

**IN THE SUPREME COURT OF INDIA CIVIL
ORIGINAL/APPELLATE JURISDICTION**

Writ Petition (Civil) No. 60 of 2019

**PICHRA WARG KALYAN MAHASABHA
HARYANA (Regd.) & ANR.....Petitioners**

Versus

THE STATE OF HARYANA & ANR..... Respondents

With

**Civil Appeal No.4952 of 2021 (Arising out
of SLP (C) No. 21893 of 2018)**

**Civil Appeal Nos.4953-4954 of 2021 (Arising out of
SLP(C) Nos. 32168-32169 of 2018**

J U D G E M E N T

L. NAGESWARA RAO, J.

Leave granted in SLP (C) No.21893 of 2018 & SLP (C)
Nos.32168-32169 of 2018.

1 Writ Petition (C) No. 60 of 2019 has been filed under Article 32 of the Constitution of India for quashing notifications dated 17.08.2016 and 28.08.2018 issued by the First Respondent as arbitrary and violative of Articles 14, 15 and 16 of the Constitution of India. A further direction is

sought for a fresh survey and verification of data for identification and specification of 'creamy layer' as per the provisions of the Haryana Backward Classes (Reservation in Services and Admission in Educational Institutions) Act, 2016 (hereinafter referred to as, the '**2016 Act**'). The Petitioners have also sought for a direction to the Respondents to provide reservation to backward classes in Haryana under the 2016 Act by considering the existing defined criteria of 'creamy layer' by the National Commission for Backward Classes or the criteria used by the State of Haryana prior to the 2016 Act.

2 Reservation in backward classes as recommended by the Mandal Commission was scrutinised by this Court in ***Indra Sawhney v. Union of India***¹ (hereinafter referred to as, '***Indra Sawhney-I***'). In the said judgement, this Court recommended constitution of a permanent body at the Central level and at the level of the States to deal with the inclusion, under-inclusion and over-inclusion of groups in the lists of other backward classes of citizens. This Court directed State Governments to identify 'creamy layer' amongst the backward classes and exclude them from the purview of reservation. Pursuant to the directions issued in

¹ 1992 Supp (3) SCC 217

Indra Sawhney-I, the Haryana Second Backward Classes Commission was constituted on 12.10.1993. The said Commission was assigned the function of specifying the basis for excluding socially advanced persons / creamy layer from the backward classes. On 16.05.1995, the Haryana Second Backward Classes Commission submitted its report recommending the criteria for excluding socially advanced persons/sections (creamy layer) from the backward classes. The State Government accepted the recommendations of the Commission and decided that the benefit of reservation shall not extend to persons/sections mentioned in Annexure 'A' to the circular dated 07.06.1995 issued by the Commissioner and Secretary to Government of Haryana, Welfare and Scheduled Castes and Backward Classes Department. The said Annexure 'A' included the children of those who held Constitutional Posts, who were Class I Officers of the All India Central and State Services (Direct Recruits), Class II Officers of the Central and State Services (Direct Recruits), employees in Public Sector Undertakings etc., and personnel belonging to Armed Forces including Para Military Forces (excluding persons holding civil posts). Children of persons belonging to a family which owned more than the permissible land under the statute of Haryana pertaining to ceiling on

land holdings were also covered under Annexure 'A'. Another category specified in Annexure 'A' was with respect to the children of persons with gross annual income of Rs. 1 lakh or above or possessing wealth above the exemption limit as prescribed in the Wealth Tax Act, 1957 for a period of three consecutive years. Lastly, Annexure 'A' brought within its fold children of persons of all other listed categories who were not disentitled to the benefit of reservation but had income from other sources of wealth bringing them within the aforementioned income / wealth criteria.

3. On 31.08.2010, the Financial Commissioner and Principal Secretary to Government of Haryana, Welfare of Scheduled Castes & Backward Classes Department informed the relevant authorities that the State Government had decided to raise income limit to Rs. 4.5 lakh for determining 'creamy layer' amongst the backward classes under the income / wealth criteria. Later, the Haryana Backward Classes (Reservation in Services and Admission in Educational Institutions) Act, 2016 was enacted to provide for reservation in services and admission in educational institutions to the persons belonging to backward classes in the State of Haryana. Section 5 of the 2016 Act provides that no persons belonging to 'creamy layer' amongst the

backward classes shall be considered for admission in educational institutions against the seats reserved for backward classes. They shall also not be entitled to claim reservation for appointment in services under the State against posts reserved for backward classes. Section 5(2) of the Act postulates that the Government shall, by notification, after taking into consideration social, economic and such other factors, as deemed appropriate, specify the criteria for exclusion and identification of persons belonging to the backward classes as 'creamy layer'.

4. In exercise of the powers conferred by the 2016 Act, the State Government issued a notification on 17.08.2016 specifying the criteria for exclusion of 'creamy layer' within the backward classes. As per the said notification, children of persons having gross annual income up to Rs. 3 lakh shall first of all get the benefit of reservation in services and admission in educational institutions. The left-out quota shall go to that class of backward classes of citizens who earn more than Rs. 3 lakh but up to Rs. 6 lakh per annum. The sections of backward classes earning above Rs. 6 lakh per annum shall be considered as 'creamy layer' under Section 5 of the 2016 Act.

5. Students aspiring to be admitted to MBBS course for the academic year 2018-2019 in the quota for backward classes filed writ petitions in the High Court of Punjab and Haryana challenging the notification dated 17.08.2016. The main grievance of the petitioners in the said writ petitions was the sub-classification of backward classes, with preference in reservation given to a particular section of a backward class group. The High Court by its judgement dated 07.08.2018 in CWP No. 15731 of 2018 and connected matters set aside the notification dated 17.08.2016 on the ground that the sub-classification of the backward classes is arbitrary and violative of Article 14 of the Constitution of India. The High Court directed the counselling of students to be held afresh on the basis of the earlier criteria existing prior to the 2016 Act. The State of Haryana questioned the correctness of the judgement of the High Court before this Court in SLP(C) No. 21893 of 2018. The request made by the State to stay the judgement of the High Court dated 07.08.2018 was declined by this Court on 28.08.2018.

6. On the same day, the State Government issued a notification after obtaining an opinion of the Advocate General of Haryana, whereby the criteria for computing annual income for the purposes of the notification dated

17.08.2016 was fixed as 'gross annual income', which shall include income from all sources. By the said notification dated 28.08.2018, all previous notifications and instructions which provided for a different mode of computing annual income stood overruled. Students, who having qualified in NEET-2018 and seeking admission to MBBS and BDS courses in the backward classes quota, filed CWP No. 22055 of 2018 in the High Court, assailing the legality and validity of the notifications dated 17.08.2016 and 28.08.2018. The High Court upheld both the notifications, aggrieved by which, SLP

(C) Nos. 32168-32169 of 2018 have been filed before this Court. As the question arising in the Writ Petition (C) No. 60 of 2019 and the appeals arising from SLP (C) No. 21893 of 2018 and SLP (C) Nos. 32168-32169 of 2018 are common, all of them are disposed of together by this judgement.

7. The point considered by the High Court in CWP No. 15731 of 2018 was restricted to the sub-classification of a backward class group, while fixing the criteria for 'creamy layer'. By the notification dated 17.08.2016, apart from fixing the income criterion as Rs. 6 lakh for identifying and excluding the 'creamy layer', the State Government divided the remaining backward classes of citizens, eligible for reservation, into two groups on the basis of their annual

income. The first group is of those persons who have gross annual income up to Rs. 3 lakh and the other, comprising persons who have income between Rs. 3 lakh and Rs. 6 lakh. According to the notification dated 17.08.2016, children of persons having gross annual income up to Rs. 3 lakh shall first be considered for the benefit of reservation in services and admission in educational institutions. The left-over quota shall then be filled up by the children of those whose annual income is between Rs. 3 lakh and Rs. 6 lakh. The contention on behalf of the State Government, that such division was made to ensure that the benefit of reservation reached the most marginalised amongst the backward classes, was rejected by the High Court. The High Court was of the opinion that this sub-classification is arbitrary and would result in depriving the benefit of reservation to persons belonging to backward classes who have income between Rs. 3 lakh to Rs.

6 lakh. After examining the material produced by the Government, the High Court criticised the State Backward Classes Commission for not examining and validating data to establish social backwardness of the backward classes. By making it clear that fixing Rs. 6 lakh as the income for determining the 'creamy layer' amongst the backward classes was not in question before it, the High Court in its

judgement dated 07.08.2018 concluded that the sub- classification giving preference to those with annual income less than Rs. 3 lakh is arbitrary.

8. In its judgement dated 31.08.2018 in CWP No. 22055 of 2018, the High Court upheld the fixation of the income limit of Rs. 6 lakh per year as criteria for determining 'creamy layer' amongst the backward classes. After clarifying that the earlier notifications issued by the State Government on 07.06.1995, 09.08.2000 and 31.08.2010 had been superseded by the 2016 Act, the High Court was of the opinion that fixing the criteria for 'creamy layer' is in the interests of persons belonging to the marginalised sections of backward classes who actually need the benefit of reservation. In so far as the notification dated 28.08.2018 is concerned, the High Court held that the State Government had jurisdiction under the 2016 Act to take into account the gross annual income from all sources for the purpose of arriving at the criteria for determining 'creamy layer'. As both the notifications dated 17.08.2016 and 28.08.2018 are in the larger interests of those backward classes who require the benefit of reservation, the High Court dismissed the writ petition.

9. We have heard Mr. Siddharth Dave, learned Senior Counsel appearing for the Petitioners and Mr. Arun Bhardwaj, learned Senior Counsel appearing for the Respondent-State. The principal contention of the Petitioners is that the notifications dated 17.8.2016 and 28.08.2018 are contrary to the law laid down by this Court in ***Indra Sawhney-I*** as economic criterion cannot be the sole criterion for identifying 'creamy layer'. It was contended on behalf of the Petitioners that the notifications are violative of Section 5 of the 2016 Act, according to which social, economic and other factors are to be taken into account for specifying the criteria for exclusion and identification of persons belonging to the backward classes as 'creamy layer'. The learned Senior Counsel for the Petitioners submitted that the sub- classification of the backward classes on the basis of income by the notification dated 17.08.2016 resulted in precluding one section of backward class of persons, whose annual income was between Rs. 3 lakh to Rs. 6 lakh, from the benefit of reservation. Computation of gross income by including income from all sources according to the notification dated 28.08.2018 is contrary to the notifications issued by the Government of India as well as the notifications that were issued by the State Government prior to the 2016

Act. According to the Petitioners, clubbing of salary income and agricultural income to compute the gross income results in exclusion of a large number of eligible sections of backward classes from seeking reservation in appointment to public services and admission to educational institutions.

10. The submissions made on behalf of the Petitioners were countered by the learned Senior Counsel appearing for the State who submitted that the notifications have been issued strictly in accordance with the judgement in ***Indra Sawhney-I***. On behalf of the State, it was contended that a detailed district-wise survey was done by the Commission to collect information relating to social and economic backwardness of all the backward classes before issuing the impugned notifications. Much stress was laid by the State on the laudable object that is achieved by the two notifications in question. The sub-classification amongst the backward classes is to ensure that people with lower income amongst backward classes get the benefit of reservation as they need a helping hand more than the others who fall within the higher income bracket of Rs. 3 lakh to Rs. 6 lakh. The notification dated 28.08.2018 is also for the purpose of providing the benefit of reservation to the marginalised sections of backward classes as such of those sections

having a higher income should not get primacy and occupy the majority of the reserved seats / posts.

11 The notification dated 17.08.2016 was issued in exercise of the power conferred on the State Government under the 2016 Act. Section 5(2) of the 2016 Act clearly provides that social, economic and other factors have to be taken into account for the purpose of determining and excluding the 'creamy layer' within a backward class. It is relevant to mention that the notification that was issued on 07.06.1995 was in tune with the judgement of this Court in **Indra Sawhney-I**. The said notification excluded certain persons who held constitutional posts and those who were in employment of the State and the Centre in higher posts from the benefit of reservation. In addition, the social advancement of other categories was taken into account for the purpose of including such categories in 'creamy layer'. Strangely, by the notification dated 17.08.2016, the identification of 'creamy layer' amongst backward classes was restricted only to the basis of economic criterion. In clear terms, this Court held in **Indra Sawhney-I** that the basis of exclusion of 'creamy layer' cannot be merely economic. J. Jeevan Reddy in para 792 of the judgement in **Indra Sawhney-I** held as follows:

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

— how and where to draw the line? For, while drawing the line, it should be ensured that it does not result in taking away with one hand what is given by the other. The basis of exclusion should not merely be economic, unless, of course, the economic advancement is so high that it necessarily means social advancement. Let us illustrate the point. A member of backward class, say a member of carpenter caste, goes to Middle East and works there as a carpenter. If you take his annual income in rupees, it would be fairly high from the Indian standard. Is he to be excluded from the Backward Class? Are his children in India to be deprived of the benefit of Article 16(4)? Situation may, however, be different, if he rises so high economically as to become — say a factory owner himself. In such a situation, his social status also rises. He himself would be in a position to provide employment to others. In such a case, his income is merely a measure of his social status. Even otherwise there

are several practical difficulties too in imposing an income ceiling. For example, annual income of Rs 36,000 may not count for much in a city like Bombay, Delhi or Calcutta whereas it may be a handsome income in rural India anywhere. The line to be drawn must be a realistic one. Another question would be, should such a line be uniform for the entire country or a given State or should it differ from rural to urban areas and so on. Further, income from agriculture may be difficult to assess and, therefore, in the case of agriculturists, the line may have to be drawn with reference to the extent of holding. While the income of a person can be taken as a measure of his social advancement, the limit to be prescribed should not be such as to result in taking away with one hand what is given with the other. The income limit must be such as to mean and signify social advancement. At the same time, it must be recognised that there are certain positions, the occupants of which can be treated as socially advanced without any further enquiry. For example, if a member of a designated backward class becomes a member of IAS or IPS or any other All India Service, his status in society (social status) rises; he is no longer socially disadvantaged. His children get full opportunity to realise their potential. They are in no way handicapped in the race of life. His salary is also such that he is above want. It is but logical that in such a situation, his children are not given the benefit of reservation. For by giving them the benefit of reservation, other disadvantaged members of that backward class may be deprived of that benefit. It is then argued for the respondents that 'one swallow doesn't make the summer', and that merely because a few members of a caste or class become socially advanced, the class/caste as such does not cease to be backward. It is pointed out that clause (4) of

Article 16 aims at group backwardness and not individual backwardness. While we agree that clause (4) aims at group backwardness, we feel that exclusion of such socially advanced members will make the 'class' a truly backward class and would more appropriately serve the purpose and object of clause (4). (This discussion is confined to Other Backward Classes only and has no relevance in the case of Scheduled Tribes and Scheduled Castes)."

The following directions were issued in Para 793 of the judgement:

"793. Keeping in mind all these considerations, we direct the Government of India to specify the basis of exclusion — whether on the basis of income, extent of holding or otherwise — of 'creamy layer'. This shall be done as early as possible, but not exceeding four months. On such specification persons falling within the net of exclusionary rule shall cease to be the members of the Other Backward Classes (covered by the expression 'backward class of citizens') for the purpose of Article 16(4). The impugned Office Memorandums dated August 13, 1990 and September 25, 1991 shall be implemented subject only to such specification and exclusion of socially advanced persons from the backward classes contemplated by the said O.M. In other words, after the expiry of four months from today, the implementation of the said O.M. shall be subject to the exclusion of the 'creamy layer' in accordance with the criteria to be specified by the Government of India and not otherwise."

12 The implementation of the judgement of this Court in

Indra Sawhney-I by identification of 'creamy layer' was not

done promptly by certain states. The State of Kerala neither appointed a Commission nor implemented the directions in the judgement for more than three years, following which contempt proceedings had to be initiated against the State. A High-Level Committee was directed to be constituted by this Court in the State of Kerala for identifying the 'creamy layer' among the designated backward classes of the State. This Court in ***Indra Sawhney v. Union of India***² (hereinafter referred to as, '***Indra Sawhney-II***') examined certain questions relating to the recommendations made by the said High-Level Committee. After thoroughly examining the factors which were given emphasis in the various opinions rendered in ***Indra Sawhney-I*** for determining 'creamy layer' amongst the backward classes, this Court held that persons from backward classes who occupied posts in higher services like IAS, IPS and All India Services had reached a higher level of social advancement and economic status and therefore, were not entitled to be treated as backward. Such persons were to be treated as 'creamy layer' without any further inquiry. Likewise, people with sufficient income who were in a position to provide employment to others should also be taken to have reached a higher social status and therefore,

² (2000) 1 SCC 168

should be treated as outside the backward class. Similarly, persons from backward classes who had higher agricultural holdings or were receiving income from properties, beyond a prescribed limit, do not deserve the benefit of reservation. The above-mentioned categories were necessarily to be excluded from backward classes. This Court in **Indra Sawhney-II** held that the exclusion of the above-mentioned categories is a 'judicial declaration' made in **Indra Sawhney-I**.

13. In **Ashok Kumar Thakur v. State of Bihar**³, this Court was concerned with the notifications issued for the identification of 'creamy layer' by the States of Bihar and Uttar Pradesh. The Schedule to the memorandum issued by the Government of India on 08.09.1993, pursuant to the judgement of **Indra Sawhney-I**, laying down the criteria for identifying 'creamy layer' was approved as being in conformity with the law laid down in the said judgement. The criteria fixed for identifying 'creamy layer' by the States of Uttar Pradesh and Bihar, respectively, were held to be wholly arbitrary and not to be in accordance with the guidelines laid down by this Court in **Indra Sawhney-I**. Consequently, this Court quashed the respective notifications issued by the

³ (1995) 5 SCC 403

States of Bihar and Uttar Pradesh and directed the States to follow the criteria laid down by the Government of India in the memorandum dated 08.09.1993 for the academic year 1995-96, with fresh criteria for subsequent years to be framed in accordance with law.

14. In this case, we are concerned with the validity of the notifications dated 17.08.2016 and 28.08.2018 issued by the Government of Haryana. The notification dated 17.08.2016 is in flagrant violation of the directions issued by this Court in ***Indra Sawhney-I*** and is at variance with the memorandum dated 08.09.1993 issued by the Union of India. The criteria mentioned for identifying such of those persons who are socially advanced have not been taken into account by the Government of Haryana while issuing the notification dated 17.08.2016. While issuing the notification dated 07.06.1995, the State Government had followed the criteria laid out in the memorandum issued by the Union of India on 08.09.1993, which was in tune with the directions given by this Court in ***Indra Sawhney-I***. In spite of Section 5(2) of the 2016 Act making it mandatory for identification and exclusion of 'creamy layer' to be on the basis of social, economic and other relevant factors, the State of Haryana has sought to determine 'creamy layer' from backward

classes solely on the basis of economic criterion and has committed a grave error in doing so. On this ground alone, the notification dated 17.08.2016 requires to be set aside. Therefore, we quash the notification dated 17.08.2016, giving liberty to the State Government to issue a fresh notification within a period of 3 months from today after taking into account the principles laid down by this Court in ***Indra Sawhney-I*** and the criteria mentioned in Section 5(2) of the 2016 Act for determining 'creamy layer'.

15. As we have struck down the notification dated 17.08.2016 *in toto*, there is no need for adjudicating the validity of the notification dated 28.08.2018, which is solely dependent on the notification dated 17.08.2016. Admissions to educational institutions and appointment to state services on the basis of the notifications dated 17.08.2016 and 28.08.2018 shall not be disturbed.

16. The Writ Petition and the Appeals arising from the Special Leave Petitions are disposed of accordingly.

.....J. [L.
NAGESWARA RAO]

.....J. [ANIRUDDHA BOSE]

New Delhi, August
24, 2021.