Nair Service Society vs State Of Kerala on 23 February, 2007

Equivalent citations: AIR 2007 SUPREME COURT 2891, 2007 AIR SCW 5276, 2007 (6) AIR KAR R 101, 2007 (4) SCALE 106, 2007 (4) SCC 1, (2007) 2 KER LT 77, (2007) 2 SCT 259, (2007) 2 GUJ LH 358, (2007) 3 SUPREME 598, (2007) 4 SCALE 106

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Bench: S.B. Sinha, P.P. Naolekar

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           CASE NO.:
Writ Petition (civil)  598 of 2000

PETITIONER:
Nair Service Society

RESPONDENT:
State of Kerala

DATE OF JUDGMENT: 23/02/2007

BENCH:
S.B. Sinha & P.P. Naolekar

JUDGMENT:
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J U D G M E N T With Contempt Petition (Civil) No.108 of 2000 And Contempt Petition (Civil) No.109 of 2000 With Suo Motu Contempt Petition (Civil) No. ../ 2006 In Writ Petition (Civil) No.930 of 1990 S.B. SINHA, J :

In these petitions, interpretation of this Court's judgment as regards identification of 'creamy layer' amongst the backward classes and their exclusion from the purview of reservation, vis-`-vis, the report of Justice K.K. Narendran Commission (hereinafter referred to as 'Narendran Commission') and acceptance thereof by the State of Kerala in issuing the impugned notification dated 27.5.2000, falls for our consideration in this writ petition by the Nair Service Society ('the Society'), a Society which was initially registered under Section 26 of the Travancore Companies Act, 1914 and after coming into force the Companies Act, 1956, it would be deemed to have been registered under Section 25 thereof. The objects of the Society are said to be :

(i) to remove the difference prevailing from places to places amongst Nairs in their social customs and usages as well as the unhealthy practices prevalent among them;

(ii) to participate in the efforts of other communities for the betterment of their lot and to maintain and foster communal amity;

(iii) to work for the uplift of the depressed classes;

(iv) to start and maintain such institutions as are found necessary to promote the objects of the society.

It is not in dispute that it had filed a writ petition before the Kerala High Court questioning the validity of the report commonly known as Mandal Commission Report. The writ petition was later on transferred to this Court. It also took part in the proceedings before Narendran Commission. Mandal Commission Report was accepted by Union of India.

A writ petition was filed before this Court, questioning the said action on the part of the Union of India by one Indra Sawhney. This Court, in its judgment in Indra Sawhney & Ors. vs. Union of India & Ors. [1992 Supp. (3) SCC 217] (hereinafter referred to as 'Indra Sawhney-I'), inter alia, directed the States to identify 'creamy layer' amongst the backward classes and exclude them from the purview of reservation.

Indisputably, pursuant to or in furtherance of the said directions, the Union of India appointed a Commission. It issued an Office Memorandum being dated September 8, 1993 laying down guidelines for identifying 'creamy layer', inter alia, stipulating that the sons and daughters of persons having gross annual income of Rs.1 lakh or above would be excluded.

The State of Kerala, it is not in dispute, did not comply with the said direction of this Court.

At this juncture, it may be noticed that the constitutional validity of the criteria for determining the 'creamy layer' for the purpose of exclusion from backward classes laid down by the States of Bihar and Uttar Pradesh came up for consideration before this Court in Ashoka Kumar Thakur vs. State of Bihar & Ors. [(1995) 5 SCC 403]. This Court held that having regard to the observations made in Indra Sawhney-I, the said criteria were ultra vires stating :

> "This Court in Mandal case [Indra Sawhney v. Union of India (1992) Supp.3 SCC 217] has clearly and authoritatively laid down that the affluent part of a backward class called "creamy layer" has to be excluded from the said class and the benefit of Article 16(4) can only be given to the 'class' which remains after the exclusion of the "creamy layer". The backward class under Article 16(4) means the class which has no element of "creamy layer" in it. It is mandatory under Article 16(4) as interpreted by this Court that the State must identify the "creamy layer" in a backward class and thereafter by excluding the "creamy layer" extend the benefit of reservation to the 'class' which remains after such exclusion. This Court has laid down, clear and easy to follow, guidelines for the identification of "creamy layer". The States of Bihar and Uttar Pradesh have acted wholly arbitrary and in utter violation of the law laid down by this Court in Mandal case "

By an order dated 10th July, 1995, this Court, while holding the State of Kerala to be guilty of contempt of this Court, gave it two month's time to purge the same and report its compliance. The Chief Secretary of the State, pursuant to said order appeared before this Court.

In its order dated 10th July, 1995, this Court, in Indra Sawhney vs. Union of India & Ors. reported in (1995) 5 SCC 429, observed :

> "We are, therefore, of the opinion that this is a case for taking action in contempt. We hold the respondent guilty of contempt. However, in order to give the respondent an opportunity to purge the contempt before we pass the sentence, we adjourn the matter by two months to enable the State Government to report compliance before 11-9- 1995, failing which this Court will proceed to pass appropriate orders in respect of the contempt. The Chief Secretary will remain present at the next date of hearing i.e. on 11-9-1995 to inform this Court whether or not the order has been complied with. If not, he runs the risk of being sentenced. Let the IAs Nos. 35 and 36 come up on 11-9-1995."

The legislature of the State of Kerala thereafter enacted the Kerala State Backward Classes (Reservation of Appointments or Posts in the Services Under the State) Act, 1995 ('the State Act'), in terms whereof it was declared that there was no socially advanced section in the State. Section 4 of the State Act contemplates that nothing contained in the law or in any judgment, decree or order of any Court or any other authority, the reservation, which had been in operation since 1958, shall continue to operate. The Society filed a writ petition before the Kerala High Court questioning the validity of the State Act. This Court admittedly passed an order dated 4.11.1996 requesting the Chief Justice of the Kerala High Court to appoint a High Powered Committee to determine the criteria for identification of 'creamy layer'.

Pursuant to the directions of the Chief Justice of Kerala High Court, a Committee headed by Justice K.J. Joseph (hereinafter referred to as 'the Joseph Committee') was constituted. The Committee submitted its report on 4.8.1997. Objections to the said report were filed before this Court. By judgment and order dated 13.12.1999 in Indra Sawhney vs. Union of India & Ors., since reported in (2000) 1 SCC 168 (hereinafter referred to as 'Indra Sawhney-II'), this Court, while holding the provisions of Sections 3, 4 and 6 of the State Act to be unconstitutional, upon consideration of the objections to the report of the Joseph Committee, accepted the same in toto, subject to certain additions of communities and sub-castes, in the following terms:

> "In the result, we accept the Justice Joseph Committee Report in toto subject to the addition of communities and sub-castes as pointed out in the affidavit of the State dated 16-1-1998, referred to above."

The Court furthermore noticed the contemptuous acts on the part of the authorities of State of Kerala and held that they had deliberately been violating the orders of this Court. Some strictures were also passed against the State Government. It was directed that the recommendations of the Joseph Committee should be implemented forthwith until such time the State comes up with its

own criteria for determining 'creamy layer'. It further directed that the suo motu contempt previously initiated by the Court would be kept pending and the State should purge its contempt only by complying with the directions contained in Indra Sawhney-II.

The recommendations made by the Joseph Committee in its report, however, were not implemented forthwith in terms of the directions of this Court. The State, on the other hand, appointed another Commission headed by Justice K.K. Narendran. The terms of reference for the said Commission were as under:

> " (a) What should by the criteria to be adopted to exclude those belong to the creamy layer among Other Backward Classes from the benefits of reservation in accordance with the observations in the judgment of the Supreme Court or what criteria should be adopted to provide maximum protection to those belonging to such communities in accordance with the above mentioned judgment.
>
> (b) Whether there is any class which may be excluded from the creamy layer on the basis of hereditary occupation or otherwise.
>
> (c) (i) Whether there should be different criteria regarding income/property for different categories coming within the creamy layer.
>
> (ii) If so, what should be the ceiling for such income/property.
>
> (iia) While calculating the income, whether it is necessary to exclude income from any particular source or sources.
>
> (iii) While making its recommendations, the Commission will take into account the existing socio-economic conditions and the special features of the Other Backward Classes in the State.
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> (iv) The Commission should submit its report to Government within one month.
>
> (v) The Officer of the Commission will be at Thiruvananthapuram and its Headquarters at Ernakulam.
>
> (vi) The Commission will have the salary, allowances and other perquisites as admissible to a sitting Judge of the High Court."

The Commission submitted an interim report. Its request seeking extension of time was accepted. At the instance of the petitioner-Society the Commission, however, in its interim report directed the State to implement the report of the Joseph Committee. The Committee sought for certain records of 9.2.2000. On 16.2.2000 the State issued fresh guidelines for identifying creamy layer in accordance with the Joseph Committee report. The Commission submitted its final report on 11.4.2000. In this writ petition filed by the Society, the validity of the said notification is in question.

Mr. Krishan Venugopal, learned counsel appearing on behalf of the petitioner would submit that the State in accepting the said report violated the underlying principles contained in the judgments of this Court in Indra Sawhney-I & II (supra) as also in Ashoka Kumar Thakur (supra). According to the learned counsel, therein this Court emphasized the requirements to exclude those categories, which ceased to be backward classes so as to obtain the benefit of reservation. Attempt in the said report was to include more and more people thereunder. It would be evident from the fact, argued Mr. Venugopal, that even by the terms of reference alone the Commission has been directed to give more than the maximum protection otherwise available to them. It was furthermore submitted that whereas those who continue hereditary occupations had been sought to be protected, the State made an attempt to modify the same by bringing in those categories of persons whose fore-fathers were carrying on such occupations regardless of the fact as to what occupations they have been carrying out now.

Mr. T.L.V. Iyer, learned senior counsel appearing on behalf of the State of Kerala, on the other hand, would submit that the Society represents the members of the forward classes and even if the recommendations of the Narendran Commission are set aside, the same would not make much difference as the rights of the members of the Society would not be affected. It was submitted that the society is not in any way concerned with the correctness or otherwise of the report submitted by Narendran Commission or the order issued by the State on 27.5.2000 inasmuch as it is not the case of the petitioner-Society that their members would become entitled to the benefit of reservation in terms of Article 16(4) of the Constitution of India. Our attention has been drawn to the notification dated 12.6.2000 wherein guidelines were issued, which, inter alia, are on the following terms:

> "7. The rule of exclusion made mention in the schedule attached to these guidelines will not apply to persons working as artisans or engaged in hereditary occupations, calling and included in Annexure 'B' appended herewith and person/group of persons coming within the definition of the expression "Fishermen Community" in Annexure C appended to these guidelines."

It was submitted that such guidelines have been issued by the Central Government as would appear from the office memorandum issued by the Government of India, as was noticed in Ashoka Kumar Thakur vs. State of Bihar & Ors. [(1995) 5 SCC 403] which is on the same terms.

Our attention was further drawn to Annexure B to the said guidelines wherein seven categories of hereditary occupations/calling, which had been excluded from the category of 'creamy layer', have been identified. It was urged that it would not be correct to contend that even where the persons concerned have left their hereditary occupation, still they would be entitled to the benefit of the reservation inasmuch as such benefit is to be granted so long as they are engaged in such occupations. As regards the quantum of income, it was submitted that limit thereof is not static and even in Ashoka Kumar Thakur (supra), this Court pointed out that the income criteria in terms of the report was required to be modified taking into account the change of per capita annual income and having regard to report of the Narendran Commission constituted in the year 2003. Recommendations of the Narendran Commission in regard to the annual income being Rs. 3 lakhs, thus, Mr. Iyer submitted, should not be interfered with. While excluding salary and agricultural

income, it was contended, that the Central Government office memorandum had been taken into consideration, which would apply only to people falling in category VI. It was furthermore submitted that as regards gross annual income, reasons have been assigned by the Commission. The learned counsel would contend that this Court should not interfere with the policy decision of the Government and it is presumed to be aware of the requirements of the people and having regard to the change in social and economic conditions of people in each State, no accurate assessment is possible. It was urged that for the purpose of consideration of the criteria in regard to the persons who should be included in the group of creamy layer, the question which is required to be posed and answered is as to whether they have reached the status of the people belonging to the general category. It was argued that jurisdiction of the court in this behalf is to find out if there is any evidence in the matter and if there is some evidence, it may not exercise its jurisdiction. Furthermore, the State had made changes only in regard to occupation and merely added one community in Schedule B, i.e., Kudumbi community. Mr. L. Nageshwara Rao, learned senior counsel appearing on behalf of the impleaded party would adopt the submissions of Mr. Iyer and furthermore submit that the reference is not bad in law warranting interference by this Court.

It stands admitted that the income limit in terms of the Joseph Committee Report, which was published in the year 1996, was Rs.1.5 lakhs; whereas the same according to the Narendran Commission Report, which was published in the year 2000, should be raised to Rs.3 lakhs. In the year 2004 the Central Government opined that the income limit should be fixed at Rs.2.5 lakhs. The Commission received a vast majority of representations, including one from the petitioner-Society. The purport and object of the said report sought for is stated in paragraph 10.4 thereof. According to the Commission, the only question was as to what criteria should be adopted for identifying the 'creamy layer'. It criticized the Joseph Committee Report in paragraph 11.3 of its Report observing that the former did not assign any reason nor was there any justification for making the provision stricter in the matter of exclusion from 'creamy layer' of backward classes.

It also advocated the change of age from 40 to 35. Although, it noticed that a few representations have been submitted by the forward classes, the same have not been dealt with at all. While identifying the backward classes in several categories, i.e. category Nos. I, II, III, V and VA, the exclusion was recorded only on the basis of status and not on the basis of annual income. However, in addition to category No.VI it was stated that in calculating the annual income, the salary income or income from agriculture would not be taken into account. No reason, however, has been assigned as to why salary income or income from agriculture would not be included for determining the category of 'creamy layer'. The intention of the State Government as revealed from the terms of reference, i.e., "giving maximum protection" has been taken note of in paragraph 15.1 of the report. The Committee recommended:

> "1. Term (b) of the terms of reference:
>
> Only persons of a backward class traditionally engaged in the hereditary occupation of that backward class will be excluded from Creamy Layer. There will not be any endblock exclusion of any backward class on the basis of the hereditary occupation of that backward class.

2. Terms of reference (a) & (c) of the terms of reference :

The gross annual income for exclusion of backward classes as creamy layer is fixed as Rs.3 lakhs or above. The scheme of criteria for exclusion as creamy layer is that under categories I,II,III and VA, the exclusion is on the basis of status and not in terms of gross annual income. In the case of a category for which the gross annual income as mentioned in category VI is the criterion income from salary or income from agricultural holdings should not be taken into account. On the ground of social backwardness persons traditionally engaged in the hereditary occupation of all backward classes are excluded from Creamy layer. On the ground of educational backwardness, all backward classes who have not successfully completed Lower Primary education are excluded from Creamy layer.

Recruitments to all posts where the salary is paid from the consolidated fund of the State will be governed by the Principles of reservation for backward classes. When there are persons, in the rank list or supplementary list waiting for appointment nobody temporarily recruited should be allowed to continue to work.

Clear instructions regarding the criteria for exclusion of Creamy Layer should be issued to the Revenue Authorities. At any rate a Creamy Layer certificate will have to be issued or refused within ten days of the receipt of application for the same."

The State, as indicated hereinbefore, by and large accepted the said report and issued a Government order dated 27.5.2000. However, the recommendations had not been accepted in toto, but certain modifications have been made therein. It is in the aforementioned context the correctness of the report of the Narendran Commission is required to be considered.

At the outset, we may mention that it is not possible for us to dismiss the writ petition summarily on the ground of lack of locus standi on the part of the petitioners. It is not disputed that in terms of Kerala State and Subordinate Services Rules, 1958, although, reservation for backward classes under the scheme is to be carried out in the following years, even if thereafter no backward candidates are available, such posts are left unfilled. Ultimately, the selection would be made on merit. Furthermore, the writ petition has been filed in public interest. As noticed hereinbefore, the petitioner-Society has raised this question again and again and had been taking part in the proceedings before the Narendran Commission. In any view of the matter, when the question of such grave importance has been brought to the notice of this Court, having regard to the principle underlying the purport and object for which the 'creamy layer' was sought to be excluded, this Court cannot shut its eyes and refuse to determine the question.

It is not in dispute that the Central Government had issued an office memorandum on 9.3.2004. It is furthermore not in dispute that Joseph Committee in its report

included the income from agricultural income and salary, whereas in Narendran Commission it excluded the same. It is furthermore not in dispute that before this Court the State of Kerala did not raise any objection thereto.

The concept of identification of 'creamy layer' came up for consideration in Indra Sawhney-I and this Court has issued certain directions in this behalf. Criteria were adopted by the States so as to avoid implementation of this Court's judgments and thus in Ashoka Kumar Thakur (supra), the criteria laid down by the State of Bihar and U.P. have been struck down by this Court being violative of Articles 14 and 16(4) of the Constitution of India. The State of Kerala did not follow the said direction as a result whereof it was found to be guilty of contempt of this Court. A stern action thereupon was proposed to be taken up against the State of Kerala in view of its contemptuous conduct, as is evident from the order of this Court in Indra Sawhney vs. Union of India & Ors., reported in (1995) 5 SCC 429. It was in the afore-mentioned backdrop, the legislation passed by the legislature of Kerala was not only struck down during the pendency of the proceedings by this Court, a Committee was also directed to be constituted. We have noticed hereinbefore that the recommendations of the Joseph Committee were accepted in toto. We have furthermore noticed that the State, without any demur, accepted the recommendations thereof with modification by addition of one caste or sub- caste. It is, therefore, difficult for us to appreciate as to on what basis Narendran Commission was appointed.

It is, furthermore, difficult for us to comprehend as to on what basis, while appointing Narendran Commission, in the terms of reference, the State of Kerala could say that the maximum benefit should be given to a particular section of people. In view of the decision of this Court in Rama Krishna Dalmia & Ors. vs. Shri Justice S.R. Tendolkar & Ors. [(1959) SCR 279], it is no longer res integra that the terms of reference while appointing a commission may be subject to judicial review. We may also notice the following observations made in Indra Sawhney-I:

" 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..."

The observations aforementioned are not to be read in isolation. For the purpose of construing a judgment, it is well-known that the same must be read in its entirety. The validity of the terms of reference of the Narendran Commission and the report submitted by it would, thus, fall for our consideration not only on the anvil of the aforementioned observations of this Court but also on reading the judgment in its entirety as also the criteria laid down in the subsequent judgments. The

judgment of this Court in Indra Sawhney-I clearly lays down that what is necessary is identification of a class which had never been backward or ceased to be backward during the passage of time, but it would give rise to a question as to whether in making such identification the class should be equated with other socially and economically forward classes. The Central Government or the State Government, evidently, had not laid down any criteria from that angle. It is, however, beyond any cavil of doubt that Indra Sawhney-I categorically states that identification of such a class should be done on a realistic basis.

Maximum protection to the backward classes, in our opinion, was not contemplated in Indra Sawhney I, Only because observations to the following effect had been made therein:

> "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"

It is also relevant to notice that in Indra Sawhney-I this Court directed both the Central Government as also the States that where reservation in favour of all the backward classes was already in operation, they should evolve a suitable criteria within a period of six months and apply the same to the socially advanced persons/sections from the designated other backward classes. This Court did not say that maximum protection was to be granted to the backward classes.

It was expected that the endeavour of the State should have been to evolve a criterion in tune with the underlying constitutional scheme that the protection is required to be given only to those who remain socially and educationally backward and not to those who have ceased to be. Those who are no longer members of the socially and educationally backward class are not to be permitted to obtain the benefit of the reservation. Thus, while laying down the criteria, the State was required to give effect to the underlying principles envisaged in the constitutional scheme as interpreted in Indra Sawhney-I. It would be useful to notice a converse case which came up for consideration before a Constitution Bench of this Court in E.V. Chinnaiah etc. vs. State of A.P. & Ors. [(2005) 1 SCC 394]. The question therein was as to whether in view of the provisions of Article 341 of the Constitution of India and the Constitution (Scheduled Castes) Order, 1950, it was permissible in law to identify groups amongst Scheduled Castes which itself constitutes a group within the meaning thereof. This Court negatived such a classification holding:

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

Therein, noticing Indra Sawhney-I, it was observed:

> "Jeevan Reddy, J. incidentally who wrote the majority judgment in Indra Sawhney made a reference to his judgment in V. Narayana Rao v. State of A.P wherein the learned Judge opined: (AIR pp.95-96, para 94) "94. ... Article 15(4) or Article 16(4) are not designed to achieve abolition of caste system much less to remove the meanness or other evils in the society. They are designed to provide opportunities in education, services and other fields to raise the educational, social and economic levels of those lagging behind, and once this is achieved, these articles must be deemed to have served their purpose. If so, excluding those who have already attained such economic well-being (interlinked as it is with social and educational advancement) from the special benefits provided under these clauses cannot be called unreasonable or discriminatory or arbitrary much less contrary to the intention of the Founding Fathers. It can be reasonably presumed that these people have ceased to be socially if not educationally backward and hence do not require the preferential treatment contemplated by Articles 15(4) and 16(4). Moreover, in the face of the repeated pronouncements of the Supreme Court referred to above, these arguments cannot be countenanced. Not only it does not amount to creating a class within a class, it is a proper delineation of classes."

Those observations were confined to backward classes and not SCs and STs. The learned Judge in Indra Sawhney also stuck to the said view.

The impugned Act as also the judgment of the High Court are premised on the observations in Indra Sawhney that there is no constitutional or legal bar for a State in categorising the backward classes as backward and more backward class. This Court, however, while referring to Article 16(4) of the Constitution stated that it recognised only one class viz. backward class of citizens in the following terms: (SCC p. 716, para 781) "781. At the outset, we may state that for the purpose of this discussion, we keep aside the Scheduled Tribes and Scheduled Castes (since they are admittedly included within the backward classes), except to remark that backward classes contemplated by Article 16(4) do comprise some castes for it cannot be denied that Scheduled Castes include quite a few castes."

It is trite that those, who have reached the status of general category, cannot be permitted to defeat the purport and object of the concept of 'creamy layer' as the idea of creamy layer was conceptualized on that philosophy. It is also trite that the State can also lay down a legislative policy as regards the extent of reservation to be made for different members of the backward class, provided they remain as such.

Even legislations based on equity must answer the tests of the equality clauses contained in Articles 14 and 16 of the Constitution of India. Article 14 of the Constitution of India enjoins upon the State not to deny to any person 'equality before law' or 'equal protection of laws' within the territory of India. The two expressions although do not lead to the same conclusion, we may notice that Section 1 of the XIV Amendment to the U.S. Constitution uses only the latter expression whereas the Irish Constitution (1937) and the West German Constitution (1949) use the expression "equal before law" alone. Both these expressions are used together in the Universal Declaration of Human Rights,

1948, Article 7 whereof says "All are equal before the law and are entitled without any discrimination to equal protection of the law." The said expressions are of great significance. Equality before law is a dynamic concept having many facets. Despite Article 38 of the Constitution of India, the courts are bound to interpret a law which seeks to achieve the said purpose not only on the anvil of the Articles 14 and 16 but also having regard to the international law. We, however, do not mean to say that international law shall ipso facto be applied for interpretation of our domestic laws but then relevance thereof, we reiterate, in a grey area, cannot be lost sight of.

It was, thus, imperative on the part of the State to evolve such guidelines which would be commensurate with the following observations of this Court in Ashoka Kumar Thakur's case (supra) :

> " It is difficult to accept that in India where the per capita national income is Rs.6929 (1993-94), a person who is a member of the IAS and a professional who is earning less than Rs.10 lakhs per annum is socially and educationally backward. We are of the view that the criteria laid down by the States of Bihar and Uttar Pradesh for identifying the "creamy layer" on the face of it is arbitrary and has to be rejected."

The terms of reference in the afore-mentioned premise, in our considered opinion, should be held to be bad in law.

We have noticed hereinbefore that in the impugned Government Order, categories of persons to whom the rule of inclusion would apply on the basis that they form part of the 'creamy layer' among the backward classes, are said to be as under:

> Category I:
>
> Constitutional Posts Sons and daughters of persons holding constitutional posts such as President, Vice President, Judges of the Supreme Court and the High Courts, Chairman and Members of UPSC, State Public Service Commissions, etc. Category II:
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> Service Category Sons and daughters of parents, either or both of whom are Class I officers (e.g., IAS officers) or Class II officers or officers of public sector undertakings subject to certain exceptions including cases where one or both of the parents die or suffer permanent incapacity.
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> Category III:
>
> Armed or Paramilitary Forces Sons and daughters of parents in the rank of Colonel or equivalent in the Army, Navy, Air Force, Paramilitary Forces, again subject to certain exceptions. Category IV:
>
> Professionals & those engaged in Trade and Industry Subject to the income limit specified in Category VI: Includes doctors, lawyers, chartered accountants, etc., as

well as those engaged in trade, business and industry. Category V:

Property Owners Includes agricultural holdings, plantations and vacant land and/or buildings in urban areas. In the case of plantations and urban areas. In the case of plantations and urban land, the income limit specified in Category VI will apply.

Category VI:

Income/Wealth test Sons and daughters of persons having gross annual income over Rs.1 lakh or possessing wealth above the exemption limit as prescribed in the Wealth Tax Act.

Categories I, II and III afore-mentioned are excluded on the basis of the status held by the persons concerned. Category IV is subject to the income limit specified in Category VI. We may, at this stage, however, state that we do not find any merit in the submission of Mr. Venugopal that bringing down the age limit from 40 to 35, vis-`-vis, the Office Memorandum issued by the Central Government fixing age limit as 40 is bad in law in view of the fact that age of superannuation of the employees in the State of Kerala is 55, as compared to the age of superannuation of the Central Government employee is 60.

So far as the income/wealth test is concerned, the same has been considered in Indra Sawhney-II. We would refer to the findings of this Court a little later, but indisputably, it is of some importance. In the Joseph Committee report the actual increases in the Consumer Price Index was considered in a scientific manner and it was noticed from the "Economic Review 1996" published by the Government that the Central Government has specified the income limit in its Office Memorandum from Rs.1 lakh in 1993 to Rs.1.50 lakhs in 1997. We have hereinbefore noticed how Narendran Commission sat in appeal over the Joseph Committee report despite the fact that the same has been accepted in toto by this Court. It did not assign any reason to justify its stand as to on what basis the income limit of Rs.1.5 lakhs fixed by the Joseph Committee in 1997 was doubled to Rs.3 lakhs within a period of three years; particularly, in view of the fact that even the Central Government, having regard to the rate of inflation prevailing throughout the country in 2004, came to the conclusion that the income limit should be raised upto 2.5 lakhs.

In Indra Sawhney-I, while applying the "means-test" and "creamy- layer test", it was opined:

"'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 [K.S. Jayasree vs. State of Kerala (1976) 3 SCC 730] 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."

Referring to K.C. Vasanth Kumar vs. State of Karnataka [(1985) Supp. SCC 714], it was opined :

"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 recognised 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 is society (social status) rises; he is no longer socially disadvantaged. His children get full opportunity to realise 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' 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).

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, 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."

In Indra Sawhney-II, it was further observed:

> "As appears from the judgments of six out of the eight Judges, viz. Jeevan Reddy (for himself and three others), Sawant and Sahai, JJ. (i.e. six learned Judges out of nine), - they specifically refer to those in higher services like IAS, IPS and All India Services or near about as persons who have reached a higher level of social advancement and economic status and therefore as a matter of law, such persons are declared not entitled to be treated as backward. They are to be treated as creamy layer "without further inquiry". Likewise, persons living in sufficient affluence who are able to provide employment to others are to be treated as having reached a higher social status on account of their affluence, and therefore outside the backward class. Those holding higher levels of agricultural landholdings or getting income from property, beyond a limit, have to be excluded from the backward classes. This, in our opinion, is a judicial "declaration" made by this Court."

[See also W.B. Freedom Fighters' Organisation vs. Union of India (2004) 7 SCC 716, at 721 (para 16)] In Indra Sawhney-II , "Means test" and "creamy-layer test" were held to be beyond the domain of the State but evidently in relation to the backward classes, the same is applicable.

Keeping in view the legal history, as also the directions made by this Court in a series of judgments referred to hereinbefore, it was obligatory on the part of the Narendran Commission to consider seriously that aspect of the matter. In any event the same could not have been ignored.

While fixing the income limit, although a State is entitled to take into consideration the level of literacy, the village income, the rise of living index and other relevant factors into consideration, it should not have accepted a report of the Committee which did not proceed scientifically, particularly, having regard to the constitutional scheme as explained by the Court in the judgments referred to hereinbefore.

We, therefore, do not find any justification for fixing the income limit at Rs.3 lakhs. We may furthermore place on record our displeasure as to the manner in which Joseph Committee report received severe criticism by the Narendran Committee, most of which were wholly unwarranted. The tests adopted by the Joseph Committee could not have been given a complete go- by the Narendran Commission. The findings of a Commission in respect of a matter of such grave significance and importance should have been based on scientific data as also evidence of experts. If Government tends to consider without adequate data and inquiry, a stage would come when the whole system of reservation will become farcical and negation of constitutional provisions. Hence, before arriving at the final conclusion, it should have noticed the rate of inflation and other relevant factors. Economic growth of a country, as a result of the village income of citizens of India, keep on changing, although while determining an issue as to whether persons who have attained economic sufficiency so as not to furthermore describe them as economically backward, is required to be taken into consideration.

So far as exclusion of salary and agricultural income is concerned, it is true that the Central Government has accepted the same and the sanction of the Central Government has also been accepted by this Court, but we should also notice that the report of the Joseph Committee had also been accepted by this Court. It is not for us, at this stage, to render our final opinion in this matter as to whether preference should be given to Joseph Committee or Narendran Commission, but there is no reason as to why a successor committee, without any just and cogent reason, ignored the recommendations of the former committee.

Equality clauses contained in Articles 14, 15 and 16 of the Constitution of India may in certain situations constitute the heart and soul of the Constitution of India. When a law is patently arbitrary, such infringement of the equality clause contained in Article 14 or Article 16 would be violative of the equality clause of the Constitution. {See Waman Rao vs. Union of India [(1981) 2 SCC 362], Maharao Saheb Shri Bhim Singhji, etc. vs. Union of India & Ors. [AIR 1981 SC 234] and Minerva Mills Ltd. & Ors. vs. Union of India & Ors. [(1980) 3 SCC 625].} It is interesting to note that in Mithu v. State of Punjab [AIR 1983 SC 473] Section 303 of the Indian Penal Code was struck down as unconstitutional invoking the equality clause contained in Article 14 of the Constitution of India. A statute professing division amongst citizens, subject to Articles 15 and 16 of the Constitution of India may be considered to be a suspect legislation. A suspect legislation must pass the test of strict scrutiny. Articles 15(4) and Article 16(4) profess to bring the socially and educationally backward people to the forefront. Only for the purpose of invoking equality clause, the makers of the Constitution thought of protective discrimination and affirmative action. Such recourse to protective discrimination and affirmative action had been thought of to do away with social disparities. So long as social disparities among groups of people are patent and one class of citizens in spite of best efforts cannot effectively avail equality of opportunity due to social and economic handicaps, the policy of affirmative action must receive the approval of the constitutional courts. For the said purpose, however, the conditions precedent laid down therefor in the Constitution must be held to be sine qua non. Thus, affirmative action in essence and spirit involves classification of people as backward class of citizens and those who are not backward class of citizens. A group of persons although are not as such backward or have by passage of time ceased to backward would come within the purview of the creamy layer doctrine evolved by this court. The court by evolving said doctrine intended to lay a law that in terms of our constitutional scheme no group of persons should be held to be more equal than the other group. In relation to the minorities, a 11-Judge Bench of this Court in T.M.A. Pai Foundation vs. State of Karnataka [(2002) 8 SCC 481] categorically held that protection is required to be given to the minority so as to apply the equality clauses to them vis-`-vis the majority. In Islamic Academy of Education vs. State of Karnataka [(2003) 6 SCC 697], it was opined that the minority have more rights than the majority. To the said extent Islamic Academy of Education (supra) was overruled by a 7-Judge Bench of this Court in P.A. Inamdar vs. State of Maharashtra [(2005) 6 SCC 537]. An executive action or a legislative Act should be commensurate, in our opinion, with the aforementioned dicta laid down by this Court in Indra Sawhney-I (supra) and followed in Ashoka Kumar Thakur (supra) and Indra Sawhney-II (supra).

In Secretary, State of Karnataka & Ors. vs. Umadevi (3) & Ors. [(2006) 4 SCC 1], a Constitution Bench of this Court has stated the law in the following terms :

"11. In addition to the equality clause represented by Article 14 of the Constitution, Article 16 has specifically provided for equality of opportunity in matters of public employment. Buttressing these fundamental rights, Article 309 provides that subject to the provisions of the Constitution, Acts of the legislature may regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of a State. In view of the interpretation placed on Article 12 of the Constitution by this Court, obviously, these principles also govern the instrumentalities that come within the purview of Article 12 of the Constitution. With a view to make the procedure for selection fair, the Constitution by Article 315 has also created a Public Service Commission for the Union and the Public Service Commissions for the States. Article 320 deals with the functions of the Public Service Commissions and mandates consultation with the Commission on all matters relating to methods of recruitment to civil services and for civil posts and other related matters. As a part of the affirmative action recognised by Article 16 of the Constitution, Article 335 provides for special consideration in the matter of claims of the members of the Scheduled Castes and Scheduled Tribes for employment. The States have made Acts, rules or regulations for implementing the above constitutional guarantees and any recruitment to the service in the State or in the Union is governed by such Acts, rules and regulations. The Constitution does not envisage any employment outside this constitutional scheme and without following the requirements set down therein. It was furthermore held :

"43. Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution "

Yet again it was stated :

" The rule of law compels the State to make appointments as envisaged by the Constitution and in the manner we have indicated earlier. In most of these cases, no doubt, the employees had worked for some length of time but this has also been brought about by the pendency of proceedings in tribunals and courts initiated at the instance of the employees. Moreover, accepting an argument of this nature would mean that the State would be permitted to perpetuate an illegality in the matter of public employment and that would be a negation of the constitutional scheme adopted by us, the people of India. It is therefore not possible to accept the argument that there must be a direction to make permanent all the persons employed on daily wages. When the court is approached for relief by way of a writ, the court has necessarily to ask itself whether the person before it had any legal right to be enforced. Considered in the light of the very clear constitutional scheme, it cannot be said that the employees have been able to establish a legal right to be made permanent even though they have never been appointed in terms of the relevant rules

> or in adherence of Articles 14 and 16 of the Constitution."

Recently, a Constitution Bench of this Court in M.Nagaraj and Ors. v. Union of India and Ors. [(2006) 8 SCC 212] has reaffirmed the importance of the creamy layer principle in the scheme of equality under the constitution. This Court held that the creamy layer principle was on of the important limits on state power under the Equality Clause enshrined under Articles 14 and 16 and any violation or dilution of the same would render the state action invalid. More precisely this Court held:

> "As stated above, the boundaries of the width of the power, namely, the ceiling-limit of 50% (the numerical benchmark), the principle of creamy layer, the compelling reasons, namely, backwardness, inadequacy of representation and the overall administrative efficiency are not obliterated by the impugned amendments. At the appropriate time, we have to consider the law as enacted by various States providing for reservation if challenged. At that time we have to see whether limitations on the exercise of power are violated. The State is free to exercise its discretion of providing for reservation subject to limitation, namely, that there must exist compelling reasons of backwardness, inadequacy of representation in a class of post(s) keeping in mind the overall administrative efficiency. It is made clear that even if the State has reasons to make reservation, as stated above, if the impugned law violates any of the above substantive limits on the width of the power the same would be liable to be set aside."

This Court reiterated the limit on state power imposed by the creamy layer rule and the invalidity of any state action in violation of the same by concluding as follows:

> "We reiterate that the ceiling-limit of 50%, the concept of creamy layer and the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency are all constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse. However, in this case, as stated, the main issue concerns the "extent of reservation". In this regard the concerned State will have to show in each case the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation. As stated above, the impugned provision is an enabling provision. The State is not bound to make reservation for SC/ST in matter of promotions. However if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance of Article 335. It is made clear that even if the State has compelling reasons, as stated above, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling-limit of 50% or obliterate the creamy layer or extend the reservation indefinitely."

This Court rationalized the creamy layer rule as a necessary bargain between the competing ends of caste based reservations and the principle of secularism. The Court opined:

> "In Indra Sawhney this Court has, therefore, accepted caste as determinant of backwardness and yet it has struck a balance with the principle of secularism which is the basic feature of the Constitution by bringing in the concept of creamy layer."

This Court, thus, has categorically laid down the law that determination of creamy layer is a part of the constitutional scheme.

Constitutional provisions are required to be construed harmoniously.

It is difficult for us to accept the submission of Mr. Iyer that this Court should not exercise its power of judicial review. What should be the criteria for achieving the constitutional goal set out by the founding fathers, not only involves interpretation of constitutional provisions, but being the subject matter of decisions by this Court, it will be improper for us to refuse to undertake judicial exercise in such matters. The level of scrutiny would be more intrinsic than the doctrine of Wednesbury unreasonableness. In terms of Article 141 of the Constitution of India, the declaration of law made by this Court is binding on all courts, a' fortiori such directions would also be binding on all authorities. Article 142 empowers this Court to pass such order as is necessary to do complete justice to any cause or matter pending before it and Article 144 enjoins all authorities, civil and judicial, to act in aid of the Supreme Court.

Interpretation and application of constitutional law particularly, in regard to the equality clause contained in Article 14 to Article 16 of the Constitution, have never been limited by this Court. If a measure tends to perpetuate inequality and makes the goal of equality a mirage, such measure should not receive the approval of the Court. {See Islamic Academy of Education (supra)} Directions have been issued by this Court in a number of cases where the question involves greater public interest or public good, including enforcement of fundamental rights. The Court never hesitates to express its opinion on the interpretation of the Constitution despite political thicket. {See Anil Kumar Jha vs. Union of India & Ors. reported in (2005) 3 SCC 150, Rameshwar Prasad (IV) & Ors. vs. Union of India & Anr. reported in (2005) 7 SCC 157, W.B. Freedom Fighters' Organisation (supra) and Bombay Dyeing & Mfg. Co. Ltd. vs. Bombay Environmental Action Group & Ors. reported in 2006 (3) SCC 434].} This Court has repeatedly held that under Article 144, the state was bound to act strictly in terms of the decisions of this Court and even, it has reservation about some of its directions, it could approach this Court and could not have acted otherwise.

However, the question, which arise for consideration is as to what relief could be granted by this Court.

Nothing has been brought on record to show that the paragraph 2(1)(c) of G.O. dated 27th May, 2000 had been given a go-by.

The State did not accept even the Narendran Commission report in its entirety. Although, as noticed hereinbefore, Mr. Iyer submitted that the benefit would be granted only to those persons who are engaged in hereditary occupation and not to them who are not so engaged, the State, however, states that there would be no restriction as proposed by the Commission for exclusion from the 'creamy layer' of backward class with hereditary occupations, i.e, black smiths and gold smiths should be engaged in such occupations. If the State has not made any amendment, it is eminently fit and proper that an amendment or clarification should be issued in this behalf inasmuch as even if a person is otherwise excluded by reason of holding a constitutional post or otherwise, he may still claim the benefit being a descendent of a person whose predecessors, being a member of the backward class, had hereditary occupation like black smith or gold smith etc. Accordingly, notification dated 27th May, 2000 being merely for notification of general public and the guidelines issued for the concerned officers, it is necessary that the State should amend the guidelines also.

In this view of the matter, although while setting aside the report of the Narendran Commission, we direct the State to appoint a fresh Commission who should go into all these aspects of the matter and submit its report.

The writ petition is allowed with the aforementioned directions and observations. We, however, for the present do not intend to pass any order on the contempt petitions. They shall remain pending.

No costs.