

(2013) 08 KL CK 0084
In the High Court Of Kerala
Case No : WP(C). No. 11578 of 2013

Arifa Lulu T.K.

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 07-08-2013

Acts Referred:

Citation : (2013) 4 KerLJ 747

Hon'ble Judges : Mr. A.M. Shaffique, J.

Bench : Single Bench

Advocate : R.K. Muraleedharan, P.K. Suresh Kumar, Senior Advocate, G. Shrikumar, Senior Advocate, M.R. Sreelatha & Zubair Pulikkol, Advocates, for the Petitioners; Santhamma P.K., G.P, for the Respondent

Final Decision : Disposed Off

Judgement

Mr. A.M. Shaffique, J.—Though the writ petition was filed as a public interest litigation, by order dated 28.5.2013 the Division Bench observed that if the petitioners are aggrieved by denial of the benefit to their children, the matter should be taken up before the single Judge having roster to consider the same. Accordingly, the above writ petition is heard and decided by this Court.

2. The petitioners inter alia seek for a direction to implement the creamy layer principle in granting reservation to socially and educationally backward classes (for short "SEBC") in the matter of admission of students to Medical, Engineering and other courses in accordance with the law laid down by the Supreme Court in *Ashoka Kumar Thakur v. Union of India* (2008 (6) SCC 1).

3. In W.P.(C) No.29271 of 2012 the first petitioner is a class II employee of KERAFED and his wife is a primary teacher in the Government school. The second petitioner is a police constable and his wife is a school teacher. The third petitioner and his wife are primary teachers in Government school. Their children intend to apply for M.B.B.S, Engineering or other professional courses in the State of Kerala after their twelfth. According to them, since the annual salary of

the parents together exceeds 4.5 lakh each, as per the present norms, they are excluded from reservation as they come under creamy layer. W.P.(C) No.11578/2013 is filed by 10 persons who are applicants for admission to MBBS, BDS and Engineering Degree course.

4. It is contended that the Government is bound to implement the judgment in Ashoka Kumar Takur's case (supra) as far as the reservation to professional (educational) courses are concerned. As matters stand now, the approach of the Government is that all those belonging to socially and economically backward classes having an annual income of Rs.4.5 lakhs and above have to be excluded from reservation as evident from the prospectus of Medical and Engineering colleges. Unless the creamy layer principle is incorporated, the students will not get the admission as contemplated. In Ashoka Kumar Takur's case (supra) it is held that wherever there is reservation in favour of backward classes, the creamy layer of such classes has to be excluded and that non-inclusion of creamy layer principle would make the entire reservation unconstitutional.

5. It is the contention of the petitioners that despite the above declaration of the law by the Supreme Court, the State Government has not implemented the creamy layer principle as far as admission to professional colleges and other institutions are concerned. Following an income limit for giving benefit of backward class reservation, according to the petitioners is totally against the principle enunciated by the Supreme Court.

6. Counter affidavit is filed by the 3rd respondent inter alia contending that admission to professional degree courses are regulated through prospectus duly approved by Govt. of Kerala as per G.O.(MS) No.644/2012/H.Edn. dated 18.12.2012. It contains general information and rules relating to the admission to professional degree courses, 2013 and other connected matters. As per clause 5.4.2 of the prospectus of the entrance examination, clear stipulation is made for reservation under SEBC. Such a status has to be granted on the basis of certificate issued by the village officer/competent authority. The candidate whose annual family income is above Rs. 4.5 lakhs is not eligible for reservation or any relaxation in the academic eligibility and is excluded from the list of beneficiaries of SEBC. This procedure is adopted to ensure that the most eligible candidate in SEBC are entitled for the reservation. According to the Government as the high income group in the same community is excluded from the reservation benefit and relaxation, it will naturally result in benefits to the lower income strata of the same community. It is contended that the very concept of the judgment of the Supreme Court in Ashoka Kumar Takur's case was to exclude creamy layer from the reservation given to backward community. Soon after the judgment in Indira Sawhney and others v. Union of India (AIR 1993 SC 477), Government of India fixed the ceiling for excluding the creamy layer at Rs. One lakh and subsequently the amount is raised in 2004 to Rs.2.5 lakhs. On 4.10.2008 the amount is again raised to Rs. 4.5 lakhs considering inflation and other factors. Therefore by Ext.P1 the Government of Kerala has fixed Rs.4.5 lakhs as a criteria for

identifying the creamy layer among the SEBC. It is therefore contended that fixation of the income at 4.5 lakhs method by itself has provided enough admission to SEBC category and the said reserved quota is filled up every year and there is no shortage of such candidates. In regard to salaried persons what is to be computed is the basic pay and dearness allowance for the purpose of calculating the total annual family income. The other allowances are not counted for calculating the annual family income. Therefore according to the Government the principle of excluding creamy layer has been complied by the authorities concerned.

7. Heard the Senior Counsel Sri. G. Shrikumar and the learned Government Pleader.

8. The short question to be considered in this writ petition is whether the fixation of annual income at Rs. 4.5 lakhs is enough for excluding the creamy layer among the backward classes.

9. According to the Government the annual income had been fixed at Rs.4.5 lakhs on the basis of the criteria fixed by the Central Government which is done pursuant to the judgment in Indira Sawhney's case (supra). Initially it was fixed at Rs. One lakh and later at Rs.2.5 lakhs and presently at 4.5 lakhs.

10. The main argument raised by the learned senior counsel appearing for the petitioners is based on Ashoka Kumar Takur's case wherein the Supreme court had occasion to consider the applicability of exclusion of creamy layer in admissions to professional courses. Certain guidelines were issued by the Government of India after the decision in Indira Sawhney's case (supra) for giving reservation for other backward classes in civil posts and services under the Government of India. Various categories of persons were included classifying them on the basis of profession, property holdings, agricultural income, wealth etc. The argument is that in respect of salaried persons Class I/Group A and Class II/Group B officers alone were excluded, as creamy layer. If such a method is adopted the beneficiaries in the above writ petition also will be entitled for reservation as SEBC. Therefore the basis of excluding creamy layer is contrary to the law laid down by the Supreme Court.

11. In Ashoka Kumar Thakur's case (supra) the Supreme Court, inter alia considered the scope and effect of Article 15(4),(5) of the Constitution in the matter relating to admissions to professional courses. Article 15 reads as under:

"15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. -

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to-

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

[(4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.]

[(5) Nothing in this article or in sub-clause (g) of clause (1) of Article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes insofar as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30.]"

Article 15(4) and (5) has been incorporated as per ninety third amendment to the Constitution. The validity of the amendment was upheld by the Supreme Court. The Supreme Court thereafter considered the scope of reservations to be given to SEBC's and relying upon the law laid down by the Constitution Bench of the Supreme Court in Indira Sawhney's case (Supra) held that the said principles can be made applicable to exclude creamy layer for admissions to professional colleges as well. The following paragraphs in the judgment are relevant which reads as under:

"169. In Indra Sawhney case Jeevan Reddy, J. has observed: (SCC p. 724, para 792)

"792. In our opinion, it is not a question of permissibility or desirability of such test but one of proper and more appropriate identification of a class-a backward class. The very concept of a class denotes a number of persons having certain common traits which distinguish them from the others. In a backward class under Clause (4) of Article 16, if the connecting link is the social backwardness, it should broadly be the same in a given class. If some of the members are far too advanced socially (which in the context, necessarily means economically and, may also mean educationally) the connecting thread between them and the remaining class snaps. They would be misfits in the class. After excluding them alone, would the class be a compact class. In fact, such exclusion benefits the truly backward."

170. It is to be understood that "creamy layer" principle is introduced merely to exclude a section of a particular caste on the ground that they are economically

advanced or educationally forward. They are excluded because unless this segment of caste is excluded from that caste group, there cannot be proper identification of the backward class. If the "creamy layer" principle is not applied, it could easily be said that all the castes that have been included among the socially and educationally backward classes have been included exclusively on the basis of caste. Identification of SEBC for the purpose of either Articles 15(4), 15(5) or 16(4) solely on the basis of caste is expressly prohibited by various decisions of this Court and it is also against Article 15(1) and Article 16(1) of the Constitution. To fulfil the conditions and to find out truly what is socially and educationally backward class, the exclusion of "creamy layer" is essential.

171. It may be noted that the "creamy layer" principle is applied not as a general principle of reservation. It is applied for the purpose of identifying the socially and educationally backward class. One of the main criteria for determining SEBC is poverty. If that be so, the principle of exclusion of "creamy layer" is necessary. Moreover, the majority in Indra Sawhney case upheld the exclusion of "creamy layer" for the purpose of reservation in Article 16 (4). Therefore, we are bound by the larger Bench decision of this Court in Indra Sawhney case and it cannot be said that the "creamy layer" principle cannot be applied for identifying SEBCs. Moreover, Articles 15(4) and 15(5) are designed to provide opportunities in education thereby raising educational, social and economical levels of those who are lagging behind and once this progress is achieved by this section, any legislation passed thereunder should be deemed to have served its purpose. By excluding those who have already attained economic well-being or educational advancement, the special benefits provided under these clauses cannot be further extended to them and, if done so, it would be unreasonable, discriminatory or arbitrary, resulting in reverse discrimination.

172. Sawant, J. also made observation in Indra Sawhney case to ensure removal of "creamy layer". He observed: (SCC p. 553, para 520)

"520. ... at least some individuals and families in the backward classes ... gaining sufficient means to develop their capacities to compete with others in every field. ... Legally, therefore, they are not entitled to be any longer called as part of the backward classes whatever their original birthmark. ... to continue to confer upon such advanced sections from the backward classes the special benefits, would amount to treating equals unequally violating the equality provisions of the Constitution. Secondly, to rank them with the rest of the backward classes would equally violate the right to equality of the rest in those classes, since it would amount to treating the unequals equally.it will lead to perverting the objectives of the special constitutional provisions since the forwards among the backward classes will thereby be enabled to lap up all the special benefits to the exclusion and at the cost of the rest in those classes, thus keeping the rest in perpetual backwardness."

173. All these reasonings are equally applicable to the reservation or any special action contemplated under Article 15(5). Therefore, we are unable to agree with

the contention raised by the respondent's learned counsel that if "creamy layer" is excluded, there may be practically no representation for a particular backward class in educational institutions because the remaining members, namely, the non-creamy layer, may not have risen to the level or standard necessary to qualify to get admission even within the reserved quota. If the creamy layer is not excluded, the identification of SEBC will not be complete and any SEBC without the exclusion of "creamy layer" may not be in accordance with Article 15(1) of the Constitution."

In paragraph 174 while considering the parameters to be followed to determine creamy layer, the Supreme Court refers to the guidelines framed by the Central Government excluding creamy layer in public employment and holds as under:

"175. We make it clear that same principle of determining the creamy layer for providing 27% reservation for backward classes for appointment need not be strictly followed in case of reservation envisaged under Article 15(5) of the Constitution. As pointed by Shri Ravivarma Kumar, learned Senior Counsel, if a strict income restriction is made for identifying the "creamy layer", those who are left in the particular caste may not be able to have a sufficient number of candidates for getting admission in the Central institutions as per Act 5 of 2007. The Government can make a relaxation to some extent so that sufficient number of candidates may be available for the purpose of filling up the 27% reservation. It is for the Union Government and the State Governments to issue appropriate guidelines to identify the "creamy layer" so that SEBCs are properly determined in accordance with the guidelines given by this Court. If, even by applying this principle, still the candidates are not available, the State can issue appropriate guidelines to effectuate the implementation of the reservation purposefully."

12. Now I shall refer to a few more paragraphs in the judgment which are extracted as under:

"391. One of the prominent questions raised in the writ petitions is whether creamy layer OBCs should be considered socially and educationally backward under the provisions of Article 15(5). While interpreting this provision, a basic syllogism must govern our decision. If you belong to the creamy layer, you are socially advanced and cannot be given the benefit of reservation".

"415. Income as the criterion for creamy layer exclusion is insufficient and runs afoul of Sawhney. Identification of the creamy layer has been and should be left to the Government, subject to judicial direction. For a valid method of creamy layer exclusion, the Government may use its post-Sawhney criteria as a template. (See OM of 8.9.1993, Para 2 (c)/Column 3, approved by this Court in Ashoka Kumar Thakur, para 10.) This schedule is a comprehensive attempt to exclude the creamy layer in which income, government posts, occupation and landholdings are taken into account. The Office Memorandum is reproduced hereunder:"

"417. The creamy layer schedule of the OM dated 8.9.1993 in my opinion, is not

comprehensive. This should be revised periodically-preferably once in every 5 years, in order to ensure that creamy layer criteria take changing circumstances into account."

"631. For a valid method of creamy layer exclusion, the Government may use its post-Sawhney criteria as a template.I urge the Government to periodically revise the OM so that changing circumstances can be taken into consideration while keeping our constitutional goal in view".

13. Having regard to the aforesaid law laid by the Supreme Court, the short question that arises for consideration is whether the State Government while issuing prospectus has taken into consideration the judgment of the Supreme Court for excluding creamy layer in the perspective as required to be done by the Supreme Court.

14. Apparently there has to be a method for excluding the creamy layer and the income derived by the family is found to be an insufficient method to be adopted in order to exclude creamy layer who are not socially or educationally backward.

15. The very concept of excluding such creamy layer is to provide reservation to backward classes who are educationally and socially backward. Income or employment of the parents alone cannot be a criteria for deciding social and educational backwardness. There may be instances where a family may have sufficient income but they might be either socially or educationally backward. Such backwardness can happen due to different reasons and that depends upon the socio-economic situation of a locality, or the district of each State. In respect of backward classes it is definitely for the Government to consider their socio economic and educational backwardness and try to figure out a method to exclude the creamy layer from reservation so that the most eligible SEBC would get the benefit of reservation. In Ashoka Kumar Takur's case the Supreme Court had directed the Union and the State Governments to issue appropriate guidelines to identify the "creamy layer" so that SEBCs are properly determined in accordance with the guidelines issued by the Court. Only if, by applying such principle, the candidates are not available, the State was directed to issue appropriate guidelines to effectuate the implementation of the reservation purposefully.

16. First of all I am not deciding a public interest litigation. I am only deciding the specific complaint raised by the petitioners. The petitioners have not highlighted any specific instance to demonstrate as to how the exclusion based on income of a family does not amount to actual exclusion of the creamy layer. What is pointed out is regarding the class of employment the parents were occupying and the income derived thereby. If both the parents are employed, one can always think that they are not economically backward. Probably the parents may or may not be educationally backward but the question is whether they have the facility to give professional education to their children. If both the parents are employed, can it be stated that they don't have the facility to

provide education to their children. Can it be said that the class of employment is not a factor or is it that the financial position alone matters or is it that the social backwardness is taken care of by excluding such persons whose parents are employed and drawing salary more than a particular limit. It has to enquire whether the socio-economic situation in the State of Kerala is such that even with the income of both the parents they are unable to provide professional education to their children. The special circumstance in the State is also to be considered depending upon the requirement for professional education availability of seats etc. One another factor to be looked into the status to be given to children of Non-resident Indians, who may not be showing any income in India and are socially and educationally maintaining very high standards. These are all matters which are required to be considered by the Government in arriving at the principle of excluding creamy layer. It is to avoid a detailed enquiry that the Supreme Court has directed the State Governments to use a certain formula as a template and issue guidelines.

17. As already indicated the Government has fixed the income limit for excluding creamy layer based on the manner in which Government of India had given reservation to backward classes. There is nothing to indicate that an in depth study had been conducted by the Government in respect of excluding the creamy layer from the reservation. Going by the principles laid by the Supreme Court the Government ought to have considered the socio-economic features of the State not merely on the basis of the income derived by various categories of persons but also their socio-economic backwardness and different methods are to be adopted for different categories of employees of the State and other persons involved in different avocation or business, agriculturists, planters etc. Such factors have to be weighed by the Government in order to understand the real scope of backwardness of a particular community and creamy layer principle has to be evolved from the same. Apparently no such study has been conducted in the matter. Under these circumstances, since the petitioners have not ventilated any individual grievance, only general directions can be issued in these writ petitions. Accordingly these writ petitions are disposed as follows:

That the Government shall conduct an independent study on the basis of the principles laid down in Ashoka Kumar Takur's case and shall evolve a scheme for excluding the creamy layer from the backward classes taking into consideration the socio-economic and educational background of different communities, including the income derived by the family. Such study may be conducted and shall be implemented during the academic year 2014-2015.