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**IN THE HIGH COURT OF SIKKIM AT GANGTOK**

***Writ Petition (C) No. 31 of 2008***

Shri Chiran Rizal,  
s/o Shri Chandra Bdr. Rizal,  
r/o Tareythang,  
P.O. Bering, P.S. Pakyong,  
East Sikkim.

...Petitioner

-Versus-

1. State of Sikkim  
through the Secretary,  
Department of Personnel,  
Adm. Reforms and Training,  
Govt. of Sikkim,  
Gangtok.
2. Secretary,  
Sikkim Public Service Commission,  
Gangtok, East Sikkim.
3. Miss. Bina Devi Sharma,  
d/o Shri Tanka Rm Sharma,  
r/o Balwakhani,  
P.O. and P.S. Gangtok,  
East Sikkim.
4. Ms. Onissa Dechen Gurung,  
d/o Shri Tej Gurung,  
R/o Season Hotel, Namnang,  
Gangtok, East Sikkim.
5. District Magistrate,  
Office of the District Collectorate,  
Govt. of Sikkim,  
Gangtok, East Sikkim.

...Respondents.

**For the petitioner:** Mr. K.T. Bhutia, Senior Advocate with Ms. Bandana Pradhan, Advocate.

**For the respondents:** Mr. J.B. Pradhan, Government Advocate for Respondents No. 1, 2 and 5.  
Mr. B. Sharma, Senior Advocate with Mr. J.K. Kharka, Advocate for Respondent No. 3

Mr. B.R. Pradhan, Senior Advocate with Ms. Yangchen Doma Gyatso, Advocate for Respondent No. 4.

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**Dates of Hearing : 21.05.2009 and 25.05.2009.**

**Date of Judgment : 05.06.2009**

**PRESENT: HON'BLE THE CHIEF JUSTICE  
MR. JUSTICE AFTAB H. SAIKIA  
HON'BLE MR. JUSTICE A.P. SUBBA, JUDGE.**

**JUDGMENT**

**(Saikia, CJ)**

Heard Mr. K. T. Bhutia, learned Senior Counsel assisted by Ms. Bandana Pradhan, learned Counsel for the petitioner and Mr. J.B. Pradhan, learned State Counsel, Sikkim representing the Official Respondents.

**2.** Also heard Mr. B. Sharma, learned Senior Counsel assisted by Mr. J.K. Kharka, learned Counsel for Respondent No. 3 as well as Mr. B.R. Pradhan, learned Senior Counsel assisted by Ms. Yangchen Doma Gyatso, learned Counsel on behalf of Respondent No. 4.

**3.** Impugning the appointment of Respondents No. 3 and 4 to the Junior Grade of the Sikkim State Civil Service (for short, 'SCS') on recommendation of the Sikkim Public Service Commission (for short, 'SPSC') vide Office Order dated 21.10.2008 (Annexure P-7) and 03.11.2008 (Annexure P-8) respectively issued by the Special Secretary to the Government of Sikkim, Department of Personnel, Administrative Reforms and Training, Public Grievances, etc., Gangtok, the petitioner has, in the instant writ petition, pleaded that pursuant to the advertisement published on 16.12.2006 in the "Herald Classified" inviting applications for filling up 40 posts of Junior Grade of SCS in the various Departments of the Government of Sikkim indicating therein the required reservations for Other Backward Classes (for short, 'OBC'),

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Other Backward Classes (Women) (for short, 'OBC (W)'), Most Backward Classes (for short, 'MBC') and Most Backward Classes (Women) (for short, 'MBC (W)'), he, being a member of OBC, applied for the same and took written examination on April 12<sup>th</sup>, 14<sup>th</sup> and 16<sup>th</sup>, 2008 and completed viva-voce test held on 16.09.2008. It is stated that after viva-voce test, the names of 40 candidates against 40 posts were recommended and a final merit list was published by the Respondent No. 2 by displaying the same on the Notice Board on 04.10.2008.

4. In the said list, according to the petitioner, only the names of the 40 candidates were shown without any indication as regards reserved posts against which those 40 candidates were going to be appointed. Therefore, the petitioner on 22.11.2008 applied to respondent No. 2 under the Right to Information Act, 2005 (for short, 'the Act') seeking detail informations namely, *inter alia*, caste certificates of all the 40 selected candidates, merit list of all the 180 candidates who were called for the viva-voce test, etc.,

5. Meanwhile, both Respondents No. 3 and 4, being OBC and MBC(W) respectively, were appointed vide Office Order dated 21.10.2008 and 03.11.2008 respectively as mentioned hereinabove.

6. On 14.11.2008, the Respondent No. 2, in reply to the petitioner's request under the Act, furnished the list of 40 successful candidates showing the allocation of roster position of each candidate against different reserved quotas including OBC, OBC(W), MBC and MBC (W). In that list, Respondents No. 3 and 4 were shown to be selected against the reserved quota of OBC and MBC(W) respectively. Since the entire informations so sought by the petitioner were not furnished, being

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aggrieved by such action of the Authority under the Act, the petitioner preferred an appeal before the Appellate Authority under the Act.

7. The petitioner has preferred this writ petition alleging that the appointments of both the Respondents No. 3 and 4 against the reserved quotas of OBC and MBC (W) are illegal, arbitrary and discriminatory as they belong to creamy layer persons/section mentioned in the Notification dated 05.12.2003 issued by the Government of Sikkim, Welfare Department.

8. The petitioner has relied upon the following relevant portions of the Notification dated 05.12.2003:

"3. The authorities competent to issue certificates for the purpose of verification of the classes/communities indicated for giving benefit of reservation in civil services, other posts of Government of India as well as in educational institutions for admission for Sikkimese candidates will also have the power to determine and mention in the certificate that the particular person/section does not belong to the creamy layer.

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#### SCHEDULE I

##### PERSONS/SECTIONS EXCLUDED FROM RESERVATION FOR MOST BACKWARD CLASSES AND OTHER BACKWARD CLASSES IN SIKKIM

| Description of Category   | To whom exclusion will apply   |
|---|--|
| I. ....   | .....  |
| II. Service Category Group 'A'/ Class I Officers of the All India Central Service and in State Government Class I Officer of the Rank of Joint Secretary and above. | Son(s) and Daughter(s) of -<br>(a) Parents, both of whom are Class I Officers of the rank of Joint Secretary and above in the State Government<br>(b) Parents, either of whom is a Class I Officer of the rank of Joint Secretary and above in the State Government<br>(c) Parents, both of whom are Class I Officers of the |





rank of Joint Secretary and above in the State Government, but one of them dies or suffers permanent Incapacitation;

(d) Parents, either of whom is a Class I Officer of the rank of Joint Secretary and above in the State Government and such parent dies or suffers permanent incapacitation and before such death or such incapacitation has had the benefit of employment in any International Organisation like UN, IMF, World Bank, etc., for a period of not less than 5 years;

(e) Parents, both of whom are Class I Officers of the rank of Joint Secretary and above in the State Government die or suffer permanent incapacitation and before such death or such incapacitation of the both, either of them has had the benefit of employment in any International Organisation like UN, IMF, World Bank, etc., for a period of not less than 5 years;

Provided that the rule of exclusion shall not apply in the following cases: -

(a) Sons and daughters of parents either of whom or both of whom are Class I Officer of the rank of Joint Secretary and above in the State Government and such parent(s) dies/die or suffer permanent incapacitation;

(b) A lady belonging to Most Backward Classes and OBC category has got married to a Class I Officer of the rank of Joint Secretary and above in the State Government and may herself like to apply for a job."

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9. The petitioner has prayed for following reliefs:

"1. A Writ of or in the nature of mandamus commanding the respondent No. 1 and 2 to cancel the appointments of the respondent Nos. 3 and 4.

2. A Writ of or in the nature of mandamus commanding the respondent Nos. 1 and 2 to terminate the services of the respondent Nos. 3 and 4 and appoint in their places the OBC and MBC candidates from the merit list retained by the respondent No. 2.

3. A Writ of or in the nature of mandamus commanding the respondent Nos. 1 and 2 to transmit all the records relating to the advertisement of the posts, selection process, merit list of all 180 candidates who faced viva voce test being successful in the written examination.

4. A Writ of or in the nature of mandamus commanding the respondent No. 5 to transmit all the records relating to OBC and MBC Certificates of the respondent Nos. 3 and 4.

5. A Writ of or in the nature mandamus commanding the respondent No. 5 to cancel the OBC and MBC Certificates of the respondent Nos. 3 and 4 if the same are placing the certificate holders beyond the purview of the Creamy Layer.

6. A Writ of or in the nature of quo-warranto questioning the authority of the respondent Nos. 3 and 4 to hold and continue to hold the present post where they are posted by the respondent No. 1.

7. Any other Writ/ Writs/ order/ orders/ direction/ directions as deemed fit and proper in the facts and circumstances of the case."

10. All the Respondents including the State of Sikkim/Official Respondents, Respondents No. 3 and 4, refuting the contentions and allegations made in the writ petition, have contested the same by filing their respective responses. In all those affidavits, denying all those statements categorically, all respondents have raised preliminary objections as regards maintainability of this writ petition questioning the locus standi of the petitioner.

11. Keeping in view the preliminary objections so raised on behalf of the Respondents including the Official Respondents, this Court while

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admitting this writ petition on 29.04.2009 making it a returnable on 21.05.2009, has recorded that the preliminary objections raised on behalf of the Respondents shall be considered on the returnable date. Accordingly, when the matter has been taken up on 21.05.2009, the learned Counsel appearing for the parties have informed the Court that all of them have exchanged their affidavits in opposition as well as rejoinders and as such the pleadings are being complete.

**12.** In that view of the matter, the Court considers it appropriate that instead of hearing the preliminary objections at this stage and since the pleadings are also complete, the matter, in the interest of justice, needs final disposal.

**13.** As agreed to by the learned Counsel representing the parties and taking note of the urgency of the matter, the writ petition has been taken up for full dressed hearing on 21.05.2009 and 25.05.2009.

**14.** In support of the writ petition and the contentions as well as submissions made therein, Mr. Bhutia, the learned Senior Counsel, has strenuously contended that both the Respondents No. 3 and 4 have come from well-to-do family and both of them are daughters of retired Class I officers to the Government of Sikkim and hence they belong to creamy layer and as such they are not entitled to get their appointments under reserved quota like, OBC and MBC (W).

**15.** Furthering such submission, the learned Senior Counsel has relied upon the averments made in paragraphs 7, 8, 9 and 10 of the instant writ petition, which are as follows:

"7. That on 16<sup>th</sup> December, 2006 when the applications for appointment were invited vide annexure P-3 the father of the respondent No. 3, Shri Tanka Ram Sharma, was holding the post of Advisor, Forest and Wildlife, Govt. of Sikkim a

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post of Class I Officer of the Rank of Joint Secretary and above in the State Govt. falling under category II(b) of Schedule I of the Notification No. 7/GOS-9(15) SWD dated 5<sup>th</sup> December, 2003 as such, the respondent No. 3 was excluded from consideration for the reserved quota of OBC. The father of the respondent No. 3 retired on 31<sup>st</sup> August, 2007 as Member, Planning Commission.

8. That the father of the respondent No. 3 before his retirement on 31.8.2007 was drawing gross salary of Rs.48,556/- (Rupees fourty eight thousand five hundred and fifty six) only per month in the scale of Rs.19,500/- (Rupees nineteen thousand five hundred) only plus other allowances and after his retirement he is receiving gross monthly family pension of Rs.20,965/- (Rupees twenty thousand nine hundred sixty five) only. The father of the respondent No. 3 Shri Tanka Ram Sharma was drawing an annual salary of Rs.5,82,672/- (Rupees five lakhs eighty two thousand six hundred seventy two) only when the application in pursuance to the advertisement annexure P-3 was submitted by his daughter the respondent No. 3. After retirement Shri Tanka Ram Sharma is drawing an annual pension of Rs.2,51,580/- (Rupees two lakhs fifty one thousand five hundred and eighty) only excluding monthly deduction of Rs.7,800/- (Rupees seven thousand and eight hundred) only against the CVP (Commutation Value Pension), therefore, the respondent No. 3 clearly belongs to Creamy Layer persons/sections under category VI of Schedule I of the Notification annexure P-2 and excluded from consideration for appointment against the OBC quota.

9. That on 16<sup>th</sup> December, 2006 when the applications for appointment were invited vide annexure P-3 the father of the respondent No. 4, Shri Tej Bahadur Gurung was holding the post of Principal Chief Engineer cum Secretary, P.W.D., a Class I Officer of the Rank of Joint Secretary and above in the State Govt. falling under category II(b) of Schedule I of the Notification No. 7/GOS-9(15) SWD dated 5<sup>th</sup> December, 2003 as such, the respondent No. 4 was excluded from consideration for the reserved quota of MBC (W). The father of the respondent No. 4 was transferred to Irrigation Department and retired on 31<sup>st</sup> May, 2007.

10. That the father of the respondent No. 4 before his retirement on 31.5.2007 was drawing gross salary of Rs.45,070/- (Rupees fourty five thousand and seventy) only per month in the scale of Rs.18,100/- (Rupees eighteen thousand one hundred) only plus other allowances and after his retirement he is receiving gross monthly family pension of Rs.20,055/- (Rupees twenty thousand and fifty five) only. The father of the respondent No. 4 Shri Tej Bdr, Gurung was drawing an annual salary of Rs.5,40,840/- (Rupees five lakhs fourty thousand eight hundred fourty) only when the application in pursuance to the advertisement annexure P-3 was submitted by his daughter the respondent No. 4. After retirement Shri Tej Bdr. Gurung is drawing an annual

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pension of Rs.2,40,660/- (Rupees two lakhs fourty thousand six hundred and sixty) only, therefore, the respondent No. 4 clearly belongs to Creamy Layer persons/sections under category VI of Schedule I of the Notification annexure P-2 and excluded from consideration for appointment against the MBC(w) quota."

16. His basic submission is that since both the Respondents No.3 and 4 are the daughters of retired Class-I officers under the Government of Sikkim, and they have reached a higher level of social advancement and economic status, and therefore as a matter of law, such persons must be declared not entitled to be treated as backward.

17. Relying on a judicial authority in a case of *Indra Sawhney vs. Union of India* reported in AIR 2000 SC 498 (para 22 at p.508), the learned Senior Counsel has submitted that both the Respondents No.3 and 4 are to be treated as creamy layer "without further enquiry".

18. Our attention has drawn to paragraph 22 in *Indra Sawhney's* case (supra), wherein the Supreme Court observed as under: -

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

19. It is further submitted that the father of Respondent No.3, who was a Class-I officer to the Government of Sikkim, retired on 31.08.2007 as a Member of Planning Commission and on 31.05.2007, being the last





date for filing application, the application for the post in question was filed by the Respondent No.3 and on that relevant time, she was the daughter of a serving Class-I officer to the Government of Sikkim. At the same time, the father of Respondent No.4 retired on 31.05.2007 as Principal Chief Engineer-cum-Secretary, Irrigation Department and on that date itself, i.e. 31.05.2007 the Respondent No.4 filed an application for the post in question being the last date of application. Under such circumstances, they automatically belong to creamy layer and in order to prove such status no further enquiry is necessary. On this count alone the appointments of the Respondents No.3 and 4 are liable to be cancelled.

**20.** Praying for issuance of a writ of quo-warranto apart from the writ of mandamus, it is submitted by Mr. Bhutia, learned Senior Counsel that if a person is found to be not eligible or qualified to hold that post like in the present case where both the Respondents No.3 and 4 are holding the post in question without having their essential eligibility, being a member of creamy layer, their appointments under OBC and MBC(W) reserved quota respectively have to be declared invalid by issuing a quo-warranto.

**21.** In support of his submission, the learned Senior Counsel relied upon a decision of the Apex Court in a case of *the State of Haryana vs. The Haryanan Co-operative Transport Ltd. and others* reported in AIR 1977 SC 237 (para 14 at pp.241, 242).

**22.** On the issue of maintainability of this writ petition questioning the locus standi of the petitioner by the Respondents, the learned Senior Counsel has submitted that assuming that the petitioner has no locus in the instant case, this High Court in exercise of powers under Article 226 of the Constitution of India can certainly entertain a petition in





furtherance of public interest and also for the welfare of the people who are in a disadvantage position, and as such it is a fit case wherein this High Court shall interfere with the appointments of Respondents No.3 and 4 in the interest of justice without questioning the locus of the petitioner. He has placed reliance on a decision of the Apex Court in a case of *Guruvayoor Devaswom Managing Committee and another vs. C. K. Rajan and others* reported in (2003) 7 SCC 546 (para 50 at p.568).

**23.** Advancing his next leg of argument, the learned Senior Counsel has submitted that the selected list, as required, was not officially published for which reason he has to make an application under the Act seeking entire informations, which are -

(i) xerox attested copy of caste certificates of selected 40 candidates for the posts of Under Secretary;

(ii) merit list of all the 180 candidates, who were called for viva voce;

(iii) Roster point allocated to each of the 40 selected candidates and

(iv) separate merit list of written examination and viva voce indicating the consolidated marks of written and viva voce by all the 180 candidates.

**24.** However, it is contended that the Authority did not furnish all the information, for which the petitioner preferred an appeal before the Appellate Authority and the same is pending before the Authority.

**25.** It is also urged that the separate merit lists on the basis of written examination/interview have not been prepared for each category of candidates for whom reservations are made.

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26. Under such circumstances, it is submitted that the appointment of Respondents No. 3 and 4 as OBC and MBC (W) candidates deserves interference of this Court and this Court may be pleased to issue a writ in the nature of mandamus and also quo-warranto as already mentioned in the prayer above noted, against the Respondents quashing the appointment of Respondents No. 3 and 4.

27. Mr. J.B. Pradhan, the learned State Counsel, refuting the submissions and allegations so advanced by the petitioner and relying upon the affidavits filed on behalf of the Official Respondents, has forcefully argued that this writ petition is not sustainable on merit on the face of the records itself. More so, it is also not maintainable for which they have raised the preliminary objection on this count. According to him, the petitioner, being an OBC un-successful candidate, has no locus standi to challenge the appointment of Respondent No. 4 who belongs to MBC (W). In support of his submission he has relied on a decision of the Supreme Court reported in (1969) 2 SCC 228 (*Kumari Chitra Ghosh and another vs. Union of India and others*) wherein in paragraph 12 at page 234, it was held that the candidates/appellants who did not compete for the reserved posts had no right and locus standi to challenge the nomination made by the Central Government to reserved seats. In the instant case, it is submitted that since the petitioner is a candidate of one particular reserved quota i.e. OBC, he has no right to question the appointment of Respondent No. 4 who belongs to a different reserved quota, i.e., MBC(W).

28. Supporting the appointment of Respondent No. 3, it is argued by the State Counsel that there is no irregularity or illegality in her appointment because as per the merit list for OBC candidates, the

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position of Respondent No. 3 was at Sl. No. 6 when the petitioner was placed much below at Sl. No. 8. Besides, the candidate at Sl. No. 7, one Khem Raj Bhatarai, has made no grievances.

**29.** That apart, it is also contended by the learned State Counsel that the Respondent No. 3 does not belong to creamy layer as claimed by the petitioner.

**30.** The Government's clear stand, according to the learned State Counsel, is that after the completion of written test and viva voce for appointment to all the posts of 40 Junior Grade under SCS, separate list was prepared for each category and thereafter, according to the 100 point roster position, the final list of 40 candidates was published. The separate merit list for OBC candidates was also notified and the same is annexed as Annexure R-8 to the counter affidavit filed on behalf of the Respondent No. 1 (at page 61 of the pleadings of the parties in the paper book). He has also, relying upon paragraph 4 especially 4 (c) of the affidavit filed on behalf of Respondent No. 1, urged that in selecting the successful candidates, the Government has carefully maintained the roster point of all the 40 candidates and paragraph 4(c) reads as follows:

“(c) On the basis of written examination and viva voce, the Commission as per the usual process forwarded names of 40 successful candidates in order of merit adjusted against different slots as per the 100 point roster system for appointment to the posts of junior Grade of Sikkim State Civil Service (Under Secretary & equivalent) on temporary regular basis to the Department of Personnel, Government of Sikkim. The list of successful candidates is mentioned herein below:-

| SL. NO. | CATEGORY | ROSTER POINT             | SELECTED CANDIDATES  |
|---------|----------|--------------------------|--|
| 1.      | UR       | 1, 4, 11, 14, 17, 26, 30 | (i) Mr. Ujjwal Rai<br>(ii) Km. Cheeki Ongkula Bhutia<br>(iii) Mr. Jigme Wangchuk Bhutia<br>(iv) Ms. Anita Subba<br>(v) Km. Roshini Pradhan<br>(vi) Km. Tashi Choden Bhutia |

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|     |           |                                  |   |
|-----|-----------|----------------------------------|---|
|     |           |                                  | (vii) Mrs. Rinchen Doma Bhutia  |
| 2.  | UR (W)    | 8, 21                            | (i) Km. Koshi Kapil<br>(ii) Km. Karnitmit Lepcha  |
| 3.  | UR(W) BLV | 34                               | (i) Km. Thinley Pema Chankapa   |
| 4.  | UR (Ex-S) | 38                               | (i) Mr. Sonam Topgay Tashi  |
| 5.  | ST        | 2, 7, 12, 16, 22, 25, 31, 33, 37 | (i) Mr. Jigme Samup Basi<br>(ii) Km. Samten Dolma Bhutia<br>(iii) Km. Rinzing Choden<br>(iv) Km. Choden Gyatso<br>(v) Km. Tsewang Doma Bhutia<br>(vi) Ms. Pema Lhaden Lama<br>(vii) Mr. Gilberi Lepcha<br>(viii) Mr. Samdup Bhutia<br>(ix) Ms. Tashi Palmu Namgyal Bhutia |
| 6.  | ST (W)    | 10, 19, 28, 40                   | (i) Km. Tenzing Yangchen Bhutia<br>(ii) Km. Lakhi Doma Bhutia<br>(iii) Ms. Tshering Lhaden Lachungpa<br>(iv) Km. Anupa Tamling  |
| 7.  | MBC       | 3, 9, 18, 24, 27, 35             | (i) Mr. Abinash Rai<br>(ii) Mr. Bishal Mukhia<br>(iii) Km Subha Mukhia<br>(iv) Mrs. Sharmistha Rai<br>(v) Mr. Suraj Gurung  |
| 8.  | MBC (W)   | 15, 32                           | (i) Km. Onissa Dechhen Gurung<br>(ii) Km. Parina Gurung   |
| 9.  | OBC       | 6, 20, 29, 36                    | (i) Mr. Dhiraj Subedi<br>(ii) Mrs. Bandhana Chettri<br>(iii) Mr. Deepen Sharma<br>(iv) Ms. Bina Devi Sharma   |
| 10. | OBC (W)   | 13                               | (i) Km. Bibhuti Pradhan   |
| 11. | SC        | 5, 23                            | (i) Mr. Sunila Kumar Mothay<br>(ii) Mr. Umesh Sunam   |
| 12. | SC (W)    | 39                               | (i) Mr. Subash Ghimiray   |

31. Mr. Pradhan, the learned State Counsel has emphatically submitted that the petitioner admittedly, being an unsuccessful candidate, as his name did not appear in the final select list, has no right to seek any relief against Respondents No. 3 and 4 by making vague, baseless and wild allegations like: they belong to creamy layer, they





obtained caste certificate fraudulently etc. It is further contended that all those allegations have been made without any supportive documents.

**32.** According to him, the appointment of Respondents No. 3 and 4 has been made strictly in accordance with the provisions of law, including giving due consideration to the 100 point roster position.

**33.** It is further submitted that given the tone and tenor of the pleadings contained in this writ petition and the reliefs sought for therein, the instant petition appears to be more of a Public Interest Litigation rather than a petition filed by an aggrieved person and as such the instant writ petition is liable to be dismissed in limine with costs.

**34.** Refuting the allegations levelled against the Respondent No. 3 by the petitioner, Mr. B. Sharma, the learned Senior Counsel representing the Respondent No. 3, has vehemently contended that the Respondent No. 3 does not belong to the creamy layer. Relying on the affidavit filed by the Respondent No. 3, it is submitted that although she was a daughter of the retired Secretary to the Government of Sikkim, she was married to one Bhim Bahadur Thapa on 23.06.2003 as per Hindu customs, much before the advertisement dated 16.12.2006 inviting applications for the post of Junior Grade SCS. However, her marriage did not continue and eventually their marriage was dissolved by a Decree of Divorce on 24.03.2007 and that also prior to the advertisement. At the time of appearing in the written examination and viva voce for the post in question, she was working a Post Graduate Teacher in a school. Under such circumstances, at the time of her appointment she does not belong to creamy layer as she is already the divorced wife of Bhim Bahadur Thapa and she has no relation with her father.

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**35.** It is further contended that more importantly the position of Respondent No. 3 in the merit list was at Sl. No. 6 when the petitioner had got 8<sup>th</sup> position much below the Respondent No. 3. Therefore, on merit also the petitioner was not entitled to get any relief against Respondent No. 3 who is senior in the merit list.

**36.** Mr. B.R. Pradhan, the learned Senior Counsel representing the Respondent No. 4, raising the preliminary objection as regards maintainability and locus standi of the petitioner, has strenuously submitted that it is an admitted position that the Respondent No. 4 has been appointed against a reserved quota of MBC (W) when the petitioner belongs to OBC and as such the petitioner has no locus standi to challenge the appointment of Respondent No. 4 as the petitioner does not belong to the same reserved category as of the Respondent No. 4.

**37.** According to Mr. Pradhan, the learned Senior Counsel, the petitioner has not approached this Court with clean hand and there is no bona fide in filing this writ petition. More so, this writ petition appears to have been filed in the nature of a Public Interest Litigation as the petitioner has failed to make out a prima facie case to show that he is an aggrieved party against the appointment of Respondent No. 4. The very facts are eminently clear from the statements made by the petitioner in his reply to the preliminary objection filed on behalf of Respondent No. 4. In paragraph 8 (at page 182 of the paper-book) of his rejoinder, it has been clearly submitted by the petitioner that the members of the Most Backward Class of the community have been deprived of their constitutional rights of being appointed against the reserved posts by the appointment of the Respondent No. 4 who is a person of creamy layer. Paragraph 8 is quoted hereunder:





"Reference paragraph 3 of the preliminary objection, it is humbly submitted that the respondent No. 4, who is a person of Creamy Layer, is appointed against the reserved post meant for MBC (W) candidate which has not only violated the various guidelines of the Notification marked annexure P-9 but also constitutional and legal rights of the Most Backward Class of the community and that too in most clandestine manner. The members of the Most Backward Class of the community have been deprived of their constitutional rights of being appointed against the reserved posts. It is reiterated that the respondent Nos. 1 and 2 have not published/notified the separate merit lists of MBC, OBC and other categories of candidates as such, they are in dark regarding their position in the merit lists and the illegal appointments against their reserved posts. The members of the Most Backward Class of the community are not in the position to challenge the illegal appointment which has been done clandestinely without notifying the separate merit list of MBC, OBC and other categories. It is humbly submitted that in view of the above given facts it is unreasonable, unfair, illegal and unconstitutional on the part of the respondent No.4 and also other respondents to question the locus standi of the petitioner."

**38.** Mr. Pradhan has submitted that the contentions made in above paragraph would make out clearly that this petition was filed at the behest of the members of the MBC without making any substantive allegations against Respondent No. 4.

**39.** It is also contended on behalf of the Respondent No. 4 that the petitioner has apparently admitted in paragraph 5 of the writ petition that he has preferred an appeal under the Act and during the pendency of the appeal under the Act, this writ petition has been filed seeking the reliefs as indicated in prayers No. 3 and 4 made in the writ petition, being also the same reliefs sought for under the Act. That being the position, the petitioner has already availed an alternative remedy, but now has approached this Court without exhausting the said alternative remedies and as such on this count alone, this writ petition is not maintainable.





40. Harping on the point of preliminary objection as regards maintainability of the writ petition, Mr. Pradhan, the learned Senior Counsel has eloquently submitted that the petitioner has sought for mandamus without demanding justice and refusal thereof. His firm stand is that to seek a writ of mandamus, it is one of the condition precedent that the petitioner must make a demand for justice and in case of the denial of the same by the authority concerned only it is opened for him to approach this Court for seeking a writ of mandamus. This has not been happened in this case. The petitioner has straightway approached this Court by filing the instant writ petition and sought for a writ in the nature of mandamus making the prayers as has already been mentioned above. Under such circumstances this writ petition warrants dismissal at the threshold.

41. To bolster up the submission so made as recorded hereinabove, the learned Counsel for the Respondents including the State Respondents have relied upon the following judicial authorities:

- (a) *Subodh Ranjan Ghosh vs. Major N.S.O. Callaghan & Anr.* AIR 1956 Cal 532.
- (b) *Kumari Chitra Ghosh & Anr. Vs. Union of India & others* (1969) 2 SCC 228
- (c) *Kamini Kumar Das Choudhury vs. State of West Bengal & Ors.* AIR 1972 SC 2060
- (d) *Saraswati Industrial Syndicate Ltd. Etc. vs. Union of India* AIR 1975 SC 460
- (e) *Anrit Lal Berry & Others vs. Collector of Central Excise, Central Revenue & Others* AIR 1975 SC 538
- (f) *Surinder Singh vs. Central Government & Others* AIR 1986 SC 2166
- (g) *Om Prakash Shukla vs. Akhilesh Kumar Shukla & Others* 1986 (Supp) SCC 285
- (h) *R.K. Jain vs. Union of India & Others* AIR 1993 SC 1769
- (i) *Madan Lal & Others vs. State of J & K & Others* (1995) 3 SCC 486
- (j) *All India General Mazdoor Trade Union (Regd.) vs. Delhi Administration & Others* 1995 Supp. (3) SCC 579
- (k) *Chandra Prakash Tiwari and Others vs. Shakuntala Shukla & Others* (2002) 6 SCC 127
- (l) *Dr. B. Singh vs. Union of India & Others* (2004) 3 SCC 363

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- (m) *R. Vishwanatha Pillai vs. State of Kerala & Others* AIR 2004 SC 1469
- (n) *State of Punjab & Others vs. Punjab Fibres Ltd. & Others* (2005) 1 SCC 604
- (o) *B. Srinivasa Reddy vs. Karnataka Urban Water Supply and Drainage Board Employees Association & Others* AIR 2006 SC 3106
- (p) *National Council for Civil Liberty vs. Union of India & Others* AIR 2007 SC 2631
- (q) *Trivedi Himanshu Ghanshyambhai vs. Ahmedabad Municipal Corporation & Others* (2007) 8 SCC 644
- (r) *Dhananjay Malik and Others vs. State of Uttaranchal & Others* (2008) 4 SCC 171

**42.** Due consideration has been given to the extensive arguments canvassed by the learned Counsel on behalf of the respective parties. We also carefully perused and scrutinized the relevant documents as well as all the judicial precedents relied upon by the learned Counsel for the parties.

**43.** All the learned Counsel representing the Respondents have taken several formidable points raising as preliminary objections as well as on merits.

**44.** The first point which has been taken as preliminary objection, as emphasized, is that there has been no demand for justice and denial thereof. We do not think that this point needs to be decided as preliminary issue. Hence we propose to resolve all the issues raised in the case in hand along with the preliminary issues including the present one.

**45.** On meticulous perusal of the pleadings, it is evidently clear that the petitioner before approaching this Court has not made any demand for any justice and there is also no denial thereof. The petitioner before approaching this Court seeking mandamus ought to have moved the competent authority concerned for redressal of the grievances.





46. Idea underlined in making of demand is that the authorities may have an opportunity of redressing the wrong. Even it is not a case of the petitioner that had he approached the authority concerned, the State Respondents would have washed its hand in the matter without giving any reliefs.

47. Nonetheless, at the same time, it is the case of the petitioner that he has sought for the entire informations under the Act which have also been made a part of the prayer in this writ petition. Since all the informations so asked for have not been furnished, being dissatisfied with such response of the authorities under the Act, he has filed an appeal before the authority which is now pending. As submitted on behalf of the petitioner, the seeking information under the Act as reflected from the reply dated 14.11.2008 from Respondent No. 2 itself, cannot said to be a demand as required in case of seeking a writ of mandamus. That being so, we are of the view that the absence of any demand for justice seems to be fatal in case of issuance of writ of mandamus.

48. For seeking a writ of mandamus, the petitioner must satisfy certain conditions precedent and those are:

(i) The petitioner must have a legal right to compel performance of the legal duty

(ii) The authorities against which the mandamus have been sought must have a legal duty to perform the same.

(iii) The application must be made by the aggrieved party.

(iv) The application must be in good faith and not for an indirect purpose or on behalf of a third party.





(v) The application must be preceded by a distinct demand for performance of the duty in order to give the party an opportunity to consider whether he/it should comply or not and such demand must be shown to have been met by a refusal either by words or conduct so that the Court may be satisfied that the party complained of is determined not to do what is demanded.

**49.** Delving upon the basic theory of demand and refusal, various High Courts and Supreme Court have laid down the law on this point very explicitly.

**50.** The Calcutta High Court in a case of *Subodh Ranjan Ghosh* (supra) in paragraph 9 authoritatively held that the demand for justice and denial thereof were not merely a technical point but a point of substance and this point must be taken into consideration when the Court was asked to issue a writ of mandamus.

**51.** The Supreme Court in *Saraswati Industrial Syndicate Ltd.*'s case (supra) in paragraph 24 asserted that the powers of the High Court under Article 226 were not strictly confined to the limits to which proceedings for prerogative writs were subject in English practice. Nevertheless, the well recognized rule that no writ or order in the nature of a mandamus would issue when there was no failure to perform a mandatory duty applied in this country as well. The salutary general rule set out in Halsbury's Laws of England (3<sup>rd</sup> Edition, Vol. 13, p. 106) has recorded in paragraph 24 runs as under:

"As a general rule the order will not be granted unless the party complained of has known what it was he was required to do, so that he had the means of considering whether or not he should comply, and it must be shown by evidence that there was a distinct demand of that which the party seeking the mandamus desires to enforce, and that that demand was met by a refusal."

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52. The *Kamini Kumar Das Choudhury's* case (supra) was also referred to to strengthen the extension of law on demand and refusal for issuance of mandamus. In this case also the Supreme Court, in paragraph 11, held that a demand for justice and its refusal thereof must precede the filing of a petition asking for a direction or a writ of mandamus.

53. In *Amrit Lal Berry's* case (supra) the Supreme Court reiterated the view expressed in *Kamini Kumar Das Choudhury's* case.

54. The Supreme Court in another case of *All India General Mazdoor Trade Union* (supra) observed that before approaching the Court with a request to grant a mandamus the appropriate authority must be given an opportunity to make a probe and examine into the grievances of the appellant because Government was in a position to collect and collate the data to place it in the correct perspective for decision making and if the appropriate Government authority exercise such power then only the aggrieved workers can certainly move the appropriate forum for a writ of mandamus (see p. 581 para 3).

55. It would thus be seen on a careful reading of those cited cases that in the instant case the appellant having been aggrieved by the appointment of the Respondents No. 3 and 4 against OBC and MBC (W) quota ought to have approached the authority for vindication of such grievance and in case of refusal of such demand, the petitioner could have moved this Court for a writ of mandamus.

56. Under such circumstances, in absence of demand and refusal thereof, we are of the considered view that such action on the part of the petitioner has become fatal. Therefore, we think that this ground alone is a good ground for refusal to exercise the discretionary power under

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Article 226 to interfere with the impugned appointments of the Respondents No. 3 and 4.

**57.** Besides, we have also found on the face of the record that the petitioner is not an aggrieved party in seeking relief against the Respondents No. 3 and 4 and the same is evident from his reply dated 28.4.2009 to the preliminary objection of Respondent No. 4 wherein paragraph 8 he has manifestly admitted that all the members of the MBC Community have been deprived of their constitutional rights of being appointed against the reserved posts and the members of the MBC Community have not been in a position to challenge the illegal appointment which has been done clandestinely without notifying the separate merit list of MBC, OBC and other categories and for that reason it is claimed by the petitioner that Respondent No. 4 and other respondents cannot question the locus standi of the petitioner. These averments would reflect that although the petitioner belongs to OBC, he has taken this move through this writ petition to espouse the cause of members of MBC by way of Public Interest Litigation.

**58.** Insofar as the prayer for issuance of writ of quo-warranto is concerned, in *B. Srinivasa Reddy's* case (supra), the Supreme Court in paragraph 81 mandated that a petition praying for a writ of quo-warranto, being in the nature of public interest, was not maintainable at the instance of a person who was not unbiased. In case in hand, the petitioner although belongs to OBC, is admittedly an unsuccessful candidate and he cannot be permitted to assail the legality of the appointment of a candidate who belongs to other category i.e. MBC (W) with which he has no connection.

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59. That apart in *R.K. Jain's case* (supra), it is clearly observed by the Apex Court in paragraph 74, p. 1803, that in service jurisprudence it is settled law that it was for the aggrieved person only who was permitted to assail the legality of the offending action. Having considered the facts and circumstances, we do not find any good and cogent reason to accept the petitioner as an aggrieved party.

60. Even in *Dr. B. Singh's case* (supra) in paragraph 16, the Supreme Court further reiterated that in service matters PIL should not be entertained and the Apex Court had even gone to the extent in cautioning that whenever such frivolous pleas were taken to explain the PIL, the Court should do well not only to dismiss the petitions but also to impose exemplary costs, as it prima facie gave an impression about oblique motives involved, and in most cases it appeared to be proxy litigation. In the instant case, we have no hesitation to record that the case in hand is a proxy litigation initiated by the petitioner to safeguard the interest of the members of MBC though he is not aggrieved by such appointment.

61. As regards the allegation that both Respondents No. 3 and 4 belong to creamy layer, nothing has been placed before this Court by way of records or documents to substantiate such allegations. Simply certain averments have been made in paragraphs 7, 8, 9 and 10 of the writ petition as already quoted above which are, in our opinion, not sufficient to accept that both the Respondents No. 3 and 4 belong to creamy layer.

62. In a case of *National Council for Civil Liberty* (supra), the Supreme Court in paragraphs 33 and 34 observed that when no material on record to prove and show the allegations regarding receipt of foreign





funds and use of those funds for subversive activities, had been produced before the Court, any allegations of such nature could not be entertained.

**63.** That apart, the petitioner has also prayed for directing the authorities for cancellation of the OBC and MBC certificates issued to the Respondents No. 3 and 4 (prayer No. 5 of the writ petition), but surprisingly no such certificate has been annexed herewith.

**64.** Amazingly the records do not disclose that at any point of time, the petitioner has approached the competent authority seeking cancellation of those caste certificates of Respondents No. 3 and 4. Record also does not reveal of any such related documents or papers against which the petitioner has asked for relief. It is established that the Courts are not permitted to make any roving enquiry so as to find out the genuineness and veracity of the allegations made in the writ petition, being filed without any substantial materials.

**65.** The Supreme Court in *Surinder Singh's* case (supra) in paragraph 9, clearly held that in absence of the impugned order, it would not be possible to ascertain the reasons which might have impelled the authority to pass order and it was therefore improper to quash an order which was not produced before the Court in a proceeding under Article 226 of the Constitution.

**66.** The next important question as to whether the petitioner, being an unsuccessful candidate, has the right to challenge the appointments of Respondents No. 3 and 4.





67. In *Om Prakash Shukla's* case (supra), it was observed that the petitioner being an unsuccessful candidate was not entitled to get any relief because he appeared the examination without any protest.

68. Such view has also been reiterated in *Madan Lal's* case (supra). In paragraph 9, the Supreme Court, relying on *Om Prakash Shukla's* case, held that it was settled that if a candidate took a calculated chance and appeared at the interview, then only because of the result of the interview was not palatable to him, he could not turn round and subsequently contended that the process of interview was unfair and the selection committee was not properly constituted.

69. In *Chandra Prakash Tiwari's* case (supra), in paragraph 34, the Supreme Court again reiterated its view expressed in *Om Prakash Shukla's* case (supra) and *Madan Lal's* case (supra) and held that the unsuccessful candidate after appearing the interview and participating therein could not be permitted to question the unfairness that process of interview was unfair and there was some lacuna in the process.

70. The same view has also found its place in the case of *Trivedi Himanshu Ghanshyambhai's* case (supra) and *Dhananjay Malik's* case (supra). In paragraphs 7 and 8 of *Dhananjay Malik's* case, the Supreme Court held as under:

"7. It is not disputed that the respondent-writ petitioners herein participated in the process of selection knowing fully well that the educational qualification was clearly indicated in the advertisement itself as BPE or graduate with diploma in Physical Education. Having unsuccessfully participated in the process of selection without any demur they are estopped from challenging the selection criterion inter alia that the advertisement and selection with regard to requisite educational qualifications were contrary to the Rules.

8. In *Madan Lal v. State of J&K* this Court pointed out that when the petitioners appeared at the oral interview conducted by the members concerned of the Commission





who interviewed the petitioners as well as the contesting respondents concerned, the petitioners took a chance to get themselves selected at the said oral interview. Therefore, only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed writ petitions. This Court further pointed out that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted."

**71.** Importantly to note herein that the petitioner has never challenged that process of interview as being unfair or selection committee was not being properly constituted. His basic allegation is that Respondents No. 3 and 4 belong to the creamy layer for which they are not entitled to get any appointment under reserved quota for OBC and MBC (W). However, all those allegations of 'creamy layer' have been stoutly and firmly rejected by the Respondents No. 3 and 4. We have discreetly perused the allegations and counter-allegations projected in the pleadings of the parties. Manifestly it transpires that all those are the disputed question of facts and the same would, in our considered opinion, not fall within the ambit of Article 226 of the Constitution.

**72.** It is also surprising to note that on a plain reading of the prayer itself would indicate that the petitioner has not even sought for any relief in his favour by asking a Mandamus for his appointment after quashment of the appointment of the Respondents No. 3 and 4. Perhaps, he is very much aware of the factual situation that he is an unsuccessful candidate and has been placed in merit list of OBC at Sl. No. 8 much below the position of the Respondent No. 3. His only grievance is that the appointment of Respondents No. 3 and 4 should be quashed and although he will not get anything, he will be simply





satisfied if a writ of mandamus and/or quo-warranto is issued by ordering to quash the appointment of the Respondents No. 3 and 4.

**73.** On the question of maintainability of the writ petition during the pendency of the statutory appeal preferred by the petitioner under the Act, it is not disputed that the petitioner, before filing this writ petition, has preferred an appeal under the Act before the competent authority for redressal of his grievances which have also been placed before this Court by way of seeking relief and that appeal is still pending.

**74.** When there is a provision for appeal under the Act and it has been pressed into service by the petitioner seeking such relief, the writ petition filed by him before exhausting such statutory remedy which appears to be efficacious, proper and adequate, cannot be entertained. In arriving at this finding, we are guided by a decision of the Apex Court in a case of *State of Punjab & Others vs. Punjab Fibres Ltd. & Others* (supra).

**75.** Having considered the facts and circumstances of the case in its entirety and on due consideration of the pleadings exchanged by and between the parties including the reliefs so sought for by the petitioner by way of prayers as has been reproduced hereinabove as well as upon thorough analysis of the judicial interpretation reflected in those cited cases and proposition of law laid down therein covering all the points so raised in this petition, we are of the firm view that the writ petition is bereft of any merit. Accordingly, we dismiss the same.

**76.** However, having considered the facts and circumstances of the case, there shall be no order as to costs.

  
Judge

  
Chief Justice.