

(2007) 03 SC CK 0022

In the Supreme Court Of India

Case No : I.A. No. 13 in Writ Petition (Civil) No. 265 of 2006 and WP (Civil) No"s. 269 and 598 of 2006 and 29 and 35 of 2007

Ashoka Kumar Thakur

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 29-03-2007

Acts Referred:

Central Educational Institutions (Reservation in Admission) Act, 2006 — Section 2, 5(1) (2), 6
Constitution of India, 1950 — Article 14, 15, 15(4), 15(5), 16
National Commission for Backward Classes Act, 1993 — Section 11

Citation : (2007) 2 BLJR 1101 : (2007) 5 JT 276 : (2007) 2 MLJ 1211 : (2007) 5 SCALE 179 : (2007) 4 SCC 361 : (2007) 4 SCR 493 : (2007) 3 UPLBEC 2208

Hon'ble Judges : Lokeshwar Singh Pantaa Panta, J;Arijit Pasayat, J

Bench : Division Bench

Advocate : Party in Perso Gopal Subramaniam, ASG., J.S. Attri and Aruneshwar Gupta, AAG, F.S. Nariman, P.P. Rao, Vivek K. Tankha and V. Kanakraj, Indu Malhotra, Gopal Shgankarnarayanan, Shilpa Gupta, Subhash Sharma, Sushil Kumar Jain, H.D. Thanvi, Sarad Singhania, Puneet Jain, Christi Jain, Ratna Kaul, Pooja Dhar, Prashant Kumar, T. Srinivasa Murthy, Satyakam, Abhishek Tiwari, Sushma Suri, Kailash Chand, A. Mariarputham, Aruna Mathur, for Arphtuam, Aruna and Co., Prashant Bhushan, M.L. Lhoty, Paban K. Sharma, Poonam Lahoty, Himanshu Shekhar, Janaranjan Das, Swetaketu Mishra, V.G. Pragasam, S. Vallinayagam, S. Prabhu Ramasubramanian, Naveen Kumar Singh, Shashwat Gupta, Shikha Tandon, Vishwajit Singh, Gopal Singh, Rituraj Biswas, Anukul Raj, Sunita Sharma, D.S. Mahra, Arun K. Sinha, G. Prakash, Beena Prakash, Atul Jha, Dharmendra Kumar Sinha, T.V. Geroge, Riku Sharma, for Corporate Law Group, S.S. Shinde, V.N. Raghupathy, S. Wasim A. Qadri, K.H. Nobin Singh, S. Biswajit Meitei, David Rao, Mukesh Kumar, Mukul Sood, Sudarshan Singh Rawat, A.K. Sinha, D.P. Singh, Sanjay Jain, Ranjan Mukherjee, S.C. Ghosh, Ritu Raj, Anil Shrivastava, U. Hazarika, Satya Mitra, Sumita Hazarika, Nishakant Pandey, Gopal Singh, K.N. Madhusoodhannan, R. Sathish, A. Subhashini, B.B. Singh and Kumar Rajesh Singh, for the Appellant;

Final Decision : Disposed Of

Judgement

Arijit Pasayat, J.—In this I.A. prayer has been made to grant interim protection pending final disposal of the writ petitions.

2. In the writ petitions the policy of 27% reservation for the Other Backward Classes (in short the "OBCs") contained in the Central Educational Institutions (Reservation in Admission) Act, 2006 (in short the "Act") is the subject matter of challenge. The primary ground of challenge is that the Union of India has failed in performing the constitutional and legal duties toward the citizenry and its resultant effect. Consequentially the Act shall have the effect and wide ramifications and ultimately it shall have the result in dividing the country on caste basis. It would lead to chaos, confusion, and anarchy which would have destructive impact on the peaceful atmosphere in the educational and other institutions and would seriously affect social and communal harmony. The constitutional guarantee of equality and equal opportunity shall be seriously prejudiced. It has been contended that a time has come to replace the "vote bank" scenario with "talent bank". The statute in question, it is contended, has lost sight of the social catastrophe it is likely to unleash. Not only the products would be intellectual pigmies as compared to normal intellectual sound students presently passing out. It has been highlighted that on the basis of unfounded and unsupportable data about the number of OBCs in the country the Act has been enacted. It has been pointed out that this Court in *Indra Sawhney v. Union of India and Ors.* [1992]6SCR321 had recognised the concept of "creamy layer" amongst the advanced OBCs to be kept out of preferential treatment. The population data of 52% projected by the Mandal Commission was not actually given the seal of acceptance. In any event, this Court in its judgment dated 16.11.1992 directed the Government to constitute a permanent body by 15th March, 1993 for examining and recommending for inclusion or exclusion in the lists of backward classes of citizens. The National Commission for Backward Classes Act, 1993 (in short the "Backward Classes Act") defines "backward classes" to mean such backward classes of citizens other than the Scheduled Castes and Scheduled Tribes as may be specified by the Central Government in the lists. In terms of Section 2(c) of the Act "lists" mean lists prepared by the Government of India from time to time for the purpose of making provision for the reservation of appointments or posts in favour of backward classes of citizens which in the opinion of the Government are not adequately represented in the services under the Government of India and any legal or other authority within the territory of India or under the control of the Government of India. Though there is a specific provision in Section 11 of the Backward Classes Act for a periodic revision of the lists, same has not been done, and on the contrary additions are being made. The rationale of 27% having been arrived at on the mythical figure that the OBCs are 52% in the country and even the ratio of 27% reservation for the students belonging to other backward classes in the educational institutions is to be funded and controlled by the Central Government. The same is to be enforced from May 2007. It is highlighted that after 1931 census there has never been any caste-wise enumeration or

tabulation which in essence corrodes the credibility of the claim of 52% population of other backward classes.

3. It is pointed out that in terms of Section 2(g), 3(iii), Sections 5(1)(2) and 6 of the Act, 27% seats are being reserved for other backward classes out of only permitted strength. The expression "Other Backward Classes" means the class or classes of citizens who are socially or educationally backward and are so determined by the Central Government. There has never been any determination on any acceptable basis. The parameters provided in the Backward Classes Act have not been kept in view. Without supportable data the introduction of a Statute which would have the effect of disturbing the harmony in the society was avoidable. Though it has been provided that increase in the number of seats can be done in a staggered manner, that is really of no consequence. The stand that number of seats available for the general categories remains unaffected is really not a solution as in essence unequals are treated as equals. The very concept of equality enshrined in Article 14 of the Constitution of India, 1950 (in short the "Constitution") is directly affected.

4. Reference is made to the figures provided by the National Samples Survey of India and the National Health and Family Survey (Government of India's own Departments) which clearly establish the hollowness of the claim about OBCs being 52% of the population. The source for the enactment of the Act was the 93rd amendment to the Constitution which has come into force w.e.f. 20.1.2006 by insertion of Clause (5) in Article 15 of the Constitution.

Prayer has been made to declare certain provisions in the Act to be unconstitutional.

5. The effect of the judgments in *M. Nagaraj and Ors. v. Union of India and Ors.* AIR2007SC71 and *Nair Service Society v. State of Kerala* (Writ Petition (Civil) No. 598 of 2000 etc. decided on 23.02.2007) has not been considered. It has been emphasized that what may have been relevant eight decades back cannot hold good in the present scenario. There has to be indepth analysis to find out the number of socially and educationally backward class of citizens. The concept of Backward class citizens is dealt with in para 786 of *Indra Sawhney's* case (supra). It is pointed out that in the immediately succeeding paragraph i.e. Paragraph 787 the position has been clarified. In that paragraph reference has also been made at page. 720 that certain classes which may not qualify for Article 15(4) may qualify for Article 16(4). Reference is made to *Janki Prasad Parimoo v. State of J & K* [1973]3SCR236 to contend that it is social and educational backwardness of a class which is material for the purposes of Articles 16(4). It does not have determinative relevance for the purposes of Articles 15(4) and 15(5). Further reference is also made to the concluding para 859 in *Indra Sawhney's* case (supra) where it has been said in category (3)(c) that it is not correct to say that backward class of citizens contemplated in Article 16(4) is the same as the socially and educationally backward classes referred to in Article 15(4). it is much wider. Therefore, it is submitted that the concept of socially and

educationally backward classes in Article 15(4) stand on a different footing from Article 16(4) and consequentially Article 15(5) is different from Article 16(4).

6. It has been highlighted that in any event the concept of creamy layer which has been completely kept out of consideration in the Statute has great relevance and effect. The criteria of Article 16(4) and the lists under the Backward Classes Act can at the most provide a rough and ready rule for the purpose of Articles 15(4) and 15(5) but that does not in any way take care of the requirements of Section 11 of the Backward Classes Act. There is no report subsequent to 3.2.2005 by the National Commission for the Backward Classes. Therefore, it is highlighted that the whole exercise has been done in great hurry without any justifiable reason. Since there is no data base after 1931 census, what the Government could have done is to find out a definite data base and then take such action as is permissible in law. Even otherwise, the Office Memorandum bearing No. 36012/31/90-Est.(SCT) dated 13.8.1990 on which great emphasis has been laid by learned Additional Solicitor General for the respondent-Union of India, does not take note of another O.M. No. 36012/22/93-Estt.(SCT) dated 8.9.1993 which expressly states as follows:

(d) The OBCs for the purpose of the aforesaid reservation would comprise, in the first phase, the castes and communities which are common to both the lists in the report of the Mandal Commission and the State Governments' Lists. A list of such castes and communities is being issued separately by the Ministry of Welfare.

7. It has been pointed out that the Act itself specifically requires a determination of socially and educationally backward classes to be made by the Central Government, as is clear from a bare reading of Section 2(g). That has not been done for the purposes of the Act and by referring to the lists meant for cases covered by Article 16(4) the requirements have not been met, there cannot be any basis for contending that the "creamy layer concept" attached to Article 16(4) has no relevance for Articles 15(4) and 15(5). It is pointed out that the intention of the Parliament does not appear to be that any existing list under Article 16(4) should be treated as the foundation for Section 2(g) of the Act. The determination should be made "in future" and not by adopting any past determination by the National Commission for the purposes of Article 15(5). The "special provision of law" under Article 15(5) is the Act which provides that OBCs must be so determined for the purposes of the Act by the Central Government (underlined for emphasis). There has been no separate determination.

8. In essence, it is submitted that the baseless figure of 27% cannot be pressed into service for introducing a Statute which has such wide ramifications. No methodology has been laid down for determining the socially and educationally backward classes because castes alone should not be made the basis for identification even though there appears to be some casual observations in Indra Sawhney's case (supra) as contended by learned Additional Solicitor General that castes can be synonyms with class. That is not the correct approach. It was

only stated that castes may be the starting point for identifying the backward class, but it can not definitely be the sole basis. The figure of 27% it is emphasized is an imaginary figure with no rational. The non exclusion of "creamy layer" has also affected the validity of the Statute.

9. In addition to these aspects highlighted by Mr. F.S. Nariman, Senior Advocate, Mr. P.P. Rao, Senior Advocate, Mr. M.L. Lahoti, Advocate, Mr. Sushil Kr. Jain, Advocate, Mr. V. Tankha, Senior Advocate, Mr. Ashoka Kr. Thakur and Dr. Mittal, who appear in person, have more or less highlighted to similar effect.

10. Mr. P.P. Rao, Senior Advocate, with reference to certain observations in Indra Sawhney's case (supra) has submitted that inclusion of castes in the lists of backward classes cannot be mechanic and cannot be done without adequate relevant data.

11. The following reports have also been referred to highlight as to how figures arrived at by the Union are erroneous.

(a) The National Sample Survey Organisation survey of 1999-2000 which shows that the present educational level is directly proportionate to his/her economic condition, (pp. 14-15 para 7.21, 7.22 and 7.23)

(b) Section 11 of the National Commission for Backward Classes Act, 1993 which says "The Central Government may at any time, and shall, at the expiration of ten years from the coming into force of this Act and every succeeding period of ten years thereafter, undertake revision of the lists with a view to excluding from such lists those classes who have ceased to be backward classes or for including in such lists new backward classes.

(c) Standing Committee on Social Justice and Empowerment Chaired by Sumitra Mahajan 2005-2006 (pp 18-22 - Copy of the Report is Annexure P-II in Vol. II at pp. 142-217).

(d) 186th Report of the Parliamentary Standing Committee of Human Resources Development submitted to the Parliament on 1-12-2006 (pp, 22-23 paras 8.8 to 8.13). The Report is Annexure P-III in Vol. II at pp. 218-227).

(e) Annual Report of National Commission for Backward Classes dt. 3-2-2005. (Para 8.14 at pp 25-26). The Report is Annexure P-IV in Vol. II at pp. 228-317.

(f) Report of the Oversight Committee constituted under the Orders of the Prime Minister on 27-5-2006 (pp. 29-30 para 8.19 to 8.21). The Report is Annexure P-V in Vol.II at pp 318-353.

12. It is pointed out that Office Memoranda of 1990 and 1991 referred to in Indra Sawhney's case (supra) cannot hold the field forever. It is pointed out that if that continues to be so, Section 11 of the Backward Classes Act would be rendered nugatory. The revision of the lists was called for after expiration of the period of 10 years. The non-revision renders the acceptability of the figures doubtful and basisless.

13. In Mandal Commission's Report it was inter-alia observed as follows:

On the basis of the Commission's Report -popularly known as Mandal Commission's Report -(for short "the Report"), two Office Memoranda - one dated August 13, 1990 and the other amended one dated September 25, 1991 were issued by the Government of India. We are reproducing those Memoranda hereunder for proper understanding and appreciation of the significance of these two OMs and the distinctions appearing between them;

No. 36012/31/90-Estt. (SCT) Government of India

Ministry of Personnel, Public Grievances & Pensions (Deptt. of Personnel & Training) OFFICE MEMORANDUM New Delhi, the 13th August, 1990

Subject: Recommendation of the Second Backward Classes Commission (Mandal Report) - Reservation for Socially and Educationally Backward Classes in Services under the Government of India.

In a multiple undulating society like ours, early achievement of the objective of social justice as enshrined in the Constitution is a must. The second Backward Classes Commission called the Mandal Commission was established by the then Government with this purpose in view, which submitted its report to the Government of India on 31.12. 1980.

2. Government have carefully considered the report and the recommendations of the Commission in the present context responding the benefits to be extended to the socially and educationally backward classes as opined by the Commission and are of the clear view that at the outset certain weightage has to be provided to such classes in the services of the Union and their Public Undertakings. Accordingly orders are issued as follows:

(i) 27 per cent, of the vacancies in civil posts and services under the Government of India shall be reserved for SEBC.

(ii) The aforesaid reservation shall apply to vacancies to be filled by direct recruitment. Detailed instructions relating to the procedure to be followed for enforcing reservation will be issued separately.

(iii) Candidates belonging to SEBC recruited on the basis of merit in an open competition on the same standards prescribed for the general candidates shall not be adjusted against the reservation quota of 27 per cent.

(iv) The SEBC would comprise in the first phase the castes and communities which are common to both, the list in the report of the Mandal Commission and the State Governments' lists. A list of such castes/communities is being issued separately.

(v) The aforesaid reservation shall take effect from 7.8.1990. However, this will not apply to vacancies where the recruitment process has already been initiated prior to the issue of these orders.

Similar instructions in respect of public sector undertakings and financial institutions including public sector banks will be issued by the Department of Public Enterprises and Ministry of Finance respectively.

Sd/. (Smt. Krishna Singh) Joint Secretary to the Govt. of India

AMENDED MEMORANDUM:

No. 36012/31/90-Estt. (SCT) Government of India Ministry of Personnel, Public Grievances & Pensions (Deptt. of Personnel & Training) OFFICE MEMORANDUM

New Delhi, the 25th September 1991

Subject: Recommendation of the Second Backward Classes Commission (Mandal Report) -Reservation for Socially and Educationally Backward Classes in Services under the Government of India.

The undersigned is directed to invite the attention to O.M. of even number dated the 13th August 1990, on the above sections of the SEBCs to receive the benefits of reservation on a preferential basis and to provide reservation for other economically backward sections of the people not covered by any of the existing schemes of reservation, Government have decided to amend the said Memorandum with immediate effect as follows:

2. (i) Within the 27 per cent of the vacancies in civil posts and services under the Government of India reserved for SEBCs, preference shall be given to candidates belonging to the poorer sections of the SEBCs. In case sufficient number of such candidates are not available, unfilled vacancies shall be filled by the other SEBC candidates.

(ii) 10 per cent of the vacancies in civil posts and services under the Government of India shall be reserved for other economically backward sections of the people who are not covered by any of the existing schemes of reservation.

(iii) The criteria for determining the poorer sections of the SEBCs or the other economically backward sections of the people who are not covered by any of the existing schemes of reservations are being issued separately.

3. The O.M. of even number dated the 13th August 1990, shall be deemed to have been amended to the extent specified above.

Sd/ (A.K. Harit) Dy. Secretary to the Govt. of India

The expression deployed in both the OMs, "Socially and Educationally Backward Classes" is on the strength of the Report of the Commission, though no such expression is used in Article 16(4) whereunder the reservation or appointments or posts in favour of any backward class of citizens is to be made. This expression is used as an explanatory one to the words "backward class" occurring in Article 16(4). Articles 16(4) and 340(1) were embodied in the Constitution even at the initial stage; but Article 15(4) containing the same expression as in Article 340(1) was subsequently added by the Constitution (First

Amendment) Act of 1951 to override the decision of this Court in *State of Madras v. Smt. Champakam Dorairajan* [1951]2SCR525

14. According to Mr. M.L. Lahoti, the Act specifically overlooks the mandate of Article 340 of the Constitution. According to him also the specific directions given by this Court in *Indra Sawhney's* case (supra) have been disregarded. Specific reference in this context is made to Section 11 of the Backward Classes Act. It is submitted that Article 340 provides that the condition of socially and educationally backward classes is to be investigated imperatively. Reference is also made to *K.C. Vasanth Kumar and Anr. v. State of Karnataka* (1988)4SCC590 to submit that the policy of reservation for employment and education should be necessarily reviewed. It was noted in that case that a time has come to review the criterion for identifying socially and educationally backward classes ignoring the caste label. Identification is an imperative requirement and cannot be by-passed on any ipso-dixi referring to out-dated data based on 1931 census. The object of advancement of socially and educationally backward classes undisputedly brings in the concept of creamy layer. Certain institutions are basically super specialty institutions e.g. All India Institute of Medical Science (AIMS). If the character of an institution of super specialty of national importance is permitted to be affected in the manner sought to be done it would be counted productive. That would affect quality of education.

15. About the Mandal Commission's report, it has been pointed out by Dr. Mittal who appears in person that survey conducted selected 0.15 of the total villages population and 7% of the district blocks. There is nothing to suggest as to on what basis the particular village or particular district was selected. The Commission itself distributed two groups (a) intermediate OBC and (b) depressed OBC, which were equi-distributed. It has been emphasized that the Mandal Commission while arriving at the figure of 52% population of OBC had added 8.6% population of other non Hindu communities. Thus, non Hindu communities formed 17% of the total OBC population. The management of social backwardness, it is submitted, has to be dynamic which means that the various measures to be adopted as a remedy have to be time bound and reviewable.

16. In response, Mr. Gopal Subramaniam, learned ASG appearing for the Union has submitted that all the issues that are being raised have been appropriately dealt with in *Indra Sawhney's* case (supra) and long earlier in *Minor P. Rajendra v. State of Madras and Ors.* [1968]2SCR786 . It is submitted that reservation whether in employment or in education is not violative of the basic structure or equality code. Various provisions in the Constitution acknowledge that reservation is an integral part of the principle of equality where inequality exists. There is nothing wrong or unconstitutional in specifying in terms of units of castes, those who have been identified as "Socially and Educationally Backward Classes" on the basis of criteria of social and educational backwardness. Reservation is not anti merit. In the absence of caste data after 1931, there was no alternative but to project the population proportion of social and educational

backward classes and other backward classes from the next best source i.e. latest available census of 1931. The identification and listing of such classes by Mandal Commission has nothing to do with the census of 1931 but was based on multiple approach in the contemporary context only and not in the context of 1931.

17. Determination or classification as to which class belongs ,to social and educational backward class or other backward class as made by the Government of India is valid and the Backward Classes Commission has a statutory function of examining as to which class included in the list is not really backward. Reservation policy is not dis-integrative and is not against the unity and integrity of the nation. On the contrary, according to him, reservation policy is a means of integrating the society disintegrated over the centuries by the age old caste system. It is submitted that the lists of OBCs identified on the basis of social and educational backwardness have been determined. The Ministry of Welfare (now named as Ministry of Social Justice & Empowerment) is in charge of the subject. There are State-wise lists. Once issued, these lists continue to be in force and are binding for any or all purposes, subject to modifications, deletions, additions from time to time in accordance with the Backward Classes Act and in the light of decision in Indra Sawhney's case (supra). The lists of Scheduled Castes and Scheduled Tribes categories covered by Clause (h) and (i) of Section 2 have already been notified in the past, and are subject to changes in accordance with Articles 341 and 342 of the Constitution. The fact that there has been centuries long historical oppression in relation to Scheduled Castes and Scheduled Tribes and Socially and Educationally Backward Classes and Other Backward Classes, has been recognized by this Court in Indra Sawhney's case (supra).

18. Reference is also made to the decision of this Court in State of A.P. v. U.S.V. Balram [1972]3SCR247 which was referred to in Indra Sawhney's case (supra).

The contentions, as noted above, have not only focused on legal issues but also on factors of great social relevance. The issues need deeper consideration in the background of their legal and social importance. The only question is whether it would be desirable to stay process of implementation of the Act and, if so, to what extent.

19. There is no dispute and in fact it was fairly accepted by learned Additional Solicitor General that there is need for periodical identification of the backward citizens and for this purpose the need for survey of entire population on the basis of an acceptable mechanism. What may have been relevant in 1931 census may have some relevance but cannot be the determinative factor. As was observed by this Court in Nagaraj 's case (supra) backwardness has to be based on objective factors whereas inadequacy has to factually exist.

20. Even in Indra Sawhney (II) AIR2000SC498 it was held as follows:

9. Inclusion of castes in the list of backward classes cannot be mechanical and cannot be done without adequate relevant data. Nor can it be done for

extraneous reasons. Care should be taken that the forward castes do not get included in the backward castes" list. In *Indra Sawhney*" Pandian, J. observed (SCC p. 408, para 174) that before a conclusion is drawn that a caste is backward or is inadequately represented in the services,

the existence of circumstances relevant to the formation of opinions is a *sine qua non*. If the opinion suffers from the vice of non-application of mind or formulation of collateral grounds or beyond the scope of statute, or irrelevant and extraneous material, then that opinion is challengeable.

Sawant, J. (see para 539 of SCC) too pointed out the need for proper application of mind to the facts and circumstances, the field, the post and the extent of existing representation and the need to balance representation. On behalf of himself and three others, Jeevan Reddy, J. pointed out (para 798 SCC) that opinion in regard to backwardness and inadequate representation must be based on relevant material. The scope of judicial scrutiny even with regard to matters relating to subjective satisfaction are governed by the principles stated in *Barium Chemicals Ltd. v. Company Law Board* [1967]1SCR898 . Likewise, periodic examination of a backward class could lead to its exclusion if it ceases to be socially backward or if it is adequately represented in the services. Once backward, always backward is not acceptable. In any case, the "creamy layer" has no place in the reservation system.

21. The concept of creamy layer cannot *prima facie* be considered to be irrelevant. It has also to be noted that nowhere else in the world do castes, classes or communities queue up for the sake of gaining backward status. Nowhere else in the world is there competition to assert backwardness and then to claim we are more backward than you. This truth was recognized as unhappy and disturbing situation and such situation was noted by this Court as a stark reality in *Indra Sawhney*'s case (*supra*).

22. According to some jurists, equality as a fundamental substantive norm is a characteristic feature of many democratic Constitutions. In societies that are diverse or in societies where certain groups of people were subjected to discrimination in the past subscription to the norm of equality necessitates an element of affirmative action. That may be the underlying object of Article 15. In India the "Varna" system of the early Vedic period was distorted and became a rigid and hierarchical caste system which resulted in lower castes being socially oppressed and economically exploited. Whatever be the truth in this plea, in the late 19th and early 20th century social reform movements started. An eminent jurist has noted that the equality provisions in the Indian Constitution were intended to be a pro-active means of social engineering and it is against this backdrop that the jurisprudence of reservations has developed in the Indian context. By contrast, the scenario in United States and South Africa can be looked at. The Constitution of US is older in point of time than that of Indian or South African Constitution. When it was initially adopted there was no mention of equality. The institution of slavery was legally sanctioned. It was only after the

Civil War that the Thirteenth and fourteenth amendments to the Constitution were enacted. The institution of slavery was abolished and "equal protection clause" came to be enacted.

23. The "separate but equal doctrine" was sanctified by the decision of US Supreme Court in *Plessy v. Ferguson* 163 US 537. But the formal equality was established in US after the decision in *Brown v. Board of Education* 347 US 483 and the Civil Rights Act, 1964. It is to be noted that in both the United States and South Africa, the past discrimination was along racial lines. This Court has in several instances focused on the question as to whether Articles 15(4) and 16(4) are a facet of equality or a derogation from it.

24. Equality of opportunity is not simply a matter of legal equality. Its existence depends not merely on the absence of disabilities but on the presence of abilities. Where, therefore, there is inequality in fact, legal equality always tends to accentuate it. (See *Dr. Pradeep Jain and Ors. v. Union of India and Ors.* (1984) IILLJ481SC .

25. In *Indra Sawhney's* case (supra) it appears that underlying principles which have been identified are the identification of class, which was held to be affirmative by using castes as a proxy. The State was Constitutionally empowered to enact affirmative action measures for backward classes. Differentiation or classifications for special preference must not be unduly unfair for the persons left out of the favoured groups.

26. There is another question which has been emphasized by learned Counsel for the petitioners is that the policy of reservation cannot be and should not be intended to be permanent or perpetuate backwardness.

In a very significant judgment in *Grutter v. Bollinger* 539 US 306 the US Supreme Court upheld the law school admission programme because it found "compelling state interest in diversity" in higher education. Referring to an earlier judgment in *Regents of University of California v. Allan Bakke* 438 US 265 the US Supreme Court by majority held that the school's interest in obtaining a "critical mass" of minority students was indeed a "tailored use". Majority opinion was to the effect that race conscious admissions policies must be limited in time and that with the efflux of time the use of racial preferences would no - longer be necessary.

27. According to South African Constitution the right in the Bill of Rights may be limited so long as the limitation is "justifiable in an open and democratic society based on human dignity, equality and freedom". The justifiability of the limitation must be assessed by evaluating the nature of the right, the nature and extent of the limitation, the importance of the purpose of the limitation, the relation between the limitation and the purpose and less restrictive means to achieve the purpose. It remains to be examined as to whether a different form of preferential treatment other than quotas could be employed as at some stage an affirmative action concept can be focused in this direction also. Though it is submitted that

the number of seats available for the general category is not affected, but that is really no answer to the broader issue.

28. If there is possibility of increase in seats in the absence of reservation it could have gone to the general category. If the stand of learned Additional Solicitor General is accepted that the exercise was not intended to be undertaken immediately and the increase would be staggered over a period of 3 years it could not be explained as to why a firm data base could not be evolved first, so that the exercise could be undertaken thereafter. By increasing the number of seats for the purpose of reservation unequals are treated as equals. The stand of learned Additional Solicitor General is that imperfection may be there in the data but so far as the existing modalities are concerned there is no difficulty in adopting the same.

29. Another important factor which needs to be noted is the concept of "Creamy layer".

In M. Nagaraj's case (supra) it was inter-alia held as follows:

123. However, in this case, as stated above, the main issue concerns the "extent of reservation". In this regard the State concerned will have to show in each case the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provisions for reservation. As stated above, the impugned provision is an enabling provision. The State is not bound to make reservation for SCs/STs in matters of promotions. However, if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance with Article 335. It is made clear that even if the State has compelling reasons, as stated above, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling limit of 50% or obliterate the creamy layer or extend the reservation indefinitely.

30. In Nair Service Society's case (supra) it was noted as follows:

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

As stated above, the boundaries of the width of the power, namely, the ceiling-limit of 50% (the numerical benchmark), the principle of creamy layer, the compelling reasons, namely, backwardness, inadequacy of representation and the overall administrative efficiency are not obliterated by the impugned amendments. At the appropriate time, we have to consider the law as enacted by various States providing for reservation if challenged. At that time we have to

see whether limitations on the exercise of power are violated. The State is free to exercise its discretion of providing for reservation subject to limitation, namely, that there must exist compelling reasons of backwardness, inadequacy of representation in a class of post (s) keeping in mind the overall administrative efficiency. It is made clear that even if the State has reasons to make reservation, as stated above, if the impugned law violates any of the above substantive limits on the width of the power the same would be liable to be set aside.

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

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

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

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

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

31. It, therefore, needs no reiteration that the creamy layer rule is a necessary bargain between the competing ends of caste based reservations and the principle of secularism. It is a part of constitutional scheme. Therefore these cases have to be examined in detail as to whether the stand of Union of India that creamy layer rule is applicable to only Article 16(4) and not Article 15(5) is

based on any sound foundation. That is more so because the lists relatable to Article 16(4) form the foundational base for Article 15(5).

32. In the background of what has been explained above, it would be desirable to keep in hold the operation of the Act so far as it relates to Section 6 thereof for the OBCs category only. We make it clear that we are not staying operation of the Statute, particularly, Section 6 so far as the Scheduled Castes and Scheduled Tribes candidates are concerned. It would be permissible for the respondent-Union of India to initiate or continue process, if any, for determining on a broad based foundation "Other Backward Classes" notwithstanding pendency of the cases before this Court and without prejudice to the issues involved.

33. The writ petitions be listed in the 3rd week of August, 2007 for final hearing. LA. is accordingly disposed of.