merit by the management. This is despite the management's discretion in admitting the students.
>
> (3) The management can have quota for admitting students at its discretion but subject to satisfying the test of merit-based admissions. For this, the management can pick students of its own choice "from out of those who have passed the common entrance test conducted by a centralized mechanism." And "such common entrance test can be conducted by the State or by an association of similarly placed institutions in the State."
>
> (4) The State can provide for reservation in favour of financially or socially backward sections of the society.
>
> (5) The allotment of different quotas, such as management seats and

State's quota for reserved categories, has to be done by the State as per the "local needs" and the "needs of that minority community in the State, both deserving paramount consideration."

25. In this context, we may note that *Islamic Academy* directed the State Governments to appoint a permanent Committee to ensure that the tests conducted by the association of colleges are fair and transparent. To be explicit, *Islamic Academy*, besides clarifying *TMA Pai*, has directed the Governments concerned to set up two committees in each State: one committee "to give effect to the judgment in *Pai Foundation*" and to approve the fee structure or to propose some other fee which can be charged by minority institutions, and the other committee "to oversee the tests to be conducted by the association of institutions."

26. After appreciating the scope of the Committees which *Islamic Academy* wanted the Governments to appoint, *P. A. Inamdar*, among other things, examined whether these Committees can regulate or take over the admission procedure and fee structure.

27. *P. A. Inamdar* has noted that whether they are minority or non-minority institutions, in a State there may be more than one similarly situated institution imparting education in any one discipline. The same aspirant seeking admission into any one course shall have to purchase admission forms from several institutions and take several admission tests conducted at different places on the same or different dates. And there may be a clash of dates, too. If the same

candidate is required to appear in several tests, he would be subjected to unnecessary and avoidable expenditure and inconvenience. There is nothing wrong if one group of institutions imparting same or similar education holds one common entrance test. Such institutions situated in one State or in more than one State "may join together and hold a common entrance test or the State may itself or through an agency arrange for holding of such test." Out of such common merit list, the successful candidates can be identified and admitted into different institutions.

28. Thus, the admission may depend on the courses of study offered, the number of seats, the kind of minority to which the institution belongs, and other relevant factors. Such an agency conducting CET, according to *P. A. Inamdar*, must be one enjoying utmost credibility and expertise in the matter. This would better fulfil the twin objectives of transparency and merit. CET is necessary for achieving those objectives and also for saving the student community from harassment and exploitation. Holding of such common entrance test, followed by centralized counselling or, in other words, single-window system regulating admissions, does not dent the rights of minority unaided educational institutions in their admitting students of their choice. Such choice can be exercised, as *P. A. Inamdar* explains, from out of the list of successful candidates prepared after the CET, and without altering the order of merit *inter se* of the students so chosen, at that.

29. Then in paragraph 142, *P. A. Inamdar* has emphasised that having regard to the larger interest and welfare of the student community and to promoting merit, achieving excellence, and curbing malpractices, the Government could regulate admissions by providing a centralized and single-window procedure. Such a procedure, to a large extent, can secure merit-based admissions on a transparent basis. Till regulations are framed, the admission committees can oversee admissions to ensure that merit is not a casualty. *P. A. Inamdar* has also acknowledged the criticism against these Committees.

30. So *P. A. Inamdar* has regarded as permissible the two committees for monitoring the admission procedure and for determining the fee structure. They are permissible as regulatory measures aimed at protecting the interest of the student community as a whole, as also the minorities themselves, in their maintaining the required standards of professional education on non-exploitative terms. Legal provisions made by the State Legislatures or the schemes evolved by the Court for monitoring the admission procedure and fee fixation, according to *P. A. Inamdar*, do not violate the right of minorities under Article 30(1) or the right of minorities and non-minorities under Article 19(1)(g). They are reasonable restrictions in the interest of minority institutions, permissible under Article 30(1) and in the interest of general public under Article 19(6) of the Constitution.

31. Eventually, *P. A. Inamdar* has felt that the non-minority unaided institutions can also be subjected to similar restrictions which are found

reasonable and which are in the interest of student community. Minorities or non-minorities, the institutions have an obligation and a duty to maintain requisite standards of professional education by giving admissions based on merit and by making education equally accessible to eligible students through a fair and transparent admission procedure and a reasonable fee structure.

The Admission Policy in Practice:

32. In practice, CET is held by the State. It declares the relative merit of the candidates; they are assigned ranks. Then, the CAP begins. The Government holds rounds of admissions—usually, three rounds. All the Government colleges and most of the aided, as well as unaided, colleges submit themselves to the CAP. As the list of colleges is available, the rank-holders apply for admission into a college of their choice. They may mention more than one college in the order of preference. The choice, usually, depends on the academic standard of the college and its proximity.

33. Predictably, the most meritorious get admission in the first round, in the colleges of their choice. As the ranking decreases, the range of choice diminishes. Thus, the second and the final rounds of admission take place. Given the academic standards, a few colleges will have their intake early in the admission process. And a few may not attract many students even by the third round. By an estimation, in the undergraduate engineering courses, some colleges will have 85% seats remaining unfilled even after the third round. Then, the

Government allows these colleges to admit students from CET though those students may not have secured commendable ranks. This is admission by default. In this case, we are not concerned with such admissions.

34. That said, a few colleges do not submit themselves to CAP. They will have their own admission procedure. These are minority institutions—minority of whatever nature, including linguistic. Both the case law and statute law permit those colleges to have their own admission policy. But they take the students from the pool of only CET. Why should the students choose these colleges that bye-pass the CAP? The reasons can be many. The academic standard, the proximity to the student location, relatively restricted competition are a few reasons. Now, the GR wants to deny the fee reimbursement to the students who secure admission bye-passing CAP, though they are drawn from the merit pool of CET. Is it discriminatory?

35. There is a third category: the deemed to be Universities. These institutions have their own intra-campus entrance, on the lines of CET. They will have the admissions from the ranks of those students that emerged successful in that intra-campus entrance. These institutions, thus, bye-pass both CET and CAP, too. The GR has eliminated from the benefits of the Scheme these students, as well.

The Category of Students that Sought Relief:

36. Here, we are concerned with the students that have had a common

CET but not a common CAP. The students that get admissions into the unfilled seats of the CAP pool of colleges and those that get admissions into deemed Universities have not fallen for consideration here, either. We will consider the students that have been admitted into minority colleges without their going through the Government-held CAP.

The Government's Defence:

37. The Government offers two reasons why it cannot extend the benefits of the Scheme to all—across the board: (a) financial constraints and (b) policy considerations.

Precedential Position:

38. Every academic year, the Government has been coming up with this policy of monetary help to the students from the underprivileged communities. So, intermittently, this policy decision has come up for judicial consideration. In fact, these repeated adjudications have given rise to certain precedential tangles. Let us see how they have fared in the context of constitutional commands concerning classification and discrimination.

Sl. No.	Parties	Challenge To	Result
1.	*Bhupendra v UOI* WP No.4822/2014	G.R. dt. 3.2.2012 (Restricting the scholarship to students securing admission only through CAP)	DB's decision, dt.18.07.2014, upholding the GR (Coram: Smt. Vasanti A. Naik & V. K. Jadhav JJ)

2.	*Dudishwar v State of Maharashtra* WP No.4915/2014	-do-	DB's decision, dt.22.06.2015, upholding the GR (Coram: Smt. Vasanti A. Naik & V. K. Jadhav JJ)
3.	*Pravin Bhima Shinde v State of Maharashtra*	-do-	DB's decision, dt.08.01.2016, upholding the GR. (Coram: S. S. Shinde & P. R. Bora)
4.	*Mrudul v State of Maharashtra*	G. R. dt.4.3.2014 (applying the same restrictions)	DB's decision, dt.27.06.2016, holding the Govt., action as discriminatory and violative of Art.14, etc. (Coram: B. P. Dharmadhikari & Indira Jain, JJ)
5.	*Association of Managements of Unaided Engg. Colleges v State of Maharashtra*	G.R. Nos.177 & 178, dt.09.05.2013 and 15.05.2013 respectively (Restricting the scholarship to students securing admission only through CAP)	DB's decision, dt.09.09.2014, holding the Govt., action as discriminatory and violative of Art.14, etc. (Coram: Anoop V. Mohta & F. M. Reis, JJ)
6.	*Bapu Sukudu Thorat v State of Maharashtra* WP No.	G.Rs. dt.27.07.2009 & 06.11.2010 (excluding students who secured admissions to the professional courses in Deemed Universities)	DB's decision, dt.20.03.2015, holding the Govt., action as discriminatory and violative of Art.14, etc. (Coram: A. S. Oka & A. S. Gadkari, JJ)
7.	*Miss Sayali Shirish Nikumbh v State of Maharashtra* (WP No.1683/2019)	G.R., (number & date unavailable), (restricting the scholarship to students securing admission only through CAP)	DB's decision, dt.19.08.2019, upholding the GR (Coram: S. C. Dharmadhikari & G. S. Patel, JJ)

8.	*Ajit Rajendra Bhagwat v State of Maharashtra*	G.R. dt.15.04.2017, (restricting the scholarship to students securing admission only through CAP)	DB's decision, dt.02.12.2019, upholding the GR (Coram: S. C. Dharmadhikari & R. I. Chagla, JJ)

The Case Holding:

1. Bhupendra v Union of India

39. In *Bhupendra v. Union of India*[5], a Division Bench of this Court, through judgment dated 18th July 2014, has "not found that the action of the State Government in restricting the scholarship for students securing admission only through the Centralized Admission Process is violative of the provisions of Article 14 of the Constitution of India."

2. Dudishwar v State of Maharashtra

40. It was decided on the lines of *Bhupendra* by the same Bench.

3. Pravin Bhima Shinde v State of Maharashtra

41. This decision, too, followed *Bhupendra*, though decided by another Bench.

4. Association of Management of Unaided Engineering Colleges v State of Maharashtra ("Association of Colleges"):

42. In *Association of Colleges* [6], another Division Bench, through the judgment dated 9th September 2014, has taken a contrary stand. In this case, the

5*Bhupendra v. Union of India* (High Court of Bombay, at Nagpur, 18 July 2014)
62015 (2) Mh. LJ 370

issue concerns fee-reimbursement. The petitioners have been getting regular fee reimbursement, though in part, since beginning. It was up to 2011-12 and 2012-13. But through Clause 14 of GR Nos.177 and 188, dt.9.5.2013 and 15.5.2013 respectively, the Government has "denied the fee reimbursement facility to the reserved category students admitted in the newly established institutions and/or newly started courses in the existing institutions from the year 2013-14."

43. *Association of Colleges* has observed that "once the competent authorities/bodies like AICTE granted the sanction/approval to such institutes and so also the affiliation by the Universities, the State role is restricted." It has also noted that the Government has issued "no prior notice for the stated mandatory procedure that Applications should be routed through the State Government for such benefits." The abrupt restrictions through clause 14, in the DB's view, are "nothing but the creation of class within the class on the basis of unreasonable and arbitrary use of powers."

44. It may be of some significance that *Association of Colleges* has not struck down the policy. Instead, it has held that "the State Government cannot insist [on the petitioners' routing the applications] through them, without declaring their such scheme in advance and giving due publications to all the concerned, at the appropriate stage and before the date and the schedule so fixed, for every academic year." Thus, *Association of Colleges* has based its reasoning on promissory estoppel. Only in the above context has the Court found the Government's action

violating Articles 14, 15, 16 and 19(g) of the Constitution of India. That said, the Court has "not interfere[ed] with the policy decision", but only with the State's "implementation of the same, in such fashion, creat[ing] a class within class."

5. Bapu Supadu Thorat v State of Maharashtra

45. In *Bapu Supadu Thorat*[7], public interest litigation, one of the issues before the DB is this: Can the Government deny the benefit of fees reimbursement to the "socially and economically backward classes" students that secured admissions in the professional colleges affiliated to the deemed universities? This Court held against the Government, which took it to the Supreme Court. We will discuss this judgment later in detail, in the context of merger and Article 141 of the Constitution.

6. Mrudul v State of Maharashtra:

46. In *Mrudul*[8] the question is whether the fee reimbursement can be declined to "the students who are admitted at "Institute Level", though their admissions are duly approved by the Admission Regulatory Committee (Pravesh Niyantran Samiti)."

47. *Mrudul* has observed that every year students belonging to various backward classes secure admission in common admission rounds. But those who do not get admission in the open rounds, secure it based on their performance in CET in colleges where 85% seats lie vacant. In this scenario, "the State

7High Court of Bombay, decided on 20.03.2015
82016 (5) Mh. LJ 359

Government has, in its own wisdom, restricted the benefit of tuition fees only to the students who are more meritorious." That is, the Government has provided the tuition fees reimbursement to only those students that secured admission in the first two or three rounds of CET. It has not extended that benefit to others, to those that were admitted into the unfilled seats at the institution level.

48. In the above factual backdrop, *Mrudul* has found "two distinct classes of backward class students." At any rate, "the State Government, depending upon its resources, has extended the benefit to only one group out of them and made it eligible for grant of reimbursement." The petitioners have not pointed out, *Mrudul* felt, that all of them constitute one class in terms of any Constitutional or Statutory provision. Nor have they contended that the State Government is duty-bound to provide free education to all of them. So according to *Mrudul*, in the "absence of this contention or other material on record," it is difficult for the Court to find fault with the Government decision "not extending the benefit of tuition fee reimbursement to those who are admitted at institute level or college level." In other words, the Government's confining the benefit "to more meritorious backward class students" affects nobody else's right.

7. Miss Sayali Shirish Nikumbh v State of Maharashtra:

49. Under the GR, dt.31st March 2016, the Government identified Non-aided Government, Aided and Unaided Colleges, Universities, and so on as well as the courses for fees reimbursement. If students of Scheduled Castes, Scheduled

Tribes, Special Backward Classes, etc., are admitted from the Academic Year 2015-16, the benefit applies to them. But if the students from any of these communities secure admission "at the Institutional level", they do not benefit from this "Freeship Scheme."

50. A woman student from SC community got the admission into MBBS., at the "Institutional Level". She was denied the benefit. Rejecting her claim, this Court in *Sayali Shirish Nikumbh*[9] has held that "it may be a Scheduled Caste Women Category student or a Scheduled Caste student simpliciter. But having availed [herself]of the Institutional admission channel, [she] cannot be heard [saying] that the tuition fees should be reimbursed." The admission is of a different category, disentitling the candidate or student like the petitioner from the benefit of the Government Resolution.

8. Ajit Rajendra Bhagwat v State Of Maharashtra:

51. In *Ajit Rajendra Bhagwat*[10] the petitioners did not secure admission into the colleges of their choice in any of the three rounds. Left with no option, finally they secured admission into colleges where unfilled seats were available. They got the admission, though not in the colleges of their choice, only because the seats in those colleges remained unfilled. Theirs is a default choice, in a manner of speaking.

52. After setting out the admission process, *Ajit Rajendra Bhagwat* has

9(High Court of Bombay, 19 August 2019)
102020 (1) Bom CR 9

observed that "it is after completion of the three rounds that the seats are given to the institutions to be filled at the institutional level so that the seats in these institutions do not remain vacant." The Rules provide, as it is noted, if any seat remains or becomes vacant after the CAP rounds, then it shall be filled in by the candidates from the same category for which it was earmarked during CAP. Further, if the seats remain vacant, then the seats shall be filled based on the applicants' relative merit.

53. As the GR, dt.15th April 2017, denies financial assistance to these students, the petitioners have assailed it as discriminatory. The Government countered the challenge; it maintained that "the candidates not securing the seats under CAP, thus, have to obtain admission at the institution level and hence, [the financial assistance] is limited to admissions through CAP."

54. Accepting the Government's contentions, *Ajit Rajendra Bhagwat* has found no merit in the petitioners' attack on "the classification between the students belonging to backward and economically weaker sections who are admitted through CAP rounds and the students who have applied through CAP rounds but are forced to seek admissions in colleges run by the respective managements after the CAP rounds." Nor does the GR fail the Supreme Court's test of reasonable classification *State of West Bengal v. Anwar Ali Sarkar*[11].

Submissions:

11AIR 1952 SC 75

Petitioners:

55. Dr. Birendra Saraf, the learned counsel for the petitioners, has elaborately argued on the issue. He has drawn our attention to the GRs the Government issued from time to time, the decisions this Court rendered, and the authorities with precedential impact on the case before us. Besides, those elaborate submission, Dr. Saraf has submitted written arguments. In those arguments, the learned counsel has formulated these propositions for our consideration. It will suffice if we extract those propositions:

- The exclusion of students admitted otherwise than through CAP from the fee reimbursement scheme is discriminatory and violative of Article 14 of the Constitution of India.
- The distinction made between students admitted through Government CAP and the other students for fee reimbursement is not a reasonable classification and bears no nexus to the object sought to be achieved.
- The distinction between SC and ST students admitted through CAP and those admitted otherwise through CAP be tantamount to creating categories in the castes enlisted by the President under Article 341 of the Constitution of India and is illegal.
- The Supreme Court's affirming this Court's judgment in *Bapu Supadu Thorat* has clinched the issue; it is biding under Article 141 of the Constitution.

56. To support his submissions, Dr. Saraf has relied on these judgments: (1) *E.V. Chinniah v State of A.P.*[12], (2) *State of Kerala v N.M. Thomas*[13], (3) *State of*

12(2005) 1 SCC 394
13(1976) 2 SCC 310

Punjab v Dayanand Medical College[14], (4) *Meydha v State of UP*[15], (5) *D. S. Nakara v Union of India* [16], (6) *State of Gujarat v Shri Ambika Mills*[17], (7) *Namit Sharma v Union of India*[18], (8) *Rahul Singh v State of UP*[19], (9) *State of Maharashtra v Manubhai*[20], (10) *Ram Prasad Sahi v State of Bihar*[21], (11) *Kunhayammed v State of Kerala*[22], (12) *Union of India v All India Services Pensioners' Assn*[23].

Respondent-Government:

57. Shri Girish Godbole, the learned Special Counsel for the Government, supported by the learned Additional Government Pleader, has argued equally elaborately as did the petitioners' counsel. In the end, he, too, submitted written arguments, formulating the proposition of his arguments. They read:

- The Government's policy objective is to ensure that the fees reimbursement should go to the Backward Class Students who have secured admission through "a transparent, well-documented, well-regulated, and non-discriminated CAP".
- If the petitioners' contentions were to be accepted, the Backward Class Students seeking admission through Management Quota should also be eligible.

14(2001) 8 SCC 664
15(2011) 88 ALR 665
16(1983) 1 SCC 305
17(1974) 4 SCC 676
18(2013) 1 SCC 745
19(2013) 100 ALR 522
20(1995) 5 SCC 730
21AIR 1953 SC 215
22(2000) 6 SCC 359
23(1988) 2 SCC 580

- Here, the student securing admission under CAP and those outside CAP form two different classes.
- The students who have applied through CAP rounds, but who took admissions in colleges run by respective Managements after completion of CAP rounds, that is at the Institutional Level, cannot be treated on a par with the students who have secured admissions by following the CAP.
- The concept of equality has an inherent limitation arising from the very nature of the constitutional guarantee. Only those who are similarly situated are entitled to equal treatment.
- *Bapu Supadu Thorat* is clearly distinguishable.

58. To support his contentions, Shri Godbole has relied on these decisions: (1) *Ashutosh Gupta v State of Rajasthan*[24], (2) *R.K. Garg v Union of India*[25], (3) *State of Kerala v N.M. Thomas*[26], (4) *Shri Rama Krishna Dalmia v Shri. Justice S.R. Tendolkar*[27], (5) *Ajay Hasia v Khalid Mujib Sehravardi*[28], (6) *Union of India v All India Services Pensioners' Association*[29].

Issues:

(I) Is CAP alone a transparent, well-documented, well-regulated, and non-discriminated admission procedure?

(II) Do the students admitted through CAP and those admitted through non-CAP form two different classes?

24(2002) 4 SCC 34
25(1981) 4 SCC 675
26(1976) 2 SCC 310
27(1959) SCR 279
28(1981) 1 SCC 722
29(1988) 2 SCC 580

(III) Do the students take admission through non-CAP only after their failing to secure admission through CAP?

(IV) Are the non-CAP students similarly situated with the CAP ones, deserving equal treatment?

Discussion:

Affirmative Action:

> You do not wipe away the scars of centuries by saying: 'now, you are free to go where you want, do as you desire, and choose the leaders you please.' You do not take a man who for years has been hobbled by chains, liberate him, bring him to the starting line of a race, saying, "you are free to compete with all the others", and still justly believe you have been completely fair…. This is the next and more profound stage of the battle for civil rights. We seek not just freedom but opportunity - not just legal equity but human ability - not just equality as a right and a theory, but equality as a fact and as a result.

59. That is Lyndon B. Jhonson, the President of a nation that has prided itself of having equality as its constitutional core. That country once felt that there was no need to enumerate the basic rights—the Bill of Rights—in the Constitution. For they are unalienable. Then, it mentioned those rights but refused to list any limitations. For such listing is an anathema, a paradox. Yet such a nation, as we call it the USA, has acknowledged that positive protection or reverse discrimination is no constitutional contradiction—rather a policy prerogative.

60. On 4th June 1965, President Lyndon Johnson, in his Commencement Address at Howard University, remarked as above quoted. For him, there is an inherent element of justice in affirmative action policies, because they aim at correcting previous injustices. In fact, he was inspired by Martin Luther King's

classic saying in his 1964 book *Why We Can't Wait* (1963: 147): Whenever this issue of compensatory or preferential treatment for the Negro is raised, some of our friends recoil in horror. The Negro should be granted equality, they agree, but should ask for nothing more. On the surface, this appears reasonable, but it is not realistic. For it is obvious that if a man enters the starting line of a race 300 years after another man, the first would have to perform some incredible feat in order to catch up.[30]

61. And we reckon race or caste, they are no different. Historical prejudices justly exact their price from the present. And those that suffered for ages look, primarily, to Government for succour and support, for problem solving. And, then, Government itself ought not to become a problem.

62. Broadly defined, 'affirmative action' encompasses any measure that allocates goods—such as admission into selective universities or professional schools, jobs, promotions, public contracts, business loans, and rights to buy, sell, or use land and other natural resources—through a process that considers individual membership in designated groups. It is for increasing the proportion of members of those groups in the relevant labour force, entrepreneurial class, or student population, where they are currently underrepresented "as a result of past oppression by state authorities and/or present societal discrimination.[31]"

30George Gerapetritis, *Affirmative Action Policies and Judicial Review Worldwide* (Springer 2016) 32

31Michel Rosenfeld & Andras Sajo (ed), *The Handbook of Comparative Constitutional Law* (Oxford University Press 2012, Kindle) 1124

63. Unlike traditional welfare policies grounded in distributional equity, affirmative action takes its formal force from a corrective justice ideal: it targets "a specific type of disadvantage arising from the illegitimate use of morally irrelevant characteristic of individuals in the allocation of scarce resources.[32]"

64. As a near-universal phenomenon, it is known as 'affirmative action' in the USA, 'positive discrimination' in the UK, 'reservations' in India, 'standardization' in Sri Lanka, 'reflecting the federal character of the country' in Nigeria, and 'sons of the soil' preferences in Malasia and Indonesia. Group preferences and quotas have also existed in Israel, China, Australia, Brazil, Fiji, Canada, Pakistan, New Zealand, the Soviet Union, and its successor states. [33] Nations with histories of discrimination have chosen a path of course correction, and affirmative action is one such sure method. In South Africa the policy preferences point towards the non-Whites, in India towards the historically disadvantaged and discriminated castes, Malaysia towards native Malaysians, and parts of Scandinavia towards women. In the United States, affirmative action policies generally favour racial minorities, especially disadvantaged minorities such as African Americans, Hispanic Americans, Native Americans, and sometimes women.[34]

32Ibid.
33Thomas Sowell, *Affirmative Action Around the World: An Empirical Study* (Yale University Press, 2004) 2
34Ashutosh Bhagwat, *The Myth of Rights: The Purposes and Limits of Constitutional Rights*, (Oxford University Press 2010) 190

Affirmative Action Around the World:

65. Affirmative Action is a global phenomenon. In the American continent, the most prominent countries that practice protective discrimination are the USA, Canada, and Brazil; in Europe France, Germany, the UK, Italy, Spain, Portugal, Belgium, the Netherlands, Austria, Ireland, Greece, most of the Nordic countries, Russia; in Asia, India and China; in Africa, Nigeria and South Africa, in Oceania, Australia and New Zealand. In the international treaty sphere, most Universal and Regional Conventions and the European Convention on Human Rights do recognise the need for protective discrimination. The list is only illustrative.

66. These countries practice one of the three forms of affirmative policies: (1) Indirect Affirmative Action. It refers to measures that are apparently neutral yet actually designed to benefit disadvantaged groups and might be construed as indirect discrimination (in European terms) or discrimination of the 'disparate impact' variety (in US terms). (2) Outreach. It encompasses measures designed only to bring a more diverse range of candidates into a recruitment (or promotion) pool. (3) Positive Discrimination or Preferential Treatment. It consists in measures that grant an advantage to the members of designated groups in the final decision over the allocation of scarce goods, through more or less flexible policy instruments (compulsory quotas, tie-break rules, aspirational 'goals' or 'targets') [35]. As to the policy implementation, in countries where

35Michel Rosenfeld & Andras Sajo (n 31) 1126

affirmative action has not been constitutionalized, its legal status has been an uncertain, shifting, and paradoxical judicial construct. [36]

The Global Phenomenon:

North America:

Canada:

67. Beginning at the top of the globe, we will take Canada. Section 15(2) of the 1982 Canadian Charter of Rights and Freedoms, which forms part of the Canadian Constitution, provides a general equality clause. But under the title "affirmative action programmes", the Charter adds that the general equality clause "does not preclude any law, programme, or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability". [37]

The USA:

68. Next comes the USA. The meaning of "affirmative action" has changed over time in the USA. When President John F. Kennedy first used the term in 1961, he meant an affirmative effort to assure equality of opportunity to all Americans and to end discrimination against members of groups historically exposed to a great deal of discrimination—most obviously African Americans.[38]

36Ibid 1136
37Gerapetritis (n 30) 110-111
38Thomas E. Weisskopf, *Affirmative Action in the United States and India: A Comparative Perspective* (Routledge 2004) 21

By the late 1960s, however, affirmative action had come to mean stronger efforts to support members of groups that had been (and were often continuing to be) discriminated against.[39]. Thus affirmative action came to encompass a form of discrimination in favour of under-represented groups, as opposed to an effort to abolish all forms of discrimination; and this is how the term continues to be understood today. [40]

South America:

69. The most populous nation of South America is Brazil; it is inhabited by many races, albeit slavery having been abolished only in 1888. In the 19th and 20th centuries, because of further immigration from Europe and Asia, Brazil launched a series of institutional tools to promote racial integration and mixing. Part of the integration policy, concerned affirmative action plans to introduce minority quotas in the field of higher education, largely following the US model [41].

European Union:

70. Almost every European country has one form of affirmative action or another. Most of it lies in the spheres of gender equality, labour welfare, and, to some extent, racial discrimination. Instead of referring to the individual nations, we had better take the European Union as a whole.

39Ibid 22
40Ibid 23-24
41Thomas E. Weisskopf (n 37) 114

71. In the field of racial equality, Council Directive 2000/43 of 29th June 2000 applies to the public and private sectors. It relates to the "access to employment, to self-employment, and to occupation, including selection criteria and recruitment conditions, promotion, access to all types and to all levels of vocational guidance and training." It is to ensure full equality in practice. Article 5, however, stresses that the principle of equal treatment prevents no Member State "from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin."

72. In the field of non-discrimination on the grounds of religion or belief, disability, age or sexual orientation, Council Directive 2000/78 of 27 November 2000 provides that the principle of equal treatment shall prevent no Member State from maintaining or adopting specific measures in employment and occupation to prevent or compensate for disadvantages linked to grounds (Article 7 para. 1) [42].

The UK:

73. Britain is a typical paradigm of a legal system which traditionally adheres to formal equality and discourages any deviations from a liberally-oriented view. The first major statutory intervention in the field of positive discrimination measures came through the Sex Discrimination Act 1975 and the Race Relations Act 1976. They provided for the introduction, under certain

42Ibid 118

conditions, of indirect positive measures, such as special education, or the encouragement for national groups when there is an underrepresentation of those groups in employment for over 12 months, or special measures of social security. More concretely, Article 49 of Sex Discrimination Act 1975 allows the reservation of seats for women or establishment of additional reserved seats in a professional body the membership of which is wholly or mainly elected. Article 71 para. 1 (b) of Race Relations Act 1976 also specifies that state authorities shall, in carrying out their functions, have due regard to the need to promote equality of opportunity and good relations between persons of different racial groups. [43]

Asia:

China:

74. Mild positive measures apply in favour of minorities. These measures cover disproportionate investment and subsidies, preferential admissions to the academia, lower fees where applicable, tax exemptions, on-going professional training and disproportionately high representation in local councils. It has achieved spectacular results in the field of University admissions in particular; the number of minority students has risen significantly, in recent years. That is, it has, in turn, resulted in much better positioning in the professional arena. [44]

Africa:

Nigeria:

43Ibid 131-32
44Ibid 155

75. In Nigeria, affirmative action policies were introduced to serve the task of social cohesion and, in turn, of creating a synthetic national identity as a necessary correlation/condition to preserve the federal character of the state. The 1999 Constitution establishes a general non-discrimination clause. That said, the Constitution further introduced the "federal character principle clause". It has stipulated that the composition of the government of the federation or any of its agencies and the conduct of its affairs shall be carried out to reflect these: the federal character of the state and the national unity, and national loyalty. There shall be no predominance of persons from a few States or from a few ethnic or other sectional groups in that Government or in any of its agencies. [45]

South Africa:

76. In the Preamble to its 1996 Constitution, South Africa recognises the injustices of its past, honours those that suffered for justice and freedom in their land. It believes that South Africa belongs to all who live in it, united in their diversity. Constitutionally, affirmative action enjoys a key role in the post-apartheid legal system, especially in the field of employment. Examples are the Employment Equity Act 1998, the strategic Broad-Based Black Economic Empowerment Act 2003. [46]

Australia

77. Despite the lack of constitutional acknowledgement of affirmative

45Ibid 156
46Ibid 157-58

action (or equality in general), Australia may convincingly claim that it has enacted the most elaborate horizontal relevant piece of legislation in the area of employment. The Affirmative Action (Equal Opportunities for Women) Act 1986, Racial Discrimination Act 1975, and Pitjantjatjara Land Rights Act 1981 are the examples. [47]

Academic Arena:

78. In relation to academic admissions, especially at the university level, affirmative actions are very widespread in most parts of the world, less so in Europe. This domino effect has occurred not only because academic qualifications constitute a prerequisite for access to profession but also because education normally amounts to a collective upgrade of historically oppressed groups, both in terms of social bargaining as well as in relation to the potential occupation of high administrative or political posts. This is the case in the USA, where many universities have introduced programmes favouring minorities for admission. These programmes have essentially modified the existing admission policies, so that race, in one or another way, has become an admission criterion. Since *Bakke* [48] in1978, it is considered that universities may—and indeed they do—use race as an additional factor when assessing applications for admission to ensure the racial diversity of students, but these actions cannot go as far as to introduce rigid

47Ibid 161
48*Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)

quotas or quotas that effectively isolate minority candidates from being assessed against all other applicants.[49]

79. Despite the background theory on affirmative action policies in university admissions, the truth is that this field is presumably the most fertile for implementing the policy given that it is par excellence in this field where the two major rationales of the policy, namely compensation for past discrimination and diversity, apply conjunctively. [50]

Indian Affirmative Action:

The Historical Origins:

80. India is the world's largest multi-ethnic society and, perhaps, the most socially fragmented. A land of well over a hundred languages and hundreds of dialects, India has its most widely spoken language used by less than one-third of its population. It is the first country in the world that has introduced affirmative action plans. Unlike the USA, India has given constitutional recognition to this positive discrimination.

81. The meaning of "reservation policies" has not varied over time in India. This term has always been understood to denote the reserving of a certain number of seats or positions, in a desirable institution or occupation, for members of groups that were under-represented in such positions. Those policies have also been labelled as "compensatory discrimination" or "protective discrimination."

49Gerapetritis (n 30) 177
50Ibid

Positive discrimination is therefore a policy aiming at including members of groups who have gained relatively limited access to society's most esteemed positions[51].

82. As we have referred to earlier, the Dalit boy's demand in 1856 for admission into a government school in Dharwar, Bombay Presidency, led the East India Company to formulate an educational policy. But the British did not follow this secular approach before 1872 and had restricted education for a chosen few. Mahatma Phule contested the discrimination in education before the Hunter Commission. This caused several developments, later. The policy of caste-based reservations was further strengthened with the enactment of the Caste Disabilities Act of 1872. The demand for entry into educational institutions and for equality of opportunity was first started in the southern States, which include parts of the present Maharashtra. These States witnessed social movements of the weaker sections for equality and self-respect; it was due to the pioneering work of various prominent social reformers, including Jyotirao Phule. Under these conditions, the first government circular reserving certain posts to backward castes was in June 1895 by the Mysore Government. Mysore was followed by the princely State of Kolhapur. Maharaja Shahu introduced reservations in favour of non-Brahmin and backward classes in education.

83. Because of the movement for social justice and equity started by the

51Weisskopf (n 38) 112

Justice Party, the then Presidency of Madras initiated the reservation in Government employment in 1921. It was followed by the Bombay Presidency comprising the major portion of present states of Maharashtra, Karnataka, and Gujarat. In August 1943, Ambedkar had secured 8.3 per cent reservations for untouchables. It was the Jammu and Kashmir Government which, for the first time after Independence, resorted to a large-scale communal reservation policy in 1952. It reserved 50 per cent to Dogra Hindus of Jammu and 10 per cent to Pandits. The first all-India effort to recommend reservations based on caste (other than SC and ST) was attempted by the Kaka Kalekar Commission in 1953. This Commission was appointed by the Government of India to satisfy the Articles 15(4) and 340(1) of the Indian Constitution. Later, individual state governments appointed their own backward classes commissions under the Commission of Enquiry Act and have drawn out lists of backward castes for reservations in educational institutions and public appointments. [52]

Affirmative Action - Constitutional Contours:

84. From the institutional and the constitutional viewpoint, India offers an excellent case study of policy implications of affirmative action. This is not only because of the extent of the measures which qualify India as the greatest affirmative action laboratory in the world but also because the Constitution itself sets out a rather analytical framework for operating the policy. Indeed, the

52Chalam (n 1) 94-96

Constitution of India refers to affirmative action policies, not merely by authorising the federal and state legislatures to adopt such measures, but also, on occasions, by setting hard quotas in the first place. Therefore, it provides a very illustrative case as to whether the constitutional upgrade of this mechanism essentially contributes to the maximisation of results. [53]

85. To begin with, Article 17 abolishes untouchability. It is a horizontal constitutional provision; it applies not only to the State and its entities but also to non-State personae, including the individuals. Article 46, under the Directive Principles, requires the State to promote with special care the educational and economic interests of the weaker sections of the people and, in particular, of the Scheduled Castes and the Scheduled Tribes. Indeed, the provision requires the State to protect them from social injustice and all forms of exploitation.

86. Article 15 elaborates on the equality principle enshrined under Article 14 of the Constitution. It prohibits discrimination on the grounds of religion, race, caste, sex, or place of birth. But Clause (4) enables the State to practice protective discrimination. Neither the very Article 15 nor Clause (2) of Article 29 "shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes." Then, Article 16(4A) speaks of "reservation in matters of promotion to any class or classes of posts in the services under the

53Gerapetritis (n 30) 150

State in favour of SCs/STs, which are not adequately represented in the services under the State".

87. Article 338 provides for a National Commission for the Scheduled Castes and Scheduled Tribes with duties to investigate and monitor all matters relating to safeguards provided for them, to inquire into specific complaints and to participate and advise on the planning process of their socio-economic envisaged and provided development etc. Article 330 and Article 332 of the Constitution respectively provide for reservation of seats in favour of the Scheduled Castes and the Scheduled Tribes in the House of the People and in the legislative assemblies of the States. Under Part IX relating to the Panchayats and Part IXA of the Constitution relating to the Municipalities, reservation for Scheduled Castes and Scheduled Tribes in local bodies has been envisaged and provided.

88. Part IX and Part IXA of the Constitution respectively permit the legislature of a State to provide for reservation of seats in Panchayat and Municipalities in favour of backward classes of citizens. Article 340 of the Constitution provides for the appointment of a Commission to investigate the conditions of Backward classes.

89. In the above factual and legal background, we will examine certain constitutional concepts and related precedents. It is because the counsel on either side have often referred to them and staked their respective cases on those

concepts and case law.

Classification:

90. *E. V. Chinnaiah* deals with the issue whether the schedule caste can further be sub-divided so that the benefit of reservation can reach those that really deserve it. The Government of AP seems to have taken a cue from *Indira Sawhney v Union of India* [54] and applied the concept of creamy layer to the Scheduled Caste. The Supreme Court has held that "legal constitutional policy adumbrated in a statute must answer the test of Article 14 of the Constitution. Classification whether permissible or not must be judged on the touchstone of the object sought to be achieved." If a class has already been identified as socially, educationally, and economically backward, the State cannot subdivide that class "so as to give more preference to a minuscule proportion of the Scheduled Castes in preference to other members of the same class." *E. V. Chinnaih*, in fact, cautions the State not to "evolve, through imperceptible extension, a theory of classification which may subvert, perhaps sub-merge, the precious guarantee of equality"

91. We may refer here to the US Supreme Court's minority opinion in *Jennifer Gratz v Lee Bollinger* [55]. It concerns college admission. Justice Ginsburg has observed that "[o]ur jurisprudence ranks race a 'suspect' category, not because (race) is inevitably an impermissible classification, but because it is one

54AIR 1993 SC 477
55539 U.S. 244 (2003)

which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality." And the minority opinion further explains, drawing from other precedents, that the "Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, *a classification that denies a benefit, causes harm, or imposes a burden must not be based on race*. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination." In our scenario, if 'caste' replaces 'race' in *Lee Bollinger*, it rings true.

Does Government action in denying fee reimbursement to non-CAP students from the underprivileged classes amount to its creating a sub-category of a cohesive caste?

92. Based on *E. V. Chinnaih*, the petitioners have argued that in relation to any State or Union Territory, Article 341(1) confers power on the President to specify by public notification "castes, races or tribes or parts of or groups within castes, races or tribes" which shall be deemed to be Scheduled Castes in relation to that State or Union territory, as the case may be. Under Clause (2) of the same Article, 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, unless this procedure is followed, a notification issued under the Clause (1) shall not be varied by any subsequent notification. Articles 342(1) and (2) envisage a similar scheme for

"*Scheduled Tribes*".

93. In this context, the petitioners have argued that the GR created a sub-clause or sub-category in otherwise homogenised Schedule Caste. To answer the petitioners' contentions, we must revisit *E. V. Chinnaiah*.

94. Exercising the powers under Article 341 of the Constitution, the President has notified 59 groups, races, tribes, and so on as the schedule castes under 'The Constitution (Schedule caste) Order 1950'. Then, the State of AP had appointed a commission to find out among the schedule castes those groups that could not avail themselves of the reservation benefits in the field of admission in professional colleges and appointment in services of the state.

95. The report submitted, the Government of AP accepted the Commission's recommendation. So it wanted to divide the Schedule Caste into four groups based on the "inter se backwardness" and give separate quota in the reservation to each group. The State Government, first, brought out an Ordinance and later an Act: Andhra Pradesh Schedule Caste (Rationalization of Reservation) Act, 2000. The Supreme Court in *E. V. Chinnaiah* considered the legislative *vires* of the State to bring out that Act.

96. In *E. V. Chinnaiah*, the Supreme Court has considered these questions: Has the impugned Act violated Article 341(2) of the Constitution? Has the State had the legislative competence to bring out the impugned enactment? And has the impugned Act sub-classified or micro-classified the Schedule Caste, thus,

violating Article 14 of the Constitution?

97. A Constitution Bench of the Supreme Court has held that the conglomeration of castes given in the Presidential Order should be regarded as representing a class as a whole. "The very idea of placing different castes or tribes or group or part thereof in a State as a conglomeration by way of a deeming definition clearly suggests that they are not to be sub-divided or sub-classified further." If a class within a class of members of the Scheduled Castes is created, the same will amount to tinkering with the List. Such sub-classification will violate Article 14 of the Constitution of India.

98. In this regard, *E. V. Chinnaiah* has drawn help from *State of Kerala v N.M. Thomas*, in which Mathew, J., has observed that it is by virtue of the notification of the President that the Scheduled Castes come into being. Though the members of the scheduled castes are drawn from castes, races, or tribes, they attain a new status by virtue of the Presidential notification. It also quotes Krishna Iyer J, for whom the sequitur to the Presidential amalgamation is that Scheduled Castes are one class for the purposes of the Constitution.

99. Eventually, applying the Doctrine of Pith and Substance, *E. V. Chinnaiah* has held that the enactment is not a law in the field of education and state public services. The Act does not provide for any reservation but only for re-distribution among sections of a class. As the constitutional obligation of providing reservation has already been done by the State, its further classification

violates the Constitution.

100. Equality of opportunity, according to the Supreme Court in *M. Nagaraj v UOI* [56], embraces two different and distinct concepts. There is a conceptual distinction between a non-discrimination principle and affirmative action, under which the State is obliged to provide a level playing field to the oppressed classes. Affirmative action in that sense seeks to move beyond the concept of non-discrimination and towards "equalizing results with respect to various groups equal results with respect to various groups. Both the conceptions constitute equality of opportunity".

101. The legislature may make a reasonable classification for legislative purposes and treat all in one class on an equal footing. Article 14 of the Constitution ensures equality among equals: its aim is to protect persons similarly placed against discriminatory treatment. That said, the Supreme Court in *Western UP Electric Power and Supply Corporation Ltd., v State of UP* [57], however, clarifies that the bar in Article 14 does not operate against rational classification. In other words, Article 14 forbids class legislation; it does not forbid reasonable classification of persons, objects, and transactions by the legislature for achieving specific ends. Classification, according to the Supreme Court in *Laxmi Khandsari v State of UP* [58], should be reasonable to fulfil these

56(2006) 8 SCC 212
57AIR 1970 SC 21
58AIR 1981 SC 873

two tests:

> (1) It should not be arbitrary, artificial or evasive. It should be based on an intelligible differentia, some real and substantial distinction, which distinguishes persons or things grouped together in the class from others left out of it.
> (2) The differentia adopted as the basis of classification must have a rational or reasonable nexus with the object sought to be achieved by the statute in question.

102. We may accept that an objective-oriented classification with intelligible differentia sustains itself. But every microscopic difference cannot be pressed into service. As the Supreme Court has held in *Roop Chand Adlakha v Delhi Development Authority* [59], to overdo classification is to undo equality. In this context, we may refer to the dictum of *Subramanyam Swamy v CBI* [60]. In that case, the Supreme Court has held that differentia which is the basis of classification must be sound and must have a reasonable relation to the object of the legislation. If the object of classification itself is discriminatory, then an explanation that the classification is reasonable, having a rational relation to the object sought to be achieved is immaterial.

103. In *Deepak Sibal v Punjab University* [61], the Supreme Court has pointed out that a classification need not be made with "mathematical precision". But if there is little or no difference between the persons or things which have been grouped together and those left out of the group, then classification cannot

59AIR 1989 SC 307
60(2014) 8 SCC 682
61AIR 1989 SC 903

be regarded as reasonable. The Court has also pointed out that to consider the reasonableness of classification, it is necessary to consider the objective for such classification. "If the objective be illogical, unfair and unjust, necessarily the classification will have to be held as unreasonable."

104. In this context, the Government has relied on *Rahul Singh*. This case also concerns fee reimbursement. There are no restrictions affecting the SC and ST students. But as to the students of Other Backward Class Category, Minority Community Category, and those belonging to General category with income limits, there are restrictions. To decide this income criterion, the Government seems to have taken each district as a unit. Thus, admittedly, a poor student will not be provided fee reimbursement if he has been admitted in an institution situated in a district where per capita income is higher. In *Rahul Singh*, as the Supreme Court has found, the State has adopted a wrong criterion. We reckon that decision does not apply here.

105. In *R. K. Garg*, the Constitution Bench of the Supreme Court has held that Article 14 does not forbid reasonable classification of persons, objects, and transactions by the legislature to attain specific ends. What is necessary in order to pass the test of permissible classification under Article 14 is that the classification must not be "arbitrary, artificial or evasive" but must be based on some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved by the legislature.

106. *R.K. Garg*, as the Government has contended before us, has held that laws relating to economic actives should be viewed with greater latitude than laws touching civil rights, such as freedom of speech, religion, and so on. It has, for that, quoted Holmes, J. that the legislature should be allowed some play in the joints because it has to deal with complex problems which do not admit of solution through any doctrine or straight jacket formula. And this is particularly true in case of legislation dealing with economic matters. The court should feel more inclined to give judicial deference to legislative judgment, according to *R. K. Garg*, in the field of economic regulation than in other areas where fundamental human rights are involved.

107. In *Rama Krishna Dalmia*, the Constitution Bench of the Supreme Court has drawn support from *Kathi Raning Rawat v State of Saurashtra* [62], its seven-Judge Bench decision, besides other decisions. Then it has culled out the principles of classification and discrimination:

> (*a*) that a law may be constitutional even though it relates to a single individual if that single individual can be treated as a class by himself;
>
> (*b*) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;
>
> (*c*) that it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;
>
> (*d*) that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the

62AIR 1952 SC 123

clearest;

(*e*) that in order to sustain the presumption of constitutionality the court may consider matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and

(*f*) that while good faith and knowledge of a legislature's existing conditions are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and un-known reasons for subjecting certain individuals or corporations to hostile or discriminatory legislation.

108. Here, we must accept that the GR is no legislation carrying the common-law presumption of constitutionality or validity. It is an administrative order, at best. Then, is it the State's core economic activity requiring judicial deference? It is not. It has only pleaded that it cannot benefit all the eligible SC students because of the financial constraints. So it wanted to segregate certain students. It has called that segregation a classification. And the question is, how far is it a classification? If it were, what is the rationale for that?

Discrimination - Burden:

109. In *State of Rajasthan v Rao Manohar Singhji* [63], a Constitution Bench of the Supreme Court has treated as well settled that a proper classification must always bear a reasonable and just relation to the things regarding which it is proposed.

110. In *Manubhai*, the issue concerned the denial of grant-in-aid to the non-Government Law Colleges in the state. The colleges wanted the aid

63AIR 1954 SC 297

retrospectively. A Division Bench of this Court held that Government action in not extending the grants-in-aid to non-Government recognised law colleges is discriminatory. It was because the Government, at the same time, extended the aid to faculties like Arts, Science, Commerce, Engineering, and Medicine.

111. On the State's appeal, the Supreme Court has noticed that the Government's defence was based "on lack of funds and also the general or vague unsubstantiated statement that other private professional educational institutions were not receiving grants-in-aid." Repelling that defence, the Court has held that "when, prima facie, a plea of discrimination is made out, the burden of proof is on the state to show that it is not so; or that a valid and permissible classification exists for the differential treatment meted out" to respondents. There should be nexus between the basis of classification and the object of the Act under consideration. Thus, *Manubhai* has, first, emphatically rejected that paucity of funds can be a reason for discrimination. Second, it has held that one facet of education cannot be selected for hostile discrimination, whatever may be the other laudable activities pursued by the Government in the matter of education or its discretion to assign the order of priorities in different spheres of education.

112. In *Ashutosh Gupta*, the Supreme Court has held that the doctrine of equality before the law is a necessary corollary to the concept of rule of law. But as to the burden of proof, it has taken as well-settled that if a person complains of unequal treatment, the burden squarely lies on that person to place before the

court sufficient materials from which it can be inferred that there is unequal treatment.

113. The concept of equality before the law, according to *Ashutosh Gupta*, does not involve the idea of absolute equality amongst all, which may be a physical impossibility. All that Article 14 guarantees is the similarity of treatment and not identical treatment. It accepts that Article 14 enjoins that the people similarly situated should be treated similarly. Then, it acknowledges as a vexed question the amount of dissimilarity that denies the people equal treatment. A legislature which has to deal with diverse problems arising out of an infinite variety of human relations must, of necessity, have the power to make special laws, to attain particular objects. And for that purpose, as *Ashutosh Gupta* stresses, it must have large powers of selection or classification of persons and things upon which such laws are to operate. Mere differentiation or inequality of treatment does not *per se* amount to discrimination within the inhibition of the equal protection clause.

114. *Ashutosh Gupta* wants the State to fulfil two conditions for any legislation to pass the judicial muster: (i) the classification must be founded on an intelligible differentia, which distinguishes persons or things that are grouped together from others who are left out of the group, and (ii) the differentia must have a rational relation to the object sought to be achieved by the Act. *Ajay Hasia*, too, reaffirms this proposition.

115. In *Rama Krishna Dalmia*, the Supreme Court has held that if the discrimination is writ large on the face of the legislation, the onus may shift to the State to sustain the validity of the legislation in question.

Presumption:

116. In *Ram Prasad Narayan Sahi*, a Constitution Bench of the Supreme Court has agreed that there is a presumption in favour of the constitutionality of a legislative enactment: it has to be presumed that legislature understands and correctly appreciates the needs of its own people. But this presumption is of little or no assistance to the State if (a) on the face of a statute, there is no classification at all or (b) if there is no attempt made to select any individual or group with reference to any differentiating attribute peculiar to that individual or group. It has, in this context, quoted Justice Brewer in *Gulf Colorado etc. Co. v Ellis* [64], that "to carry the presumption to the extent of holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminatory legislation is to make the protection clauses of the Fourteenth Amendment a mere rope of sand".

State's Explanation:

117. This Court, on 25th March 2014, passed an order requiring the State to explain the reason for making a distinction in giving the benefit of fee reimbursement to only those students who take admission through CAP. In its

64165 U.S. 150

reply, the State, it seems, disclosed only one reason: financial aspects. That part of the Government's reply reads:

> At the outset, I say and submit that from time to time, Government Resolutions have been issued for declaring the policy for fee – reimbursement and the said policy is directly connected with the financial aspects and financial position of State Government."

118. Indeed, as rightly contended by the petitioners, the Government's plea of fund deficiency flies in the face of *Manubhai* dictum.

Bapu Thorat & the Doctrine of Merger:

119. In *Bapu Supadu Thorat*, a public interest litigation, one of the issues before the DB is, Can the Government deny the benefit of fees reimbursement to the "socially and economically backward classes" students that secured admissions in the professional colleges affiliated to the deemed universities? The other issue is whether the State Government can deny the benefit of centrally sponsored post-metric scholarships to the students belonging to the Scheduled Castes and Scheduled Tribes in the colleges of deemed Universities.

120. As to the scholarship, *Bapu Supadu Thorat* has found that it is central-sponsored. From the Union Government's pleadings, it has held that "the students of deemed universities are not at all excluded from the benefits under the said scheme", so the State Government cannot deny the benefits of the centrally funded scheme to the students of the deemed universities.

121. As to the fees reimbursement, *Bapu Supadu Thorat* has set out the

Government's objections: (a) the deemed universities are not being monitored by the State Government; (b) they are not participating in the CAP conducted by the State Government. To repel the Government's contentions, *Bapu Supadu Thorat* has relied on the co-equal Bench's decision in *Association of Colleges* case. It has, finally, held that the State Government's decision "to treat the socially and economically backward class students in professional colleges run by the deemed universities differently from similar students in the recognised unaided and permanently unaided colleges for the purposes of reimbursement of education fees is arbitrary and violative of Article 14 of the Constitution of India."

122. When the matter was taken in SLP, the Supreme Court has refused to interfere with the High Court's view. Here, we have to examine whether it is an *in limini* dismissal without attracting the merger principle. If so, does it still attract Article 141 of the Constitution? Both parties, predictably, relied on *Kunhayammad v. State of Kerala*[65].

The Doctrine of Merger & Kunhayammad:

123. In this celebrated case on the doctrine of merger, the Supreme Court has held that the logic underlying the doctrine of merger is that there cannot be more than one decree or operative order governing the same subject at a given point of time. In para 41 of the judgment, it has summarised its findings:

(i) In an appeal or revision, once the superior court has disposed of the *lis*

65(2000) 6 SCC 359

either way—whether the decree or order under challenge is set aside or modified or simply confirmed—it is the decree or order of the superior court, tribunal, or authority that is final, binding, and operative. In that merges the decree or order passed by the court, tribunal, or the authority below.

(ii) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. The first stage concerns the disposal of prayer for special leave to file an appeal. The second stage commences if the leave to appeal is granted and special leave petition is converted into an appeal.

(iii) The doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum, and the content or subject-matter of challenge laid or capable of being laid shall determine the applicability of merger. Under Article 136 of the Constitution, exercising its appellate power, the Supreme Court may modify or affirm the judgment or order appealed against. But when it exercises its discretionary jurisdiction to dispose of the special leave to appeal, it does not exercise that appellate power. The doctrine of merger can therefore be applied to the former and not to the latter.

(iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case, it does not attract the doctrine of merger. An order refusing special leave does not displace the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(v) If the order refusing leave to appeal is a speaking order—that is, if it gives reasons—it has, then, two implications:

> First, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution.

Second, other than the declaration of law, whatever is stated in the order is the finding recorded by the Supreme Court.

Third, this finding binds the parties to the lis and also the court, tribunal, or authority in any other proceedings that arise later.

(vi) Once the Supreme Court grants leave to appeal and invokes its appellate jurisdiction, the order it passes in appeal attracts the doctrine of merger—the order may be of reversal, modification, or merely of affirmation.

(vii) Once an appeal is filed or a petition seeking leave to appeal is converted into an appeal before the Supreme Court, the High Court's jurisdiction to entertain a review petition is lost.

124. Proposition (v) above clarifies that the speaking order in the SLP will not displace the judgment impugned, but it becomes a binding precedent, as a matter of judicial discipline. Yet, it cannot be treated as the only order binding as *res judicata* in the subsequent proceedings between the parties.

125. Earlier, too, the Supreme Court in *All India Services Pensioners' Assn.*, has held that when it dismisses an SLP giving reasons, the decision becomes "one which attracts Article 141 of the Constitution." And it shall be binding on all the courts in India.

What does the Supreme Court's judgment in Bapu Supadu Thorat case contain?

126. The State filed the SLP in 2015. The Supreme Court allowed the respondents to place their defence on record. Later, on 14.11.2019, it dismissed the SLP No.20207 of 2015 with this Order:

> We do not find any ground to interfere in the well-reasoned judgment passed by the High Court. *In our considered opinion, the High Court is justified in extending the State scheme to the deemed universities also by assigning valid reasons.*

127. If we look at paragraph 44 of *Kunhayammad*, we find the Court's summarised findings. Under Point (v), as we have already noted, if the order refusing leave to appeal is a speaking order—that is, if it gives reasons—then, the statement of law contained in that order attracts Article 141 of the Constitution. Besides, whatever are the "findings recorded by the Supreme Court" would bind the parties thereto "and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline."

128. Under Article 141 of the Constitution, the law declared by the Supreme Court shall bind all courts within the territory of India. In other words, we should see whether the Supreme Court's order dismissing the SLP is a speaking order—containing reasons—for it to attract Article 141. That said, we may note that the Supreme Court in its order, dt.14.11.2019, has rendered a "considered opinion". That considered opinion gives judicial imprimatur to the High Court's directive to the State to "extend the State scheme to the deemed universities also." While concluding that, the Supreme Court has found that the High Court judgment (a) is well considered and (b) contains valid reasons.

129. As we may note, the Supreme Court exercises discretionary jurisdiction under Article 136; it is "an inherent, extraordinary, and plenary

power." If we apply *Kunhayammad's* observation (v), the Supreme Court's order, dt.14.11.2019, is a speaking one; it has applied its mind and rendered an opinion. For that opinion, it has adopted the reasoning the High Court supplied in the case. So we reckon that the Supreme Court's judgment, dt.14.11.2019, in *State of Maharashtra v Bapu Supadu Thorat* is a judgment under Article 141 with its binding force unimpaired, though it does not attract the principle of merger.

Arbitrary Action:

130. Article 14 outlaws arbitrary administrative action. When there is arbitrariness in State action, Article 14 springs into action and the courts strike down such action. Arbitrary State action, too, infringes Article 14. A very fascinating aspect of Article 14 which the courts in India have developed over time, according to M. P. Jain's *Indian Constitutional Law* [66], is that Article 14 embodies "a guarantee against arbitrariness" on the part of the Administration. As the Supreme Court has observed in *Royappa* [67]: "from a positivistic point of view, equality is antithetic to arbitrariness." Any action that is arbitrary must necessarily involve the negation of equality, for abuse of power is hit by Article 14. As the Supreme Court has articulated in *Bachan Singh v State of Punjab*,[68] the rule of law permeates the entire fabric of the Indian Constitution, and it excludes arbitrariness: "Wherever we find arbitrariness or unreasonableness there

66(7th Edn., Lexis Nexis 2017) 956
67*EP Royappa v State of Tamil Nadu*, AIR 1974 SC 555, as quoted in MP Jain's *Indian Constitutional Law* (n.42) 956
68AIR 1982 SC 1325

is denial of rule of law." In other words, Article 14 enacts a guarantee primarily against arbitrariness and inhibits state action, whether legislative or executive, which suffers from the vice of arbitrariness.

131. In *AL Kalra v. P & E Corporation of India Ltd.*,[69] the Supreme Court has gone one step ahead. According to it, to challenge any arbitrary action under Article 14, the petitioner need not show that there is someone else similarly situated as he himself, or that he has been dissimilarly treated. On this point, the Supreme Court has observed in *Kalra*: "Article 14 strikes at arbitrariness in executive/administrative action because any action that is arbitrary must necessarily involve the negation of equality. One need not confine the denial of equality to a comparative evaluation between two persons to arrive at a conclusion of discriminatory treatment. An action *per se* arbitrary itself denies equality of protection by law."

132. *M. P. Jain*[70] further notes that this new dimension of Article 14 transcends the classificatory principle. Article 14 is no longer to be equated with the principle of classification. It is primarily a guarantee against arbitrariness in state action, and the doctrine of classification has been evolved only as a subsidiary rule for testing whether particular state action is arbitrary or not. If a law is arbitrary or irrational, it will fall foul of Article 14.

Grant of Benefits by the State:

69AIR 1984 SC 1361
70M. P. Jain (n 62) 956

133. Here, we are grappling with the question of fee reimbursement. No law mandates that the fee of the SC students must be returned or that they should be paid back their educational expenditure. It is, indeed, a welfare decision of the Government. The modern state is a source of succour and, therefore, we need to examine whether it is bound by any norms in dispensing its largess.

134. In India, it is now well established that in dispensing its largess, the State is expected to act in conformity with certain health standards and norms, as held by the Supreme Court in *Netai Bag v State of West Bengal.*[71]. The principle of non-discrimination contained in Article 14 has been applied by the Supreme Court in an area of great contemporary importance: conferring benefits and awarding contracts by the government. There can be no quarrel with the proposition that the government is not as free as a private person to pick and choose the recipients of its largess. Whatever its activity, a government is always a government and, as such, is subject to the restraints, inherent in a democratic society. The government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal. Every action of the government must be informed with reason and should be free from arbitrariness because the government is always a government.[72]

135. As is held in *Ramana Dayaram Shetty v. International Airport Authority*

71(2000) 8 SCC 262
72M.P. Jain (n.32) 961

of India,[73] where the government is dealing with the public, whether by giving of jobs or entering into contracts or issuing quotas or licences or granting other forms of largess, the government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norm which is not arbitrary, irrational or irrelevant.

136. After we have discussed the constitutional concepts involved in the matter and the precedential position that affects the case, we may unravel the issues that we have framed above.

Denouement:

The Justification for Discrimination:

(a) Financial Constraints:

137. The impugned GR, dt.27.02.2013, limits the benefit of fees reimbursement to "the students who are admitted under the Government Centralised Admission Process (CAP)." It, thus, implies that the students who secure admission, say, into an undergraduate engineering course through a process other than CAP are disentitled to this benefit. Besides, the GR also disentitles "the students taking admissions in Deemed Universities are not eligible for this Scheme." We reckon, here, we are not concerned with any admissions into deemed to be universities.

138. Over time, this Court wanted the Government to place on record its

73AIR 1979 SC 1628

reasons why it had excluded the scheduled caste students getting admissions through the non-CAP method. And, indeed, the Government filed its reply. According to it, its policy as spelt out in the GR is "directly connected with the financial aspects and financial position of State Government." Nothing more. But the Supreme Court, as we have already noticed, declared in *Manubhai* that paucity of funds could be no ground, with nothing more, to introduce a classification of beneficiaries.

Policy Considerations:

139. At least, during arguments, the Government has put forward policy considerations, too. It has set out these grounds of policy defence:

> (1) To ensure that the fees reimbursement should go to the Backward Class Students who have secured admission through a transparent, well-documented, well-regulated, and non-discriminated CAP.
>
> (2) The students admitted through CAP and those admitted through non-CAP are two different classes.
>
> (3) The students who have secured admission through non-CAP after their failed attempt to get admission through CAP cannot be treated on a par of with CAP-admitted students.
>
> (4) As the non-CAP students are not similarly situated, they are not entitled to equal treatment.

Policy Prerogative and Judicial Review:

140. Under the American constitution, judicial review is, perhaps, a constitutional contrivance. But in India, it is a constitutional mandate. Yet, in India, the Constitutional Courts have maintained institutional deference in

exercising this power. More particularly, regarding the policy decisions of the Executive, Courts usually adopt a hands-off approach. They do allow free play in the joints for the Executive in policy formulation and experimentation.

141. That said, the Supreme Court, on more than one occasion, has held that "the Courts would not interfere with the matter of administrative action or changes made therein, unless the Government's action is arbitrary or discriminatory or the policy adopted has no nexus with the object it seeks to achieve or is *mala fide*. [74]. So let us answer the Government contentions.

(I) Is CAP alone a transparent, well-documented, well-regulated, and non-discriminated admission procedure?

142. The Government claims, rather self-certifies, that CAP is transparent, well-documented, well-regulated, and non-discriminated. Appreciably so. But does that mean the admissions through non-CAP are "not transparent, not well-documented, not well-regulated, and discriminated"? Even the Government has not alleged so. It has proclaimed CAP as good, yet it has not denounced the non-CAP admission as deficient or defective. Further, all along, the admissions through non-CAP, too, are under the strict supervision of the State-appointed Commission. They are neither unchecked nor unregulated.

143. Here, as *P. A. Inamdar* has held, the admission can be through the Governmental CAP or though the institutional non-CAP. Both methods are legal

74 *Monarch Infrastructure (P) Ltd.* v *Commissioner, Ulhasnagar Municipal Corporation*, AIR 2000 SC 2272

and permissible. Both the admission processes have judicial imprimatur and statutory sanction. If we keep aside the deemed universities, the CAP colleges and the non-CAP colleges take the students from the common merit pool of CET. A method of admission cannot be treated as legal for one purpose and illegal for another purpose. Here, the students legitimately, lawfully get admitted through the institutional method (non-CAP) of admission. They suffer no discrimination otherwise on that count. Then, we fail to understand how the Government can brand non-CAP admission as deficient for extending a beneficial scheme.

144. We may note one crucial aspect here. The Government's providing the fees reimbursement benefit to the scheduled caste students is not merit based. It is simply disability based—the social disability of caste. Nor can the Government successfully sustain a plea that the SC students getting admitted through CAP are more meritorious. Merit is not the distinguishing factor between CAP and non-CAP admissions. Rather, a minority institution, as is the case here, getting students admitted through non-CAP enjoys a constitutional privilege. By no stretch can we brand that privilege any the less acceptable.

(II) Do the students admitted through CAP and those admitted through non-CAP form two different classes?

145. Whether classification is permissible, according to *E. V. Chinnaiah*, depends on the object the State sought to achieve. The State cannot "evolve, through imperceptible extension, a theory of classification which may subvert,

perhaps sub-merge, the precious guarantee of equality" The State spelt out nothing worthy of consideration except financial constraints. That plea already stands rejected.

146. Here, the Government maintains that the SC students getting admitted through CAP and those getting admitted through non-CAP are two distinct classes. It is a well-worn legal truism that the classification must not be "arbitrary, artificial or evasive". It must always rest upon some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved. So holds the Supreme Court in *S. Seshachalam v Chairman, Bar Council of T.N*[75]. Let us pose unto ourselves a question whether there is any reasonable basis for the differentiation between the two classes—the SC students admitted through CAP and those admitted through non-CAP—created by the State. We fail to see any. At any rate, we should agree that the justification for classification must originate from the object sought to be achieved.

147. By providing the fee reimbursement, among others, to the SC students, what has the Government sought to achieve? We reckon the fees reimbursement is a facet of affirmative action. The 'reservations' is a correctional policy, not a concessional one. For integrating a historically, socially, and economically marginalised section into the 'mainstream' society, education is the sure-fire device. Education not only enlightens but also elevates an individual's

75(2014) 16 SCC 72

status. It is the "collective upgrade". It gives the people the necessary wherewithal to live and to live with dignity—the need of the hour for every society. In that process, mere admission into the education portals is no guarantee that the marginalised individual emerges educated.

148. Pursuing courses—technical ones at that—with poverty hard on a student's heels is no easy task. As the students from the marginalised sections move up in the education ladder, their proportionate representation falls. There are more dropouts. One of the reasons for that, it seems, is the financial constraints those students face. And precisely for this reason, the Government has come up with the beneficial policy of financial help to those students. Indeed, this governmental policy is need based, not merit based. Even otherwise, the Government has failed to demonstrate before us that those that get admission through non-CAP are less meritorious. CAP and non-CAP admissions are two modes of admission with legitimacy and legality. With no demonstrable data, we cannot conclude that one is superior to the other.

149. In the end, we cannot but conclude that the classification the Government introduced through the impugned GO is "arbitrary, artificial, or evasive," as the Supreme Court has categorised in *Seshachalam*.

(III) Do the students secure admission through non-CAP only after their failed attempt through CAP?

150. At least the Government maintains so. As we have already noted,

certain institutions have been allowed to have their own admission policy. Students seek admission into a college usually based on the relative academic standard of that college. There is nothing on record for us to accept that the best of the colleges are in CAP pool and, conversely, that the non-CAP colleges are demonstrably inferior. So the Government's assertion that the students secure admission through non-CAP only after their failed attempts through CAP is a sweeping statement, besides being inaccurate. Again, we remind ourselves that the whole scheme does not consider the relative merit of the SC students.

(IV) Are the non-CAP students similarly situated with the CAP ones, deserving equal treatment?

151. The Government has persisted with its plea that the State action enjoys the presumption of correctness and that the burden lies on the petitioners to dislodge that. Put differently, there can be no presumption of discrimination; the petitioners must establish it.

152. True. We reckon the primary burden lies on the petitioners. They only need to demonstrate before the Court *prima facie* that the governmental policy is iniquitous. And they did demonstrate that. Even otherwise, the Government agrees that it has classified the scheduled castes students into two classes: CAP admitted; non-CAP admitted. Because of this classification, one class of students—if they were a class—loses benefits. Then, it is the State's burden to justify the classification. Unjustified classification amounts to indefensible

discrimination.

153. Here, we have already considered the Government's justification of the classification as "arbitrary, artificial, or evasive."

The Judicial Cleavage:

154. After going through the judgments rendered by the Division Benches on the same issue, we reckon *Bhupendra* has only held that it has "not found" the Government action as violative of Article 14 of the Constitution It does not elaborate beyond that. To the same effect are *Dudishwar* and *Pravin Bhima Shinde.*

155. In *Mrudul* the Division Bench has felt that the petitioners have not pointed out that all of them constitute one class. Nor have they contended that the State Government is duty bound to provide free education to all of them. So in the "absence of this contention or other material on record," *Mrudul* has found it "difficult to find fault with the Government decision." Therefore, we hold that Mrudul turns on its own facts; it contains no proposition of law that needs correctional course.

156. In *Sayali Shirish Nikumbh, a* woman student from SC community got the admission into MBBS., at the "Institutional Level." She was denied the benefit. The Division Bench has held that as she has availed herself of the institutional admission channel, she "cannot be heard to say that the tuition fees should be reimbursed." It has accepted institutional admission as a different category. But we have failed to notice any demonstrable basis for that conclusion.

So we hold that *Sayali Shirish Nikumbh* has been wrongly decided.

157. In *Ajit Rajendra Bhagwat*, after completing three rounds of admission, some colleges had still been left with unfilled seats. The Government allowed those colleges to admit students into those vacancies. The petitioners were admitted. They were the students that failed to get admission into colleges of their choice in the first three rounds. The Division Bench has accepted the dichotomy between the CAP admissions and non-CAP admissions. We are afraid this case too suffers the same shortcomings as *Sayali Shirish Nikumbh* does and meets the same end: It is wrongly decided.

158. That said, *Association of Colleges* has not struck down or interfered with the policy. It has held that the GR should not affect the students that already secured admission.

Bapu Supadu Thorat and Article 141 of Constitution of India:

159. *Bapu Supadu Thorat* ought to put the lid on the controversy. It is the only decision that struck down the GO and, later, was taken to the Supreme Court. We have already discussed elaborately and concluded that the Supreme Court has not only dismissed the States' SLP but also considered the case on the merits. The Apex Court's decision, thus, has attracted Article 141 of the Constitution, as per the criteria set out in *Kunhayammad*. So it precedentially binds this Full Bench, too.

Result:

We, therefore, declare that the Government Resolution, dt.27.02.2013, is arbitrary and discriminatory. It is set aside to the extent it deprives the non-CAP SC students of the benefits. As a corollary, we direct the Government to reimburse "the education fees" and "the examination fees" (already paid or yet to be paid by the students) to the petitioners.

A.A. SAYED, J

DAMA SESHADRI NAIDU, J

P.D. NAIK, J.

L.S.Panjwani, P.S.

Through an oral application the learned Additional Government Pleader seeks a certificate under Article 134A of the Constitution of India for the Government to appeal to the Supreme Court. We decline to issue the certificate for we reckon that the case involves no substantial question of law as to the interpretation of the Constitution.

Besides, the learned Additional Government Pleader wanted the Court to stay the operation of the judgment for eight weeks.

On the other hand, the learned Counsel for the petitioners has submitted that the Government has not reimbursed the fees for many years and the marginalised students have been suffering.

Under these circumstances, though we refuse to stay the operation of the judgment, we nevertheless grant eight weeks' time for the Government to implement the scheme, for the benefit of the petitioners as well, and reimburse the fee, as mandated in the judgment.

A.A. SAYED, J.

DAMA SESHADRI NAIDU, J.

P.D. NAIK, J.

L.S. Panjwani, P.S.