

## **P.V.Indiresan vs Union Of India & Ors on 18 August, 2011**

**Equivalent citations: 2011 AIR SCW 4855, 2012 (1) AIR JHAR R 348, 2011 (6) AIR BOM R 39, (2011) 9 SCALE 33, AIR 2011 SC (CIV) 2100, 2011 (8) SCC 441, (2011) 6 SERVLR 776, (2011) 4 SCT 657, (2012) 3 ALL WC 2469, (2011) 181 DLT 608, (2011) 8 MAD LJ 956, (2011) 4 ESC 571, 2011 (10) ADJ 5 NOC, 2011 (4) KCCR SN 476 (SC), 2011 (4) KLT SN 10 (SC)**

**Author: R.V.Raveendran**

**Bench: A. K. Patnaik, R. V. Raveendran**

IN THE SUPREME COURT OF INDIA

CIVIL APPEAL JURISDICTION

CIVIL APPEAL NO. 7084 OF 2011

[Arising out of SLP [C] No.27965/2010]

P.V. Indiresan

... Appellant

Vs.

Union of India & Ors.

... Respondents

### **J U D G M E N T**

**R.V.RAVEENDRAN, J.**

Leave granted.

2. This appeal raises a short but important question relating to the implementation of the 27% reservation for other backward classes (for short `OBCs') in Central Educational Institutions under

the Central Educational Institutions (Reservation in Admission) Act, 2006 (Act No.5 of 2007) (for short 'CEI Act'). The question relates to the meaning of the words "cut-off marks" used in the clarificatory order dated 14.10.2008 in P.V. Indiresan & Ors. v. Union of India - (2009) 7 SCC 300, in regard to the decision of the Constitution Bench in Ashoka Kumar Thakur v. Union of India - (2008) 6 SCC 1.

## Background

3. The constitutional validity of the Constitution (Ninety-third Amendment) Act, 2005 as also the constitutional validity of CEI Act were considered and upheld by a Constitution Bench of this Court on 10.4.2008 reported in Ashoka Kumar Thakur vs. Union of India (for short 'A.K. Thakur'). Four separate opinions were rendered in the said decision by the learned Chief Justice of India, Pasayat J. (for himself and Thakker J), Raveendran J. (one of us) and Bhandari J. On the basis of the four opinions, the Constitution Bench formulated the following common order on which there was unanimity :-

"668. The Constitution (Ninety-third Amendment) Act, 2005, is valid and does not violate the "basic structure" of the Constitution so far as it relates to the State-maintained institutions and aided educational institutions. Question whether the Constitution (Ninety-third Amendment) Act, 2005 would be constitutionally valid or not so far as "private unaided"

educational institutions are concerned, is not considered and left open to be decided in an appropriate case. Bhandari, J. in his opinion, has, however, considered the issue and has held that the Constitution (Ninety-

third Amendment) Act, 2005, is not constitutionally valid so far as private unaided educational institutions are concerned.

669. Act 5 of 2007 is constitutionally valid subject to the definition of "Other Backward Classes" in Section 2(g) of Act 5 of 2007 being clarified as follows: If the determination of "Other Backward Classes" by the Central Government is with reference to a caste, it shall exclude the "creamy layer" among such caste.

670. Quantum of reservation of 27% of seats to Other Backward Classes in the educational institutions provided in the Act is not illegal.

671. Act 5 of 2007 is not invalid for the reason that there is no time-limit prescribed for its operation but majority of the Judges are of the view that the review should be made as to the need for continuance of reservation at the end of 5 years.

4. The petitioner herein made an application in A. K. Thakur alleging that some central educational institutions were interpreting the decision contrary to the law laid down therein and sought the following directions/clarifications :

(a) that the limit of cut-off marks for admission of students in the OBC quota in Central Educational Institutions be a maximum 10 marks below the cut-off for the general category;

(b) that all vacant seats in the reserved quota after the seats have been filled in accordance with (a) above shall automatically revert to the general category;

5. The said application was heard and disposed of by the Constitution Bench by the following Order dated 14.10.2008 (record of proceedings reported in P V Indiresan Vs. Union of India - 2009 (7) SCC 300) :

"1. The applicants have prayed for two reliefs in this application. This application is an offshoot of the judgment passed by the Constitution Bench of this Court on 10.4.2008.

2. A question had been raised in this application as to what should be the extent of cut-off marks for admission of students of OBCs in the Central Educational Institutions. Having heard the learned Solicitor General of India and learned Senior Counsel on both the sides and also having regard to the observations made in the judgments pronounced by this Court, we make it clear that the maximum cut-off marks for OBCs be 10% below the cut-off marks of general category candidates.

3. We are told that in many of the Central Educational Institutions the seats which are to be filled up by OBC candidates are still remaining vacant. These institutions may endeavour to fill up these vacant seats by other eligible students at the earliest i.e at least by the end of October 2008 observing inter se merit of the candidates. All other rules and regulations regarding admissions shall be strictly followed. The application is disposed of accordingly."

(emphasis supplied) The Government of India by official memorandum dated 17.10.2008 directed that the said order dated 14.10.2008 be implemented by the Central Educational Institutions by ensuring that the maximum cut-off marks of OBCs are not kept lower than 10% from the cut-off marks for general category candidates as directed by this Court.

6. The Jawaharlal Nehru University (for short 'JNU'), second respondent herein, interpreted the said order of this Court dated 14.10.2008 to mean that the minimum marks for admission to be secured by an OBC candidate should not be less than the marks secured by the last student admitted under general category less 10%. The admissions for 2008-09 and 2009-10 were done on that basis. As a result, it would appear considerable number of OBC seats got reverted to general category for non-availability of eligible OBC students with the required marks. Therefore, the standing committee on admissions of JNU, at its meeting held on 10.6.2010, considered the ways and means to fulfill 27% quota for OBC students for 2010-11. The Committee noted the difference between eligibility, qualifying marks and cut-off marks as under:

"Eligibility for applying for admission refers to the pre- requisite of the last qualifying examination such as school leaving, graduation, etc. [Eg. : for admission to MA course, the applicant should have secured a minimum of 50% marks in the BA Course].

Qualifying marks refer to the minimum marks in the entrance examination decided by the University in advance which it deems fit to preserve the academic standards. [Eg.: For admission, the candidate possessing eligibility, should secure a minimum of 30% in the entrance examination].

Cut-off marks for the merit list are decided on the basis of number of seats available in each programme/division, in the merit list prepared of all candidates having obtained equal to or above qualifying marks. [Eg.: The marks secured by the candidate allotted/admitted to the last of the General category seats, becomes the cut-off marks for general category]."

As there was some divergence in views as to whether the procedure followed in 2008-09 and 2009-10 should be continued, the following two proposals were placed before the Deans Committee:

(i) The current policy and procedure to consider the cut-off as per the definition given above and to provide for OBC category (creamy layer excluded) a maximum relaxation of 10% below the cut-off marks arrived for unreserved category candidates.

However, in accordance with the Ashok Kumar Thakur judgment after giving maximum possible relaxation, wherever the non-

creamy layer OBC candidates fail to fill the reservation, the remaining seats would revert to general category students.

Or

(ii) To consider the minimum qualifying marks in the entrance examination approval by it as the cut-off to provide maximum relaxation of 10% to OBC candidates (creamy layer excluded) below the cut-off of general candidates as per the interpretation of the Supreme Court judgment by fixing cut-off in advance for admission in various programmes of study to OBC candidates (creamy layer excluded) to be implemented in this year, i.e. 2010-11 admissions. The merit list will be drawn as per the admission policy of the University and approval intake and offers. However, in accordance with the Ashok Kumar Thakur judgment after giving maximum possible relaxation, wherever the non-creamy layer OBC candidates fail to fill the reservation, the remaining seats would revert to general category students."

7. The Deans Committee of JNU discussed the issue at its meeting dated 17.6.2010, considered the proposals of the Standing Committee on Admissions and resolved as follows in regard to the admissions of OBC candidates for the academic year 2010-2011:

"The Deans Committee after detailed discussion decided to accept the second proposal of the Standing Committee on Admissions viz. to treat the minimum qualifying marks in the entrance examinations as the cut-off to provide maximum relaxation of 10% to OBC candidates (creamy layer excluded) below the cut-off of general candidates as per the interpretation of the Supreme Court Judgment by fixing cut-off in advance for admission to various programmes of study to OBC candidates (creamy layer excluded) for inviting them for viva-voce as well as for admission to various programmes of study to be implemented in this year i.e. 2010-11 admissions. The merit list will be drawn as per the admission policy of the University and approved intake and offers. Further, in accordance with the Ashok Kumar Thakur judgment after giving maximum possible relaxation, wherever the non-creamy layer OBC candidates fail to fill the reservation, the remaining seats would revert to general category students. Hence to be eligible to be invited for viva voce examination a candidate must secure following marks out of 70 in the written examination.

Programme	General Category		OBC		SC/ST/PH categories	
M.Phil/Ph.D.M.Tech	35%	i.e. 24.50	31.5%	i.e. 25%		
/Ph.d.Pre-Ph.D/Ph.D	marks		22.05 marks		17.50 marks	
MPH/PH.D						
MA, BA and Part	25%	i.e. 17.50	22.5%	i.e. 15%		
time programmes	marks		15.75 marks		10.50 marks	
where viva-vice is						
prescribed						

To be eligible for admission a candidate must secure a minimum overall score out of 100 as given in the table below:

Programme	General Category		OBC		SC/ST/PH categories	
M.Phil/Ph.D.M.Tech/	40%	i.e. 40	36%	i.e. 36	30%	i.e. 30
Ph.d.Pre-Ph.D/Ph.D	marks		marks		marks	
MPH/PH.D						
MA/M.Sc/MCA, BA	30%	i.e. 30	27%	i.e. 27	25%	i.e. 25

(Hons.) 1st & 2nd Year marks

marks

marks

Part Time (COP &

Advanced Diploma in

Mass Media in Urdu)

The Committee further resolved that the above recommendations will be implemented only for this year, i.e. 2010-2011 and admission policy will be reviewed after the current admission process is over and statistics are available for implementation from the next year i.e. 2011-2012."

8. A legal notice dated 27.6.2010 was issued to the JNU on behalf of a students association contending that the change in the procedure for admissions to the seats reserved for OBCs proposed by the JNU was contrary to the clarificatory order of this Court dated 14.10.2008, and threatening initiation of contempt proceedings, if the said decision dated 17.6.2010 of the Deans Committee was implemented. As a consequence, JNU sought legal opinion. JNU was advised that while the procedure sought to be adopted by JNU for 2010-2011, vide its resolution dated 17.6.2010 may not be contempt of court, it may not stand judicial scrutiny and could be viewed as an attempt to circumvent the law declared in A. K. Thakur and therefore, it should continue the policy and procedure adopted during the previous two years. As a consequence on 12.7.2010 the Deans Committee reviewed the earlier decision dated 17.6.2010 and decided to restore/continue the procedure that was followed during the previous year (2009-2010), that is to admit only OBC candidates who secure marks within 10% band below the marks secured by the last candidate admitted in the general category and transfer all the unfilled OBC seats to general category.

9. The revised decision dated 12.7.2010 of the Deans Committee was challenged by two OBC students (respondents 3 and 4) in a writ petition [W.P.(C) No.4857/2010] filed in the Delhi High Court. A learned Single Judge of the High Court allowed the writ petition by impugned order dated 7.9.2010 holding as under:

"Procedure followed by the second respondent (JNU) and the stand of the first respondent (UOI) regarding reservation for OBCs is thus declared to be bad. It is declared that the first respondent UOI/Universities are entitled to only fix minimum eligibility criteria for admission in the reserved category at maximum 10% below the minimum eligibility criteria fixed for the General (Unreserved) category. The OBC candidates to avail of reservation provided for them in the CEI Act are not required to, in admission test or in the eligibility exam, secure marks within the bandwidth of 10% below the cut-off marks of the last candidate admitted in the General (Unreserved) category."

10. The said order was challenged by the appellant herein, a non party before the High Court with an application seeking leave to challenge the order of the learned Single Judge directly before this

Court, without filing a letter patent appeal. As the matter involved interpretation of the words "cut-off marks" employed by this Court in the order dated 14.10.2008, this Court granted such permission on 27.9.2010 to the appellant.

#### Contentions of Parties

11. The appellant contends that 'cut-off marks' refers to the marks secured by the last candidate admitted to a particular course of study or under a particular category. 'Cut-off marks' are decided with reference to a merit list of candidates prepared (with reference to the eligibility marks and/or where there is an entrance examination, with reference to the qualifying marks) on the basis of number of seats available in a programme.

The marks secured by the last candidate admitted from such merit list to the programme denotes the 'cut-off marks' for admission to that programme.

The appellant submitted that the words "10% below the cut-off marks of general category candidates" would mean 10% below the marks secured by the last candidate admitted under general category. That is if the last candidate admitted under general category had secured 80% marks, and the lowering of minimum marks was 10% for OBCs, then OBC candidates who have secured marks in the band width of 79 to 72 marks (that is 80 less 10%) would alone be entitled to claim admission. This would also mean that until admissions to general category seats are determined and the 'cut off' marks that is the marks secured by the last general category candidate is ascertained, admissions to OBC reservation seats cannot be commenced, as the bandwidth of marks to be possessed by OBC candidates for admission would depend upon the marks secured by the last candidate admitted under general category.

12. On the other hand, the learned counsel for the third and fourth respondents (the OBC category candidates who were the writ petitioner before the High Court) contended that the CEI Act does not stipulate or provide any minimum "cut off marks" for OBC category candidates who are entitled to the benefit of 27% reservation. It is also submitted that there is no mandatory direction either in A K Thakur or Indiresan to fix the cut off marks for the general category or cut off marks for OBC category candidates. It is submitted that the words "the maximum cut-off marks for OBCs be 10% below the cut-off marks of general category candidates" in the order dated 14.10.2008 would mean that the minimum eligibility marks (or minimum qualifying marks if there is an entrance examination) for general category, can be lowered or reduced by not more than 10% to prescribe the minimum eligibility marks for OBC candidates. That is, if 50% was the minimum eligibility marks for admission to general category seats, the maximum cut off marks for OBC being 10% below the general category candidates, the minimum eligibility marks for OBC cannot be less than 45% (that is 50% minus 10% of 50%).

13. The respondents further submitted that neither the Constitution Bench which decided A. K. Thakur which made the clarificatory order dated 14.10.2008, nor the appellant at whose instance the order of clarification was issued, had proceeded on the basis that cut off marks would refer to the

marks secured by the last candidate admitted to the general category. The object of appellant in making the application seeking clarification of the order in A. K. Thakur was to ensure that the lowering of the minimum eligibility/qualifying marks for admission of OBCs candidates did not lead to a large disparity with the general candidates affecting the excellence of higher education. Therefore, the appellant wanted a ceiling for the lowering of the minimum marks for admission of OBC candidates to be prescribed. It was in that context the Constitution Bench ordered that the minimum marks for admission of OBC candidate should not be less than 10% below the minimum eligibility/qualifying marks for general category candidates.

14. The grievance of OBC candidates was not in regard to the determination of minimum eligibility/qualifying marks. For example, as noticed above, if the minimum eligibility marks for general category is fixed as 60 for English or 70 for journalism, they have no grievance if the minimum eligibility marks being fixed at 54 marks for English and 63 for journalism in regard to OBC candidates. The OBC candidates have also no grievance if they are required to pass an entrance examination and are required to secure the minimum qualifying marks in the entrance examination. Their grievance is with reference to determining the minimum eligibility/qualifying marks for admission of OBC students with reference to the marks secured by the last candidate admitted under the general category.

Their grievance is to linking of their admissions to an uncertain and fluctuating benchmark which would depend upon the quality of the last student admitted under the general category. According to the respondents by adopting the method of determining the 'cut off' marks for OBCs with reference to 'cut off' marks of last general category candidate defeats the purpose of reservation of 27% seats for OBC candidates and denies the just and legitimate entitlement of OBCs for admission. It is pointed out that the adoption of such a procedure in 2008-2009 and 2009-2010 had resulted in large number of seats meant for OBCs being transferred to general category candidates.

#### Question for consideration

15. The problem or question for consideration arising out of the rival contentions may be appreciated with reference to the following illustration:

"A central educational institution has 100 seats in its B.Com. programme. Eligibility for admission is with reference to the marks secured in the qualifying examination [that is 10+2 or its equivalent]. The minimum eligibility prescribed for admissions is 50% marks for general category, 45% for OBCs and 40% for SC/ST. Having regard to the reservation policy applicable to the institution, out of 100 seats, 50 seats have to be filled by general category candidates, 27 seats are to be filled by OBC candidates and 23 seats (15 + 7.5 rounded off to 23) are to be filled by SC/ST candidates. 300 candidates seek admission, of whom 160 belong to general category, 90 belong to OBCs and 50 belong to SC/ST. The college prepares a common merit list and the first 50 candidates in the said common merit list are granted admission under the general category. The first candidate in the merit list has secured 98 marks and the 50th candidate in the merit list who is the last candidate in the general category has



secured 80 marks. The college also prepares a separate list of 90 OBC candidates merit list, 30 SC candidates and 20 ST candidates. Out of the OBC candidates list of 90 candidates, the first 15 have found a place in the first 50 in the common merit list on their own merit and are admitted and treated them as general category candidates, leaving 75 candidates in the OBC list. Out of the said 75 OBC candidates, 20 candidates have secured marks ranging from 79 to 72, and the remaining 55 have secured marks ranging 71 to 46."

According to the respondents (OBC candidates), the first 27 candidates from the OBC candidates list, that is 20 candidates who have secured between 79 to 72 marks and the next 7 candidates in the order of merit (who have secured less than 72) are entitled to be selected to the 27 seats reserved for OBCs. According to the appellant as the last candidate in the general category has secured 80 marks, and as the "maximum cut off marks for OBCs should be 10% below the cut off marks of general category candidates", the general category cut off marks should be 80 and the OBC cut off marks should be 72% (80 minus 8); and only those OBC candidates who have secured marks in the band of 79 to 72 are entitled to be selected under the OBC category. Out of the list of 90 OBC candidates the first ten having been admitted as general category candidates on their own merit, the next 20 OBC candidates who have secured marks between 79 to 72 are entitled to be granted admission under the OBC category. The remaining 55 candidates having obtained less than the cut off marks 72 marks are not entitled to admission. As a consequence, even though there were still 55 candidates in the OBC candidates merit list, who had secured more than the required minimum of 45% in the qualifying examination, they are not entitled to get admission; and the seven OBC seats which remain unfilled, would have to be transferred as general category seats and will be filled by the general category candidates from the common merit list in the order of merit.

16. The appellant (and other intervenors who claim to be concerned about excellence in education) contend that 'cut off' marks' are different from 'eligibility marks' or 'qualifying marks'. There is no dispute that eligibility marks refers to the minimum marks a candidate is required to have in the last qualifying examination (for example, 10+2 examination for admissions to a Bachelor's degree programme or the graduation examination for admissions to a post graduate programme) as a condition precedent for seeking admission to the higher course of study which the appellant seeks admission. Similarly, there is no dispute that qualifying marks refers to the minimum marks required to be secured in the special entrance examination, that may be held to determine the inter-se merit of candidates from different universities/sources and to ensure that candidates to be admitted possess the minimum academic standards required or expected for a special course of study; and it is only those securing the qualifying marks in the entrance examination, where it is a part of the admission process, who will be included in the merit list for admission, or will become eligible for being called for viva voce. [For example, it is stated that in Delhi University, admissions to degree courses, except for English and Journalism Courses, are on the basis of 'eligibility marks' that is the prescribed minimum marks in 10+2 examination. Those who seek admission in degree courses in English and Journalism will have to participate in special entrance examinations. A candidate seeking admission to Bachelor's degree in Journalism is required to have eligibility marks of 70% in 10+2 examination and also pass the entrance examination; and a candidate seeking admission to Bachelor's degree in English is required to have eligibility marks of 60% in 10+2

examination and also pass the entrance examination]. In Dr. Preeti Srivastava vs. State of M.P. - (1999) 7 SCC 120, this Court referred to the difference between eligibility and qualification, thus :

"At times, in some of the judgments, the words "eligibility" and "qualification" have been used interchangeably, and in some cases a distinction has been made between the two words - "eligibility" connoting the minimum criteria for selection that may be laid down by the University Act or any Central statute, while "qualifications" connoting the additional norms laid down by the colleges or by the State."

Eligibility Marks and Qualifying Marks are pre-determined, and notified in the Admission Prospectus, so that a candidate intending to apply for admission knows what eligibility marks he should possess in the qualifying examination or what qualifying marks he should secure in the entrance examination (if there is an entrance examination).

17. The question for our consideration in this appeal by special leave is the meaning to be assigned to the direction "the maximum cut-off marks for OBCs be 10% below the cut-off marks of general category candidates" in the order dated 14.10.2008 of this Court.

#### The Interpretation

18. In English language, many words have different meanings and a word can be used in more than one sense. Every dictionary gives several meanings for each word. The proper use of a dictionary lies in choosing the appropriate meaning to the word, with reference to the context in which the word is used. We cannot mechanically apply all and every meanings given in a dictionary. Nor can we choose an inappropriate meaning that the word may carry and then try to change the context in which it is used. The context in which the word is used determines the meaning of the word. A randomly chosen meaning for the word should not change the context in which the word is used. This is the fundamental principle relating to use of words to convey a thought or explain a position or describe an event. We may demonstrate this with reference to the dictionary meanings of the word 'cut-

off'.

19. The Reader's Digest Word Power Dictionary gives the following meanings and illustrative uses with reference to such meanings, for the word 'cut-off' [1996 Edition, Page 195] :

"Cut Off \*to remove Cut off the thorns on the stem otherwise you will pick yourself  
\*to prevent from leaving or reaching a place; to be isolated The village was cut off by floods I feel so cut off when I stay on my parents' farm \*to disconnect or stop supplying something He was cut off before he could finish his telephone conversation  
\*to disinherit He was cut off without a cent \*to block We must cut off all escape routes \*expiry, final deadline Post your entry now, because the cut-off date is today"

(emphasis supplied) The Collins Dictionary of the English Language gives the thirteen meanings to the word cut-off [1979 Edition, Page 369] :

- "1. to remove by cutting.
2. to intercept or interrupt something, esp. a telephone conversation.
3. to discontinue the supply of : to cut off the water.
4. to bring to an end.
5. to deprive of rights; disinherit : she was cut off without a penny.
6. to sever or separate : she was cut off from her family.
7. to occupy a position so as to prevent or obstruct (a retreat or escape).
8. (a) the act of cutting off; limit or termination. (b) (as modifier) : the cut off point.
9. Chiefly U.S. a route or way that is shorter than the usual one; short cut.
10. a device to terminate the flow of a fluid in a pipe or duct.
11. the remnant of metal, plastic, etc., left after parts have been machined or trimmed.
12. Electronics. (a) the value of voltage, frequency, etc., below or above which an electronic device cannot function efficiently. (b) (as modifier) : cut off voltage.
13. a channel cutting across the neck of a meander, which leave an oxbow lake.
14. another name for oxbow (the lake)."

(emphasis supplied) The Illustrated Oxford Dictionary gives the following meanings to the word cut-off [2003 Edition, Page 205] :

- "1. The point at which something is cut off.
2. A device for stopping a flow.
3. (US) a short cut.
4. (in plural) shorts, esp. made by cutting the legs off jeans.

(emphasis supplied) What is appropriate for our purpose are the meanings 'the point at which something is cut off' in Oxford, 'limit' or 'the cut off point' in Collins and the meaning 'final deadline' in Reader's Digest.

20. The term 'cut-off marks' in academic and judicial vocabulary has several meanings. When rejecting a person's request for selection on the ground that his marks are less than the marks secured by the last candidate who was selected, by describing the marks secured by the last candidate as 'cut-off marks'. The words 'cut-off marks' are also used while notifying a body of applicants who form part of a merit list or the general public, the marks secured by the last selected candidate so that they can know that persons with lesser merit/marks had not been selected or have no chance of being selected. 'Cut-off marks' are also used to refer to the minimum marks (either eligibility marks or qualifying marks) required for admission to a course.

21. Both sides relied upon certain observations of Pasayat, J. and Bhandari J, in A K Thakur in support of the interpretation put forth by them.

While appellant argued that the said observations clearly indicated that minimum marks for admission of OBC candidates should be a prescribed percentage below the marks secured by the last candidate under general category (cut off marks for general category), the respondents argued that the observations clearly meant that the minimum marks for admission of OBC candidates should be a prescribed percentage below the minimum eligibility/qualifying marks prescribed for general candidates. We may therefore refer to the said observations. Pasayat J stated in his summing up :

"358. To sum up, the conclusions are as follows:

(1) For implementation of the impugned Statute creamy layer must be excluded.

(2) There must be periodic review as to the desirability of continuing operation of the Statute. This shall be done once in every five years. (3) The Central Government shall examine as to the desirability of fixing a cut off marks in respect of the candidates belonging to the Other Backward Classes (OBCs). By way of illustration it can be indicated that five marks grace can be extended to such candidates below the minimum eligibility marks fixed for general categories of students. This would ensure quality and merit would not suffer. If any seats remain vacant after adopting such norms they shall be filled up by candidates from general categories."

(emphasis supplied) In the course of his judgment, Bhandari, J. referred to cut-off marks at two places (vide paras 371 and 535). They are extracted below :

"If we want to really help the socially, educationally and economically backward classes, we need to earnestly focus on implementing Article 21A. We must provide educational opportunity from day one. Only then will the casteless/classless society be within our grasp. Once children are of college-going age, it is too late for reservation to have much of an effect. The problem with the Reservation Act is that

most of the beneficiaries will belong to the creamy layer, a group for which no benefits are necessary. Only non-creamy layer OBCs can avail of reservations in college admissions, and once they graduate from college they should no longer be eligible for post-graduate reservation. 27% is the upper limit for OBC reservation. The Government need not always provide the maximum limit. Reasonable cut off marks should be set so that standards of excellence greatly effect. The unfilled seats should revert to the general category.

x x x x x The best universities are the best, in part, because they attract the best students. The same can be said for almost any organization. In the case of higher education, the universities that admit the best will likely churn out the best. The precise extent to which the university made the best so good cannot be qualified. The point is that universities alone cannot produce qualified job candidates. Forced to admit students with lower marks, the university's final product will not be as strong. Once the creamy is excluded, cut-off marks would likely drop considerably in order to fill the 27% quota for non creamy layer OBCs. When the creamy layer is not removed, as in the case of Tamil Nadu, the difference in cut off marks for the general and backward categories may be insignificant. (See para 408 of Indira Sawhney). Of course, the extent to which standards of excellence would suffer would vary by institution. As I mention below, I urge the Government to set OBC cut off marks no lower than 10 marks below that of the general category. This is only a recommendation.

(emphasis supplied) In his judgment, Bhandari, J. observed thus in regard to the question 'would it be reasonable to balance OBC reservation with societal interests by instituting OBC cut off marks that are slightly lower than that of the general category?':

"627. Balaji (supra) concluded that reservation must be reasonable. The Oversight Committee has made a recommendation that will ensure the same. At page 34 of Volume I of its Report, the Oversight Committee recommended that institutions of excellence set their own cut off marks such that quality is not completely compromised. Cut offs or admission thresholds as suggested by the Oversight Committee are reproduced: 4.4.2. The Committee recognizes that those institutions of higher learning which have established a global reputation (e.g. IITs, IIMs, IISc, AIIMS and other such exceptional quality institutions), can only maintain that if the highest quality in both faculty and students is ensured. Therefore, the committee recommends that the threshold for admission should be determined by the respective institutions alone, as is done today, so that the level of its excellence is not compromised at all. 4.4.3. As regards 'cut-offs' in institutions other than those mentioned in para 7, these may be placed somewhere midway between those for SC/ST and the unreserved category, carefully, calibrated so that the principles of both equity and excellence can be maintained.

4.4.4. The Committee strongly feels that the students who currently tend to get excluded must be given every single opportunity to raise their own levels of attainment, so that they can reach their true potential. The Government should invest heavily in creating powerful, well designed and executed remedial preparatory measures to achieve this objective fully.

628. Standards of excellence however should not be limited to the best aided institutions. The Nation requires that its citizens have access to quality education. Society as a whole stands to benefit from a rational reservation scheme.

629. Finding 68% reservation in educational institutions excessive, Balaji admonished States that reservation must be reasonable and balanced against other societal interests. States have "to take reasonable and even generous steps to help the advancement of weaker elements; the extent of the problem must be weighted, the requirements of the community at large must be borne in mind and a formula must be evolved which would strike a reasonable balance between the several relevant considerations." To strike such a balance, Balaji slashed the impugned reservation from 68 to less than 50%. Balaji thus serves as an example in which this Court sought to ensure that reservation would remain reasonable. We heed this example. There should be no case in which the gap of cut off marks between OBC and general category students is too large. To preclude such a situation, cut off marks for OBCs should be set no lower than 10 marks below the general category. To this end, the Government shall set up a committee to look into the question of setting the OBC cut off at not more than 10 marks below that of the general category. Under such a scheme, whenever the non-creamy layer OBCs fail to fill the 27% reservation, the remaining seats would revert to general category students."

(emphasis supplied) In his summary of findings also, Bhandari, J., again referred to cut-off marks as under :

"11. Would it be reasonable to balance OBC reservation with societal interests by instituting OBC cut-off marks that are slightly lower than that of the general category ?

It is reasonable to balance reservation with other societal interests. To maintain standards of excellence, cut off marks for OBCs should be set not more than 10 marks out of 100 below that of the general category."

(emphasis supplied)

22. The clarificatory order dated 14.10.2008 in P.V. Indiresan vs. Union of India [2009 (7) SCC 300] which stated that the "maximum cut off marks for OBCs be 10% below the cut off marks of general category candidates" is sought to be interpreted differently by the appellant and respondents, with reference to the said observation. The appellant contends that the "cut off marks of general category

candidates" refers to the marks secured by the last candidate who secures a seat under general category and therefore only such OBC students who have secured marks in the bandwidth of 10% below the marks secured by the last general category candidate, will be entitled to admission. On the other hand the respondents contend that the words "cut off marks of general category candidates were used to refer to the minimum eligibility/qualifying marks prescribed for admission to the course under general category.

23. We find that this court has been regularly and routinely using the words 'cut off marks' to describe the minimum marks required to be secured in the qualifying examination for being eligible for admission or to describe the minimum qualifying marks to be obtained in an entrance examination.

As this court has routinely used the words 'cut off marks' to refer to 'eligibility marks' or 'qualifying marks', whenever this Court uses the words 'cut off marks', their meaning would depend upon the context. The words may refer to either the minimum marks to be secured in the qualifying examination or the entrance examination to be eligible for admission, or to the marks secured by the last candidate admitted in a particular category.

24. We may refer to some of the cases where this court has used the term 'cut off marks' to refer to the eligibility marks or qualifying marks.

24.1) In Dr. Jeevak Almast vs. Union of India [1988 (4) SCC 27] this Court observed : "The scheme contained the provision that the cut-off base for selection for admission shall be 50 per cent marks", while referring to the All India Entrance Examination. This clearly demonstrates that the words 'cut-off' base was used to refer to the qualifying marks the minimum eligibility marks in the qualifying examination.

24.2) In Ajay Kumar Agrawal and Ors. v. State of U.P. [1991 (1) SCC 636] this court while referring to the minimum marks required for being eligible for admission to post graduate course described the minimum qualifying marks in the qualifying examination, as 'cut off base' marks. We extract below the relevant portion as follows :-

"11. It is not disputed that in Uttar Pradesh the prevailing practice was a 50 per cent base for allowing Post Graduate Study to doctors with MBBS qualifications but taking their University examination as the base without any separate selection test, it is not the case of any of the parties before us that the selection is bad for any other reason. We are of the view that it is in general interest that the 50 per cent cut-off base as has been adopted should be sustained."

24.3) In State of Uttar Pradesh v. Dr. Anupam Gupta [1993 Supp (1) SCC 594], this court extracted the following provision from a Government order relating to eligibility marks for admission which was minimum of 50% for general category candidates and 40% for reserved category candidates :-

"(2) This examination shall have 100 per cent objective type questions.

The eligibility criteria for admission to post-graduate courses shall be 50 per cent minimum qualifying marks for candidates of general category and 40 per cent minimum qualifying marks for candidates of reserved categories (SC/ST)."

Thereafter it used the words cut off marks to refer to the minimum eligibility marks for general category candidates and reservation category candidates:

"... Thus it could be seen that this Court consistently laid down the criteria for conducting entrance examination to the post graduate degree and diploma courses in Medicine and the best among the talented candidates would be eligible for admission. 50% cut off marks was also held to be valid to achieve excellence in post graduate speciality. Accordingly we uphold the prescription of 50% cut off marks to general candidates and 40% to SCs and STs together with 1.65% weightage of total marks i.e. 50 marks in total in entrance examination as constitutional and valid."

(emphasis supplied) 24.4) In *Ombir Singh & Ors. v. State of U.P.* [1993 Supp. (2) SCC 64] this court while upholding the prescription of 50% and 40% respectively as the minimum eligibility marks in the qualifying examination followed the decisions in *Ajay Kumar Agarwal* and *Dr. Anupam Gupta* by relying upon and reiterating the passages in those decisions which use the words cut-off marks to refer to qualifying marks. We extract below the relevant portions of the said decision:

"So far as the validity of the admission rules fixing 50% marks for the general category candidates and 40% marks for the SC/ST category candidates to be obtained at the entrance examination as minimum qualifying marks for being eligible for admission to the Post-Graduate medical courses, the same are not subject to any challenge ..... ".... It may be further mentioned that this Court in *Ajay Kumar Agrawal and Ors. v. State of U.P.* [1991 (1) SCC 636] observed as under:-

"It is not disputed that in Uttar Pradesh the prevailing practice was a 50 per cent base for allowing Post Graduate Study to doctors with MBBS qualifications but taking their University examination as the base without any separate selection test, it is not the case of any of the parties before us that the selection is bad for any other reason. We are of the view that it is in general interest that the 50 per cent cut-off base as has been adopted should be sustained."

3. The matter again came up for consideration before this Court and in *State of Uttar Pradesh and Ors. v. Dr. Anupam Gupta* [1993 Supp. 1 SCC 594], it was held as under:-

"Thus it could be seen that this Court consistently laid down the criteria for conducting entrance examination to the post graduate degree and diploma courses in Medicine and the best among the talented candidates would be eligible for admission. 50% cut off marks was also held to be valid to achieve excellence in post graduate speciality. Accordingly we uphold the prescription of 50% cut off marks to general candidates and 40% to SCs and STs together with 1.65% weightage of total marks i.e.



50 marks in total in entrance examination as constitutional and valid."

4. Thus, we further hold that any challenge to the above rule laying down minimum percentage of marks for eligibility for admission to Post-

Graduate courses is no longer reintegra."

24.5) In Hemani Malhotra vs. High Court of Delhi - (2008) 7 SCC 11, we find that this Court has used the words 'cut-off marks' to refer to describe 'minimum qualifying marks' following Justice Shetty Commission Report which also used the term 'cut-off marks' while referring to 'minimum qualifying marks'. In that case, the advertisement inviting applications stated that "minimum qualifying marks in the written examination shall be 55% for general candidates and 50% for SC and ST candidates". The subsequent resolution of the full court provided that the "minimum qualifying marks in viva voce will be 55% for general candidates and 50% for SC/ST candidates.

This Court while considering the correctness of the said resolution observed thus :

"This Court further notices that Hon'ble Justice Shetty Commission has recommended in its Report that 'The vive- voce test should be in a thorough and scientific manner and it should be taken anything between

25 to 30 minutes for each candidate. What is recommended by the Commission is that the vive-voce test shall carry 50 marks and there shall be no cut off marks in vive-voce test.- This Court notices that in All-India Judges Association and Ors. v. Union of India - (2002) 4 SCC 247, subject to the various modifications indicated in the said decision, the other recommendations of the Shetty Commission (supra) were accepted by this Court. It means that prescription of cut off marks at viva-voce test by the respondent was not in accordance with the decision of this Court."

24.6) In K. Manjusree vs. State of A.P. - (2008) 3 SCC 512, this Court used the words 'cut-off percentage' to refer to minimum qualifying marks. The relevant portion is extracted below :

"The sub- committee was also of the view that apart from applying the minimum marks for the written examination for determining the eligibility of the candidates to appear in the interview the same cut off percentage should be applied for interview marks, and those who fail to secure such minimum marks in the interview should be considered as having failed."

25. This Court also used the word 'threshold marks' to describe the minimum qualifying marks. In Parveen Jindal v. State of Haryana [1993 Supp. (4) SCC 70] this court referred to Rule 7 of the Haryana Service of Engineers Class I, PWD (Irrigation Branch) Rules, 1964 which prescribes the qualifying marks, relevant portion of which is extracted below:

"Provided that a candidate shall not be considered qualified for appointment, unless he obtains not less than forty per cent marks in each subject and also not less than

fifty per cent marks in the aggregate, and no candidate who does not obtain the qualifying marks shall be called for interview by the commission.

This Court, while referring to the contentions of the appellant therein, used the word 'threshold' marks to refer to the qualifying marks, as is evident from the following passage:

"Whereas the Rules say that a candidate obtaining 50% marks in the written test is entitled to be called for viva-voce, the Commission has arbitrarily prescribed a threshold of 65% which it had no jurisdiction to do. As a result of the said arbitrary stipulation several of the appellants have been denied the opportunity of selection. The Commission must not be directed to make selections afresh for all the three wings/branches in the Public Works Department."

(emphasis supplied)

26. In A K Thakur, while referring to the observations of the Report (Vol.II) of the Oversight Committee (Planning Commission, Govt. of India) on Reservation in Higher Educational Institutions, Bhandari, J. used the words 'cut offs' or 'admission thresholds' as interchangeable words by observing. "Cut-offs or admission thresholds as suggested by the Oversight Committee are reproduced" (vide : Para 627)

27. In A K Thakur, Pasayat, J. has also used the words "cut-off marks" to refer to minimum eligibility marks. While summing up his conclusions (in para 358 extracted above) he observed that the "Central Government shall examine as to the desirability of fixing cut off marks in respect of the candidates belonging to the Other Backward Classes (OBCs.)", and proceeded to observe "By way of illustration it can be indicated that five grace marks can be extended to such candidates below the minimum marks fixed for general categories of students." The suggestion made is that if the minimum eligibility marks for general category students is 50, the minimum eligibility marks for OBC candidates should be 45. This clearly shows the words "cut off marks" have been used to refer to minimum eligibility or qualifying marks.

28. Even the Oversight Committee on Reservation in Higher Educational Institutions, Government of India (Planning commission) in its Interim Report and Final Report uses the words 'cut off marks' and 'threshold marks' to refer to minimum eligibility marks. We extract below the relevant portions:

"Interim Report The Oversight Committee considers expansion, inclusion and excellence as the moving spirit, behind the new reservation policy. The institutions of higher learning should keep these three principles in view while determining threshold marks for admission to OBC students..... (vide para 6 of the Preamble).

As regards 'cut offs' in institutions other than those mentioned in para 7, these may be placed somewhere mid way between those for SC/ST and the unreserved category,

carefully calibrated so that the principles of both equity and excellence can be maintained (vide para 8 of Preamble). Final Report (Vol.II) 4.4 Cut offs or admission thresholds:

4.4.1 The issue of threshold levels or cut offs for OBC candidates has already been addressed in the Interim Report (paras 7 and 8) as under :

x x x

x x x

x x x

4.4.3 As regards 'cut offs' in institutions other than those mentioned in

para 7, these may be placed somewhere mid way between those for SC/ST and the unreserved category, carefully calibrated so that the principles of both equity and excellence can be maintained.

Para 4.4.3 of the Report of the Oversight Committee obviously refers to a situation where if the minimum eligibility marks for general category candidates is 50% and the minimum eligibility marks for SC/ST candidates are 40%, the minimum eligibility for OBC should be somewhere midway that is 45%. It should be noted that the observations of Bhandari J in paras 629 and 645 of the decision in A K Thakur, which is the fulcrum of the entire argument of appellant are made in the context of the aforesaid observations of Oversight Committee and therefore, when Bhandari J uses the words 'cut off marks', he is also clearly referring to the eligibility marks.

29. The words "cut-off marks" are freely used to describe the prescribed minimum marks even in academic circles and central educational institutions. For example, the prospectus of MBBS admissions in All India Institute of Medical Sciences (AIIMS) provides in Para 2 (dealing with eligibility) that a candidate should have obtained a minimum aggregate of 60% marks in the case of general and OBC candidates and 50% in the case of SC/ST candidates in aggregate. It also provides that all candidates who are so found eligible, have to appear for a competitive entrance examination and Clause 4.1 refers to the minimum marks required to be secured in the MBBS Entrance Examination who could be admitted.

"4.1 Minimum cut-off marks in the MBBS Entrance Examination : As per the decision of the governing body and institute body at it meeting held on 26.11.2009 with regard to cut-off marks in the MBBS entrance examination, the candidate belonging to general category will be required to have 50% minimum cut-off marks. Those belonging to OBC category will be required to have 45% minimum cut-off marks and those belonging to SC/ST will have to ensure at least 40% minimum marks in the MBBS entrance examination."

It will be seen from the above that the words 'cut-off marks' are used as the minimum marks required in the entrance examination.

30. Pasayat J and Bhandari J. were concerned about the standards of excellence in higher education. Having regard to the fact that OBCs were far better placed economically and socially than SCs/STs, they wanted to ensure that the minimum percentage for OBCs was somewhere between the minimum marks for SC/ST and minimum marks for general category candidates. They did not want the minimum eligibility marks for OBCs should be the same as the minimum eligibility marks for Scheduled Castes and Scheduled Tribes. They were of the view that if very low eligibility marks were provided for OBC, the disparity would affect higher education standards. It is in that context, that Bhandari, J. observed that cut off marks for OBCs, should not be lower than 10 marks below that of general category thereby meaning that minimum eligibility marks for OBC should be set no lower than 10% below the eligibility marks for the general category. Pasayat J in fact specifically stated that the minimum marks for OBCs should be 5 marks less than the minimum eligibility marks for general category.

31. The Constitution Bench of this Court in Dr. Preeti Srivastava (supra) observed as follows :

"29. The submission, therefore, that there need not be any qualifying marks prescribed for the common entrance examination has to be rejected. We have, however, to consider whether different qualifying marks can be prescribed for the open merit category of candidates and the reserved category of candidates. Normally passing marks for any examination have to be uniform for all categories of candidates. We are, however, informed that at the stage of admission to the M.B.B.S. course, that is to say, the initial course in medicine, the Medical Council of India has permitted the reserved category candidates to be admitted if they have obtained the qualifying marks of 35% as against the qualifying marks of 45% for the general category candidates. It is, therefore, basically for an expert body like the Medical Council of India to determine whether in the common entrance examination viz. PGMEET, lower qualifying marks can be prescribed for the reserved category of candidates as against the general category of candidates; and if so, how much lower. There cannot, however, be a big disparity in the qualifying marks for the reserved category of candidates and the general category of candidates at the post- graduate level. This level is only one step below the apex level of medical training and education where no reservations are permissible and selections are entirely on merit. At only one step below this level the disparity in qualifying marks, if the expert body permits it, must be minimal. It must be kept at a level where it is possible for the reserved category candidates to come up to a certain level of excellence when they qualify in the speciality of their choice. It is public interest that they have this level of excellence."

(emphasis supplied) In Dr. Preeti Srivastava, the Constitution Bench held that if the qualifying marks for reserved category was 20% and the qualifying marks for general category was 45%, the disparity was too great to sustain the public interest at the level of postgraduate medical training and education. This Court noticed that for MBBS the difference in qualifying marks was only 10% that is 45% for general category and 35% for reserved category and that difference was not unreasonable. The Constitution Bench was of the view that prescribing different minimum

qualifying marks for general category and reservation category was permissible so long as the difference was not too great; and that at post graduate level, the disparity in the qualifying marks between general category and reservation categories should be narrower than the disparity between the two categories at graduate level. It should be noted that neither Dr. Preeti Srivastava, nor A.K. Thakur nor any other decision of this Court required that the reservation category candidates should possess marks which are within a narrow bandwidth below the cut off marks for the last student admitted in the general category. All the decisions spoke of difference/disparity in regard to eligibility marks and qualifying marks.

32. Therefore, the context in which Bhandari J. concluded that "cut-off marks for OBCs should be set no lower than 10% marks below general category" (vide Paras 535 and 629) of A K Thakur, he meant that eligibility/qualifying marks for OBCs should be set not lower than 10% below the eligibility/qualifying marks of general category. Similar is the position regarding the observation of Pasayat J. in Para 358 of A K Thakur.

Pasayat J. observed that the cut off marks for OBCs should be fixed by extending 5 grace marks, that is 5 marks below the minimum eligibility marks fixed for general categories of students. We fail to understand how the words "minimum eligibility marks fixed for general categories of students" used by Pasayat J can be read as 'cut off marks' of general category, that is marks secured by the last candidate admitted under general category. We, therefore, hold that the words "maximum cut-off marks for OBCs be 10% below the cut off marks of general category candidates" in the order dated 14.10.2008 of the Constitution Bench meant that if the minimum eligibility/qualifying marks prescribed for general category candidates was 50%, the minimum eligibility/qualifying marks for OBCs should be 45%.

33. The appellant canvasses the continuance of the procedure adopted by JNU during 2008-09 and 2009-10. What in effect was that procedure?

During those years, JNU would fix the minimum eligibility marks as say 40% when the admission programme is announced. JNU would apply it only to general category candidates. It would not say what was the minimum eligibility marks for OBC candidates, but would decide the same, only after all the general category seats were filled, by fixing a band of marks upto 10% below the marks secured by the last candidate admitted under the general category. If a OBC candidate secured the marks within that band, he would be given admission. Otherwise even if he had secured 70%, as against the minimum of 40% he would not get a seat, if the band of marks was higher. Such a procedure, was arbitrary and discriminatory, apart from being unknown in regard to admissions to educational institutions,. The minimum eligibility marks for admission to a course of study is always declared before the admission programme for an academic year is commenced. An institution may say that for admissions to its course, say Bachelor's degree course in science, the candidate should have successfully completed a particular course of study, say 10+2, with certain special subjects. Or it can say that the candidate should have secured certain prescribed minimum marks in the said qualifying examination, which may be more than the percentage required for passing such examination. For example if a candidate may pass a 10+2 examination by securing 35% marks, an institution can say at its discretion that to be eligible for being admitted to its course of study, the

candidate should have passed with at least a minimum of 40% or 50% or 60%. Whatever be the marks so prescribed, it should be uniform to all applicants and a prospective applicant should know, before he makes an application, whether he is eligible for admission or not. But the 'cut-off' procedure followed by JNU during those days had the effect of rewriting the eligibility criteria, after the applications were received from eligible candidates. If the minimum eligibility prescribed for an admission in an institution was 50% and a candidate had secured 50%, he could not be denied admission, if a seat was available, based on a criterion ascertained after the last date for submission of applications. No candidate who fulfils the prescribed eligibility criteria and whose rank in the merit list is within the number of seats available for admission, can be turned down, by saying that he should have secured some higher marks based on the marks secured by some other category of students. A factor which is neither known nor ascertained at the time of declaring the admission programme cannot be used to disentitle a candidate to admission, who is otherwise entitled for admission. If the total number of seats in a course is 154 and the number of seats reserved for OBCs is 42, all the seats should be filled by OBC students in the order of merit from the merit list of OBC candidates possessing the minimum eligibility marks prescribed for admission. (subject to any requirement for entrance examination.) When an eligible OBC candidate is available, converting an OBC reservation seat to general category is not permissible.

#### Alternative contention

34. The appellant also urged that there is a marked distinction between scheduled castes and scheduled tribes who have faced historical discrimination and social handicap apart from being socially and educationally backward and the Other Backward Classes who were only socially and educationally not forward, but did not suffer from such historical discrimination and social handicap [vide ground 'G' of the special leave petition]. The appellant contended all benefits associated with reservations for SCs/STs need not, and in fact, cannot, be extended to reservations for OBCs. Expanding the said submission, the appellant contended that the principle that when candidates belonging to a reserved category get selected in the open competition field on the basis of their own merit, they will not be counted against the reservation quota, but will be treated as open competition candidates, will apply only to SCs/STs and not to the OBCs. In other words, his submission is that all OBC candidates selected and admitted to a course of study should be counted towards the 27% reservation for OBCs including those OBC candidates who get selected on their own merit without the benefit of reservation.

35. The appellants relied upon the decision of three Judge Bench of this court in *Chattar Singh vs. State of Rajasthan* [1996 (11) SCC 742] wherein this court held that by a process of interpretation, OBCs cannot be treated or declared to be similar to SCs/STs. This court also held that Scheduled Castes and Scheduled Tribes on one hand and the OBCs on the other are to be treated as distinct classes for the purpose of reservation. This Court observed:

"Though OBCs are socially and economically not forward, they do not suffer the same social handicaps inflicted upon Scheduled Castes and Scheduled Tribes. .... The object of reservation for the Scheduled Castes and Scheduled Tribes is to bring them into the mainstream of national life, while the object in respect of the backward

classes is to remove their social and educational handicaps.....The Founding Fathers of the Constitution, having been alive to the dissimilarities of the socio-economic and educational conditions of the Scheduled Castes and Scheduled Tribes and other segments of the society have given them separate treatment in the Constitution. The Constitution has not expressly provided such benefits to the OBCs..."

The appellant also relied upon the following observations of one of us (Raveendran, J.) at para 653 of Ashoka Kumar Thakur (supra) :

"I agree with the decision of the learned Chief Justice that reservation of 27% for other backward classes is not illegal. I would however leave open the question whether members belonging to other backward classes who get selected in the open competition field on the basis of their own merit should be counted against the 27% quota reserved for other backward classes under an enactment enabled by Article 15(5) of the Constitution for consideration in an appropriate case."

The appellant therefore contended that unlike in the case of Scheduled Castes and Scheduled Tribes, the OBC candidates who get selected in the open competition field on the basis of their own merit, should be counted against the 27% OBC quota under an enactment enabled by section 15(5) of the Constitution.

36. The respondents on the other hand contended that the following observations in Indra Sawhney vs. Union of India [1992 Supp. (3) SCC 217] were intended to apply not only to Scheduled Castes and Scheduled Tribes, but also to OBCs : -

"811. In this connection it is well to remember that the reservations under Article 16(4) do not operate like a communal reservation. It may well happen that some members belonging to, say, Scheduled Castes get selected in the open competition field on the basis of their own merit; they will not be counted against the quota reserved for Scheduled Castes; they will be treated as open competition candidates."

The respondents also relied upon the following observations of a Constitution Bench in R.K. Sabharwal vs. State of Punjab [1995 (2) SCC 745] :

"When the State Government after doing the necessary exercise makes the reservation and provides the extent of percentage of posts to be reserved for the said backward class then the percentage has to be followed strictly. The prescribed percentage cannot be varied or charged simply because some of the members of the backward class have already been appointed/promoted against the general seats. As mentioned above the roster point which is reserved for a backward class has to be filled by way of appointment/promotion of the member of the said class. No general category candidate can be appointed against a slot in the roster which is reserved for the backward class. The fact that considerable number of members of a backward class have been appointed/promoted against general seats in the State Services may

be a relevant factor for the State Government to review the question of continuing Reservation for the said class but so long as the instructions/Rules providing certain percentage of reservations for the backward classes are operative the same have to be followed. Despite any number of appointees/promotes belonging to the backward classes against the general category posts the given percentage has to be provided in addition."

(emphasis supplied)

37. The appellants' counsel replied by contending that the observations in Indra Sawhney and R.K.Sabharwal will not help the contention of the OBC candidates. According to him, para 811 of Indra Sawhney refers only to Scheduled Castes and therefore extendable to Scheduled Tribes but not to OBCs. He submitted that the observations in Sabharwal did not apply to an enactment enabled by Article 15(5). He also pointed out that the CEI Act merely provides a reservation of 27% seats for OBCs. but is silent as to whether those OBCs. who get selected in the open competition field on the basis of their own merit, should be counted against the quota reserved for OBCs. or not. It was submitted that the principles evolved with reference to SCs and STs or reservations in employment, cannot be applied to reservations under section 3 of the CEI Act enabled by Article 15(5). A plain reading of this provision, it is submitted, would mean that all persons belonging to OBCs admitted to the institution shall be counted against 27%.

38. The issue before the High Court was with reference to the meaning of the words cut-off marks. The submissions in regard to the question whether OBC candidates who are selected on the basis of their own merit without the benefit of reservation, should be counted towards 27% reservation, was not the subject matter of the writ petition from which this appeal arises. Further, this issue was not directly raised, but was referred only in an indirect manner in the pleadings before this Court and Union of India had no occasion to deal with this larger issue. We therefore do not propose to decide the alternative contention which has wide ramifications except to note that the appellant has raised an important issue which merits serious consideration in an appropriate case.

### Conclusions

39. The words 'cut off marks' has been used thrice in the second para of the order dated 14.10.2008 containing the operative direction. It is used in the first sentence of the para while posing the question for decision, that is 'what should be the extent of cut off marks for admission of students of OBCs in CEIs'. It is used in the second sentence of the para while giving the answer to the question posed, that is "we make it clear that the maximum cut off marks for OBCs be 10% below the cut off marks of general category candidates. The words 'cut off marks' occurring in three places in the second para of the order dated 14.10.2008 has three distinct and different meanings :

(i) the use of the words, 'extent of cut off marks' in the first sentence refers to the 'minimum eligibility marks' (or to the 'minimum qualifying marks' if there is entrance examination), for admission of OBC candidates.



(ii) The use of the words, "maximum cut-off marks for OBCs" in the first part of the second sentence refers to the percentage of marks by which the eligibility/qualifying marks could be lowered from the minimum eligibility/qualifying marks prescribed for general category students. In other words, it refers to the difference between the minimum eligibility/qualifying marks for general category and minimum eligibility/qualifying marks for OBCs and directs that such difference should not be more than 10% of the minimum eligibility/qualifying marks prescribed for general category candidates.

(iii) The use of the words, "cut off marks of general category candidates"

in the latter part of the second sentence, refers to the minimum eligibility marks (or to the minimum qualifying marks if there is an entrance examination) prescribed for general category candidates. The use of the words 'cut-off-marks' in none of the three places in para 2 of the order dated 14.10.2008, refers to the marks secured by the last candidate to be admitted in general category or in any particular category, or to the minimum marks to be possessed by OBC candidates, determined with reference to the marks secured by the last candidate to be admitted under general category.

40. The order dated 14.10.2008 means that where minimum eligibility marks in the qualifying examinations are prescribed for admission, say as 50% for general category candidates, the minimum eligibility marks for OBCs should not be less than 45% (that is 50 less 10% of 50). The minimum eligibility marks for OBCs can be fixed at any number between 45 and 50, at the discretion of the Institution. Or, where the candidates are required to take an entrance examination and if the qualifying marks in the entrance examination is fixed as 40% for general category candidates, the qualifying marks for OBC candidates should not be less than 36% (that 40 less 10% of 40).

41. We therefore, dispose of this appeal, affirming the decision dated 7.9.2010 of the learned Single Judge of the High Court, subject to the clarifications/observations above, and subject to the following conditions :

(i) In regard to the admissions for 2011-2012, if any Central Educational Institution has already determined the 'cut-off marks' for OBCs with reference to the marks secured by the last candidate in the general category, and has converted the unfilled OBC seats to general category seats and allotted the seats to general category candidates, such admissions shall not be disturbed. But where the process of conversion and allotment is not completed, the OBC seats shall be filled by OBC candidates.

(ii) If in any Central Educational Institution, the OBC reservation seats remain vacant, such institutions shall fill the said seats with OBC students.

Only if OBC candidates possessing the minimum eligibility/qualifying marks are not available in the OBC merit list, the OBC seats shall be converted into general category seats.

(iii) If the last date for admissions has expired, the last date for admissions shall be extended till 31.8.2011 as a special case, to enable admissions to the vacant OBC seats.

\_\_\_\_\_J.

(R. V. Ravee

New Delhi;

\_\_\_\_\_J.

August 18, 2011.

(A. K. Patn

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