

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH.

DATE OF DECISION : 7.8.2018

1. C.W.P. No.15731 of 2018 (O&M)
**Nisha Minor through her father
versus
State of Haryana and others.**
2. C.W.P. No.15955 of 2018 (O&M)
**Aakash Verma minor through his father
versus
State of Haryana and others.**
3. C.W.P. No.15966 of 2018 (O&M)
Henna Khan v. State of Haryana and others.
4. C.W.P. No.15857 of 2018 (O&M)
Rajkaran Singh v. State of Haryana and others.
5. C.W.P. No.16375 of 2018 (O&M)
Muskan Verma v. State of Haryana and others.
6. C.W.P. No.16376 of 2018
Rohan v. State of Haryana and others.
7. C.W.P. No.16480 of 2018 (O&M)
Himanshu v. State of Haryana and others.
8. C.W.P. No.16485 of 2018 (O&M)
Kailash Sharma and others v. State of Haryana and others.
9. C.W.P. No.17167 of 2018 (O&M)
Sagar v. State of Haryana and others.
10. C.W.P. No.17186 of 2018 (O&M)
Himanshu and another v. State of Haryana and others.

11. C.W.P. No.17273 of 2018 (O&M)
Rohit Verma v. State of Haryana and others.
12. C.W.P. No.17279 of 2018 (O&M)
Pratibha v. State of Haryana and others.
13. C.W.P. No.17437 of 2018 (O&M)
Manpreet Kaur v. State of Haryana and others.
14. C.W.P. No.17978 of 2018 (O&M)
Pragati Verma v. State of Haryana and others.
15. C.W.P. No.18211 of 2018 (O&M)
Mohit v. State of Haryana and others.
16. C.W.P. No.18234 of 2018 (O&M)
Anupama and another v. State of Haryana and others.

CORAM : HON'BLE MR.JUSTICE MAHESH GROVER
HON'BLE MR.JUSTICE MAHABIR SINGH SINDHU

Present:- Shri P.R.Yadav, Advocate for the petitioners
(in CWP Nos.15731,15857,16480,16485, 17186,17437 of 2018).

Shri Shri S.K.yadav, Advocate for the petitioners
(in CWP No.17273 of 2018).

Shri Rakesh Nagpal, Advocate for the petitioners
(in CWP No.17978 of 2018).

Ms.Lavleen Dhaliwal, Advocate for the petitioners
(in CWP No.18234 of 2018).

Shri Kanhiya Soni, Advocate for the petitioners
(in CWP No.18211 of 2018).

Shri Vikram Sheoran, Advocate for the petitioners
(in CWP No.15966 of 2018).

Shri Krishan Singh, Advocate for petitioner (in CWP No.17167 of 2018).

Shri R.K.Verma, Advocate for petitioner (in CWP Nos.17279, 16375, 16376 of 2018).

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Shri Samarath Sagar, Additional A.G. Haryana.

Shri A.S.Virk, Advocate for respondent No.3-KUK.

Shri S.S.Gill, Advocate for petitioner(in CWP No.15955 of 2018).

MAHESH GROVER, J.

By this order we dispose of C.W.P. Nos.15731,15955,15966,15857, 16375,16375, 16480,16485,17167,17186,17273,17279,17437,17978, 18211 and 18234 of 2018. These petitions have been filed by young aspirants to the M.B.B.S. Course for the current session. All of them belong to Backward Classes and are aggrieved of the notification dated 17.8.2016 issued by the State.

For the sake of convenience, brief facts have been taken from C.W.P. No.15731 of 2018.

Since it is germane to the controversy, we deem it appropriate to extract Annexure P-3 here below :-

“HARYANA GOVERNMENT
WELFARE OF SCHEDULED CASTES AND BACKWARD
CLASSES DEPARTMENT

NOTIFICATION

The 17th August, 2016

No.808-SW(1)-In exercise of the powers conferred by clause (d) of Section of the Haryana Backward Classes (Reservation in Services and Admission in Educational Institutions) Act, 2016 (15 of 2016), the Governor of Haryana hereby specify the following criteria for exclusion of creamy layer within the Backward Classes as per the Schedule appended to the Act, namely Schedule I, II & III.

The children of persons having gross annual income of

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upto Three lakh Rupees shall first of all get the benefit of reservation in services and admission in educational institutional. The left out quota shall go to that class of Backward Classes of citizens who earn more than Three Lakh rupees but upto Six Lakh rupees per annum. The sections of the Backward Classes earning above six lakh rupees per annum shall be considered as Creamy Layer under Section 5 of the said Act.”

We may notice another concern raised in the petitions which however, has been rendered inconsequential on account of the statement made by the respondents before the Court where after realizing their mistake qua the information given in the prospectus, the same was rectified and the decision applied to all aspects regardless. Yet, for the purpose of being true to the record, we extract the orders passed by us on 6.7.2018 and 25.7.2018 on the statement made by the respondent :-

ORDER PASSED ON 6.7.2018 :

“On the request of the learned counsel for the State, adjourned to 17.7.2018.

In the meantime, the petitioners shall be considered for the second round of counseling without conferring any equitable right in their favour. We also notice that there has been a serious lapse as far as the information set out on the website and the forms available regarding the criteria to be adopted qua the income to ascertain the backward class and the benefit flowing therefrom.

The prospectus containing erroneous information in terms of earlier notifications of 1995 and 2000 which

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according to the respondents themselves has been superseded in view of the Haryana Backward Classes (Reservation in Services and Admission in Educational Institutions) Act, 2016. It is not denied before us that the information given on the website and the available forms as also the prospectus was on the basis of the earlier superseded instructions and evidently this would have led to supply of improper information leading to serious consequences in ascertaining the merit of the candidates. We, therefore, make it clear that the admissions made to the B.C. category shall be subject to the outcome of the present writ petitions.

A photo copy of this order be placed on the files of the afore-numbered connected cases.

(MAHESH GROVER)
JUDGE

6.7.2018 (MAHABIR SINGH SINDHU)
JUDGE”

ORDER PASSED ON 25.7.2018 :

“CM No.10210 of 2018 in CWP No.15731 of 2018

Notice of the application for 1.8.2018.

Main case

Affidavit of Geeta Bharti, IAS, Special Secretary to Govt. Haryana, Welfare of Scheduled Caste and Backward Classes Department, Haryana on behalf of respondent No.2 (In CWP No.15731 of 2018) has been filed in the Court today and the same is taken on record. A copy thereof has been supplied to the counsel opposite.

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On 6.7.2018 we had noticed certain anomalies that might have crept in on account of insistence of the State on the notification dated 9.8.2000. Mr.Sagar, learned State counsel on instructions from Dr.Sheeba, Deputy Director, Medical Education and Research, Haryana states that the said notification is not being insisted upon and rather where some candidates have given information on the basis of aforesaid notification, opportunity has been given to them to rectify the mistake by providing the requisite information in terms of the latter notification dated 17.8.2016 for the purposes of second counseling.

It has also been stated by Mr.Sagar that the date for second counseling has not been announced so far.

We have heard learned counsel for the parties. Before we proceed with the matter, we would like to have a complete data/particulars from the State regarding those aspirants whose income is upto 3 lacs and those whose income is above 3 lacs and upto 6 lacs. The said information be supplied to this Court on the date fixed in a sealed cover.

Adjourned to 1.8.2018.

A photocopy of this order be placed on the files of all afore-numbered connected cases.

(MAHESH GROVER)
JUDGE

(MAHAVIR SINGH SINDHU)
JUDGE”

The sole surviving grievance thereafter is regarding the afore-extracted notification dated 17.8.2016 which contemplates that the children of those from amongst the Backward Classes having a gross annual income of upto three lakhs rupees shall first of all get the benefit of reservation in services and admission in educational institutions and the left out quota shall go to that class of Backward Classes of citizens who earn more than three lakh rupees but upto six lakh rupees per annum. The petitioners perceive this to be in conflict with the judgment of the Hon'ble Supreme Court in **Indra Sawhney etc. etc. v. Union of India and others** 1992 Supp.(3) S.C.C.792, as also a few other judgments, while respondents justify their action again with reference **Indra Sawhney etc. etc. v. Union of India and others** (supra) to contend that they have the power to prescribe an economic criteria to identify the creamy layer.

The decision in **Indra Sawhney etc. etc. v. Union of India and others** (supra) therefore, forms the fulcrum of the discussion and possibly our conclusions as well.

We need not elaborately deal with the arguments raised before us, but suffice it to say that those with an income of Rs.3 lakhs would largely result in exclusion of those backward classes who have the income between rupees 3 to 6 lakhs besides resulting in a favourable situation to a few, according to the petitioners.

The State, in turn, justifies it to be in tune iwth the laudable objective of ensuring the benefit of reservation to the most marginalized.

In support of their plea, the petitioners have referred to the observations of the Hon'ble Supreme Court in **Indra Sawhney etc. etc. v. Union of India and others** (supra) which we extract here below :-

“190. It should not be out of place to recall the observation

of Hegde, J. in Hira Lal (AIR 1971 SC 1777) observing, "The

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extent of reservation to be made is primarily a matter for the State to decide. By this we do not mean to say that the decision of the State is not open to judicial review.....The length of the leap to be provided depends upon the gap to be covered." (Emphasis supplied)

191. Desai, J. in *Vasanth Kumar* (AIR 1985 SC 1495) expressed his view that in dealing with the question of reservation in favour of Scheduled Castes, Scheduled Tribes as well as other SEBCs 'Judiciary retained its traditional blindfold on its eyes and thereby ignored perceived realities'. (SCC 729, para 20).

Whether the further arbitrary classification as 'poorer sections' from and out of the identified SEBCs is permissible under Article 16 (4) after acceptance and approval of the list without reservation and whether such classification suffers from non-application of mind ?

192. The most important pivotal and crucial issue that I would now like to ponder over relates to the intent of para 2 (i) of the OM dated 25th September 1991 whereunder it is declared that "within the 27% of the vacancies in civil posts and services under the Government of India reserved for SEBCs, Preference will be given to the candidates belonging to the poorer sections of the SEBCs. In case sufficient number of such candidates is not available, unfilled vacancies shall be filled by the other SEBC candidates". (Emphasis supplied)

193. To say in other words, the Government intends to prescribe an income ceiling for determination of 'poorer sections' of the SEBCs who will be eligible to avail of the

preference of reservation of appointments or posts in the Services under the State. It is an admitted fact that the Government so far has not laid down any guideline or test for identifying and ascertaining the 'poorer sections' among the identified SEBCs.

194. The OM has specifically used the expression, 'poorer sections' but not 'weaker sections' as contemplated under Article 46 of the Constitution. Though the expressions 'poorer sections' and 'weaker sections' may connote in general 'the disadvantaged position of a section of the people' they do not convey one and the same meaning and they are not synonymous. When the OM deliberately uses the expression 'poorer sections', it has become incumbent to examine what that expression means and whether there can be any sub-classification as 'poorer' and 'non-poorer' among the same category of potential backward class of citizens on the anvil of economic criterion.

195. The word 'poor' lexically means "having little or no money, goods or other means of support" (Webster's Encyclopedic Unabridged Dictionary) or "lacking financial or other means of subsistence" (Collins English Dictionary).

196. The OM uses the expression 'poorer' in its comparative term for the word 'poor'. It is common knowledge that the superlative term for the word 'poor' is 'poorest'. The very usage of the word 'poorer' is in comparison with the positive word 'poor'. Therefore, it necessarily follows that the OM firstly considers all the identified SEBCs in general as belonging to 'poor sections' from and out of which the 'poorer

sections' are to be culled out by applying a test to be yet formulated by the Government evidently on economic criterion or by application of poverty test based on the ceiling of income. After the segregation of 'poorer sections' of the SEBCs, the left out would be the 'poor sections'. By the use of the word 'poorer', the Government is superimposing a relative poverty test for identifying and determining a preferential class among the identified SEBCs. It is stated that the preference will be given first to the 'poorer sections' and only in case there are unfilled vacancies, those vacancies will be filled by the left out SEBCs, namely, those other than the poorer sections. In other words, it means that all the identified SEBCs do not belong to affluent sections but to poor and poorer sections, that the expression 'poorer sections' denotes only the economically weaker sections of SEBCs compared with the remaining same category of SEBCs and that those, other than the 'poorer sections' although socially and educationally backward are economically better off compared with the 'poorer sections'. The view that all the identified SEBCs are considered as 'poor' or 'poorer' is fortified by the fact that there is an inbuilt explanation in the amended OM itself to the effect that those who do not fall within the category of 'poorer sections' also will be entitled for the benefit of reservation but of course subject to the availability of unfilled vacancies.

197. An argument was advanced that for identifying 'poorer sections', the 'means test' signifying an imposition of outer income limit should be applied and those who are above the

cut off income limit should be excluded so that the better off sections of the SEBCs may be prevented from taking the benefit earmarked for the less fortunate brethren, and the only genuine and truly members of 'poorer sections' of SEBCs may avail the benefit of reservation. In support of this argument, an attempt has been made to draw strength on two decisions of this Court rendered in Jayashree (AIR 1976 SC 2381) and Vasanth Kumar (AIR 1985 SC 1495).

198. Chief Justice Ray in Jayashree seems to have been inclined to take the view that reservation of seats in educational institutions should not be allowed to be enjoyed by the rich people suffering from the same communal disabilities.

199. Chinnappa Reddy, J. in Vasanth Kumar recognises this 'means test' saying that "an upper income ceiling would secure the benefit of reservation to such of those members of the class who really deserved it", with which view Venkataramiah, J. (as the learned' Chief Justice then was) has agreed.

200. Thus the above argument based on 'means test' though seems to be plausible at the first sight is, in my opinion, not well founded and must be rejected on the ground that the identified category of SEBCs, having common characteristics or attributes - namely the potential social backwardness cannot be bisected or further classified by applying the economic or poverty test.

201. A doubt has been created as to whether the word 'poorer' connotes economic status or social status or is to be

understood in any other way.

202. The word 'poorer' when examined in the context in which it is deployed both syntactically and etymologically, in my view, may not convey any other meaning except relative poverty or comparative economic status. If any other meaning is imported which the Government evidently appears to have not contemplated, virtually one will be rewriting the second OM.

203. An order of a Constitution Bench dated 1st October 1991 clearly spells out that Bench was of the view that 'poorer sections' are to be identified by the economic criterion. The relevant portion of the above Order reads as follows :

"The matters are adjourned to 31st October 1991 when learned Additional Solicitor General will tell us how and when Government would be able to give the list of the economic criteria referred to in the notification of 25th September 1992." (Emphasis supplied)

204. The same view is reflected in a subsequent Order dated 4th December 1991 made by this nine-Judges Bench, the relevant part of which reads thus :

"Learned Additional Solicitor General states that the Government definitely expects to be able to fix the economic criteria by January 28, 1992 As far as the question of stay granted by us earlier is concerned, we see no reason to pass any order at this stage as the petitions are posted for hearing on January 28, 1992 and in view of the economic criterion not being yet determined and other relevant circumstances,

no question of immediate implementation of the notification arises." (Emphasis supplied)

205. The above Order of this Court supports my view that the Government has to identify the 'poorer sections' only by the economic criteria or by the application of poverty test otherwise called 'means test'. It appears that this Court has all along been given to understand that 'poorer sections' will be tested by the Government on economic criterion.

206. The above view is further fortified by the very fact that the second OM providing 10% of the reservation for economically backward sections of the people not covered by any other scheme of the reservation' indicates that the Government has taken only the economic criteria in making the classification of the various sections of the people (Emphasis supplied). Therefore, I proceed on the basis that the second OM identifies the 'poorer sections' only on the basis of economic status.

207. When the 'means test' is analysed in depth so as to explore its merits and demerits, one would come to an inevitable conclusion that it is not a decisive test but on the other hand it will serve as a protective umbrella for many to get into this segregated section by adopting all kinds of illegal and unethical methods. Further, this test will be totally unworkable and impracticable in the determination of "getting somebody in and getting somebody out" from among the same identified SEBCs. If this 'means test' argument is accepted and put into action by scanning the identified SEBCs by applying a super-imposition test, the very object and purpose of

reservation, intended for the socially backward class would reach only a include sac and the identified SEBCs would be left in a maze. In my considered opinion, it will be a futile exercise for the courts to find out the reasons in support of the division between and among the group of SEBCs and make rule therefor, for multiple reasons, a few of which I am enumerating hereunder.

(1) The division among the identified and ascertained SEBCs having common characteristics and attributes - the primary of which being the potential social backwardness, as 'poorer sections' and 'non-poorer sections' on the anvil of economic criterion or by application of a super-imposition test of relative poverty is impermissible as being opposed to the scope and intent of Article 16 (4).

(2) If this apex Court puts its seal of approval to part 2 (i) of the second OM whereunder a section of the people under the label of 'poorer sections' is carved out from among the SEBCs, it becomes a law declared by this Court for the entire nation under Article 141 of the Constitution and is binding on all the Courts within the territory of India and that the decision of this Court on a constitutional question cannot be over-ridden except by the constitutionally recognised norms. When such is the legal position, the law so declared should be capable of being effectively implemented in its full measure, in the generality of cases and not confined in its applicability to some rare or freakish cases. The law should not be susceptible of being abused or misused and leave scope for manipulation which can remain undetected. If the law so declared by this

Court is indecisive and leaves perceivable loopholes, by the aid of which one can defeat or circumvent or nullify that law by adopting an insidious, tricky, fraudulent and strategic device to suit one's purpose then that law will become otiose and remain as a dead letter.

I would like to indicate the various reasons in support of my opinion that this process of elimination or exclusion of a section of people from and out of the same category of SEBCs cannot be sustained leave apart the authority of the Government to take any decision and formulate its policy in its discretion or opinion provided that the policy is not violative of any constitutional or legal provisions or that discretion or opinion is not vitiated by non-application of mind, arbitrariness, formulation of collateral grounds or consideration of irrelevant and extraneous material etc.

- (a) If the annual gross income of a Government servant derived from all his sources during a financial year is taken as a test for identifying the 'poorer sections', that test could be defeated by reducing the income below the ceiling limit by a Government servant voluntarily going on leave on loss of pay for few months during that financial year so that he could bring his annual income within the ceiling limit and claim the benefit of reservation meant for 'poorer sections'. Similarly, a person owning extensive land also may lay a portion of his land fallow in any particular year or dispose of a portion of his land so as to bring his agricultural income below the ceiling limit so that he may fall within the

category of 'poorer sections'.

- (b) The fluctuating fortunes or misfortunes also will play an important role in determining whether one gets within the area of 'poorer sections' or gets out of it.
- (c) Take a case wherein there are two brothers belonging to the same family of 'backward class' of whom one is employed in Government service and another is privately employed or has chosen some other profession. The annual income of the Government employee if slightly exceeds the ceiling limit, his children will not fall within the category of 'poorer sections' whereas the other brother can deceitfully show his income within the ceiling limit so that his children can enjoy that benefit.
- (d) Among the pensioners also, the above anomaly will prevail as pointed out in Janaki Prasad (AIR 1973 SC 930). सत्यमेव जयते
- (e) Any member of SEBCs who is in Government job and is on the verge of his superannuation and whose income exceeds the ceiling limit, will go out of the purview of 'poorer sections' but in the next financial year, he may get into the 'poorer sections' if his total pensionary benefits fall within the ceiling limit.
- (f) A person who is within the definition of 'poorer sections' may suddenly go out of its purview by any intervening fortuitous circumstances such as getting a marital alliance in a rich family or by obtaining any wind-fall wealth.

- (g) If poverty test is made applicable for identifying the 'poorer sections' then in a given case wherein a person is socially oppressed and educationally backward but economically slightly advanced in a particular year, he will be deprived of getting the preferential treatment.

The above are only by way of illustrations, though this type can be multiplied, for the purpose of showing that a person can voluntarily reduce his income and thereby circumvent the declared law of this Court. In all the above illustrations, enumerated as (a) to (g) the chance of "getting into or getting out of the definition of 'poorer sections' will be like a see-saw depending upon the fluctuating fortunes or misfortunes.

- (3) The income-test for ascertaining poverty may severally suffer from the vice of corruption and also encourage patronage and nepotism.

- (4) When the Government has accepted and approved the lists of SEBCs, identified by the test of social backwardness, educational backwardness and economic backwardness which lists are annexed to the Report, there is no justification by dividing the SEBCs into two groups, thereby allowing one section to fully enjoy the benefits and another on a condition only if there are unfilled vacancies.

- (5) The elimination of a section of SEBCs by putting an arbitrary and unnecessary barrier on the basis of economic criterion is absolutely unjustified. This process of elimination or exclusion of a section of SEBCs will be tantamount to pushing those persons into the arena of open competition along with the forward class if there are no unfilled vacancies

out of the total 27% meant for SEBCs. This will cause an irretrievable injustice to all the non-poorer sections though they are also theoretically declared as SEBCs.

(6) The second OM providing a scanning test is neither feasible nor practicable. It will be perceptible and effectual only if the entire identified backward class enjoys the benefit of reservation.

(7) The proposed 'means test' is highly impressionistic test, the result of which is likely to be influenced by many uncertain and imponderable facts.

(8) It may theoretically sound well but in practice attempts may be made in a underhanded way to get round the problem.

208. What I have indicated above is only the tip of the iceberg and more of it is likely to surface at the time when any scanning process and super-imposition test are put into practice.

209. In this connection, I would like to mention the views of the Tamil Nadu Government as expressed by the Chief Minister of Tamil Nadu in the Chief Ministers' Conference held in New Delhi (already referred to) stating that the application of income limit on reservation will exclude those people whose income is above the 'cut-off' limit and literally, it means that they will come under the open competition quota and if caste is not the sole criterion, income limit cannot also be the decisive and determining factor for social backwardness and that the exclusion of certain people from the benefits of reservation by the application of economic criterion will not bring the desired effect for the advancement

and improvement of the backward classes who have suffered deprivation from the time immemorial.”

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“792. In our opinion, it is not a question of permissibility or desirability of such test but one of proper and more appropriate identification of a class – a backward class. The very concept of a class denotes a number of persons having certain common traits which distinguish them from the others. In a backward class under clause (4) of Article 16, if the connecting link is the social backwardness, it should broadly be the same in a given class. If some of the members are far too advanced socially (which in the context, necessarily means economically and, may also mean educationally) the connecting thread between them and the remaining class snaps. They would be misfits in the class. After excluding them alone, would the class be a compact class. In fact, such exclusion benefits the truly backward. Difficulty, however, really lies in drawing the line – how and where to draw the line ? For, while drawing the line, it should be ensured that it does not result in taking away with one hand what is given by the other. The basis of exclusion should not merely be economic, unless, of course, the economic advancement is so high that it necessarily means social advancement. Let us illustrate the point. A member of backward class, say a member of carpenter caste, goes to Middle East and works there as a carpenter. If you take this annual income in rupees, it would be fairly high from the Indian standard. Is he to be excluded from the Backward Class ? Are his children in India

to be deprived of the benefit of Article 16(4) ? Situation may, however, be different, if he rises so high economically as to become – say a factory owner himself. In such a situation, his social status also rises. He himself would be in a position to provide employment to others. In such a case, his income is merely a measure of his social status. Even otherwise there are several practical difficulties too in imposing an income ceiling. For example, annual income of Rs.36,000 may not count for much in a city like Bombay, Delhi or Calcutta whereas it may be a handsome income in rural India anywhere. The line to be drawn must be a realistic one. Another question would be, should such a line be uniform for the entire country or a given State or should it differ from rural to urban areas and so on. Further, income from agriculture may be difficult to assess and, therefore, in the case of agriculturists, the line may have to be drawn with reference to the extent of holding. While the income of a person can be taken as a *measure* of his social advancement, the limit to be prescribed should not be such as to result in taking away with one hand what is given with the other. The income limit must be such as to mean and signify social advancement. At the same time, it must be recognized that there are certain positions, the occupants of which can be treated as socially advanced without any further enquiry. For example, if a member of a designated backward class becomes a member of IAS or IPS or any other All India Service, his status in society (social status) rises ; he is no longer socially disadvantaged. His children get full opportunity to realize their

potential. They are in no way handicapped in the race of life. His salary is also such that he is above want. It is but logical that in such a situation, his children are not given the benefit of reservation. For by giving them the benefit of reservation, other disadvantaged members of that backward class may be deprived of that benefit. It is then argued for the respondents that 'one swallow does not make the summer' and that merely because a few members of a caste or class become socially advanced, the class/caste as such does not cease to be backward. It is pointed out that clause (4) of Article 16 aims at group backwardness and not individual backwardness. While we agree that clause (4) aims at group backwardness, we feel that exclusion of such socially advanced members will make the 'class' a truly backward class and would more appropriately serve the purpose and object of clause (4). (This discussion is confined to Other Backward Classes only and has no relevance in the case of Scheduled Tribes and Scheduled Castes).

793. Keeping in mind all these considerations, we direct the Government of India to specify the basis of exclusion – whether on the basis of income, extent of holding or otherwise – of 'creamy layer'. This shall be done as early as possible, but not exceeding four months. On such specification persons falling within the net of exclusionary rule shall cease to be the members of the Other Backward classes (covered by the expression 'backward class of citizens') for the purpose of Article 16(4). The impugned Office Memorandums dated August 13, 1990 and September 25,

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1991 shall be implemented subject only to such specification and exclusion of socially advanced persons from the backward classes contemplated by the said O.M. In other words, after the expiry of four months from today, the implementation of the said O.M. shall be subject to the exclusion of the 'creamy layer' in accordance with the criteria to be specified by the Government of India and not otherwise.

(e) Whether a class should be situated similarly to the Scheduled Caste/Scheduled Tribes for being qualified as a Backward Class ?”

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“799. It follows from the discussion under Question No.3 that a backward class cannot be determined only and exclusively with reference to economic criterion. It may be a consideration or basis along with and in addition to social backwardness, but it can never be the sole criterion. This is the view uniformly taken by this Court and we respectfully agree with the same.”

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Question No.10 :

Whether the distinction made in the second Memorandum between 'poorer sections' of the backward classes and others permissible under Article 16 ?

843. While dealing with Question No.3(d), we held that exclusion of 'creamy layer' must be on the basis of social advancement (such advancement as renders them misfits in the backward classes) and not on the

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basis of mere economic criteria. At the same time, we held that income or the extent of property held by a person can be taken as a measure of social advancement and on that basis 'creamy layer' of a given caste/community/occupational group can be excluded to arrive at a true backward class. Under Question No.5, we held that it is not impermissible for the State to categorize backward classes into backward and more backward on the basis of their relative social backwardness. We had also given the illustration of two occupational groups, viz., goldsmiths and vaddes (traditional stone-cutters in Andhra Pradesh) ; both are included within 'other backward classes'. If these two groups are lumped together and a common reservation is made, the goldsmiths would walk away with all the vacancies leaving none for vaddes. From the said point of view, it was observed, such classification among the designated backwards classes may indeed serve to help the more backward among them to get their due. But the question now is whether clause (i) of the Office Memorandum dated September 25, 1991 is sustainable in law. The said clause provides for preference in favour of "poorer sections" of the backward classes over other members of the backward classes. On first impression, it may appear, that backward classes are classified into two sub-groups on the basis of economic criteria alone and a preference provided in favour of the poorer sections of the

backward classes. In our considered opinion, however, such an interpretation would not be consistent with context in which the said expression is used and the spirit underlying the clause nor would it further the objective it seeks to achieve. The object of the clause is to provide a preference in favour of more backward among the “socially and educationally backward classes”. In other words, the expression 'poorer sections' was meant to refer to those who are socially and economically more backward. The use of the word 'poorer', in the context, is meant only as measure of social backwardness. (Of course, the Government is yet to notify which classes among the designated backward classes are more socially backward, i.e. 'poorer sections'). Understood in this sense, the said classification is not and cannot be termed as invalid either constitutionally speaking or in law. The next question that arises is : what is the meaning and context of the expression 'preference' ? Having regard to the fact the backward classes are sought to be divided into two sub-categories, viz. backward and more backward, the expression 'preference' must be read down to mean an equitable apportionment of the vacancies reserved (for backward classes) among them. The object evidently could not have been to deprive the 'backward' altogether from benefit of reservation, which could be the result if word 'preference' is read literally – if the 'more backward

take away all the available vacancies/posts reserved for OBCs, none would remain for 'backward' among the OBCs. It is for this reason that we are inclined to read down the expression to mean an equitable apportionment. This, in our opinion, is the proper and reasonable way of understanding the expression 'preference' in the context which it occurs. By giving the above interpretation, we would be effectuating the underlying purpose and the true intention behind the clause.”

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(5) There is no constitutional bar to classification of backward classes into more backward and backward classes for the purposes of Article 16 (4).. The distinction should be on the basis of degree of social backwardness. In case of such classification, however, it would be advisable – may, necessary – to ensure equitable distribution amongst the various backward classes to avoid lumping so that one or two such classes do not eat away the entire quota leaving the other backward classes high and dry.

For excluding 'creamy layer', an economic criterion can be adopted as an indicium or measure of social advancement.

(6) A 'provision' under Article 16(4) can be made by an executive order. It is not necessary that it

should be made by Parliament/Legislature.

- (7) No special standard of judicial scrutiny can be predicated in matters arising under Article 16 (4). It is not possible for necessary to say more than this under this question.”

The respondents, on the other hand, while justifying the notification, have relied on the following observations of the Hon'ble Supreme Court in **Indra Sawhney etc. etc. v. Union of India and others** (supra) :-

“86. 'Means test' in this discussion signifies imposition of an income limit, for the purpose of excluding persons (from the backward class) whose income is above the said limit. This submission is very often referred to as “the creamy layer” argument. Petitioners submit that some members of the designated backward classes are highly advanced socially as well as economically and educationally. It is submitted that they constitute the forward section of that particular backward class – as forward as any other forward class member – and that they are lapping up all the benefits of reservations meant for that class, without allowing the benefits to reach the truly backward members of that class. These persons are by no means backward and with them a class cannot be treated as backward. It is pointed out that since *Jayasree* (AIR 1976 SC 2381), almost every decision has accepted the validity of this submission.

On the other hand, the learned counsel for the States of Bihar, Tamil Nadu, Kerala and other counsel for respondents strongly oppose any such distinction. It is submitted that once a class is identified as a backward class after applying the

relevant criteria including the economic one, it is not permissible to apply the economic criteria once again and sub-divide a backward class into two sub-categories. Counsel for the State of Tamil Nadu submitted further that at one stage (in July 1979) the State of Tamil Nadu did indeed prescribe such an income limit but had to delete it in view of the practical difficulties encountered and also in view of the representations received. In this behalf, the learned counsel invited our attention to Chapter 7-H (pages 60 to 62) of the Ambashankar Commission (Tamil Nadu Second Backward Classes Commission) Report. According to the respondents the argument of 'creamy layer' is but a mere ruse, a trick, to deprive the backward classes of the benefit of reservations. It is submitted that no member of backward class has come forward with this plea and that it ill becomes the members of forward classes to raise this point. Strong reliance is placed upon the observations of Chinnappa Reddy J. in Vasant Kumar (AIR 1985 SC 1495), to the following effect :

“ ... One must, however, enter a caveat to the criticism that the benefits of reservation are often snatched away by the top creamy layer of backward class or caste. That a few of the seats and posts reserved for backward classes are snatched away by the more fortunate among them is not to say that reservation is not necessary. This is bound to happen in a competitive society such as ours. Are not the unreserved seats and posts snatched away, in the same way, by the top creamy layers amongst them on the same principle of merit on which the non reserved seats are taken away by the top layers of the

society. How can it be had if reserved seats and posts are snatched away by the creamy layer of backward classes, if such snatching away of unreserved posts by the top creamy layer of society itself is not bad ?”

In our opinion, it is not a question of permissibility or desirability of such test but one of proper and more appropriate identification of a class – a backward class. The very concept of a class denotes a number of persons having certain common traits which distinguish them from the others. In a backward class under clause (4) of Article 16, if the connecting link is the social backwardness, it should broadly be the same in a given class. If some of the members are far too advanced socially (which in the context, necessarily means economically and, may also mean educationally) the connecting thread between them and the remaining class snaps. They would be misfits in the class. After excluding them alone, would the class be a compact class. In fact, such exclusion benefits the truly backward. Difficulty, however, really lies in drawing the line – how and where to draw the line? For, while drawing the line, it should be ensured that it does not result in taking away with one hand what is given by the other. The basis of exclusion should not merely be economic, unless, of course, the economic advancement is so high that it necessarily means social advancement. Let us illustrate the point. A member of backward class, say a member of carpenter caste, goes to Middle East and works there as a carpenter. If you take his annual income in rupees, it would be fairly high from the Indian standard. Is he to be

excluded from the Backward Class ? Are his children in India to be deprived of the benefit of Article 16(4) ? Situation may, however, be different, if he rises so high economically as to become say a factory owner himself. In such a situation, his social status also rises. He himself would be in a position to provide employment to others. In such a case, his income is merely a measure of his social status. Even otherwise there are several practical difficulties too in imposing an income ceiling. For example, annual income of Rs.36,000/- may not count for much in a city like Bombay, Delhi or Calcutta whereas it may be a handsome income in rural India anywhere. The line to be drawn must be a realistic one. Another question would be, should such a line be uniform for the entire country or a given State or should it differ from rural to urban areas and so on. Further, income from agriculture may be difficult to assess and, therefore, in the case of agriculturists, the line may have to be drawn with reference to the extent of holding. While the income of a person can be taken as a measure of his social advancement, the limit to be prescribed should not be such as to result in taking away with one hand what is given with the other. The income limit must be such as to mean and signify social advancement. At the same time, it must be recognized that there are certain positions, the occupants of which can be treated as socially advanced without any further enquiry. For example, if a member of a designated backward class becomes a member of I.A.S. or I.P.S. or any other All India Service, his status in society (social status) rises ; he is no

longer socially disadvantaged. His children get full opportunity to realize their potential. They are in no way handicapped in the race of life. His salary is also such that he is above want. It is but logical that in such a situation, his children are not given the benefit of reservation. For by giving them the benefit of reservation, other disadvantaged members of that backward class may be deprived of that benefit. It is then argued for the respondents that one swallow doesn't make the summer, and that merely because a few members of a caste or class become socially advanced, the class/caste as such does not cease to be backward. It is pointed out that clause (4) of Article 16 aims at group backwardness and not individual backwardness. While we agree that clause(4) aims at group backwardness, we feel that exclusion of such socially advanced members will make the 'class' as truly backward class and would more appropriately serve the purpose and object of clause (4). (This discussion is confined to other Backward Classes only and has no relevance in the case of Scheduled Tribes and Scheduled Castes).

Keeping in mind all these considerations, we direct the Government of India to specify the basis of exclusion whether on the basis of income, extent of holding or otherwise of 'creamy layer'. This shall be done as early as possible, but not exceeding four months. On such specification persons falling within the net of exclusionary rule shall cease to be the members of the Other Backward Classes (covered by the expression 'backward class of citizens') for the purpose of Article 16(4). The impugned Office Memorandum dated 13th

August, 1990 and 25th September, 1991 shall be implemented subject only to such specification and exclusion of socially advanced persons from the backward classes contemplated by the said O.M. In other words, after the expiry of four months from today, the implementation of the said O.M. shall be subject to the exclusion of the 'creamy layer' in accordance with the criteria to be specified by the Government of India and not otherwise.

(c) Whether a class should be situated similarly to the Scheduled Caste/scheduled Tribe for being qualified as a Backward Class ?”

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“114. While dealing with Question No.3(d), we held that exclusion of 'creamy layer' must be on the basis of social advancement (such advancement as renders them misfits in the backward classes) and not on the basis of mere economic criteria. At the same time, we held that income or the extent of property held by a person can be taken as a measure of social advancement and on that basis 'creamy layer' of a given caste/community/occupational group can be excluded to arrive at a true backward class. Under Question No.5, we held that it is not impermissible for the State to categorize backward classes into backward and more backward on the basis of their relative social backwardness. We had also given the illustration of two occupational groups, viz., gold-smiths and vaddes (traditional stone-cutters in Andhra Pradesh); both are included within 'other backward classes'. If these two groups are lumped together and a common reservation is made, the

gold-smiths would walk away with all the vacancies leaving none for vaddes. From the said point of view, it was observed, such classification among the designated backwards classes may indeed serve to help the more backward among them to get their due. But the question now is whether clause (i) of the Office Memorandum dated 25th September, 1991 is sustainable in law. The said clause provides for a preference in favour of “poorer sections” of the backward classes over other members of the backward classes. On first impression, it may appear that backward classes are classified into two sub-groups on the basis of economic criteria alone and a preference provided in favour of the poorer sections of the backward classes. In our considered opinion, however, such an interpretation would not be consistent with the context in which the said expression is used and the spirit underlying the clause nor would it further the objective it seeks to achieve. The object of the clause is to provide a preference in favour of more backward among the “socially and educationally backward classes”. In other words, the expression 'poorer sections' was meant to refer to those who are socially and economically more backward. The use of the word poorer, in the context, is meant only as a measure of social backwardness. (Of course, the Government is yet to notify which classes among the designated backward classes are more socially backward, i.e. 'poorer sections'). Understood in this sense, the said classification is not and cannot be termed as invalid either constitutionally speaking or in law. The next question that arises is : what is the meaning and context of the

expression 'preference'? Having regard to the fact the backward classes are sought to be divided into two sub-categories, viz., backward and more backward, the expression 'preference' must be read down to mean an equitable apportionment of the vacancies reserved (for backward classes) among them. The object evidently could not have been to deprive the 'backward' altogether from benefit of reservation, which could be the result if word 'preference' is read literally – if the 'more backward' take away all the available vacancies/posts reserved for O.B.Cs., none would remain for 'backward' among the O.B.Cs. It is not for this reason that we are inclined to read down the expression to mean an equitable apportionment. This, in our opinion, is the proper and reasonable way of understanding the expression preference in the context in which it occurs. By giving the above interpretation, we would be effectuating the underlying purpose and the true intention behind the clause.

It shall be open to the Government to notify which classes among the several designated other backward classes are more backward for the purposes of this clause and the apportionment of reserved vacancies/posts among 'backward' and "more backward". On such notification, the clause will become operational.

Question No.11 : Whether the reservation of 10% of the posts in favour of 'other economically backward sections of the people who are not covered by any of the existing schemes of the reservations' made by the Office Memorandum dated 25.9.1991 permissible under Art.16?"

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92A. We are of the opinion that there is no constitutional or legal bar to a State categorizing the backward classes as backward and more backward. We are not saying that it ought to be done. We are concerned with the question if a State makes such a categorization, whether it would be invalid? We think not. Let us take the criteria evolved by Mandal Commission. Any caste, group or class which scored eleven or more points was treated as a backward class. Now, it is not as if all the several thousands of castes/groups/classes scored identical points. There may be some castes/groups/classes which have scored points between 20 to 22 and there may be some who have scored points between eleven and thirteen. It cannot reasonably be denied that there is no difference between these two sets of castes/groups/classes. To give an illustration, take two occupational groups viz., gold-smiths and vaddes (traditional stone-cutters in Andhra Pradesh) both included within Other Backward Classes. None can deny that gold-smiths are far less backward than vaddes. If both of them are grouped together and reservation provided, the inevitable result would be that gold-smiths would take away all the reserved posts leaving none for vaddes. In such a situation, a State may think it advisable to make a categorization even among other backward classes so as to ensure that the more backward among the backward classes obtain the benefits intended for them. Where to draw the line and how to effect the sub-classification is, however, a matter for the Commission and the State - and so long as it is reasonably

done, the Court may not intervene. In this connection, reference may be made to the categorization obtaining in Andhra Pradesh. The Backward Classes have been divided into four categories. Group-A comprises of "Aboriginal tribes. Vimukta jatis. Nomadic and semi-nomadic tribes etc.". Group-B comprises professional group like tappers, weavers, carpenters, ironsmiths, goldsmiths, kamsalins etc. Group-C pertains to "Scheduled Castes converts to Christianity and their progeny", while Group-D comprises of all other classes/communities/groups, which are not included in groups A, B and C. The 25% vacancies reserved for backward classes are sub-divided between them in proportion to their respective population. This categorization was justified in Balram [1972] 3 S.C.R. 247 AT 286. This is merely to show that even among backward classes, there can be a sub-classification on a reasonable basis.

There is another way of looking at this issue. [Article 16 \(4\)](#) recognizes only one class viz., "backward class of citizens". It does speak separately of Scheduled Castes and Scheduled Tribes, as does [Article 15\(4\)](#). Even so, it is beyond controversy that Scheduled Castes and Scheduled Tribes are also included in the expression "backward class of citizens" and that separate reservations can be provided in their favour. It is a well-accepted phenomenon throughout the country. What is the logic behind it? It is that if Scheduled Tribes, Scheduled Castes and Other Backward Classes are lumped together, O.B.Cs. will take away all the vacancies leaving Scheduled Castes and Scheduled Tribes high and dry. The

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

PART-V(QUESTION NOS. 6, 7 AND 8)

Question 6: To what extent can the reservation be made?

(a) Whether the 50% rule enunciated in Balaji a binding rule or only a rule of caution or rule of prudence?

(b) Whether the 50% rule, if any, is confined to reservations made under Clause (4) of [Article 16](#) or whether it takes in all types of reservations that can be provided under [Article 16](#)?

(c) Further while applying 50% rule, if any, whether an year should be taken as a unit or whether the total strength of the cadre should be looked to ?”

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180. The quintessence of the above definition is that a group of persons having common traits or attributes coupled with retarded social, material (economic) and intellectual (educational) development in the sense not having so much of intellect and ability will fall within the ambit of 'any backward class of citizens' under Art.16(4) of the Constitution.”

Apart from the above, learned counsel for the respondents while justifying the notification, has stated that the only reasonable and intelligible basis to ensure the benefit to percolate to the truly deserving incumbents under the economic criteria has been laid down by them.

We have heard the learned counsel for the parties.

Before we deal with the issues raised before us, we deem it

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appropriate to refer to the communication dated 13.9.2017 issued by the Government of India, Ministry of Personnel, Grievances and Pension, Department of Personnel & Training, where it has been noticed that vide Government of India Memorandum dated 8.9.1993, it was provided that sons and daughters of persons having gross annual income of Rs.1 lakh or above for a period of three consecutive years would fall within the creamy layer and would not be entitled to get the benefit of reservation available to the Other Backward Classes. This limit was subsequently raised to Rs.2.5 lakh, Rs.4.5 lakh and Rs.6 lakh and as noticed from communication dated 13.9.2017, a decision has been taken to increase the income limit from Rs.6 lakh to Rs.8 lakh. We thought it prudent to refer it for the reason that the State has been adopting the economic criteria to identify the creamy layer, if their own notifications issued from time to time are seen. In a notification dated 7.6.1995, which till date finds mention in the prospectus, the income prescribed is Rs.1 lakh, but for computing the same, the income from salary or agriculture land was not to be excluded. The situation, however, underwent a change subsequently. In any way, the only conclusion that we derive from the above is that the State is adopting Government of India's memorandum of prescribing income for the creamy layer with the last prescription being Rs.6 lakhs which is still in vogue, but restricted now on account of the impugned notification.

We had, during the course of hearing, asked for the record of the counseling to understand the impact of an exclusion resulting from enforcement of the impugned notification. Likewise, we had summoned the record from the Backward Classes Commission, as the State in its reply has fallen back on the recommendations of the Backward Classes Commission as a justification to enforce the impugned notification and for the purpose of reference, the recommendations of the Backward Classes Commission are extracted here below:-

**“Item No.2: Consideration on the reference of the office of
the Principal Secretary to Government of Haryana,**

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Welfare of SCs and BCs Department, regarding CWP No.17531 of 2018 – Nisha (Minor) v. State of Haryana and others pending in the Hon'ble Punjab and Haryana High Court at Chandigarh received from the office of the Advocate General, Haryana.

A reference dated 20.7.2018 of the office of the Principal Secretary to Government of Haryana, Welfare of SCs and BCs Department, regarding CWP No.17531 of 2018 – Nisha (Minor) v. State of Haryana and others pending in the Hon'ble Punjab and Haryana High Court at Chandigarh forwarding the letter of the office of the Advocate General, Haryana was received by this Commission in order to know as to on what basis the Haryana Backward Classes Commission in its resolution dated 12.8.2016 had mentioned that around 60-70% of the backward classes earn not more than RS.2.5 lacs per annum.

The events leading to the passing of resolution dated 12.8.2016. The relevant part of the resolution is reproduced below : The Haryana Backward Classes Commission had received a letter dated 11.8.2016 from the Principal Secretary to Government of Haryana, Welfare of SCs and BCs Department on the subject of socially advanced persons/sections (Creamy Layer) from backward classes. This letter was considered by this Commission in its meeting held on 12.8.2016 and the following decision was taken :

“In order to fulfill the objective of reservation in favour of backward classes of citizens, it is recommended that the persons of backward classes of citizens who 'enough means of

income' (called creamy layer) should make place for the 'have-nots' in the backward class of citizens. If the creamy layer of backward class of citizens is considered to be that section of backward class of citizens, who earn Rs.6.00 lacs per annum (in one slab only), it would amount to deprive those sections of backward class of citizens who earn about Rs.20,000/- per month rounded about to RS.2.5 lacs. There are about 60-70% people of backward classes who earn not more than Rs.2.5 lacs per annum. Those backward classes of citizens who earn Rs.6.00 lacs per annum or to say Rs.50,000/- per month would eat away the entire quota of reservation, leaving almost nothing for those sections of backward classes of citizens who earn about Rs.2.5 lacs per annum and live hand to the mouth. The power of slabbing the backward class of citizens is inherent in the power under section 5 of the Act.”

In view of the above facts and circumstances of the case, it was resolved by the Commission that the detailed reply be sent to the Principal Secretary to Government of Haryana, Welfare of SCs and BCs Department as under :

1. The above resolution was passed by this Commission keeping in view the observations made by the Hon'ble Supreme Court in the case reported as **Indra Sawhney etc. etc. vs. Union of India and others, etc. decided on 16 November, 1992** AIR 1993 SC 477 that categorization in the backward classes is permissible.
2. That the Commission in the course of its hearings with the persons and delegations, who had applied for the inclusion of their communities as also those who were already a part of

the backward classes and had applied for the change in the name of their caste, impressed on the Commission that majority of their members earn not more than Rs.2.5 lacs annually. It was further urged before the Commission by the representatives of such communities that such strained economic avenues of their members make it hard for them to provide meaningful education to their children at par with the people having enough means and were living in Juggies/huts.

3. That on the basis of its meetings and interactions with the members of the communities forming a part of Backward Classes in the State of Haryana, The Commission found the most glaring example of such backwardness in the existing Ghumantu Jatis, also known as De-notified tribes and Tapriwas such as Chirimar, Mallah, Gadaria, Garhi Lohar, Shorgir, Shergir, Singhikat, Banzana, Bhattu, Nat (Muslim), Rahbiari etc. They were traditionally Gypsy and Nomadic castes forming one of the lowest rung communities in the society. A large number of their members (individual castes/tribes making up the community) are included in the BC Category Schedule-I, and the same are surviving with means ranging between Rs.0 to Rs.2.5 lacs annually. Extrapolating from the same, the Commission reasonably concluded that the population of the said community must have only increased, with no corresponding increase in their level of income. Taking the same index as the base example, the Commission further concluded that the population of other members of the communities forming apart of the Backward Classes, Schedule-I, must have also reasonably increased.

4. That the members of this Commission had also visited many districts of the State to verify the genuineness of the claims made by the persons/delegations of the communities which are a part of backward classes and they formed their opinion that the economic conditions of the caste in the backward classes have not improved although their population has increased. It was found to be believable by the Commission. Furthermore, the interactions showed that the capacity of such communities is still existing between Rs.20,000/- and Rs.25,000/- per month. This is majorly because the occupations undertaken by the majority of these communities do not allow for any reasonable increase in their income. For example, the castes namely, Dhobi/Dhobi Rajak, Dakaut, Faquir, Gadaria, Pal, Baghi, Harijan, Nai, Nais, Sain, Kurmi, Kumhars, Prajabati, Mirasi, Shorgir, Shergir, Rabari, Nat (Muslim), Charge (Mahabrahmin) etc. are still engaged in their traditional caste based occupations which do not sustain any increase in economic means beyond Rs.25,000/- per month. This is translating into availability of only limited educational avenues not at par with communities of backward classes with higher incomes than theirs.

5. That it was for the reasons given above the Commission reached the conclusion while passing its resolution dated 12.8.2016 that 60 to 70% of the members of the backward classes are earning not more than Rs.25,000/- per month.

6. Furthermore, the observations of the Hon'ble the then Chief Justice of the Hon'ble Supreme Court in the

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Constitution Bench case reported as K.C.Vasanth Kumar v. State of Karnataka AIR 1985 SC 1495 are very relevant on the subject. Moreover the Constitution Bench of Hon'ble Supreme Court in the judgment reported as Ashok Kumar Thakur v. Union of India in WRIT PETITION (CIVIL) No.265 of 2006 decided on 10.4.2008 quoted in para 289 the observations in N.M.Thomas as under :

“We may recall here a trite observation in case of N.M.Thomas which reads as under (SCC pg.363 para 124) : 'A word of sociological caution. In the light of experience, here and elsewhere, the danger of 'reservation' it seems to me, is threefold. Its benefits, by and large, are snatched away by the top creamy layer of the 'backward' caste or class, thus, keeping the weakest among the weak always and leaving the fortunate layers to consume the whole cake. Secondly, this claim is overplayed to consume the whole cake. Thirdly, this claim is overplayed extravagantly in democracy by large and vocal groups whose burden of backwardness has been substantially lightened by the march of time and measures of better education and more opportunities of employment, but wish to wear the 'weaker section' label as a means to score over their near-equals formally categorized as the upper brackets.

7. Though the Commission has not undertaken any exhaustive exercise of identifying backward classes de-novo independently, the material/ evidence, as available with it and meetings it had with members of such communities mentioned above, have been taken as foundation for its conclusion which

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conform the tests and methodology laid down in the case of **K.C.VASANTH KUMAR V. STATE OF KARNATAKA** (supra) and N.M.Thomas.

8. Further, it may also be mentioned that the notification dated 17.8.2016 issued by the Government of Haryana making categorization in the backward classes and laying down the creamy layer, based on the recommendations of this Commission was approvingly quoted by the Hon'ble Punjab and Haryana High Court in its judgment dated 1.9.2017 in CWP No.9931 of 2016 (O&M) Murari Lal Gupta v. State of Haryana and others at page 21 of the judgment.

Therefore, it was resolved by this Commission, that the above information be sent to the Principal Secretary to Government of Haryana, Welfare of SCs and BCs Department, in response to their letter dated 20.7.2018.”

The aforesaid is in fact, in response to our queries during the course of hearing as the communication dated 23.7.2018 from the Backward Classes Commission to the Principal Secretary would reveal. Suffice it to say that even in the original record, this is the sole explanation given as a justification for the impugned notification.

After hearing the learned counsel for the parties, we are of the opinion that the observations made by the Hon'ble Supreme Court in **Indra Sawhney etc. etc. v. Union of India and others** (supra) leave no room for doubt that the State would have the power to take steps to ensure affirmative action and the scope of judicial scrutiny would depend on the nature of the subject matter, nature of the rights and character of the legal and constitutional provisions applicable.

The Hon'ble Supreme Court in **Indra Sawhney etc. etc. v. Union**
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of India and others (supra) that :

“843. ... exclusion of 'creamy layer' must be on the basis of social advancement (such advancement as renders them misfits in the backward classes) and not on the basis of mere economic criteria. At the same time, we held that income or the extent of property held by a person can be taken as a measure of social advancement and on that basis 'creamy layer' of a given caste/community/occupational group can be excluded to arrive at a true backward class.”

It was also held by the Hon'ble Supreme Court in this very judgment as under :

“843. ... it is not impermissible for the State to categorize backward classes into backward and more backward on the basis of their relative social backwardness.”

It was further held by the Hon'ble Supreme Court as under :-

“ 843. ... such classification among the designated backwards classes may indeed serve to help the more backward among them to get their due. But the question now is whether clause (i) of the Office Memorandum dated September 25, 1991 is sustainable in law. The said clause provides for preference in favour of “poorer sections” of the backward classes over other members of the backward classes. On first impression, it may appear, that backward classes are classified into two sub-groups on the basis of economic criteria alone and a preference provided in favour of the poorer sections of the backward classes. In our considered opinion, however, such an interpretation would not be consistent with context in which

the said expression is used and the spirit underlying the clause nor would it further the objective it seeks to achieve. The object of the clause is to provide a preference in favour of more backward among the “socially and educationally backward classes”. In other words, the expression 'poorer sections' was meant to refer to those who are socially and economically more backward. The use of the word 'poorer', in the context, is meant only as measure of social backwardness.”

Considering the classification of backward and more backward, the Hon'ble Supreme Court observed as under :-

“843. ... the expression 'preference' must be read down to mean an equitable apportionment of the vacancies reserved (for backward classes) among them. The object evidently could not have been to deprive the 'backward' altogether from benefit of reservation, which could be the result if word 'preference' is read literally – if the 'more backward take away all the available vacancies/posts reserved for OBCs, none would remain for 'backward' among the OBCs. It is for this reason that we are inclined to read down the expression to mean an equitable apportionment. This, in our opinion, is the proper and reasonable way of understanding the expression 'preference' in the context which it occurs. By giving the above interpretation, we would be effectuating the underlying purpose and the true intention behind the clause.”

In conclusion, the observations of the Hon'ble Supreme Court may be summed up pointwise as below :-

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“859.

4(a) A backward class of citizens cannot be identified only and exclusively with reference to economic criteria (para 799).

(b) It is, of course, permissible for the Government or other authority to identify a backward class of citizens on the basis of occupation-cum-income, without reference to caste, if it is so advised (para 800).

... ..

(9) There is no particular or special standard of judicial scrutiny applicable to matters arising under Article 16(4). (para 842).

... ..

860.

(5) There is no constitutional bar to classification of backward classes into more backward and backward classes for the purposes of Article 16(4). The distinction should be on the basis of degrees of social backwardness. In case of such classification, however, it would be advisable – nay, necessary – to ensure equitable distribution amongst the various backward classes to avoid lumping so that one or two such classes do not eat away the entire quota leaving the other backward classes high and dry.

For excluding 'creamy layer', an economic criterion can be adopted as an indicium or measure of social advancement.”

Coming to the impugned notification and applying the tests laid down by the Hon'ble Supreme Court, we are of the opinion that the State has faltered in prescribing this criteria for the reason that it is not substantiated by any

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verifiable data to establish social backwardness of the classes that stand to benefit. By virtue of the earlier notification, the State had quoted certain sections of the society as backward on the basis of their caste and occupation. They further went on to limit the benefit to the creamy layer who earned upto rupees six lakhs. This ostensibly has been done on the basis of the Government of India's classification of economic criteria.

Indeed, the only justification offered is the recommendation of the Backward Classes Commission which if perused, does in no manner, reveal any material for its conclusion that income of majority of the members of backward classes not being more than Rs.2.5 lakhs annually. It states that on the basis of its meetings and communications from the members of the communities from the backward classes in the State of Haryana, the Commission found glaring examples of such backwardness in the existing Gomanthu Jatis, also known as de-notified tribes and Tapriwas such as Chirimar, Mallah, Gadaria, Garhi Lohar, Shorgir, Shergir, Singhikat, Banzana, Bhattu, Nat (Muslim), Ranbari etc. It was observed that large number of these castes/tribes are included in the backward class category Schedule-I and the same are surviving with means ranging between Rs.0 to Rs.2.5 lac annually. The Commission then “reasonably concluded” that the population of the said community must have increased, with no corresponding increase in their level of income. Taking the same index as the base example, the Commission further concluded that the population of other members of the communities forming a part of the Backward Classes, Schedule-I must have also reasonably increased.

The Commission then noticed that their members had visited many districts of the State to verify the genuineness of the claims made by the persons/delegations of the various communities to conclude that although their population had increased, their income had not. It noticed the established capacity of such communities to earn between Rs.20,000/- to Rs.25,000/- per month and the

vocation they pursued, did not show any reasonable increase in the income. It then goes to identify certain other casts/classes such as Dhobi/Dhobi Rajak, Dakaut, Faquir, Gadaria, Pal, Baghel, Hajjam, Nai, Nais, Sain, Kurmi, Kumhars, Prajapati, Mirasi, Shorgir, Shergir, Rabari, Nat(Muslim), Charge (Mahabrahmin) etc.

It is largely on the aforesaid premise that the Commission has based its conclusions that found acceptance by the State resulting in the impugned notification.

Had the Commission, on the basis of some verifiable data concluded about certain castes/classes with their vocations being backward, the State would have been well justified to identify such castes to treat them socially more backward with verifiable data to conclude economic backwardness as well. But this has not happened and instead, what has resulted, is a complete exclusion of those with income beyond Rs.3 lakhs, regardless of their caste, vocation etc. Evidently, even if the intention of the State may not be doubted, and it is nobody's case that there is an ulterior motive in making such a prescription, yet the object intended to be achieved has not yielded any result rather it has resulted in sheer exclusion of a section of people though backward and it possibly may have resulted in excluding those who are identified as socially backward by the Backward Class Commission itself.

There is another way of looking at it. Supposing a Class IV employee working in a metropolitan city, earns more than his counterpart in a suburb, or a small town but continues to remain economically disadvantaged on account of high costs of living, while his counterpart has more liquidity due to low costs of living and invests wisely to secure income for himself from other sources. The one in a big city would continue to remain as socially and economically disadvantaged though empowered in many other ways, as his counterpart who continues to be as socially disadvantaged though economically advantaged. In its application of the economic criteria as the one dictated by the State it helps the one

who has lesser salaried income as he has acquired more from other sources but it has no co-relation to his social status. Both have not been liberated either from shackles of poverty or gained social status.

In any case, economic welfare, even if accepted as the sole basis of exclusion by describing them as 'creamy layer', should in comparison of two or more in the group of disadvantaged bear a significant departure, to display a marked improvement of one's social standing and economic empowerment.

Within the spectrum of 0-6 lakhs as prescribed it will be difficult to say that one with an income of 3 lakhs is more favourably placed than the one with less than 3 lakhs in income, in terms of social status or vocation.

The notification fixing 6 lakh as the limit is not in question. What is challenged is the sub classification granting a preference to those with income upto 3 lakh and hence once it is accepted that certain categories though identified as backward, will be treated as creamy layer with an income more than 6 lakhs, any further sub classification in the list of backwards without any inputs can be termed to be an arbitrary classification that ensures reverse discrimination which closes the doors of equitable distribution amongst the backward classes.

True, economic criteria and well being can be one of the indications for social upliftment but as the Hon'ble Supreme Court has observed, it cannot be the sole criteria. Evidently the social advancement of a caste or a group would have to be identified on an empirical data and it cannot be assumed straightway that those with income above 3 lakhs would have unshackled the social backwardness ; such an exclusion from within the identified backward classes cannot stand the test of constitutional requirement.

The end result is that the State has given a benefit with one hand only to take it away with the other. There is absolutely no established co-relation between the socially backward and the economic deprived and thus, on the said reasoning, we are of the opinion that the impugned notification has to be held to be

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bad in law and deserves to be set aside.

Consequently, the writ petitions are allowed and counseling of the students shall be held afresh on the basis of the earlier existing criteria limiting the preference to those Backward Classes with an income of upto Rs.6 lakhs with no further sub-classification.

(MAHESH GROVER)
JUDGE

August 7, 2018
GD

(MAHABIR SINGH SINDHU)
JUDGE

Whether speaking/reasoned	Yes
Whether reportable	Yes/No

सत्यमेव जयते

