



**IN THE HIGH COURT OF SIKKIM AT GANGTOK**  
(Civil Extra Ordinary Jurisdiction)

DATED : 17.09.2010

**CORAM**

**HON'BLE MR. JUSTICE P.D. DINAKARAN, CHIEF JUSTICE**

**(I) Writ Petition (C) No. 28 of 2009**

Smt. Bina Devi Sharma,  
D/o Tanka Ram Sharma,  
R/o Balwakhani,  
P.O. & P.S. Gangtok,  
East Sikkim.

...Petitioner.

-versus-

1. The State of Sikkim,  
Through the Chief Secretary,  
Government of Sikkim,  
Gangtok.
2. The Secretary,  
Department of Personnel,  
Adm. Reforms & Training,  
Government of Sikkim  
Gangtok, East Sikkim.
3. District Collector,  
Office of the District Collectorate,  
East Sikkim at Gangtok.
4. Sub-Divisional Magistrate,  
Pakyong, East Sikkim.



5. Shri Khemraj Bhattarai,  
C/o Chiran Rizal,  
Enchey Sr. Secondary School,  
Gangtok, East Sikkim.

...Respondents.

For the petitioner : Mr. B. Sharma, Sr. Advocate with  
Mr. Bhola N. Sharma, Advocate.

For the respondents : Mr. J.B. Pradhan, Additional  
Advocate General with Mr. Karma  
Thinlay Namgyal, Government  
Advocate and Mr. S.K. Chettri,  
Asstt. Govt. Advocate for official  
respondents No. 1 to 4

Mr. A. Moulik, Sr. Advocate with Mr.  
N.G. Sherpa and Ms. K.D. Bhutia,  
Mr. Manish Kr. Jain and Mr. Leonard  
Gurung, Advocates for respondent  
No. 5

**(II) Writ Petition (C) No. 02 of 2010**

Miss Onissa Dechhen Gurung,  
D/o Shri Tej Bahadur Gurung,  
R/o Season Hotel,  
Namnang,  
Gangtok, East Sikkim.

...Petitioner.

-versus-

1. The State of Sikkim,  
Through the Chief Secretary,  
Government of Sikkim,  
Gangtok, Sikkim.
2. The District Collector, West Sikkim  
Through the District Magistrate,  
Gyalshing, West Sikkim.



3. Ms. Baby Mukhia,,  
D/o Shri Durga Prasad Mukhia,  
R/o Rujich Building, Street No.2,  
Jorethang, South Sikkim.

Also residing at Chakung Busty,  
Soreng Sub-Division,  
West Sikkim.

...Respondents.

For the petitioner : Mr. B.R. Pradhan, Sr. Advocate with  
Mr. Jorgay Namkha, Ms. Yangchen  
D. Gyatso, Ms. Zola Megi and Ms.  
Denkila Bhutia, Advocates.

For the respondents : Mr. J.B. Pradhan, Additional  
Advocate General with Mr. Karma  
Thinlay Namgyal, Government  
Advocate and Mr. S.K. Chettri,  
Asstt. Govt. Advocate for official  
respondents No. 1 and 2.

Mr. A. K. Upadhyaya, Sr. Advocate  
with Mr. Ashim Chhetri, Mr. D.  
Tewari and Ms. Mukul R. Parajuli,  
Advocates for respondent No. 3.

**III. Writ Petition (C) No. 16 of 2009**

Shri Khemraj Bhattarai,  
Son of Shri Siwanath Bhattarai,  
Resident of Lower Samdong,  
P.O. Raley Khasey,  
East Sikkim.

...Petitioner

-versus-



1. State of Sikkim through  
The Secretary,  
Department of Personnel,  
Adm. Reforms & Training,  
Government of Sikkim,  
Gangtok.
2. Sikkim Public Service Commission,  
Represented by the Secretary,  
Gangtok, P.O. Gangtok,  
East Sikkim.
3. Ms. Bina Devi Sharma,  
D/o Shri Tanka Ram Sharma,  
a resident of Balwakhani  
P.O. & P.S. Gangtok  
East Sikkim.
4. The Sub-Divisional Magistrate,  
Sub-Divisional Administrative Centre,  
Government of Sikkim,  
Pakyong, East Sikkim.

...Respondents

For the petitioner : Mr. A. Moulik, Sr. Advocate with Mr. N.G. Sherpa and Ms. K.D. Bhutia, Mr. Manish Kr. Jain and Mr. Leonard Gurung, Advocates

For the respondents : Mr. J.B. Pradhan, Additional Advocate General with Mr. Karma Thinlay Namgyal, Government Advocate and Mr. S.K. Chettri, Asstt. Govt. Advocate and Mr. J.K. Kharka, Advocate (Standing Counsel for SPSC) for official respondents

Mr. B. Sharma, Sr. Advocate with Mr. Bhola N. Sharma, Advocate for respondent No. 3

**IV. Writ Petition (C) No. 25 of 2009**

Ms. Baby Mukhia,  
D/o Shri D.P. Mukhia,  
R/o Rujich Building,  
Street No. 2,  
Jorethang,  
South Sikkim.

...Petitioner

-versus-

1. State of Sikkim  
Through the Secretary,  
Department of Personnel, Adm. Reforms &  
Training, Public Grievances, Carrier Options  
and Employment, Skill Development and  
Chief Minister's Self Employment Scheme,  
Government of Sikkim,  
Gangtok.
2. Sikkim Public Service Commission,  
Through the Secretary,  
Government of Sikkim,  
Gangtok, East Sikkim.
3. The District Collectorate,  
West Sikkim  
Through the District Collector,  
Gyalshing, West Sikkim.
4. Ms. Onissa Dechhen Gurung,  
D/o Shri Tej Bahadur Gurung,  
Retired Principal Chief Engineer-cum-  
Secretary,  
R/o Hotel Four Season, Namnang,  
P.O. & P.S. Gangtok, East Sikkim.

...Respondents



- For the petitioner : Mr. A. K. Upadhyaya, Sr. Advocate with Mr. Ashim Chhetri, Mr. D. Tewari, Ms. Binita Chhetri and Ms. Mukul R. Parajuli, Advocates.
- For the respondents : Mr. J.B. Pradhan, Additional Advocate General with Mr. Karma Thinlay Namgyal, Government Advocate and Mr. S.K. Chettri, Asstt. Govt. Advocate and Mr. J.K. Kharka, Advocate (Standing Counsel for SPSC) for official respondents No. 1, 2 and 3
- Mr. B. R. Pradhan, Sr. Advocate with Mr. Jorgay Namkha, Ms. Yangchen D. Gyatso, Ms. Zola Megi and Ms. Denkila Bhutia, Advocates for respondent No. 4

## **JUDGEMENT**

***DINAKARAN, CJ***

### **I. The Pivotal Questions**

**1.** The pivotal questions that arise for consideration in these Writ Petitions are –

- (i) Whether a daughter of a Class-I officer of the rank of Joint Secretary and above in the State Government is excluded from the reservation made for Other Backward Classes, herein after referred to as OBC, as per the Notification dated



05.12.2003 of the Government of Sikkim, despite her marriage, on the ground that she belongs to Creamy Layer?

and

- (ii) Whether a daughter of a Class-I Officer of the rank of Joint Secretary and above in the State Government is excluded from the reservation made for Most Backward Classes, herein after referred to as MBC, as per the Notification dated 05.12.2003 of the Government of Sikkim, in spite of retirement of her father, on the ground that she belongs to Creamy Layer?

**2.1** The Writ Petitions No. 28 of 2009 filed by Ms. Bina Devi Sharma and No. 16 of 2009 filed by Khemraj Bhattarai are inter-connected and they are related to:

"question No. (i), Whether a daughter of a Class-I officer of the rank of Joint Secretary and above in the State Government is excluded from the reservation made for Other Backward Classes, herein after referred to as OBC, as per the Notification dated 05.12.2003 of the Government of Sikkim, despite her marriage, on the ground that she belongs to Creamy Layer?"

**2.2** The Writ Petitions No. 2 of 2010 filed by Onissa Dechhen Gurung and No. 25 of 2009 filed by Kumari Baby Mukhia are inter-connected and they are related to:



"question No. (ii), Whether a daughter of a Class-I Officer of the rank of Joint Secretary and above in the State Government is excluded from the reservation made for Most Backward Classes, herein after referred to as MBC, as per the Notification dated 05.12.2003 of the Government of Sikkim, in spite of retirement of her father, on the ground that she belongs to Creamy Layer?"

## **II. Brief Facts relating to Question No. 1**

**3.1** Ms. Bina Devi Sharma is the writ petitioner in W.P.(C) No. 28 of 2009. She obtained an OBC Certificate on 16.08.2004 from the office of the Sub-Divisional Magistrate, Pakyong, the 4<sup>th</sup> respondent therein. On the strength of the OBC Certificate, she applied for the post of Junior Grade in Sikkim State Civil Service, got selected and appointed to the said post reserved for the OBC category by the Department of Personnel, Adm. Reforms and Training, Government of Sikkim, by a proceeding dated 21.10.2008. Mr. Khemraj Bhattarai, the 5<sup>th</sup> respondent therein, by a complaint dated 12.06.2009 questioned the OBC Certificate dated 16.08.2004 issued to Ms. Bina Devi Sharma, on the ground that she belongs to 'Creamy Layer'. The Sub-Divisional Magistrate, Pakyong, East Sikkim, the 4<sup>th</sup> respondent therein, after due enquiry, by proceedings dated 07.09.2009 cancelled the OBC Certificate dated 16.08.2004 issued to Ms. Bina Devi Sharma, holding that Ms. Bina Devi Sharma belongs to creamy layer of the OBC as per the Notification dated 05.12.2003 of the



Government of Sikkim read with the clarification dated 14.10.2004 issued by the Government of India, Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training, as her father Mr. Tanka Ram Sharma was working as Class I Officer in the Government of Sikkim, and the fact that she was married and later got divorced, are not relevant. Hence, she filed the Writ Petition (C) No. 28 of 2009.

**3.2** Placing reliance on the proceedings dated 07.09.2009 issued by the Sub-Divisional Magistrate, Pakyong, East Sikkim cancelling the Community Certificate dated 16.08.2004, issued to Ms. Bina Devi Sharma, Mr. Khemraj Bhattarai filed Writ Petition No. 16 of 2009 for issue of Writ of Quo-Warranto questioning the authority of Ms. Bina Devi Sharma to hold and continue to hold the present post of Junior Grade in Sikkim State Civil Service, and also for consequential relief, viz., a direction for appointing him as Junior Grade in Sikkim State Civil Service in place of Ms. Bina Devi Sharma, as he stands next to Ms. Bina Devi Sharma in the OBC Merit Order.

### **III. Brief facts relating to the Question No. (ii)**

**4.1** Ms. Onissa Dechhen Gurung, the petitioner in W.P.(C) No. 2 of 2010 obtained a MBC Certificate from the office of the



Block Development Officer, Soreng, West Sikkim on 23.11.2007. On the strength of the Certificate, she applied for the post of Junior Grade in Sikkim State Civil Service, got selected and appointed to the said post reserved for MBC (W) category by the Department of Personnel, Adm. Reforms and Training, Government of Sikkim by proceedings dated 03.11.2008. But one Kumari Baby Mukhia made a complaint before the District Collector, West, questioning the MBC Certificate issued to Ms. Onissa Dechhen Gurung by the Block Development Officer, Soreng, contending that the latter belongs to creamy layer as her father was a Class I Officer in the Government of Sikkim. The District Magistrate, after due enquiry, by proceedings dated 13.01.2010, cancelled the MBC Certificate dated 23.11.2007 issued to Ms. Onissa Dechhen Gurung by the Block Development Officer holding that she belongs to creamy layer as her father was working as the Principal Chief Engineer-cum-Secretary to Government of Sikkim. She is thus excluded from the Most Backward Class, as per the Notification dated 05.12.2003 of the Government of Sikkim read with the clarification dated 14.10.2004 issued by the Department of Personnel and Training, Ministry of Personnel, Public Grievances and Pensions, Government of India.



4.2 Placing reliance on the proceedings dated 13.01.2010 of the District Collector, West, Kumari Baby Mukhia filed Writ Petition (C) No. 25 of 2009 challenging the appointment dated 03.11.2008 of Ms. Onissa Dechhen Gurung in the Junior Grade of the Sikkim State Civil Service as MBC (W) candidate and for consequential reliefs. While so, Ms. Onissa Dechhen Gurung filed the Writ Petition (C) No. 02 of 2010 challenging the proceedings of the District Magistrate, West Sikkim dated 13.01.2010, whereby the MBC Certificate dated 23.11.2007 issued to her by the Block Development Officer, Soreng was cancelled. Hence the Writ Petitions No. 02 of 2010 and No. 25 of 2009.

**IV. Previous challenge to the appointments of Ms. Bina Devi Sharma and Ms. Onissa Dechhen Gurung in W.P.(C) No. 31 of 2008 dismissed on 05.06.2009.**

5. It is relevant to mention that one Chiran Rizal, filed a Writ Petition (C) No. 31 of 2008 before this Court, challenging the appointment of Ms. Bina Devi Sharma as well as Ms. Onissa Dechhen Gurung in the Junior Grade of the Sikkim State Civil Service, on the ground that both of them belong to the creamy layer in Other Backward Classes and Most Backward Classes respectively, as their fathers were Class I Officers in the



Government of Sikkim. The said Writ Petition was heard and dismissed by a Judgement dated 05.06.2009.

**V. Joint hearing**

**6.1** Heard Mr. B. Sharma, learned Senior Counsel for Ms. Bina Devi Sharma, petitioner in W.P.(C) No. 28 of 2009 and Mr. A. Moulik, learned Senior Counsel for Mr. Khemraj Bhattarai, the contesting respondent in W.P.(C) No. 28 of 2009 and also the petitioner in W.P.(C) No. 16 of 2009.

**6.2** Heard Mr. Bhaskar Raj Pradhan, learned Senior Counsel for Ms. Onissa Dechhen Gurung, petitioner in W.P.(C) No. 02 of 2010 and Mr. A.K. Upadhyaya, learned Senior Counsel for Kumari Baby Mukhia, the contesting respondent in W.P.(C) No. 2 of 2010 and also the petitioner in W.P.(C) No. 25 of 2009.

**6.3** Heard Mr. J.B. Pradhan, learned Additional Advocate General appearing on behalf of the State of Sikkim and other State Government authorities.



**VI. Relevant and undisputed materials relating to the issues available on record**

**7.** For better appreciation of the facts and circumstances of the case, it is appropriate to refer to the following vital and undisputed materials available on record.

**8.1** Mr. Tanka Ram Sharma (Mr. T. R. Sharma), the father of Ms. Bina Devi Sharma, was initially appointed as Assistant Teacher on 03.12.1969 and 29.04.1970 and the said appointment was temporary. By proceedings dated 19.02.1974 of the Chief Conservator of Forest, Government of Sikkim, Mr. T.R. Sharma was selected to undergo two years Diploma Course in Higher Forestry at Indian Forest College, Dehradun and thereafter, he was appointed to the Indian Forest Service by proceedings dated 10.02.1981 with effect from 08.03.1978 and confirmed in the said service by proceedings dated 08.09.1982. Then by Office Order dated 12.03.1998 promoted as Principal Chief Conservator of Forest, and subsequently re-designated as Principal Chief Conservator of Forest-cum-Secretary, Forest Department by Office Order dated 16.03.1998.

**8.2** The marriage of Ms. Bina Devi Sharma was held on 23.06.2003 and the same was dissolved by a decree of divorce



dated 24.03.2007 by mutual consent in Family Court (Civil) Case No. 18 of 2006 on the file of the Family Court, Gangtok, Sikkim.

**8.3** The Government of Sikkim by Notification dated 17.09.2003 recognized and declared the 'Bahun' Community as Other Backward Classes (OBC) in the State of Sikkim.

**9.1** It is also relevant to note that the Government of Sikkim by a Notification dated **05.12.2003**, in compliance of the decision of the Apex Court in *Indra Sawhney vs. Union of India* (AIR 1993 SC 477), notified the guidelines, keeping in view socio-economic criteria, to exclude socially advanced persons/sections (creamy layer) from the reservation for MBC and OBC in the State of Sikkim.

**9.2** Schedule - I of the said Notification dated 05.12.2003, provides the list of persons/sections (creamy layer), who are excluded from the reservation for MBC and OBC in the State of Sikkim; Schedule - II prescribes the format of Certificate to be issued for MBC; and Schedule - III prescribes the format of Certificate to be issued for OBC.



**9.3** For better understanding and appreciation of the issues involved, it is apt to extract the Notification No. 7/GOS-9(15) SWD dated 05.12.2003, which reads as hereunder:

GOVERNMENT OF SIKKIM  
WELFARE DEPARTMENT

No. 7/GOS-9(15)SWD

Dated 5<sup>th</sup> December, 2003

NOTIFICATION

In partial modification of Notification No.3/WD/95 dated the 6<sup>th</sup> June, 1995, published in Extraordinary Gazette No. 125 dated the 16<sup>th</sup> June, 1995, the Governor of Sikkim is hereby pleased to notify the following namely :-

In **Indra Sawhney** Vs. Union of India case AIR 1993 – Supreme Court 477 – the **Hon'ble Supreme Court directed all State Governments** to constitute a permanent body for entertaining, examining and recommending for inclusion and/or exclusion of the class/caste of people in the list of Backward Classes to be notified by the State Governments within a period of four months from the date of Judgment of 16<sup>th</sup> November, 1992. **It also directed that keeping view the socio-economic criteria to exclude socially advanced person/section (creamy layer) from the list of Other Backward Classes.** Guidelines should be issued as soon as possible.

2. **Based on the Central Government guidelines**, the Sikkim Commission for Backward Classes has already recommended the criteria for exclusion of the creamy layer. To give effect to this judgment and to give relief to the Socially and Educationally Backward Classes or Most Backward Classes and Other Backward classes, the **State Government has decided to notify the creamy layer in the list of Socially and Educationally Backward Classes or Most Backward Classes and Other Backward Classes.** The criteria are provided in Schedule I appended to this Notification.

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.**

4. The authority authorised to issue such certificates are the District Magistrates, Additional District Magistrates and Sub-Divisional Magistrates of the area where the candidate or his/her family normally resides. **Certificates to be issued will be in the Form as prescribed in Schedule II and Schedule III appended to this Notification.** The certificate will be accepted by all the Departments and Institutions for giving benefit of reservation to Socially and Educationally Backward Classes or Most Backward Classes and Other Backward Classes. The authorities empowered to issue certificate are also authorized to make a slight variation of the language of the certificate if any institution has prescribed its own Form.

This supercedes Notification No. 3/WD/95 dated 6<sup>th</sup> June, 1995.

By order and in the name of the Governor.

Sd/-  
C. CINTURY  
PRINCIPAL SECRETARY  
SOCIAL WELFARE DEPARTMENT  
(F. No. GOS 9(15)SWD/WD"

(emphasis supplied)

#### "SCHEDULE I

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

Description of Category	To whom rule of exclusion will apply
I. ....	.....
II. Service Category	<b>Son (s) and Daughter (s) of -</b>
(A) 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	(a) <b>Parents</b> , both of whom are <b>Class I Officers</b> of the rank of Joint Secretary and above in the State Government (b) <b>Parents</b> , either of whom <b>is Class I Officer</b> of the ranks of Joint Secretary and above in the State Government.



	<p>(c) <b>Parents</b> both of whom are <b>Class I Officers</b> of the rank of Joint Secretary and above in the State Government, but one of them dies or suffers permanent incapacitation;</p> <p>(d) <b>Parents, either of whom is a Class I Officer</b> of the rank of Joint Secretary and above in State Government and such parent <b>dies or suffers</b> permanent Incapacitation, <b>and before such death or such incapacitation has had the benefit of employment</b> in any International Organisation like UN, IMF, World Bank, Etc. <b>for a period of not less than 5 years.</b></p> <p>(e) <b>Parents</b>, both of whom are <b>Class I Officers</b> of the rank of Joint Secretary and above in the State Government <b>die or suffer permanent incapacitation and before such death or such incapacitation of the both, either of them has had the benefit of employment</b> in any International Organisation like UN, IMF, World Bank, etc. <b>for a Period not less than 5 Years.</b> <b>Provided that the rule of exclusion shall not apply in the following case :-</b></p> <p>(a) <b>Sons and daughters of parents either of whom or both of whom are Class I Officer</b> of the rank of Joint Secretary and above in the State Government <b>and such parent(s) dies/die or suffer permanent</b></p>
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	<p><b>incapacitation;</b>  (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;</p>
(B) Employees in public Sector Undertakings, etc.	.....
III. Armed Forces including Paramilitary Forces (Persons holding Civil posts are not included)	.....
IV. Professional Class and those engaged in trade and Industry	.....
V. Property owners	.....
(A) Agricultural holding	.....
(B) Plantations	.....
(C) Vacant land and/or buildings in urban areas or urban agglomerations.	.....
VI. Income/Wealth Test	<p>Son(s) and daughter(s) of –  (a) Persons having gross annual Income of Rs.2.00 lakhs (Rupees two lakhs) or above;  (b) Persons of Categories I, II, III and V-A who are not disentitled to the benefit of reservation but have income from other sources of wealth which will bring them within the income mentioned above.</p> <p>EXPLANATION –  (i) .....  (ii) .....</p> <p>EXPLANATION –  Wherever the expression permanent incapacitation occurs in this schedule, it shall mean incapacitation which results in putting an officer out of service.</p>

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(emphasis supplied)



## " SCHEDULE - II

## CERTIFICATE OF MOST BACKWARD CLASSES

(As notified vide Government of India, Ministry of Welfare Resolution No. 12011/68/93-BCC(C) dated 10<sup>th</sup> September, 1993, Ministry of Social Justice and Empowerment Resolution, New Delhi, the 6<sup>th</sup> December, 1999 and State Government Notification No. 5A/SWD dated 17<sup>th</sup> September, 2003)

This is to certify that Shri/Smt./Miss.....  
.....and Ministry of Social Justice  
and Empowerment Resolution New Delhi, the 6<sup>th</sup> December, 1999.

Shri/Smt/Miss .....  
.....District of State.

This is to certify **that he/she does not belong to the persons/sections (Creamy Layer) mentioned in column 3 of the Schedule to the Government of India**, Department of Personnel & Training OM No. 36012/22/93-Estt(SCT), **dated 8.9.1993** and **Government of Sikkim Notification No.: 7/GOS-9(15)SWD dated 5<sup>th</sup> December, 2003.**

PHOTO

DISTRICT COLLECTOR/  
ADDITIONAL DISTRICT COLLECTOR/  
SUB-DIVISIONAL MAGISTRATE"

(emphasis supplied)

## " SCHEDULE III

## CERTIFICATE OF OTHER BACKWARD CLASSES

(As notified vide State Government Notification No.5A/SWD dated 17<sup>th</sup> September, 2003)

This is to certify that Shri/Smt./Miss.....  
.....dated 19<sup>th</sup> September,  
2003 in the State of Sikkim.

Shri/Smt/Km.....  
.....State.

This is to certify **that he/she does not belong to the persons/sections (Creamy Layer) mentioned in column 3 of**



**the Schedule to the Government of India**, Department of Personnel & Training OM No. 36012/22/93-Estt(SCT), **dated 8.9.1993** and **Government of Sikkim Notification** No.: 7/GOS-9(15)SWD **dated 5<sup>th</sup> December, 2003**.

PHOTO

DISTRICT COLLECTOR/  
ADDITIONAL DISTRICT COLLECTOR/  
SUB-DIVISIONAL MAGISTRATE"

(emphasis supplied)

**9.4** The notification of the Government of India dated 14.10.2004, clarifying the criteria prescribed in the Office Memorandum dated 08.09.1993, reads as hereunder: -

"No.36033/5/2004 - Estt. (Res.)  
GOVERNMENT OF INDIA  
MINISTRY OF PERSONNEL, PUBLIC GRIEVANCES &  
PENSIONS, DEPARTMENT OF PERSONNEL & TRAINING

New Delhi, Dated, the 14<sup>th</sup> October, 2004.

To,  
The Chief Secretaries of all the States/Union Territories.

Subject. Clarifications regarding creamy layer amongst  
OBCs.

Sir,

I am directed to invite your attention **to the Schedule to this Department's OM No. 36012/22/93-(SCT) dated 8<sup>th</sup> September, 1993 which contains the criteria to determine the creamy layer amongst the OBCs.** In regard to the children of the persons in civil services of the Central and State Governments, it provides that son(s) and daughter(s) of:

- a) .....
- b) .....
- to
- n) .....



2. ....  
i. ....  
ii. ....  
iii. ....

3. ....

4. Following questions have been raised time to time about the application of the above provisions to determine creamy layer.

(i) Will the sons and daughters of parents either of whom or both of whom are directly recruited Class I/Group A officer(s) and such parent(s) dies/die or suffers /suffer permanent incapacitation **after retirement** be treated to be excluded from the creamy layer?

(ii) Will the sons and daughters of parents both of whom are directly recruited Class II/Group B officers and one of them dies or suffer permanent incapacitation **after retirement** be treated to be excluded from the creamy layer?

(iii) Will the sons and daughters of parents both of whom are directly recruited Class II/Group B officers and both of them dies or suffer permanent incapacitation **after retirement** even though either of them has had got the benefit of employment in any international Organisation like UN, IMF, World Bank, etc. for a period of not less than 5 years before their death or permanent incapacitation be treated to be excluded from the purview of creamy layer?

(iv) Will the sons and daughters of parent(s) **who retire from the service**, on the basis of which their sons and daughters fall in creamy layer, continue to fall in creamy layer after retirement of the parent(s)?

(v) Will the sons and daughters of parents of whom husband is directly recruited Class III/Group C or Class IV/Group D employee and he gets into Class I/Group A at the age of 40 or earlier be treated to be falling in creamy layer?

(vi) Will a candidate who himself is a directly recruited Class I/Group A officer or a directly recruited Class II/Group D employee and he gets into Class I/Group A at the age of 40 or earlier be treated to be falling in creamy layer?



(vii) Will a candidate who himself is a directly recruited Class I/Group A officer or a directly recruited Class II/Group B officer who got into Class I/Group A at the age of 40 or earlier be treated to be falling in creamy layer on the basis of his service status?

(viii) The instructions provide that **a lady belonging to OBC category who has got married to a directly recruited Class I/Group A officer shall not be treated as falling in creamy layer on the basis of her marriage.** Will a man belonging to OBC category who is married to a directly recruited Class I/ Group 'A' officer be treated as falling in creamy layer on the basis of his marriage?

(ix) .....

(x) .....

5. It is clarified in regard to clauses (i), (ii) and (iii) of para 4 that the sons and daughters of

(a) Parents either of whom or both of whom are directly recruited Class I/ Group A officer and such parents(s) **dies/die or suffers/suffer permanent incapacitation while in service;**

(b) Parents both of whom are directly recruited Class II/Group B officer and one of them dies or suffers permanent incapacitation while in service; and

(c) Parents both whom are directly recruited Class II/Group B officers and both of them die or suffer permanent incapacitation while in service, even though 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** before their death or permanent incapacitation are not treated to be falling in creamy layer. But if the parent(s) **dies/die or suffers/suffer permanent incapacitation, in such cases after retirement from service, his/their sons and daughters would be treated to be falling in creamy layer** and would not get the benefit of reservation.

6. In regard to clause (iv) of para 4, it is clarified that **sons and daughters of parents who are included in the creamy layer on the basis of service status of their parents shall continue to be treated in creamy**



**layer even if their parents have retired or have died after retirement.**

7. In regard to clause (v) of para 4, it is clarified that the sons and daughters of parents of whom only the husband is a directly recruited Class II/Group B officer who gets into Class I/Group A at the age of 40 or earlier are treated to be creamy layer. **If the father is directly recruited Class III/Group C or Class IV/Group D employee and he gets into Class I/Group A at the age of 40 or earlier, his sons and daughters shall not be treated to be falling in creamy layer.**

8. In regard to clause (vi), (vii) and (viii) of para 4, **it is clarified that the creamy layer status of a candidate is determined on the basis of the status of his parents and not on the basis of his own status or income or on the basis or income of his/her spouse.** Therefore, while determining the creamy layer status of a person the status or the income of the candidate himself or of his/her spouse shall not be taken into account.

9. ....

10. ....

11. You are requested to bring the contents of this letter to all concerned in the State.

Yours faithfully,

**(K. G. Verma)**

Deputy Secretary to the Govt. of India"

(emphasis supplied)

**10.1** As the 'Bahun' Community was notified as Other Backward Class by Notification dated 17.09.2003, Ms. Bina Devi Sharma applied for OBC Certificate enclosing her Income Certificate dated 05.08.2004, wherein she had only mentioned her income, without mentioning the employment of her father as Class I Officer or his income.



**10.2** On the basis of the above details, the Sub-Divisional Magistrate, Pakyong, the 4<sup>th</sup> respondent, issued the OBC Certificate dated 16.08.2004 in favour of Ms. Bina Devi Sharma, which reads as hereunder:

"Government of Sikkim  
EAST DISTRICT COLLECTORATE  
GANGTOK-SIKKIM  
SCHEDULE III

Memo No. 3180/SDOP

Dated 16.8.04

**CERTIFICATE OF OTHER BACKWARD CLASSES**

(As notified vide state government notification No: 5A/SWD dated 17<sup>th</sup> September, 2003)

This is to certify that SHRI/SMT/MISS **Bina Devi Bhandari (Sharma)** D/o **Tanka Ram Bhandari (Sharma)** of Pakyong village **East Pendam** District whose photograph is pasted below, belongs to the 'Bahun' community which is recognised as Other Backward Classes under Notification No: 5A/SWD dated 17<sup>th</sup> September 2003 published in Government Extraordinary Gazette Sikkim Notification No: 308 dated 19<sup>th</sup> September, 2003 in the State of Sikkim.

Shri/Smt/Km. **Bina Devi Bhandari (Sharma)** her family ordinarily reside(s) in the **East Pendam, East** District of the Sikkim State. **This is also to certify that he/she does not belong to the persons/sections (Creamy layer) mentioned in Column 3 of the Schedule to the Government of India, Department of Personnel and Training O. M. No. A16012/22/93-East (SCT) dated 8.9.1993 and the government of Sikkim Notification No. 7/GOS-9(15) SWD dated 5<sup>th</sup> December, 2003.**

Sd/-  
Sub-Divisional Magistrate/Office,  
Pakyong Sub-Division,  
East Sikkim."

(emphasis supplied)



**11.1** By Notification dated 15.12.2006, Government of Sikkim invited applications for filling up 40 posts of Junior Grade in the Sikkim State Civil Service, fixing 31.05.2007 as the last date for receipt of applications. In the said advertisement, the Government also notified the reservation on roster point, which reads as under:

	<u>No. of Posts</u>	<u>Roster Point</u>
<b>Reservation</b>	07-UR	1, 4, 11, 14, 17, 26, 30
	02-UR(W)	8, 21
	01-UR(W)BLV	34
	01-UR(Ex-S)	38
	09-ST	2, 7, 12, 16, 22, 25, 31, 33, 37
	04-ST(W)	10, 19, 28, 40
	<b>06-MBC</b>	3, 9, 18, 24, 27, 35
	<b>02-MBC(W)</b>	15, 32
	<b>04-OBC</b>	6, 20, 29, 36
	<b>01-OBC (W)</b>	13
	02-SC	5, 23
	01-SC(W)	39
<b>Total</b>	<b><u>40 posts</u></b>	

Accordingly, six posts were reserved for MBC, two posts were reserved for MBC (W), four posts were reserved for OBC and one post was reserved for OBC (W), which reservations we are concerned with in these writ petitions.

**11.2.1** Pursuant to the said advertisement dated 16.12.2006, the Sikkim Public Service Commission conducted written and Viva Voce Tests. Based on the performance and merit of the candidates in the said tests, the Sikkim Public Service



Commission selected and prepared combined Merit Order for all the candidates as well as a separate Merit Order for OBC and MBC candidates, and they are extracted as hereunder.

**11.2.2** The top 11 candidates in the combined Merit Order reads as follows:

**SELECTION TO THE POST OF JR. GRADE OFFICER IN THE SIKKIM STATE CIVIL SERVICE**

**Merit Order of UNRESERVED (UR) Candidates**

Sl. No.	Roll No.	Name	Gender
1.	572	Mr. Ujjwal Rai	Male
2.	2893	Km. Cheeki Ongkula	Female
3.	3231	Mr. Jigmi Wangchuk	Male
4.	3373	Ms. Anita Subba	Female
<b>5.</b>	<b>3166</b>	<b>Km. Rohini Pradhan</b>	<b>Female</b>
6.	3521	Km. Tashi Choden Bhutia	Female
7.	1379	Mrs. Rinchen Doma Bhutia	Female
8.	1652	Mr. Sonam Topgay Tashi	Male
9.	3597	Km. Thinlay Pema Chankapa	Female
<b>10.</b>	<b>3059</b>	<b>Km. Koshi Kapil</b>	<b>Female</b>
11.	3242	Km. Karnitmit Lepcha	Female

(emphasis supplied)

11 posts were reserved for Unreserved candidates, namely 7 UR, 2 UR (W), 1-UR(Ex-S) and 1 UR (W) BLV, to which even meritorious reserved candidates, who come within the top 11 ranks in the combined Merit Order are also entitled to be considered.

**11.2.3** **SELECTION TO THE POST OF JR. GRADE OFFICER IN THE SIKKIM STATE CIVIL SERVICE**

**Merit Order of OBC Candidates**

Sl. No.	Roll No.	Name	Gender
<b>1.</b>	<b>3166</b>	<b>Km. Rohini Pradhan</b>	<b>Female</b>
<b>2.</b>	<b>3059</b>	<b>Km. Koshi Kapil</b>	<b>Female</b>





3.	3094	Mr. Dhiraj Subedi	Male
4.	971	Mr. Depen Sharma	Male
5.	2657	Mrs. Bandana Chettri	Female
<b>6.</b>	<b>567</b>	<b>Km. Bina Devi Sharma</b>	<b>Female</b>
<b>7.</b>	<b>2466</b>	<b>Mr. Khem Raj Bhattarai</b>	<b>Male</b>
<b>8.</b>	<b>343</b>	<b>Mr. Chiran Rizal</b>	<b>Male</b>
<b>9.</b>	<b>665</b>	<b>Km. Bibhuti Pradhan</b>	<b>Female</b>
10 to 36	...	...	...

(emphasis supplied)

Ms. Bina Devi Sharma, Shri Khemraj Bhattarai and Chiran Rizal, petitioner in W.P.(C) No. 31 of 2008, which was dismissed by this Court vide judgement dated 05.06.2009, are ranked 6, 7 and 8 in the OBC list.

#### 11.2.4

#### SELECTION TO THE POST OF JR. GRADE OFFICER IN THE SIKKIM STATE CIVIL SERVICE

##### Merit Order of MBC Candidates

Sl. No.	Roll No.	Name	Gender
1	3384	Mr. Abinash Rai	Male
2	2541	Mr. Bishal Mukhia	Male
3.	2452	Km. Subha Mukhia	Female
4.	1050	Mrs. Sahrmistha Rai	Female
5.	3268	Mr. Suraj Gurung	Male
6.	3783	Km. Prerna Chamling	Female
<b>7.</b>	<b>3378</b>	<b>Km. Onissa Dechhen Gurung</b>	<b>Female</b>
8.	667	Mr. Beedur Gurung	Male
9.	2782	Mr. Kiran Rai	Male
10.	716	Km. Parina Gurung	Female
<b>11.</b>	<b>200</b>	<b>Km. Baby Mukhia</b>	<b>Female</b>

(emphasis supplied)

Ms. Onissa Dechhen Gurung and Kumari Baby Mukhia, the petitioner and contesting respondent in W.P.(C) No. 2 of 2010 respectively are ranked at 7 and 11 in the MBC list.

#### 11.3

Among the top 11 candidates in the combined Merit Order of Unreserved Candidates, **Km. Rohini Pradhan and Km.**



Koshi Kapil viz. 5<sup>th</sup> & 10<sup>th</sup> rank holders in the combined Merit Order respectively belong to OBC. As four posts were reserved for OBC, leaving the first two OBC candidates, namely, Km. Rohini Pradhan and Km. Koshi Kapil, rank holders 1 and 2 in the OBC merit list, who are selected as UR candidates, the next four rank holders, namely, 3<sup>rd</sup> rank holder Mr. Dhiraj Subedi, 4<sup>th</sup> rank holder Mr. Deepen Sharma, 5<sup>th</sup> rank holder Mrs. Bandhana Chetri, and 6<sup>th</sup> rank holder Ms. Bina Devi Sharma in the OBC Merit Order were selected for the 4 posts reserved for OBC. Accordingly, Ms. Bina Devi Sharma was also selected as the last OBC candidate, and hence Mr. Khemraj Bhattarai who is ranked next, i.e. No. 7, stakes his claim for consideration, as Mr. Chiran Rizal is ranked at 8<sup>th</sup>, and 9<sup>th</sup> rank holder Ms. Bibhuti Pradhan is selected against the post reserved for OBC (W).

**11.4** Among the top 11 rank holders of combined Merit Order, no one belongs to MBC. Therefore, the first six rank holders in MBC Merit Order were selected against the six posts reserved for MBCs. The 7<sup>th</sup> rank holder, namely, Ms. Onissa Dechhen Gurung and 10<sup>th</sup> rank holder Km. Parina Gurung were selected for the two posts reserved for MBC (W), leaving the 8<sup>th</sup> and 9<sup>th</sup> rank holders as they are male candidates, and therefore



the next, i.e. 11<sup>th</sup> rank holder Km. Baby Mukhia, stakes her claim for consideration to the post reserved for MBC (W).

**12.1** The Sikkim Public Service Commission, by its proceedings dated 04.10.2008 recommended 40 names of the candidates for filling up of 40 posts in Junior Grade of Sikkim State Civil Service to the Government of Sikkim, where under Ms. Bina Devi Sharma was selected against the post reserved for OBC and Ms. Onissa Dechhen Gurung was selected for the post reserved for MBC (W).

**12.2** The said proceedings of the Sikkim Public Service Commission dated 04.10.2008 was challenged by one Chiran Rizal in Writ Petition No. 31 of 2008; as at that time, the OBC Certificate issued to Ms. Bina Devi Sharma and MBC Certificate issued to Ms. Onissa Dechhen Gurung were not cancelled.

**12.3** Chiran Rizal specifically challenged the OBC Certificate issued to Ms. Bina Devi Sharma and MBC Certificate issued to Ms. Onissa Dechhen Gurung in the said Writ Petition No. 31 of 2008, on the ground that the fathers of Ms. Bina Devi Sharma and Ms. Onissa Dechhen Gurung, namely, Mr. Tanka Ram Sharma and Mr. Tej Bhadur Gurung respectively, were working as Class I Officers in the State Government and as such, they belong to the



creamy layer and they are not entitled to be treated as Backward Class as per the decision of the Apex Court in ***Indra Sawhney (1<sup>st</sup>)*** case (1992) Supp. 3 SCC 217 and ***Indra Sawhney (2<sup>nd</sup>)*** case (2000) 1 SCC 168.

**12.4** However, the State Government in W.P.(C) No. 31 of 2008 contended that the petitioner Chiran Rizal, who belongs to OBC, has no right to challenge the selection and appointment of Onissa Dechhen Gurung who was selected to the post reserved for MBC (W); and that, Chiran Rizal, ranked at 8<sup>th</sup> in OBC Merit Order. Further it was contended that he has no locus standi to question the selection and appointment of Ms. Bina Devi Sharma who stood at 6<sup>th</sup> rank in the OBC Merit Order because Chiran Rizal is not the next candidate in the OBC list to stake claim for consideration.

**12.5** The above stand of the State Government was recorded by the Division Bench in its judgment dated 05.06.2009, in W.P.(C) No. 31 of 2008, as hereunder:

**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 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.**

**12.6** The State Government placed reliance on the following decisions of the Apex Court in support of their above contention in W.P.(C) No.31 of 2008:-

- (i) **Om Prakash Shukla vs. Akhilesh Kumar Shukla & Ors.** 1986 (Supp) SCC 285
- (ii) **Madan Lal & Ors. Vs. State of J & K & Ors.** (1995) 3 SCC 486
- (iii) **Chandra Prakash Tiwari & Ors. Vs. Shakuntala Shukla & Ors.** (2002) 6 SCC 127
- (iv) **Trivedi Himanshu Ghanshyambhai vs. Ahmedabad Municipal Corporation & Ors.** (2007) 8 SCC 644, and
- (v) **Dhananjay Malik & Ors. Vs. State of Uttaranchal & Ors.** (2008) 4 SCC 171



**12.7** As the OBC Certificate issued to Ms. Bina Devi Sharma and the MBC Certificate issued to Ms. Onissa Dechhen Gurung were not cancelled as on 05.06.2009, at that point of time, the Division Bench in its judgment dated 05.06.2009 in W.P.(C) No. 31 of 2008 decided the said writ petition on the preliminary objection holding that -

(i) Mr. Chiran Rizal has no locus standi on the preliminary objection to file the above W.P.(C) No. 31 of 2008;

(ii) to seek mandamus, Mr. Chiran Rizal must have legal right to compel the authority by way of mandamus and the authorities must have a legal duty to perform the same;

(iii) the unsuccessful candidates who participated in the process of selection are not entitled to get any relief; and

(iv) Chiran Rizal may approach the authorities, if he is aggrieved by the appointment of Ms. Bina Devi Sharma on account of OBC Certificate and by that of Ms. Onissa Dechhen Gurung on account of MBC Certificate, vindicating such grievances, and dismissed the writ petition, as hereunder:

**“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 the 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."

#### **VII. Contentions made on behalf of the respective parties**

**13.1** With this background of facts and materials available on record, the contentions made on behalf of the respective parties are narrated as follows.

**13.2** Heard Mr. B. Sharma, learned Senior Counsel appearing on behalf of Ms. Bina Devi Sharma, writ petitioner in W.P.(C) No. 28 of 2009 and Mr. Bhaskar Raj Pradhan, learned Senior Counsel appearing on behalf of Ms. Onissa Dechhen Gurung, the writ petitioner in W.P.(C) No. 2 of 2010, assailing



the cancellation of the OBC and MBC Certificates issued to the respective parties.

**13.3** Heard Mr. J.B. Pradhan, learned Additional Advocate General representing the State Government and its authorities in all the writ petitions.

**13.4** Also heard Mr. A. Moulik and Mr. A.K. Upadhyaya, learned Senior Counsel appearing on behalf of the contesting respondents, namely, Mr. Khemraj Bhattarai in W.P.(C) No. 28 of 2009 and Kumari Baby Mukhia in W.P.(C) No. 2 of 2010, respectively.

**VII-A. Contentions challenging the cancellation of OBC/MBC Certificates**

**14.** Mr. B. Sharma and Mr. Bhaskar Raj Pradhan, learned Senior Counsel, while challenging the impugned proceedings of the Sub-Divisional Magistrate, Pakyong, East Sikkim and District Magistrate, West Sikkim dated 07.09.2009 and 13.01.2010 cancelling the OBC and MBC Certificates issued to Ms. Bina Devi Sharma and Ms. Onissa Dechhen Gurung respectively, raised preliminary objections on common grounds: -

(i) that the Sub-Divisional Magistrate, Pakyong and District Magistrate, West Sikkim, without specific power to



cancel, have no authority to pass the impugned proceedings, dated 07.09.2009 and 13.01.2010 respectively cancelling the OBC and MBC Certificates which were already issued by the competent authorities; and therefore the same is without jurisdiction. In this regard, Mr. Bhaskar Raj Pradhan, placed reliance on the decision of the apex Court in ***Indian National Congress (I) vs. Institute of Social Welfare and Ors.*** reported in **(2002) 5 SCC 685**.

(ii) that the cancellation of the impugned OBC/MBC Certificates is contrary to the stand taken by the respondent Government in W.P.(C) No. 31 of 2008, as the said issue was already considered and rejected by a Division Bench of this Court by judgment dated 05.06.2009 in W.P.(C) No. 31 of 2008, which operates as res-judicata; and therefore, the Sub-Divisional Magistrate, Pakyong and the District Magistrate, West Sikkim being the subordinate authorities to the State Government, have no authority to reopen the issue and pass the impugned orders of cancellation dated 07.09.2009 and 13.01.2010.

(iii) that as per Section 9 of the Sikkim Commission for Backward Classes Act, 1993, the State Commission, constituted under Section 3 of the Act by the State of Sikkim, alone has all the power to examine the inclusion, and exclusion of any class of citizens as backward class in the list and



therefore, the clarification dated 14.10.2004 issued by the Central Government is not binding on the State Government.

**15.1** In addition to the above contentions, Mr. B. Sharma, learned Senior Counsel appearing for Ms. Bina Devi Sharma contends that Ms. Bina Devi Sharma was not a dependent of her father after her marriage. She is considered to be independent and single after her marriage. Since she applied for the post in Junior Grade of the Sikkim State Civil Service, pursuant to the Notification of the State Government dated 15.12.2006, only after her marriage, her status as a daughter of her father, who was working as a Class I Officer in the State Government, is totally irrelevant. The only test, which ought to have been applied in her case, after her marriage, is clause VI of the first schedule of the Notification of the Government of Sikkim dated 05.12.2003, which deals with Income/Wealth Test, as hereunder:

"VI. Income/Wealth Test: Son(s) and daughter(s) of -

- (a) Persons having gross annual income of Rs.2.00 lakhs (Rupees two lakhs) or above;
- (b) Persons of Categories I, II, III and V-A who are not disentitled to the benefit of reservation but have income from other sources of wealth which will bring them within the income mentioned above."



As she had rightly disclosed her income as less than Rs.2.00 lakhs per annum, the Sub-Divisional Magistrate, Pakyong, being satisfied that she met all the requirements in law, issued an OBC Certificate to her on 16.08.2004. Therefore, cancellation of the said Certificate by the District Collector by the impugned proceedings dated 07.09.2009 is erroneous and illegal.

**15.2** Mr. B. Sharma further contends that even though Ms. Bina Devi Sharma the petitioner, and Mr. Khemraj Bhattarai, the contesting respondent, as directed, appeared before the office of the Sub-Divisional Magistrate, Pakyong on 27.08.2009, no full fledged enquiry was conducted on that day and therefore, the impugned order violates the principle of natural justice.

**15.3** Mr. B. Sharma, placing reliance on paragraphs 4(vi) and 7 of the clarification dated 14.10.2004 of the Central Government, further contends that the father of Ms. Bina Devi Sharma entered into service as Assistant Teacher (Class III/Group C) and then got into Class I/Group A at the age of 40 or earlier, and therefore his daughter Ms. Bina Devi Sharma will not be treated to be falling in creamy layer.

**16.1** Mr. Bhaskar Raj Pradhan, learned Senior Counsel appearing for Ms. Onissa Dechhen Gurung in addition to the



common grounds referred to above contends that the clause II (A) of the first schedule is applicable only to the son(s) and daughter(s) of the parent, both or either of whom **are/is working** as Class I Officer in the State Government, but the said clause is not applicable to the son(s) and daughter(s) of the parents who **are retired** from their service as Class I Officers in the State Government. It is contended that the **retirement of the parents from their service** as Class I Officers **will exclude the son(s)/daughter(s) from the purview of the Creamy Layer**; and consequently such son(s) and daughter(s) **is/are** entitled to the benefit of the reservation as OBC or MBC, as the case may be.

**16.2** Mr. B.R. Pradhan, learned Senior Counsel emphasizes much on the words "are"/"is" employed in clause II (A) of the first schedule, in support of his contention that clause II(A) refers to only the son(s) and daughter(s) of the parents, both or either of whom **are/is in service** as Class I Officer, but not in a case where the parents had retired from service. In this regard he relies on a decision of the Delhi High Court in **Sh. Chander Vijay vs. Union of India & Others**.

**17.** Mr. J.B. Pradhan, learned Additional Advocate General appearing for the State Government and its authorities, justifying



the impugned proceedings dated 07.09.2009 and 13.01.2010 passed by the Sub-Divisional Magistrate, East Sikkim, and District Magistrate, West Sikkim, cancelling the OBC and MBC Certificates issued by the Sub-Divisional Magistrate, Pakyong and Block Development Officer, Soreng respectively contends -

(i) that the object of the Sikkim Commission for Backward Classes Act, 1993 is only to constitute a State Commission for Backward Classes with the specific purpose of examining requests for inclusion of any class of citizens as a backward class in the lists and hear complaints of over-inclusion or under-inclusion of any backward class in such lists and tender such advise to the State Government as it deems appropriate; and the advise of the Commission shall ordinarily be binding upon the State Government, as per section 9 of the said Act. In the instant case, the lis is not relating to over-inclusion or under-inclusion, but to issues raised in the above writ petitions and as to the validity of the OBC and MBC Certificates issued by the competent authorities as per the Notification dated 05.12.2003 of the Government of Sikkim in accordance with the directions of the Apex Court in **Indra Sawhney** case, (1992) Suppl (3) SCC 217, directing all the State Governments to constitute a permanent body for entertaining, examining and recommending



for inclusion and/or exclusion of the class/caste of people in the list of backward classes to be notified by the Government of Sikkim, keeping in view the socio-economic criteria to exclude socially advanced person/section (creamy layer) from the list of Other Backward Classes/Most Backward Classes;

(ii) that, as per the said Notification dated 05.12.2003, the District Magistrate/Additional District Magistrate/Sub Divisional Magistrate are competent authorities to issue such Certificates. Therefore, by Notification dated 03.04.2007 the Government of Sikkim, notified that the Block Development Officers are also authorized to issue certificates for Other Backward Classes and Most Backward Classes;

(iii) that the power conferred on the authorities competent to issue certificate includes the power to verify, determine and to mention in the certificate that such person/section does not belong to creamy layer. In this regard Mr. J.B. Pradhan, learned Additional Advocate General invites my attention to Schedules II and III of the said Notification dated 05.12.2003, viz the formats of the OBC/MBC Certificates. Whenever any material placed before such authorities for issuance of certificates are contrary to the material truth furnished after verification, or illegal and contrary to the



rules/guidelines or clarification of the Government issued in this regard, such authorities are empowered to pass appropriate orders exercising their administrative power conferred on them under Notification dated 05.12.2003 and therefore, it is not correct to say that the impugned proceedings dated 07.09.2009 and 13.01.2010 are without jurisdiction. As such the decision in **Indian National Congress (I) vs. Institute of Social Welfare and others** reported in **(2002) 5 SCC 685**, therefore, is not applicable to the facts and circumstances of the case.

(iv) that, the authorities competent to issue OBC/MBC Certificates are also required to certify that the applicants he/she does not belong to the persons/sections (Creamy Layer) mentioned in column 3 of the Schedule to the Government of India, Department of Personnel & Training O.M. No. 36012/22/93-Estt (SCT), dated 08.09.1993 and Government of Sikkim, Notification No. 7/GOS-9(15)SWD dated 05.12.2003. But later on, the Central Government by Notification dated 14.10.2004 issued clarification to their earlier O.M. No. 36012/22/93-(SCT) dated 8<sup>th</sup> September, 1993. Therefore, those, who have obtained OBC/MBC Certificates from the competent authorities stating that they do not belong to the creamy layer as per the notification of the Central Government



dated 08<sup>th</sup> September, 1993 and seek benefits of such OBC/MBC Certificates, are bound by the clarification of the Central Government dated 14.10.2004 issued in that regard;

(v) that, as per the clarification dated 14.10.2004,

(a) sons and daughters of parents who are included in the creamy layer on the basis of service status of their parents shall continue to be treated in creamy layer even if their parents have retired or have died after retirement;

(b) the creamy layer status of a candidate is determined on the basis of the status of his parents and not on the basis of his own status or income or on the basis or income of his/her spouse. Therefore, while determining the creamy layer status of a person the status or the income of the candidate himself or of his/her spouse shall not be taken into account.

(vi) that the impugned proceedings dated 07.09.2009 and 13.01.2010 cancelling the OBC/MBC Certificates of Ms. Bina Devi Sharma and Ms. Onissa Dechhen Gurung are



passed strictly in accordance to the ratio laid down by the apex Court in -

- (a) ***Indra Sawhney and others Vs. Union of India and others*** reported in **1992 Supp (3) SCC 217**;
- (b) ***Ashoka Kumar Thakur vs. State of Bihar and others*** reported in **(1995) 5 SCC 403**;
- (c) ***Indra Sawhney vs. Union of India and others*** reported in **(2000) 1 SCC 168**; and
- (d) ***Ashoka Kumar Thakur vs. Union of India and others*** reported in **(2008) 6 SCC 1**;

(vii) that the judgment dated 05.06.2009 in W.P.(C) No. 31 of 2008 will not operate as res-judicata, because, in the said judgment, it is recorded that the State Government has clearly taken a stand that if any one is aggrieved with the issuance of certificates, they are at liberty to approach the competent authority. Therefore, when the aggrieved persons approached the competent authority, the competent authority rightly considered their grievances, gave fair and reasonable opportunity to both parties, conducted a due enquiry and passed appropriate orders dated 07.09.2009 and dated 13.01.2010, which are impugned in the writ petitions. The judgment dated 05.06.2009 made in W.P.(C) No. 31 of 2008, in no way operates a Res-judicata as there is no finding in the said judgment



whether Ms. Bina Devi Sharma and Ms Onissa Dechhen Gurung belong to the creamy layer or not.

**18.1** Mr. A. Moulik, learned Senior Counsel appearing for the contesting respondent in W.P.(C) No. 28 of 2009 submits that the marital status of Ms. Bina Devi Sharma is immaterial, because even while applying for OBC certificate, she concealed her marital status and gave only the name of her father for her normal residential address. According to Mr. A. Moulik, the clarification dated 14.10.2004 of the Central Government, issued to the earlier Office Memorandum dated 08.09.1993, is binding on the State Government as the competent authority to issue OBC/MBC Certificates are also required to verify and certify that the applicant does not belong to Creamy Layer; otherwise that OBC/MBC Certificates issued by the Competent Authorities will be contrary to the law declared by the Apex Court in **Indra Sawhney (1<sup>st</sup>) case (1992) Supp. 3 SCC 217** and **Indra Sawhney (2<sup>nd</sup>) case (2000) 1 SCC 168**.

**18.2** Mr. A. Moulik, learned Senior Counsel also brought to my notice that Mr. Khemraj Bhattarai and Kumari Baby Mukhia are not parties in Writ Petition (C) No. 31 of 2008 and therefore, contends that the judgment in W.P.(C) No. 31 of 2008 is not



binding on Mr. Khemraj Bhattarai and Kumari Baby Mukhia. It is also contended that there is no specific finding in the said judgment dated 05.06.2009 that Ms. Bina Devi Sharma and Ms. Onissa Dechhen Gurung belong to the creamy layer or not on account of the disputed facts relating to the said controversies.

**19.1** Mr. A. K. Upadhyaya, learned Senior Counsel, appearing for Kumari Baby Mukhia, brought to my notice -

(i) that the State Government invited applications for filling up of 40 posts of Junior Grade of Sikkim State Civil Service, notifying 31.01.2007 as the last date, which was subsequently extended till 31.05.2007;

(ii) that the father of Ms. Onissa Dechhen Gurung, the petitioner in WP.(C) No. 2 of 2010, was working as Principal Chief Engineer-cum-Secretary, in the Government of Sikkim till 31.05.2007; and

(iii) that Ms. Onissa Dechhen Gurung obtained the Community Certificate on 23.11.2007 i.e. after the retirement of her father as Principal Chief Engineer-cum-Secretary in the Government of Sikkim. Hence, Mr. Upadhyaya contends that the fact that on the date of applying for MBC Certificate, the father of Ms. Onissa Dechhen Gurung was in service is not relevant. He also contends that Kumari Baby Mukhia was not a party in the



earlier Writ Petition (C) No. 31 of 2008 and therefore, the decision dated 05.06.2009 in W.P.(C) No. 31 of 2008 is not binding on her. In any event, Mr. Upadhyaya contends that as per the clarification dated 14.10.2004 issued by the Government of India, Ms. Onissa Dechhen Gurung belongs to the creamy layer and therefore stands excluded from the reservation made for the MBC; as it is immaterial that her father retired from service thereafter.

**19.2** Mr. Upadhyaya also contends that Ms. Onissa Dechhen Gurung, having entered into service, on an OBC Certificate issued contrary to law, is not entitled to continue in service, as per the decisions in-

- (a) **Kumari Madhuri Patil and another vs. Addl. Commissioner, Tribal Development and others** reported in **(1994) 6 SCC 241**;
- (b) **Superintendent of Post Offices and others vs. R. Valasina Babu** reported in **(2007) 2 SCC 335**; and
- (c) **Regional Manager, Central Bank of India vs. Madhulika Guruprasad Dahir and others** reported in **(2008) 13 SCC 170**.



**19.3** Countering the argument that on 27.08.2009, the Sub-Divisional Magistrate did not conduct a full fledged enquiry, Mr. Upadhyaya contends that no full fledged enquiry like in a suit is required to be conducted for verification of the materials relied on for issuing the Community Certificates, in such case as held by the Apex Court in **State of T. N. and others vs. A. Gurusamy** reported in **(1997) 3 SCC 542**.

### **VIII. Consideration, Findings and Decision**

**20.1** I have given a careful consideration to the submissions made by the learned Senior Counsel and the learned Additional Advocate General.

#### **VIII. A. Core Issues**

**20.2** The core issues that arise for my consideration in these writ petitions are -

- (i) Whether a daughter of a Class-I officer of the rank of Joint Secretary and above in the State Government is excluded from the reservation made for Other Backward Classes, herein after referred to as OBC, as per the Notification dated 05.12.2003 of the Government of Sikkim,



despite her marriage, on the ground that she belongs to Creamy Layer?

and

- (ii) Whether a daughter of a Class-I Officer of the rank of Joint Secretary and above in the State Government is excluded from the reservation made for Most Backward Classes, herein after referred to as MBC, as per the Notification dated 05.12.2003 of the Government of Sikkim, in spite of retirement of her father, on the ground that she belongs to Creamy Layer?

#### **VIII. B. Preliminary Objections**

**21.** Before deciding the main issues referred to above, the following preliminary objections raised by the contesting respondents are to be dealt with:

- (i) Whether the Sub-Divisional Magistrate, Pakyong and District Magistrate, West Sikkim, without specific power to cancel the OBC and MBC Certificates, have authority to pass the impugned proceedings dated 07.09.2009 and 13.01.2010 cancelling the OBC and MBC Certificates which were already issued by the competent authorities?



(ii) Whether the judgment of the Division Bench dated 05.06.2009 made in the W.P.(C) No. 31 of 2008 operates as Res-Judicata and binding on the authorities of the State Government?

(iii) Whether the clarification dated 14.10.2004 issued by the Central Government to the O.M. No. 36012/22/93-Estt(SCT) dated 08.09.1993 is binding on the State Government in view of Section 9 of Sikkim Commission for Backward Classes Act, 1993, whereunder the State Commission alone has power to examine the request for inclusion or exclusion of any class of citizens as Backward Classes?

Since all the preliminary objections are interrelated, they are dealt with jointly.

**22.1** Concededly, the petitioners, namely, Ms. Bina Devi Sharma and Ms. Onissa Dechhen Gurung applied for OBC and MBC Certificate only based on the Notification of the Government of Sikkim dated 05.12.2003. The said Notification was issued by the State Government pursuant to the judgment dated 16.11.1992 of the Apex Court in Mandal Commission case, i.e. ***Indra Sawhney vs. Union of India*** reported in **AIR 1993 SC 477**, wherein the Hon'ble Apex Court directed all the State



Governments to constitute a permanent body for entertaining, examining and recommending for inclusion and/or exclusion of the class/caste of people in the list of Backward Classes and to issue notification accordingly. Pursuant to the said direction of the Apex Court, the Central Government and the State Government, keeping in view the socio-economic criteria to exclude socially advanced person/section (creamy layer) from the list of Other Backward Classes and Most Backward Classes, issued Notifications dated 10.09.1993 and 06.06.1995 respectively; and thereafter the Notification dated 06.06.1995 of the State Government was partially modified by Notification dated 05.12.2003.

In accordance with the said Notification dated 05.12.2003, Government of Sikkim has notified the creamy layer in the list of Socially and Educationally Backward Classes or Most Backward Classes and Other Backward Classes. The relevant criteria are provided in Schedule I appended to the said Notification. The Notification dated 05.12.2003 also empowers the competent authorities to issue Certificates and also to determine and mention in the Certificate that the particular person/section does not belong to the creamy layer, which is evident in Schedule II and III, namely, the formats of the OBC and MBC Certificates.



**22.2** It is, therefore, clear that the right to seek the OBC and MBC Certificates before the competent authority only flows from the Notification dated 05.12.2003, which also prescribes certain powers and duties on the competent authorities:

- (i) to issue OBC and MBC Certificates ;
- (ii) to certify that they do not belong to creamy layer, as per O.M. No. 36012/22/93-Estt(SCT) dated 08.09.1993 of the Central Government and the Notification dated 05.12.2003 of the Government of Sikkim.

**22.3** If either of the findings arrived at by the competent authorities are questioned on the ground that the certificates issued by the competent authorities executing their administrative powers, are not based on correct facts; or they are not in accordance with law, such authorities are empowered to verify the facts and pass appropriate orders after giving fair and reasonable opportunity to the persons concerned and holding due enquiry into the matter.

**23.1** In the instant case, Ms. Bina Devi Sharma and Ms. Onissa Dechhen Gurung claim that they belong to OBC/MBC respectively and they also claim that they do not belong to the creamy layer. Competent authorities also originally issued



OBC/MBC Certificates to them respectively and also certified that they do not belong to creamy layer as per the Office Memorandum dated 08.09.1993 of the Central Government and Notification dated 05.12.2003 of the State Government. Based on the said OBC/MBC Certificates, they were selected and appointed in the posts of Junior Grade in Sikkim State Civil Service and the same was challenged by Chiran Rizal in W.P.(C) No. 31 of 2008. In the said W.P.(C) No. 31 of 2008 the State Government took a stand that any person aggrieved by such OBC/MBC Certificates is at liberty to challenge the OBC/MBC Certificates before the competent authorities.

**23.2** As disputed facts were raised by the parties as to whether Ms. Bina Devi Sharma and Ms. Onissa Dechhen Gurung belong to creamy layer or not, the Division Bench, by judgment dated 05.06.2009 in W.P.(C) No. 31 of 2008, did not render any specific findings in that regard. However, the Division Bench in the judgment dated 05.06.2009 recorded the stand of the State Government as hereunder:

"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 Respondent 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."



It is pertinent to note that the contesting respondents, who questioned the OBC and MBC Certificates issued to Ms. Bina Devi Sharma and Ms. Onissa Dechhen Gurung respectively, before the District Collector, East Sikkim and District Magistrate, West Sikkim, are not parties to the W.P.(C) No. 31 of 2008.

**24.1** That apart, both Ms. Bina Devi Sharma and Ms. Onissa Dechhen Gurung rely upon their OBC/MBC Certificates dated 16.08.2004 and dated 23.11.2007 respectively, whereunder it was also certified that they do not belong to creamy layer as per the Office Memorandum dated 08.09.1993 and the Notification dated 05.12.2003. Therefore, the clarification dated 14.10.2004 issued by the Central Government clarifying the criteria issued in the Office Memorandum dated 08.09.1993 of the Central Government is binding on the authorities who issued the said Certificates.

**24.2** The contention that the clarification dated 14.10.2010 is not binding on the State Government in view of Section 9 of the Sikkim Commission for Backward Classes Act, 1993, in my considered opinion, is untenable, because as rightly pointed out by the learned Additional Advocate General, the lis in the present batch of writ petitions is not as to the inclusion or exclusion of



any section of people in the list of backward classes, OBC and MBC; but as to the correctness of the OBC and MBC Certificates issued to Ms. Bina Devi Sharma and Ms. Onissa Dechhen Gurung certifying that they do not belong to creamy layer. Therefore, the said clarification dated 14.10.2004 is binding on the authorities as well as the parties who claim that they do not belong to the creamy layer as per Office Memorandum dated 08.09.1993 of the Central Government and the Notification dated 05.12.2003 of the State Government.

25. Mr. Bhaskar Raj Pradhan, learned Senior Counsel for Ms. Onissa Dechhen Gurung relies on the decision in ***Indian National Congress (I) vs. Institute of Social Welfare and Ors*** reported in **(2002) 5 SCC 685**, and contends that, without specific power to cancel the MBC Certificate, which was already issued by the Block Development Officer, Soreng, the District Magistrate, West Sikkim cannot cancel the said Certificate issued on 23.11.2007 without specific power to pass the impugned proceedings dated 13.01.2010. In *Indian National Congress (I)* case, the issue was whether the Election Commission of India by exercising power conferred under Section 29 A of the Representation of People Act, 1951 acts quasi-judicially and passes quasi-judicial order and whether such order can be



reviewed by it on the basis of a complaint for deregistering a political party. The Apex Court in the said decision held that the power conferred on the Election Commission of India under Section 29 A of the Act is quasi-judicial power and therefore the Commission cannot assume the power to deregister or to cancel the registration by operation of Section 21 of the General Clauses Act, because Section 21 cannot be extended to a quasi-judicial authority. For purpose of clarity, Section 21 of the General Clauses Act, is reproduced hereunder:

"21. Power to issue, to include power to add to, amend, vary or rescind, notifications, orders, rules or bye-laws. - Where, by any Central Act or regulation, a power to issue notifications, orders, rules or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any) to add to, amend, vary or rescind any notifications, orders, rules or bye-laws so issued."

The Apex Court, while holding that Section 21 of the General Clauses Act cannot be extended to a quasi-judicial authority, in the said *Indian National Congress (I)* case, held as hereunder:

"39. On perusal of Section 21 of the General Clauses Act, we find that the expression "order" employed in Section 21 shows that such an order must be in the nature of notification, rules and bye-laws etc. The order which can be modified or rescinded on the application of Section 21 has to be either executive or legislative in nature. But the order which the Commission is required to pass under Section 29-A is neither a legislative nor an executive order but is a quasi-judicial order."

The Apex Court held in *Indian National Congress (I)*'s case that coherent and cogent reasons are required for interference, where



no full-fledged enquiry is called for. Suffice it to give an opportunity to the parties concerned to establish their case and to give a finding that the procedure applied was wrong and the reasons given are illegal. Therefore, the decision relied on by Mr. Bhaskar Raj Pradhan is in no way helpful to interfere with the impugned proceedings of the Collector dated 13.10.2010, on the ground of want of specific provision to cancel the certificate in question.

**26.** For the above reasons, the preliminary questions –

(i), "Whether the Sub-Divisional Magistrate, Pakyong, East Sikkim and District Magistrate, West Sikkim, without specific power to cancel the OBC and MBC Certificates, have authority to pass the impugned proceedings dated 07.09.2009 and 13.01.2010 cancelling the OBC and MBC Certificates which were already issued by the competent authorities?", is answered in positive;

(ii) "Whether the judgment of the Division Bench dated 05.06.2009 made in the W.P.(C) No. 31 of 2008 operates as res-judicata and binding on the authorities of the State Government?", is answered that the judgment dated 05.06.2009 in W.P.(C) No. 31 of 2008 does not operate as res-judicata and therefore, the same is not binding on the authorities; and



(iii) "Whether the clarification dated 14.10.2004 issued by the Central Government to the O.M. No. 36012/22/93-Estt(SCT) dated 08.09.1993 is binding on the State Government in view of Section 9 of Sikkim Commission for Backward Classes Act, 1993, whereunder the State Commission alone has power to examine the request for inclusion or exclusion of any class of citizens as Backward Class?", is answered in the positive.

### **VIII C - Is there any Procedural lapse?**

**27.** The next question that arises for consideration is whether there is any procedural lapse in passing of the impugned proceedings dated 07.09.2009?

According to Mr. B. Sharma, learned Senior Counsel, even though Ms. Bina Devi Sharma, the petitioner and Mr. Khemraj Bhattarai, the respondent were called upon to appear before the office of the Sub Divisional Magistrate, Pakyong on 27.08.2009, there was no full-fledged enquiry, but on the other hand, Mr. Moulik, learned Senior Counsel, contends that there was an enquiry. In any event, as held by the apex Court in **State of Tamil Nadu & others vs. A. Gurusamy** reported in **(1997) 3 SCC 542**, no full-fledged enquiry like a suit is required for verification of the materials relied upon. It may not be out of place to refer to the aforesaid decision of the Apex Court wherein



it is held that in the case of cancellation of the Community Certificate, the District Collector does not decide it like a suit but what he does is make an enquiry complying with the principles of rational (sic natural) justice because for the purpose of verification the documents relied upon are self-serving document. Therefore, applying the ruling of the Apex Court in the said decision of **State of Tamil Nadu** (supra), I do not find any procedural lapses in passing of the impugned proceeding dated 07.09.2009.

#### **IX. Core Issues**

**28.** The core issues are :-

- (i) Whether a daughter of a Class-I officer of the rank of Joint Secretary and above in the State Government is excluded from the reservation made for Other Backward Classes, herein after referred to as OBC, as per the Notification dated 05.12.2003 of the Government of Sikkim, despite her marriage, on the ground that she belongs to Creamy Layer?

and

- (ii) Whether a daughter of a Class-I Officer of the rank of Joint Secretary and above in the State Government is excluded from the reservation made for Most Backward Classes, herein after referred to as MBC, as per the



Notification dated 05.12.2003 of the Government of Sikkim, in spite of retirement of her father, on the ground that she belongs to Creamy Layer?

29. In the case of Ms. Bina Devi Sharma, her OBC Certificate dated 16.08.2004 was cancelled by the impugned proceedings dated 07.09.2009, on the ground that her father was employed as Class I Officer in the State Government, and that her marital status is not relevant to determine her status as creamy layer; and in the case of Ms. Onissa Dechhen Gurung, her MBC Certificate dated 23.11.2007 was cancelled by the impugned proceedings dated 13.01.2010 on the ground that her father was employed as Class I Officer in the State Government and that the retirement of her father is not relevant to determine that she belongs to creamy layer. In both the cases, the issues revolve on a centrifugal force that the respective candidates belong to creamy layer as per the Office Memorandum dated 08.09.1993 of the Central Government and Notification dated 05.12.2003 of the State Government and in view of the clarification dated 14.10.2004 issued by the Central Government clarifying the criteria prescribed to determine the creamy layer, as provided under Office Memorandum dated 08.09.1993 of the Central Government. Therefore, both the issues are considered jointly as hereunder:



**30.** It is already noticed that the Notification dated 08.09.1993 of the Central Government and the Notification dated 06.06.1995 of the State Government, which was partially modified by Notification dated 05.12.2003 as well as clarification dated 14.10.2004 of the Central Government, clarifying the criteria to determine the creamy layer as provided under Office Memorandum dated 08.09.1993 are all issued pursuant to the direction of the Supreme Court in Mandal Commission case, namely, *Indra Sawhney vs. Union of India*, and other related decisions; viz -

- (a) *Indra Sawhney and others Vs. Union of India and others* reported in 1992 Supp (3) SCC 217;
- (b) *Ashoka Kumar Thakur vs. State of Bihar and others* reported in (1995) 5 SCC 403;
- (c) *Indra Sawhney vs. Union of India and others* reported in (2000) 1 SCC 168; and
- (d) *Ashoka Kumar Thakur vs. Union of India and others* reported in (2008) 6 SCC 1;

**31.** It is also discussed, as a preliminary issue, that the clarification dated 14.10.2004 clarifying the criteria to determine the creamy layer as provided under Office Memorandum dated 08.09.1993 is binding on the authorities competent to issue OBC and MBC Certificates; and also on the applicants who are claiming the OBC and MBC Certificates, as per Schedule II and III



appended to the Notification dated 05.12.2003 of the State Government, whereunder the competent authorities are also required to determine and certify that the applicant (he/she) does not belong to the persons/sections (Creamy layer) mentioned in Column 3 of the Schedule to the Government of India, Department of Personnel and Training O. M. No. A16012/22/93-East (SCT) dated 8.9.1993 and the Government of Sikkim Notification No. 7/GOS-9(15) SWD dated 5<sup>th</sup> December, 2003.

**32.** The 'creamy layer' is a creation under the directions of the Apex Court in the Mandal Commission case and other related decisions, required to be followed during the verification of the social status for issuing OBC/MBC Certificate for the purpose of conferring reservation benefits in the matter of education and public employment. It is, therefore, appropriate to refer to the rulings of the Apex Court in this regard, for better appreciation.

**33.** The majority view of the Hon'ble Judges of the Apex Court in the Mondal Commission case, *Indra Sawhney vs. Union of India* reported in AIR 1993 SC 477 is that : -

"86. 'Means test' in this discussion signifies imposition of an income limit, for the purpose of excluding persons (from the backward class) whose income is above the said limit. **This submission is very often referred to**



as **"the creamy layer" argument**. Petitioners submit that some members of the designated backward classes are highly advanced socially as well as economically and educationally. It is submitted that they constitute the forward section of that particular backward class - as forward as any other forward class member - and that they are lapping up all the benefits of reservations meant for that class, without allowing the benefits to reach the truly backward members of that class. These persons are by no means backward and with them a class cannot be treated as backward. It is pointed out that since Jayasree, almost every decision has accepted the validity of this submission.

On the other hand, the learned Counsel for the State of Bihar, Tamil Nadu, Kerala and other counsel for respondents strongly oppose any such distinction. It is submitted that once a class is identified as a backward class after applying the relevant criteria including the economic one, it is not permissible to apply the economic criteria once again and sub-divide a backward class into two sub-categories. Counsel for the State of Tamil Nadu submitted further that at one stage (in July 1979) the State of Tamil Nadu did indeed prescribe such an income limit but had to delete it in view of the practical difficulties encountered and also in view of the representation received. In this behalf, the learned Counsel invited our attention to Chapter 7-H (pages 60 to 62) of the Ambashankar Commission (Tamil Nadu Second Backward Classes Commission) Report. According to the respondents the argument of 'creamy layer' is but a mere ruse, a trick, to deprive the backward classes of the benefit of reservations. It is submitted that no member of backward class has come forward with this plea and that it ill becomes the members of forward classes to raise this point. Strong reliance is placed upon the observations of Chinnappa Reddy, J. in Vasant Kumar, to the following effect:

"... One must, however, enter a caveat to the criticism that the benefits of reservation are often snatched away by the top creamy layer of backward class or caste. That a few of the seats and posts reserved for backward classes are snatched away by the more fortunate among them is not to say that reservation is not necessary. This is bound to happen in a competitive society such as ours. Are not the unreserved seats and posts snatched away, in the same way, by the top creamy layers amongst them on the same principle of merit on which the non reserved seats are taken away by the top layers of society. How can it be bad if reserved seats and posts are snatched away



by the creamy layer of backward classes, if such snatching away of unreserved posts by the top creamy layer of society itself is not bad?"

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 I.A.S. or I.P.S. 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) or 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).

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 13th August, 1990 and 25th September, 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.

X

X

X



121. We may summarise our answers to the various questions dealt with and answered hereinabove:

.....

(3)(a) A caste can be and quite often is a social class in India. If it is backward socially, it would be a backward class for the purposes of Article 16(4). Among non-Hindus, there are several occupational groups, sects and denominations, which for historical reasons, are socially backward. They too represent backward social collectives for the purposes of Article 16(4). (Paras 61 to 82)

(b) Neither the Constitution nor the law prescribes the procedure or method of identification of backward classes. Nor is it possible or advisable for the court to lay down any such procedure or method. It must be left to the authority appointed to identify. It can adopt such method/procedure as it thinks convenient and so long as its survey covers the entire populace, no objection can be taken to it. Identification of the backward classes can certainly be done with reference to castes among, and along with, other occupational groups, classes and sections of people. One can start the process either with the occupational groups or with castes or with some other groups. Thus one can start the process with the castes, wherever they are found, apply the criteria (evolved for determining backwardness) and find out whether it satisfies the criteria. If it does - what emerges is a "backward class of citizens" within the meaning of and for the purposes of Article 16(4). Similar process can be adopted in the case of other occupational groups, communities and classes, so as to cover the entire populace. The central idea and overall objective should be to consider all available groups, sections and classes in society. Since caste represents an existing, identifiable social group/class encompassing an overwhelming majority of the country's population, one can well begin with it and then go to other groups, sections and classes. (Paras 83 and 84)

.....

(d) **'Creamy layer' can be, and must be excluded.** (Para 86)."



34. In **Ashoka Kumar Thakur v. State of Bihar and others** reported in **AIR 1996 SC 75**, the Apex Court relied upon the earlier decision in 'Mandal case' as follows –

"4. We may refer to the opinions given by the learned Judges in 'Mandal case' on the question of exclusion of the 'creamy layer' from the backward class.

5. **P.B. Sawant, J.** spoke about the 'creamy layer' in the following words:

"The correct criterion for judging the forwardness of the forwards among the backward classes is **to measure their capacity not in terms of the capacity of others in their class, but in terms of the capacity of the members of the forward classes**, as stated earlier. **If they cross the Rubicon of backwardness, they should be taken out from the backward classes and should be made disentitled to the provisions meant for the said classes.**

It is necessary to highlight another allied aspect of the issue, in this connection. What do we mean by sufficient capacity to compete with others? Is it the capacity to compete for Class IV or Class III or higher class posts? A Class IV employee's children may develop capacity to compete for Class III posts and in that sense, he and his children may be forward compared to those in his class who have not secured even Class IV posts. It cannot, however, be argued that on that account, he has reached the "creamy" level. If the adequacy of representation in the services as discussed earlier, is to be evaluated in terms of qualitative and not mere quantitative representation, which means representation in the higher rungs of administration as well, the competitive capacity should be determined on the basis of the capacity to compete for the higher level posts also. Such capacity will be acquired only when the backward sections reach those levels or at least, near those levels."

6. **R.M. Sahai, J.** held that the exclusion of 'creamy layer' is a social purpose. Any legislation or executive action to remove such persons individually or



collectively cannot be constitutionally invalid. The learned Judge elaborated his conclusions as under :

"More backward and backward is an illusion. No constitutional exercise is called for it. What is required is practical approach to the problem. **The collectivity or the group may be backward class but the individuals from that class may have achieved the social status or economic affluence. Disentitled them from claiming reservation.** Therefore, while reserving posts for backward classes, the departments should make a condition precedent that every candidate must disclose the annual income of the parents beyond which one could not be considered to be backward. **What should be that limit can be determined by the appropriate State.** Income apart, provision should be made that wards of those backward classes of persons who have achieved a particular status in society either political or social or economic **or if their parents are in higher services then such individuals should be precluded to avoid monopolisation of the services reserved for backward classes by a few. Creamy layer, thus, shall stand eliminated.**"

7. **B.P. Jeevan Reddy**, J. speaking for the Court enunciated the concept of 'creamy layer' in the following words:

"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).... 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'".

**35. In Ashoka Kumar Thakur v. State of Bihar and others** reported in **(1995) 5 SCC 403**, the Apex Court has further held as follows:-

"10. We have carefully examined the criteria for identifying the "creamy layer" laid down by the Government of India in the Schedule, quoted above, and we are of the view that the same is in conformity with the law laid down by this Court in *Mandal case*. **We have no hesitation in approving the rule of exclusion frame by the Government of India in para 2(c) read with the Schedule of the office memorandum quoted above.** Learned counsel for the petitioners have also vehemently commended that the State Governments should follow the Government of India and lay down similar criteria for identifying the "creamy layer".

15. This Court has categorically held in *Mandal case* that a person, belonging to a backward class, who becomes member of **IAS, IPS or any other All India Service, his children cannot avail the benefit of reservation.** The States of Bihar and Uttar Pradesh have added further conditions such as salary of rupees ten thousand or more per mensem, the wife or husband to be graduate and one of them owning a house in an urban area. So far as the professionals are concerned, an income of Rs. 10 lakhs per annum has been fixed as the criterion. It



is further provided that the wife or husband is at least graduate and the family owns immovable property of the value of at least rupees twenty lakhs. Similarly, the criteria regarding traders, industrialists, agriculturists and others is wholly arbitrary apart from being contrary to the guidelines laid down by this Court in 'Mandal case'.

16. Multiple conditions have been provided in all the categories. **The 'spouse' to be a graduate and holding property in urban area, are the conditions attached to almost every category. These conditions have no nexus with the object sought to be achieved.** Since the conditions are not severable the two criteria's as a whole have to be struck-down.

17. This Court, in 'Mandal case' has clearly and authoritatively laid down that the affluent part of a backward class called 'creamy layer' has to be excluded from the said class and the benefit of Article 16(4) can only be given to the "class" which remains after the exclusion of the 'creamy layer'. The backward class under Article 16(4) means the class which has no element of 'creamy layer' in it. It is mandatory under Article 16(4) - as interpreted by this Court - **that the State must identify the 'creamy layer' in a backward class and thereafter by excluding the 'creamy-layer' extend the benefit of reservation to the 'class' which remains after such exclusion.** this Court has laid down, clear and easy to follow, guidelines for the identification of 'creamy layer'. The States of Bihar and Uttar Pradesh have acted wholly arbitrary and in utter violation of the law laid down by this Court in 'Mandal case'. **It is difficult to accept that in India where the per capita national income is Rs. 6929 (1993-94), a person who is a member of the IAS and a professional who is earning less than Rs. 10 lakhs per annum is socially and educationally backward.** We are of the view that the criteria laid down by the States of Bihar and Uttar Pradesh for identifying the 'creamy layer' on the face of it is arbitrary and has to be rejected."



36. In 2<sup>nd</sup> case of **Indira Sawhney vs. Union of India and others** reported in **(2000) 1 SCC 168**, the Apex Court held as follows:-

"6. The issues which presently arise before this Court are, as follows:

(1) What is the law declared and what are the directions given in *Indira Sawhney* in regard to "creamy layer" in the context of Articles 14 and 16?

(2) Can the declaration of law in regard to "creamy layer" in the context of Articles 14 and 16 in *Indira Sawhney* and in other rulings be undone by the Kerala Legislature by a retrospective validating law containing a statutory declaration whose effect is to say that no "creamy layer" exists in the State of Kerala?

(3) Are the provisions of Sections 3, 4 and 6 of the Kerala State Backward Classes (Reservation of Appointments or Posts in the Services) Act (Act No. 16/95) violative of Articles 14 and 16 of the Constitution of India?

(4) Whether the violation of Article 14 (and Article 16) amounts to violation of the basic structure of the Constitution of India?

(5) If the provisions of Sections 3, 4 and 6 of the Kerala Act 16/95 are to be struck down, is the Report of High Level Committee headed by Justice K.J. Joseph to be accepted and are there any valid objections to the report?

(6) If Sections 3, 4 and 6 of the Kerala Act 16/95 are to be struck down and the High Level Committee Report of Justice K.J. Joseph is accepted, what further directions are to be issued to the State of Kerala?

*Point 1:*

7. Our Constitution is wedded to the concept of equality and equality is a basic feature. Under Article 15(2), there is a prohibition that State shall not discriminate against any citizen on the grounds only of religion, race, caste, sex and place of birth or any of them. It is equally true that ours is a caste-ridden society. Still, it is a constitutional mandate not to discriminate on the basis of caste alone. Provisions can be



made for the upliftment of socially and educationally backward classes, scheduled castes or scheduled tribes or for women and children. Article 16(4) empowers the States for making any provision for reservation in appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. Reservation is permissible (i) in favour of any backward class of citizens; and (ii) if it is not adequately represented in services under the State.

8. Caste only cannot be the basis for reservation. Reservation can be for a backward class citizen of a particular caste. Therefore, **from that caste, creamy layer and non-backward class of citizens are to be excluded. If the caste is to be taken into consideration then for finding out socially and economically backward class, creamy layer of the caste is to be eliminated for granting benefit of reservation, because that creamy layer cannot be termed as socially and economically backward.** These questions are exhaustively dealt with by a nine Judge Bench of this Court in *Indira Sawhney v. Union of India* [1992] Suppl. 3 SCC 217, and it has been specially held that 'only caste' cannot be the basis for reservation.

X

X

X

10. If forward classes are mechanically included in the list of backward classes or **if the creamy layer among backward classes is not excluded, then the benefits of reservation will not reach the really backward among the backward classes. Most of the benefits will then be knocked away by the forward castes and the creamy layer. That will leave the truly backward, backward for ever.** Jeevan Reddy, J. while delivering the majority judgment, inter alia, held as under: SCC pp. 717 and 718, paras 783 and 784)

**"If the real object is to discover and locate backwardness, and if such backwardness is found in a caste, it can be treated as backward; if it is found in any other group, section or class, they too can be treated as backward.**

\* \* \*

Reservation is not being made under Clause (4) in favour of a 'caste' but a backward class. Once a caste satisfies the criteria of backwardness, it becomes a backward class for the purposes of Article 16(4)."

X

X

X



12. We shall next proceed to the question relating to 'creamy layer'.

13. In *Indira Sawhney*, on the question of exclusion of 'creamy layer' from the Backward Classes, there was agreement among eight out of the nine learned Judges of this Court. There were five separate Judgments in this behalf which required the "creamy layer" to be identified and excluded.

14. The judgment of Jeevan Reddy, J. was rendered for himself and on behalf of three other learned Judges, Kania, CJ and M.N. Venkatachaliah, A.M. Ahmadi, JJ. (as they then were). The said judgment laid emphasis on the relevance of caste and also stated that **upon a member of the backward class reaching an "advanced social level or status", he would no longer belong to the backward class and would have to be weeded out.** Similar views were expressed by Sawant, Thommen, Kuldeep Singh, and Sahai, JJ. in their separate judgments.

15. It will be necessary to refer to and summarise briefly the principles laid down in these five separate judgments for that would provide the basis for decision on points 2 to 5.

16. While considering the concept of 'means-test' or 'creamy layer', which signifies imposition of an income limit, for the purpose of excluding the persons (from the backward class) whose income is above the said limit, in Q paragraph 791, the Court has noted that counsel for the States of Bihar, Tamil Nadu, Kerala and other counsel for respondents strongly opposed any such distinction and submitted that once a class is identified as a backward class after applying the relevant criteria including the economic one, it is not permissible to apply the economic criteria once again and sub-divide a backward class into two sub-categories. The Court negated the said contention by holding that **exclusion of such (creamy layer) socially advanced members will make the 'class' a truly backward class and would more appropriately serve the purpose and object of Clause (4).**

17. Jeevan Reddy, J. dealt with the 'creamy layer' under question 3(d)(paras 790, 792, 793 of SCC) and under question 10 (paras 843, 844). This is what the learned Judge declared: **There are sections among the backward classes who are highly advanced, socially and educationally and they constitute the forward section of that community. These advanced sections do not belong to the true backward class. They are**



(para 790) "as forward as any other forward class member".

**"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."** (SCC p. 724, para 792).

(emphasis supplied)

The learned Judge said: (SCC p. 724, para 792)

"After excluding them alone, would the class be a compact class. In fact, such exclusion benefits the truly backward."  
(emphasis supplied)

A line has to be drawn, said the learned Judge, between the forward in the backward and the rest of the backward but it is to be ensured that what is given with one hand is not taken away by the other. **The basis of exclusion of the "creamy layer" must not be merely economic, unless economic advancement is so high that it necessarily means social advancement, such as where a member becomes owner of a factory and is himself able to give employment to others.** In such a case, his income is a measure of his social status. In the case of agriculturists, the line is to be drawn with reference to the agricultural land holding. While fixing income as a measure, the limit is not to 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. **There are again some offices in various walks of life the occupants of which can be treated as socially advanced, "without further inquiry", such as IAS and IPS officers or others in All India Services. In the case of these persons, their social status in society rises quite high and the person is no longer socially disadvantaged.** Their children get full opportunity to realise their potential. They are in no way handicapped in the race of life. Their income is also such that they are above want. It is but logical that children of such persons are not given the benefits of reservation. If the categories or sections above mentioned are not excluded, the truly disadvantaged members of the backward class to which they belong will be deprived of the benefits of reservation. The Central Government is, therefore, directed (para 793) to identify and notify the "creamy layer" within four months and after such notification, **the 'creamy layer' within the backward class shall "cease" to be covered by the reservations under**



**Article 16(4).** Jeevan Reddy, J. finally directed (see question 10) that the exclusion of the creamy layer must be on the basis of social advancement and not on the basis of economic interest alone. Income or the extent of property holding of a person is to be taken as a measure of social advancement - and on that basis - the 'creamy layer' within a given caste, community or occupational group is to be excluded to arrive at the true backward class. There is to be constituted a body which can go into these questions as follows: (SCC p. 757, para 847)

"We direct that such a body be constituted both at Central level and at the level of the State within four months from today.... There should be a periodic revision of these lists to exclude those who have ceased to be backward or for inclusion of new classes, as the case may be." (emphasis supplied)

**The creamy layer** (see para 859, sub para 3(d)) **can be, and must be excluded.** Q **Creamy layer has to be excluded and 'economic criteria' are to be adopted as an indicium or measure of social advancement.** (Para 860, sub para 5). **The socially advanced persons must be excluded,** (para 861 (b)). That is how Jeevan Reddy, J. summarised the position.

18. **Sawant, J.** too accepted (para 553 of SCC) that "at least some individuals E and families in the backward classes, however small in number gain sufficient means to develop "capacities to compete" with others in every field. That is an undeniable fact. **Social advancement is to be judged by the 'capacity to compete' with forward castes, achieved by the members or sections of the backward classes.** Legally, therefore, these persons or sections who reached that level are not entitled any longer to be called as part of the backward class whatever their original birthmark. Taking out these "forwards" from the "backwards" is 'obligatory' as these persons have crossed the Rubicon (para 553-554). On the crucial question as to what is meant by "capacity to compete", the learned Judge explained (para 522) that if a person moves from Class IV service to Class III, that is no indication that he has reached such a stage of social advancement but if the person has successfully competed for "higher level posts" or at least "near those levels", he has reached such a state.

19. **Thommen, J.** (paras 287, 295, 296, 323) observed that if some members in a backward class acquire the necessary financial strength to raise themselves, the Constitution does not extend to them the protection of reservation. **The creamy layer has to be**





"weeded out" and excluded, if it has attained a "certain pre-determined economic level".

20. Kuldip Singh, J. (para 385) referred to the "affluent section of the backward class. Comparatively "such persons" in the backward class - though they may not have acquired a higher level of education - are able to move in the society without being discriminated socially". These persons practice discrimination against others in that group who are comparatively less rich. It must be ensured that these persons do not "chew up" the benefits meant for the true backward class. "Economic ceiling" is to be fixed to cut off these persons from the benefits of reservation. In the result, the "means test" is imperative to skim off the "affluent" sections of backward classes.

21. Sahai, J. (para 629) observed that the individuals among the collectivity or the group who may have achieved a "social status" or "economic affluence", are disentitled to claim reservation. Candidates who apply for selection must be made to disclose the annual income of their parents which if it is beyond a level, they cannot be allowed to claim to be part of the backward class. What is to be the limit must be decided by the State. Income apart, provision is to be made that wards of those backward classes of persons who have achieved a particular status in society be it political or economic or if their parents are in higher services then such individuals must be precluded from availing the benefits of reservation. **Exclusion of "creamy layer" achieves a social purpose.** Any legislative or executive action to remove such persons individually or collectively cannot be constitutionally invalid.

22. As appears from the judgments of six out of the eight Judges, viz. **Jeevan Reddy** (for himself and three others), Sawant and Sahai JJ.- (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.

23. The submission of Sri Rajeev Dhawan for the S.N.D.P. Yogam that the above separate judgments contain mere illustrations and do not contain any declaration of law cannot, in our opinion, be accepted. Counsel also relied upon observations in the judgment of Jeevan Reddy, J. to the effect that in such a big country as ours, **norms may differ from State to State or from region to region**. In our view, those observations do not detract from the declaration of law that the above sections belong to the creamy layer and hence are to be kept outside the backward class. **We may add that some more categories of persons who can be said to have gone outside the creamy layer are those "broad categories" enumerated in the notification of the Central Government dated 8.9.93 pursuant to Indira Sawhney and the said broad categorisation has been accepted by this Court in Ashok Kumar Thakur v. State of Bihar and Ors. MANU/SC/0011/1996 : AIR1996SC75 as valid.** With respect, we are in entire agreement with the principles laid down in Ashok Kumar Thakur.

24. **We may point out that the identification of creamy layer in every backward class is in fact based upon horizontal division of every section of the backward class into creamy layer or non-creamy layer.** For example, if there are a dozen named backward classes and each have particular percentage of D quota in the reservation, they can be arranged in a vertical distribution one after the other (see para 812 of Indira Sawhney referring to vertical and horizontal divisions), and the separate and the aggregate quota meant for them can be spelled out. But in each of these named backward classes listed one below the other, it is not difficult to make horizontal divisions of those p belonging to (i) constitutional offices (ii) particular services, (iii) professions (iv) industry and trade (v) particular income level and (vi) particular holding of property etc. to segregate the creamy and non-creamy layers in each vertical sub-classification of backward class and say that the children of such persons in these horizontal sub-divisions of the backward classes will be creamy layer and therefore outside the backward classes. This is not a difficult exercise. It is also important to notice that such a horizontal division based on such norms will be applicable not only to those in the Backward Classes presently falling under the norm but the norms or limits so set would also be applicable to those reaching that level in the future. May be, as stated in the



notification of the Central Government dated 8.9.93 issued pursuant to Indira Sawhney, the income levels may have to be reasonably upgraded periodically to set off inflation. Subject to such a reasonable revision in the norms, if any, periodically, the norms whether laid down by the Central Government or the State Governments must apply not only for the immediate present but also for the future. This, in our view, was the declaration of law made in Indira Sawhney and in Ashok Kumar Thakur in relation to identification and exclusion of creamy layer.

25. So far as the directions in Indira Sawhney are concerned, they are that the Central and State Governments are obliged to create separate bodies which will identify the creamy layer in the backward classes within a time frame. Point 1 is decided accordingly.

POINTS 2 and 3:

26. These two points are crucial to the case. Under these points, we shall now deal with the validity of the Kerala Act (Act 16/95).

***(i) Equals and unequals, twin aspects:***

27. As the 'creamy layer' in the backward class is to be treated "on par" with the forward classes and is not entitled to benefits of reservation, it is obvious that if the 'creamy layer' is not excluded, there will be discrimination and violation of Articles 14 and 16(1) inasmuch as equals (forwards and creamy layer of backward classes) cannot be treated unequally. **Again, non-exclusion of creamy layer will also be violative of Articles 14, 16(1) and 16(4) of the Constitution of India since unequals (the creamy layer) cannot be treated as equals that is to say, equal to the rest of the backward class.** These twin aspects of discrimination are specifically elucidated in the judgment of Sawant J, where the learned Judge stated as follows: (para 520)

"[T]o continue to confer upon such advanced sections ...special benefits, would amount to treating *equals unequally* ....Secondly, to rank them with the rest of the backward classes would ...amount to treating *unequals equally*".

Thus, any executive or legislative action refusing to exclude the creamy layer from the benefits of reservation will be violative of Articles 14 and 16(1) and also of Article 16(4). We shall examine the validity of Sections 3, 4 and 6 in the light of the above principle.

***(ii) Validation***



28. ....

29. In the context of the law laid down in *Indira Sawhney* and in *Ashok Kumar Thakur* **if the legislature of any State does not take steps to remove the defect or to effectively and realistically remove the defect to exclude the 'creamy layer' from the backward classes then the benefits of reservations which are invalidly continued in favour of the 'creamy layer' cannot be declared retrospectively valid merely by a legislative declaration that such creamy layer is absent as done by Section 3 of the Kerala Act.** Nor can it be done by means of the validating provision contained in Section 6 of that Act. **The creamy layer principle laid down in *Indira Sawhney*, cannot be ignored as done by Section 6 of the said Act.** We shall elaborate these aspects later. **If under the guise of elimination of the 'creamy layer', the legislature makes a law which is not indeed a true elimination but is seen by the Court to be a mere cloak, then the Court will necessarily strike down such a law as violative of principle of separation of powers and of Articles 14, 16(1) and Article 16(4).**

**(iii) *Ashok Kumar Thakur* a case of unrealistic elimination but Central Government's O.M, dated 8.9.93 approved:**

30. Such a case of unrealistic elimination of creamy layer came up before this Court from Bihar and Uttar Pradesh and we shall refer to the same. This happened in *Ashok Kumar Thakur v. State of Bihar and Ors.* MANU/SC/0011/1996 : AIR 1996 SC 75 , already referred to. There the position was that unrealistically high levels of income or holding or other conditions were prescribed by the Legislatures of Bihar and Uttar Pradesh under the Bihar Reservation of vacancies in Posts and Services (Amendment) Ordinance, 1995 (5 of 1995) and Schedule II read with Section 3(b) of the U.P. Public Services Reservation for Schedules Castes and Scheduled Tribes and other Backward Classes Act, 1994 (Act 4 of 1994) G respectively. In that case, so far as Bihar was concerned, Schedule III (except Clause I), of the Bihar Ordinance and so far as UP was concerned, Schedule II read with Section 3(b) of the U.P. Act were therefore quashed by this Court, on the ground of discrimination.

31. While dealing with these Acts, this Court referred to the fact that pursuant to *Indira Sawhney* the Government of India had appointed a Commission presided over by a retired Judge of the High Court of Patna and on the basis



of the Report of the Commission, it had issued an office Memorandum dated 8.9.93 designating

(A) .....

(B) *Service category: children of*

(a) parents, Group A/Class I officers of All India Central Services and State Services (direct recruits) where both or one of the parents are Class I officers, subject to certain conditions;

(b) children of Group B/Class II officers of the Central and State Services (direct recruitment), subject to certain conditions;

(c) children of employees of Public Sector Undertakings, Banks, Insurance Organisations, Universities etc., and in comparable posts and positions under private employment;

(d) children of members of Armed Forces and Para-Military Forces;

37. In the 2<sup>nd</sup> case of **Ashoka Kumar Thakur v. Union of India and others** reported in (2008) 6 SCC 1, the Apex Court held as follows –

"384. According to the Kerala Legislature, there was no creamy layer in Kerala. The legislation was challenged in **Indra Sawhney v. Union of India and Ors.** : AIR 2000 SC 498 , (hereinafter referred to as **Sawhney II**). The Court struck the two provisions that barred creamy layer exclusion, concluding **that non-exclusion of the creamy-layer and inclusion of forward castes in reservation violates the right to equality under Article 14 and the basic structure.**

385. In **Sawhney II** at para 65, the Court had gone to the extent of observing that not even the Parliament, by constitutional amendment, could dismantle the basic structure by including the creamy layer in reservation (SCC p. 202, para 65):

"65. What we mean to say is that the Parliament and the legislature in this country cannot transgress the basic feature of the



Constitution, namely, the principle of equality enshrined in Article 14 of which Article 16(1) is a facet. **Whether the creamy layer is not excluded or whether forward castes get included in the list of backward classes, the position will be the same, namely, that there will be a breach not only of Article 14 but of the basic structure of the Constitution. The non-exclusion of the creamy layer or the inclusion of forward castes in the list of backward classes will, therefore, be totally illegal. Such an illegality offending the root of the Constitution of India cannot be allowed to be perpetuated even by constitutional amendment.**

(emphasis in original)

386. By definition, the creamy and non-creamy are unequal when it comes to schooling. Relative to their non-creamy counterparts, the creamy have a distinct advantage in gaining admission. While the creamy and non-creamy are given equal opportunity to gain admission in the reserved category, this equality exists in name only. Will the OBC daughter of a Minister, IAS officer or affluent business owner attend better schools than her non-creamy counterpart? Yes. Will she go to private tuitions unaffordable to her non-creamy counterpart? Certainly. And where will she cram for the all-decisive entrance exams? In a coaching center? Of course. Will she come home from school to find a family member waiting? Probably. And when she seeks help from her parents, are they educated and able to give superior assistance with schoolwork? Most likely.

397. In a number of judgments, the view has been taken that the creamy layer's inclusion takes from the poor and gives to the rich.

398. Our Courts in following cases had taken the same view. [See: **N.M. Thomas** (supra), para 124 (seven-Judge Bench); **K.C. Vasanth Kumar and Anr. v. State of Karnataka** 1985 (Supp) SCC 714, paras 2, 24 and 28 (five-Judge Bench); **Sawhney I.**, paras 520, 793 and 859(3)(d) (nine-Judge Bench); **Ashoka Kumar Thakur v. State of Bihar and Ors.** : AIR1996SC75 (two-Judge Bench); **Sawhney II**, paras 8-10, 27, 48 and 65-66 (three-Judge Bench); **Nagaraj** (supra), paras, 120-124 (five-Judge Bench); **Nair Service Society v. State of Kerala** : AIR2007SC2891 (two-Judge Bench)].

415. Income as the criterion for creamy layer exclusion is insufficient and runs afoul of **Sawhney I.** (See: page



724 at para 792). **Identification of the creamy layer has been and should be left to the Government, subject to judicial direction. For a valid method of creamy layer exclusion, the Government may use its post-Sawhney I criteria as a template.** (See: O.M. of 8-9-1993, para 2(c)/Column 3, approved by this Court in *Ashoka Kumar Thakur* (supra), para 10). **This schedule is a comprehensive attempt to exclude the creamy layer in which income, Government posts, occupation and land holdings are taken into account.** The Office Memorandum is reproduced hereunder:

No. 36012/22/93-Estt (SCT)  
Government of India  
Ministry of Personnel, Public Grievances & Pension  
(Department of Personnel & Training)  
New Delhi, the **8<sup>th</sup> September, 1993**

#### OFFICE MEMORANDUM

**Subject:** Reservation for Other Backward Classes in Civil Posts and Services under the Government of India - Regarding.

The undersigned is directed to refer to this Department's O.M. No. 36012/31/90-Estt(SCT) dated 13<sup>th</sup> August, 1990 and 25<sup>th</sup> September, 1991 regarding reservation for Socially and Economically Backward Classes in Civil Posts and Services under the Government of India and to say that following the Supreme Court judgment in *Indra Sawhney v. Union of India and Ors.* Writ Petition (Civil) No. 930 of 1990 the Government of India appointed an Expert Committee to recommend the criteria for exclusion of the socially advanced persons/sections from the benefits of reservation for Other Backward Classes in civil posts and services under Government of India.

2. Consequent to the consideration of the Expert Committee's recommendation this Department's Office Memorandum No. 36012/31/90-Estt. (SCT), dated 13.8.1990 referred to in para (1) above is hereby modified to provide as follows:

(a) 27% (Twenty seven percent) of the vacancies in civil posts and services under the Government of India, to be filled through direct recruitment, shall be reserved for the Other Backward Classes. Detailed instructions relating to the procedure to be followed for enforcing reservation will be issued separately.



(b) Candidates belonging to OBCs 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%.

(c) (i) The aforesaid reservation shall not apply to persons/sections mentioned in column 3 of the Schedule to this Office Memorandum.

(ii) The rule of exclusion will not apply to persons working as artisans or engaged in hereditary occupations, callings. A list of such occupations, callings will be issued separately by the Ministry of Welfare.

(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 Government's Lists. A list of such castes and communities is being issued separately by the Ministry of Welfare.

(e) The aforesaid reservation shall take immediate effect. However, this will not apply in vacancies where the recruitment process has already been initiated prior to the issue of this order.

3. 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 by the Ministry of Finance respectively from the date of this Office Memorandum.

#### **SCHEDULE**

<b><u>Description of category</u></b>	<b><u>To whom rule of exclusion will apply.</u></b>
<b>I. Constitutional Posts</b>	Son(s) and daughter(s) of (a) President of India; (b) Vice-President of India; (c) Judges of the Supreme Court and of the High Courts; (d) Chairman and Members of UPSC and of the State Public Service Commission; Chief Election Commissioner; Comptroller and Auditor



General of India;

(e) persons holding constitutional positions of like nature.

**II. Service Category**

**(A) Group A/ Class I Officers of the All India Central and State Services (Direct Recruits)**

**Son(s) and daughter(s) of**

**(a) parents, both of whom are Class I Officers;**

**(b) parents, either of whom is a Class I officer;**

**(c) parents, both of whom are Class I Officers, but one of them dies or suffers permanent incapacitation;**

**(d) parents, either of whom is a Class I officer 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 five years;**

**(e) parents, both of whom are Class I officers 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.**

**(f) Provided that the rule of exclusion shall not apply in the following cases:**

**(a) Son(s) and daughter(s) of parents either of whom or both of whom are class I officers and such parent(s)**



dies/die or suffer permanent incapacitation;

**(b) A lady belonging to OBC category has got married to a Class I officer, and may herself like to apply for a job.**

(B) Group B/Class II officers of the Central and State Services (Direct Recruitment)

Son(s) and daughter(s) of

(a) Parents both of whom are Class II officers;

(b) parents of whom only the husband is a Class II officer and he get into Class I at the age of 40 or earlier;

(c) parents, both of whom are Class II officers and one of them dies or suffers permanent incapacitation and either one 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 five years before such death or permanent incapacitation;

(d) parents of whom the husband is a Class I officer (direct recruit or **pre-forty promoted**) and the wife is a Class II officer and the wife dies; or suffers permanent incapacitation; and

(e) parents, of whom the wife is a Class I officer (direct recruit or **pre-forty promoted**) and the husband is a Class II officer and the husband dies or suffers permanent incapacitation:

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

Son(s) and daughter(s) of

(a) parents both of whom are Class II officers and one of them dies or suffers permanent incapacitation;



(b) parents, both of whom are Class II officers and both of them die or suffer permanent incapacitation, even though 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 five years before their death or permanent incapacitation.

(C) Employees in Public Sector Undertakings etc.

The criteria enumerated in A and B above in this category will apply mutatis mutandis to officers holding equivalent or comparable posts in PSUs, Banks, Insurance Organisations, Universities, etc. and also to equivalent or comparable posts and positions under private employment, pending the evaluation of the posts on equivalent or comparable basis in these institutions, the criteria specified in Category VI below will apply to the officers in these institutions.

**III. Armed Forces Including Paramilitary Forces**

(Persons holding civil posts are not included)

Son(s) and daughter(s) of parents either or both of whom is or are in the rank of Colonel and above in the Army and to equivalent posts in the Navy and the Air Force and the Para Military Forces:

Provided that:

(i) If the wife of an Armed Forces officer is herself in the Armed Forces (i.e. the category under consideration) the rule of exclusion will apply only when she herself has reached the rank of Colonel;

(ii) The service ranks below Colonel of husband and wife shall not be clubbed together;

(iii) If the wife of an officer in the Armed Forces is in civil



employment, this will not be taken into account for applying the rule of exclusion unless she falls in the service category under Item No. II in which case the criteria and conditions enumerated therein will apply to her independently.

**IV. Professional Class and Those Engaged in Trade and Industry**

(i) Persons engaged in profession as a Doctor, Lawyer, Chartered Accountant, Income Tax consultant, financial or management consultant, dental surgeon, engineer, architect, computer specialist, film artists and other film professional, author, playwright, sports persons, sports professional, media professional or any other vocations of like status. Criteria specified against Category VI will apply:

(ii) Persons engaged in trade, business and Industry. Criteria specified against Category VI will apply-

*Explanation:*

(i) Where the husband is in same profession and the wife is in a Class II or lower grade employment, the income/wealth test will apply only on the basis of the husband's income;



(ii) If the wife is in any profession and the husband is in employment in a Class II or lower rank post, then the income/wealth criterion will apply only on the basis of the wife's income and the husband's income will not be clubbed with it.

**V. Property Owners**

**A. Agricultural holdings**

Son(s) and daughter(s) of persons belonging to a family (father, mother and minor children) which owns

(a) only irrigated land which is equal to or more than 85% of the statutory ceiling area, or

(b) both irrigated and unirrigated land, as follows:

(a) both irrigated and unirrigated land, as follows:-

(i) The rule of exclusion will apply where the precondition exists that the irrigated area (having been brought to a single type under a common denominator) 40% or more of the statutory ceiling limit for irrigated land (this being calculated by excluding the unirrigated portion). If this precondition of not less than 40% exists, then only the area of unirrigated land on the basis of the conversion formula existing, into the irrigated type. The irrigated area so computed from unirrigated land shall be added to the actual area of irrigated land if after such clubbing together the total area in terms of irrigated land is 80% or more of the statutory ceiling limit for irrigated land, then the rule of exclusion will apply and disentitlement will occur;



(ii) The rule of exclusion will not apply if the land holding of a family is exclusively unirrigated.

**B. Plantations**

(i) Coffee, tea, rubber etc. Criteria of income/wealth specified in Category VI below will apply.

(ii) Mango, citrus, apple plantations, etc. Deemed as agricultural holding and hence, criteria at A above under this category will apply.

C. Vacant land and/or buildings, in urban areas or urban agglomerations Criteria specified in Category VI below will apply.

Explanation: Building may be used for residential, industrial or commercial purpose and the like two or more such purposes.

**VI. Income/Wealth Test Son(s) and daughter(s) of-**

**(a) persons having gross annual income** of Rs. 1 lakh or above or possessing wealth above the exemption limit as prescribed in the Wealth Tax Act for a period of three consecutive years;

(b) persons in Categories I, II, III and VA who are not disentitled to the benefit of reservation but have income from other sources of wealth which will bring them within the income/wealth criteria mentioned in (a) above.

*Explanation.-*

(i) Income from salaries or agricultural land shall not be clubbed;

(ii) The income criteria in terms of rupee will be modified taking into account the change in its value every three years; If the situation, however, so demands, the interregnum may be less.



*Explanation:* Wherever the expression "permanent incapacitation" occur in this schedule, it shall mean incapacitation which results in putting an officer out of service.

416. In sum, the schedule excludes the children of those who hold constitutional posts, e.g., the children of the President of India, Supreme Court Judges, Chairman and Members of UPSC and others are excluded. Class 1 Officers' children are not eligible for OBC perks either. When both parents are Class-II Officers, their children are excluded. The same criteria that apply to Class-I and II officers apply to children of parents who work at high levels within the private sector. Agricultural owners are excluded when their irrigated holdings are more than or equal to 85% of the statutory ceiling. The O.M. further excludes persons having a gross annual income of Rs. 2.5 lakh or more. The Government raised the income limit from Rs. 1 to Rs. 2.5 lakh on 09.03.2004 vide O.M. 36033/3/2004.

417. **The creamy layer schedule of the O.M. dated 8.9.93, in my opinion, is not comprehensive. This should be revised periodically - preferably once in every 5 years, in order to ensure that creamy layer criteria take changing circumstances into account.**

38. It is clear that in conformity with the above law laid down by Apex Court in (i) ***Indra Sawhney (1<sup>st</sup>) case (1992) Supp. 3 SCC 217***, (ii) ***Indra Sawhney (2<sup>nd</sup>) case (2000) 1 SCC 168***, (iii) ***Ashoka Kumar Thakur (1<sup>st</sup>) case (1995) 5 SCC 403*** and (iv) ***Ashoka Kumar Thakur (2<sup>nd</sup>) case (2008) 6 SCC 1***, the Central Government by Notification dated 08.09.1993, and the State Government by Notification dated 06.06.1995, which were partially modified by Notification dated 05.12.2003 of the State Government, constituted a permanent body for entertaining, examining and recommending for inclusion



and/or exclusion of the class/caste of people in the list of Backward Classes to be notified by the State Governments, keeping in view the socio-economic criteria to exclude socially advanced person/section (creamy layer) from the list of Other Backward Classes and Most Backward Classes. The relevant criteria are provided in Schedule I appended to the said Notification. The Notification dated 05.12.2003 also empowers the competent authorities to determine and mention in the Certificate that the particular person/section does not belong to the creamy layer.

**39.1** In the case of Ms. Bina Devi Sharma, the Sub-Divisional Magistrate, Pakyong, East Sikkim, by proceedings dated 07.09.2009, during enquiry, cancelled the OBC Certificate dated 16.08.2004 issued to Ms. Bina Devi Sharma, for the following reasons: -

"9. The records in the office reveal that Ms Bina D. Sharma was issued an OBC Certificate bearing Memo No.3180/SDOP dated 16/08/04 by this office. The records further reveal that, while applying for OBC Certificate, Ms. Sharma on oath had affirmed that she was the only member of the family and serving as a Post Graduate Teacher in the Government of Sikkim. She had also submitted her income certificate on the basis of which an OBC certificate was issued to her. **During the enquiry information was sought from the department of Personnel and Training, Government of Sikkim which revealed that during the relevant time of issue of OBC Certificate to Ms. Bina D. Sharma, her father Shri Tanka Ram Sharma, IFS was holding the post of Pr. Chief Conservator of Forest cum Secretary of Forest, Environment and Wildlife Management Department, Government of Sikkim.** ....."



**39.2** The Sub-Divisional Magistrate, Pakyong, East Sikkim, relying on the clarification dated 14.10.2004 issued by the Government of India, further in the impugned proceedings dated 07.09.2009 observed as follows:

"it is clarified that the creamy layer of a candidate is determined on the basis of the status of his/her parents and not on the basis of his own status or income or on the basis of status or income of his/her spouse. Therefore, while determining the creamy layer status of a person the status or the income of the candidate himself or of his/her spouse shall not be taken into account."

Accordingly cancelled the OBC Certificate dated 16.08.2004 issued to Ms. Bina Devi Sharma.

**40.** Similarly, in the case of Ms. Onissa Dechhen Gurung, the District Magistrate, West Sikkim, by proceedings dated 13.01.2010, after due enquiry, cancelled the MBC Certificate issued to Ms. Onissa Decheen Gurung by the Block Development Officer, Block Administrative Centre, Soreng, West Sikkim on 23.11.2007, on the following reasons: -

"11. ...., in regard to the Schedule II - Service category, the Notification No. 7/GOS/9(15)/SWD, dated: 05-12-2003 states "Goup A/Class I Officer of All India Central Service and in the State Govt. Class I Officer of the Rank of Joint Secretary and above parents either of whom is a Class I Officer of the rank of Joint Secretary and above in the State Government....." are excluded from reservation for Most Backward (MBC) or Other Backward Classes (OBC) and the Schedule also "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, which means that once a Govt. Servant reaches the level of creamy layer he/she is excluded



from the creamy layer only on his/her death or permanent incapacitation and not on retirement. Hence, such officers on retirement continue to be under creamy layer category. The fact is also corroborated explicitly vide Para VI of Letter No.36033/5/2004-Estt. (Res.) dated:14-10-2004 issued by Govt. of India, Deptt. of personnel & Training which states, "it is clarified that sons and daughters of parents who are included in the creamy layer on the basis of service status of their parents shall continue to be treated in creamy layer even if their parents have retired or have died after retirement".

12. Though, the respondent contended that the Letter No.36033/5/2004-Estt. (Res.) dated: 14-10-2004 issued by Govt. of India, Deptt. of personnel & Training is not extended and enforced by the State Government, the same is not tenable as the said letter is not a Notification but only a clarification which doesn't require any subsequent Gazette Notification for its extension.

13. Consequently, in view of the facts and in the light of the Notification No.7/GOS/9(15)/SWD, dated: 05-12-2003 read with Letter No. 36033/5/2004-Estt. (Res.) dated: 14-10-2004 issued by Govt. of India, Deptt. of Personnel & Training, I hold that Ms Onissa Dechhen Gurung falls under the creamy layer even after retirement of her father Shri T. B. Gurung as Secretary-cum-Principal Chief Engineer, Irrigation and Flood Control Department, Govt. of Sikkim."

**41.1** Mr. B. Sharma, the learned Senior Counsel contends that Ms. Bina Devi Sharma was married and later got divorced and therefore became single and independent. Hence her relation with her father is not relevant to determine her status as creamy layer because the criteria prescribed under clause II A of the Notification dated 05.12.2003 is not applicable in her case. But I am unable to appreciate the said arguments, because if such arguments are accepted all the married sons will also escape from 'creamy layer' and the rule of exclusion will not be applicable to all sons if they marry, consequently the very rule of



exclusion will become a mockery, in the eye of law, and the Office Memorandum dated 08.09.1993 issued by the Central Government and the Notification dated 15.12.2003 issued by the State Government pursuant to the direction of the Apex Court will all become redundant.

**41.2** Mr. B. Sharma, learned Senior Counsel also submits that in the case of Ms. Bina Devi Sharma on account of her marriage she has to be treated as independent and single, and therefore Clause VI which refers to Income/Wealth Test alone is applicable. But the suggestion of Mr. B. Sharma in this regard is not convincing, because even Clause VI viz. Income/Wealth Test refers **to the sons and daughters of persons having gross annual income**, but does not refer to the gross annual income of the applicant herself.

**41.3** 'Means Test'/'Creamy Layer Test' is intended to determine the socially advanced status of the sons/daughters who seek the benefit of reservation, but not that of the spouse. Therefore, as clarified in paragraph 8 of the Notification dated 14.10.2004 of the Central Government, the creamy layer status of a candidate is determined on the basis of the status of the



parents and not on the basis of his/her own status or income or income of his/her spouse.

**41.4** Mr. B. Sharma alternatively, invites my attention to paragraph 4 (vi) and paragraph 7 of the clarification dated 14.10.2004, which reads hereunder:

- "4. (i) to .....  
(v)  
(vi) Will a candidate who himself is a directly recruited Class I/Group A officer or **a directly recruited Class II/Group B officer who got into Class I/Group A at the age of 40 or earlier** be treated to be falling in creamy layer on the basis of his service status?
- .....

7. In regard to clause (v) of para 4, it is clarified that the sons and daughters of parents of whom only the husband is a directly recruited Class II/Group B officer who gets into Class I/Group A at the age of 40 or earlier are treated to be creamy layer. **If the father is directly recruited Class III/Group C or Class IV/Group D employee and he gets into Class I/Group A at the age of 40 or earlier**, his sons and daughters shall not be treated to be falling in creamy layer."

According to Mr. B. Sharma, the father of Ms. Bina Devi Sharma entered into service as Assistant Teacher and then got into Class I/Group A at the age of 40 or earlier, and therefore his daughter Ms. Bina Devi Sharma cannot be treated to be falling in creamy layer. I am unable to appreciate this argument for the simple



reason that the father of Ms. Bina Devi Sharma was initially appointed as Assistant Teacher only on temporary basis, and thereafter, he was independently selected, sent to the Forest Training and then appointed as Forest Officer in the Forest Department in the Government of Sikkim directly. Therefore, the contention that the father of Ms. Bina Devi Sharma was recruited only as Assistant Teacher in Class III and thereafter, got appointed as Class I officer and therefore, Ms. Bina Devi Sharma does not fall in creamy layer is untenable. Be that may be, it has to be remembered that the paragraph 4 (vi) and paragraph 7 of the Clarification dated 14.10.2004 of the Central Government only refer to the criteria prescribed in the case of pre-forty promotees mentioned in Clause II(B) of the Office Memorandum dated 08.09.1993, does not refer to the Notification dated 05.12.2003 of the State Government, which does not deal with such case of pre-forty promotees. Hence the contention of Mr. B. Sharma, learned Senior Counsel in this regard is totally misconceived.

**42.1** Mr. Bhaskar Raj Pradhan, learned Senior Counsel for the petitioner in W.P.(C) No. 02 of 2010 Ms. Onissa Dechhen Gurung, invited my attention to a decision dated 05.10.2007 of the Division Bench of the Delhi High Court in *the Secretary M/O*



*Personal, Public Grievance and Pensions vs. Tanu Kashyap and Another.* In this case, the Division Bench held as follows:

"16. The expression 'income' has a definite connotation and it does not include 'pension'. However, even if pension is to be treated as income, it was much less than Rs. 2.50 lacs. Therefore, even if the income criteria is applied, the respondent did not come under the exclusion category and, thus, could get the benefit of being OBC. This is also clear from the letter dated 8/9.2.2007 which was written by Bharat Coking Coal Ltd. to the General Manager (Personnel), obtained under the Right to Information Act, and clearly demonstrates the equivalence. This letter reads as under:

Kindly refer to your letter No. CIL/CSA(vi)/Krinal Sinha/RTI/355 dated \_\_.1.2007 on the above mentioned subject.

The desired details are furnished as under in the prescribed proforma:

Classification of Pay scale in Offered pay scale Grade offered in post of service CMWO (Rs.) in CIL (Rs.) CIL e.g. E1, E2 in CMWO and E3 etc. Group-A 1100-1600/1800 3000-100-3500- E-5 (unrevised) 125-4500 (revised)

2400-100-3200

Group-A 700-1300 2200-75-2800-EB- E-4 (unrevised) 100-4000 (revised)

2280-100-2900

Group-B 2000-3500 1680-60-1800-100- E3 (revised) 2700

Group-B 1640-2900 1130-2400 E-2 (revised)

17. Learned Counsel for the petitioner submitted that in the Circular dated 14.10.2004 it was abundantly clarified that in case a person belonged to the creamy layer, even after his retirement he would continue to fall in this category and his sons and daughters would not be entitled to the benefit of OBC. However, attracting of this kind of situation presupposes the existence of two pre-conditions:

(i) there was a determination about the creamy layer of the parent(s); and



(ii) it happened when the parent(s) was/were in the service.

An interesting question may arise for consideration, namely, whether a person would be treated as belonging to 'creamy layer' the moment his income touches Rs. 2.50 lacs p.a. for three years or such a determination is to take place with reference to the date when benefit of OBC is claimed by the sons and daughters of such a person. No such clarification is issued in this behalf. From the Examination Notice and the certificate which the candidate is required to submit, i.e. for the last three years, it implies, in the absence of specific clarification, that the question of creamy layer would be determined on the date when any child of such a parent(s) is/are seeking benefit of OBC. As on that date if the parent(s), after applying the yardstick contained in the Notification dated 9.3.2004, are found in creamy layer, then that situation would continue to apply even if such a parent(s) retires. Even otherwise, this would be the logical date for determination of the question about the creamy layer, else it may lead to absurd consequences. For example, in case a person retired from Government service 10 years ago, though at that time he earned income of Rs. 2.50 lacs per annum for three years, but his son or daughter applies for Government job as OBC category 10 years after his retirement when he is drawing pension and there is hardly any income, can such son or daughter be denied the status of OBC only because at one point of time his/her father had the requisite income. Likewise, for those engaged in trade and industry, for whom Income/Wealth Test is applicable, may have good income much earlier, but if such person is, because of losses suffered in the business, is living in penury for the last number of years before his child applies for the job, can such a child be denied the benefit of reservation only because number of years ago his/her father was having good income. In any case, this is for the Government to clarify and in the absence of any such clarification and coupled with the fact that the Examination Notice requires income for the last three years to be submitted, the cut off date for determining the creamy layer will have to be the date when any child of such a parent is seeking the benefit of reservation under OBC category.

In the present case, however, there was no determination as to whether the father of the respondent No. 1 was covered under the creamy layer. It fell for consideration only when the respondent No. 1 applied and as on that date, since her father had retired and had no income in the year 2003-04, he did not satisfy the criteria of creamy layer mentioned in the notification. If the Government intends it otherwise, it will have to specifically provide so.



For this, many questions may arise which will have to be determined and it is not for us to lay down any such guideline or take a policy decision. The provisions which stand as of today and which we have examined above, on application thereof, we are of the opinion that the learned Tribunal rightly held that the respondent No. 1 was an OBC candidate and did not belong to the creamy layer on the date she applied for the test, i.e. August 2004 and, therefore, she could rightly apply under the OBC category."

Placing reliance on the said decision of Delhi High Court dated 05.10.2007, Mr. Bhaskar Raj Pradhan, learned Senior Counsel, on behalf of the petitioner, Ms. Onissa Dechhen Gurung contends that the criteria fixed in Schedule I of the Notification dated 05.12.2003 is not applicable in case of retired parents.

**42.2** In my considered opinion, the decision of the Delhi High Court dated 05.10.2007 in *the Secretary M/O Personal, Public Grievance and Pensions vs. Tanu Kashyap and Another* is directly contrary to the law laid down by the Apex Court in (i) ***Indra Sawhney (1<sup>st</sup>)* case (1992) Supp. 3 SCC 217**, (ii) ***Indra Sawhney (2<sup>nd</sup>)* case (2000) 1 SCC 168**, (iii) ***Ashoka Kumar Thakur (1<sup>st</sup>)* case (1995) 5 SCC 403** and (iv) ***Ashoka Kumar Thakur (2<sup>nd</sup>)* case (2008) 6 SCC 1**. That apart, the Division Bench has not considered the relevancy of the Office Memorandum dated 08.09.1993 of the Central Government and the clarification dated 14.10.2004 issued by the Central Government in that regard.



**42.3** On the other hand, learned Single Judge of the Delhi High Court by Order dated 06.07.2004 in *Sh. Chander Vijay vs. Union of India & Others* interpreted the words 'is or are', employed in the criteria prescribed in Office Memorandum dated 08.09.1993 of the Central Government with reference to the 'means test' and 'status test', as in the instant case, with regard to the son(s) and daughter(s) of Class I Officer, shall be read as 'was or were' also. The relevant portion of the said decision of the Delhi High Court reads as hereunder:

**"10. It is in the aforesaid background of purpose and context that the notifications, provisions regarding the petitioner's exclusion need to be examined. Leaving aside for the moment, the argument on interpretation of the expression, "is" it would be seen that the petitioner's father retired as a Class I Officer.** Accordingly, in terms of the notifications, as reproduced earlier, petitioner being his son, falls in the category, who is to be excluded. It is the case of respondent Nos.2 to 4 in their counter affidavit that petitioner and his father both own considerable property. It is stated that petitioner owns 59 bighas of irrigated land in Chhattar Garh, Bikaner, Rajasthan. Petitioner's father owns 31 bighas of irrigated land at Chhattar Garh, Bikaner, Rajasthan. The facility of irrigation is available from the siphon system attached to the land through the Indira Gandhi Canal. It is stated that the petitioner and his family own orchards near the National Highway By Pass No.8. There is a big house and tube well and a swimming pool. The nature, extent of land and the factum of irrigation facility is disputed. Petitioner's brother, Sh. Sukhbir Singh and sister-in-law are stated to be members of IAS, as stated by the petitioner's father in the  
applicat  
on for ration card.

11. From the foregoing, it would be seen that petitioner is the offspring of a Class I Officer for considerable period. This factor alone, even if the acquisition and possession of immovable properties was not to be reckoned, shows that



petitioner has shed of the disadvantage of social backwardness. Petitioner has not been deprived of the opportunities and means as others in the socially backward classes. The submission of the learned senior counsel for the petitioner that petitioner's father had undergone compulsory retirement and the notification is not intended to cover within their ambit offspring of retired first class officers militates against the very intent and purpose of the criteria laid down in Indra Sawhney's case and as enumerated by the Expert Committee as noted above. The mere fact that a Class I Officer upon retirement would get only a pension and have a fall in income or fall in status, in comparison to while in office, can hardly be a ground to bring back the said person or his offspring from Creamy Layer into the backward category.

**12. Let us now consider the legal submission made by learned senior counsel, who urged that it was not permissible to read the words, "is or are" used in the notifications as "was or were". Learned counsel contended that it was not permissible to add or amend and by construction and make up the lacunae which are left out.**

**13. The submission of the counsel that by use of the word "is or are" intention was to exclude only those, whose parents were presently employed in Government Class I service and not those whose services had either been terminated or those who had superannuated, is devoid of merit and deserves to be rejected.**

14. Reliance is placed by petitioner on Smt. Hira Devi and others Vs. District Board, Shahjhanpur reported at AIR 1952 Supreme Court 362 to urge that while it is the duty of the Court to harmonise the various provisions of the Act as enacted by the legislature but it certainly was not the duty of the Court to stretch the words used by the legislature to fill in gaps or omissions in the provisions of the Act. In Smt. Hira Devi and others Vs. District Board, Shahjhanpur (Supra) , when these observations were made, the court was dealing with the facts, which are entirely distinguishable. Under the UP District Board Act, the statute had specific provisions governing and subscribing the power of suspension. These were codified in Sections 71 and 90, the Supreme Court dis-approved the High Court's action in reading the power of suspension into the words, "orders of any authority whose sanction is necessary." It was in these circumstances that the above observations were made. The said authority does not advance petitioner's case.



15. Reliance is also placed on number of judgments to submit that the Court could not add or amend or by construction make up the failings. Further, that when the words used are plain and unambiguous, the Court is bound to construe them in their ordinary sense. Reliance is also placed on Mohan Kumar Singhania and others Vs. Union of India and others reported at AIR 1992 Supreme Court 1 to submit that while interpreting a statute, the consideration of inconvenience and hardship should be avoided and that when the language is clear and explicit and the words used are plain and unambiguous, we are bound to construe them in their ordinary sense with reference to other clauses of the Act or Rules, as the case may be, so far as possible to make a consistent enactment of the whole statute or series of statutes/Rules/Regulation relating to the subject matter. Added to this, in construing a statute, the Court has to ascertain the intention of the law making authority in the backdrop of the dominant purpose and the underlying intendment of the said statute and that every statute is to be interpreted without any violence to its language and applied as far as its explicit language admits consistent with the established rule of interpretation."

16. There is no quarrel with the principles of interpretation as stated in Mohan Kumar Singhania and others Vs. Union of India and others (Supra) or that if the meaning of the words are clear the Court is not to add, amend or delete the same.

17. **The situation in the instant case is, however, different. A perusal of the notification shows that the word "is and are" have been used not in the present sense alone. The use of the said expression in various clauses of the notification is indicative of happening in the past and/or in future.** This is evident from sub-clauses c, d and e, where the provision is made for the eventuality of demise or suffering a permanent incapacitation which would be indicative of a future event. Again in sub-clause d, eventuality of demise and permanent incapacitation an event in future is considered with reference to denial of benefit with a past event that is beneficial employment in any international organisation like, U.N. I.M.F., World Bank etc., of not less than 5 years. It would thus be seen that the words "is and are" have been used to cover the past as well as future.

18. **Reference may usefully be made to the definition of the expression "is" in Black's Law Dictionary. "This word although normally referring to the present, often has a future meaning, but is**



not synonymous with "shall have been". It may, however, have a past signification as in the sense of has been."

19. Reference may also be usefully made to the judgment of the Supreme Court in F.S.Gandhi, (dead) by L.Rs. Vs. Commissioner of Wealth Tax, Allahabad reported at (1990) 3 Supreme Court Cases 624. The Supreme Court had the occasion to consider interpretation of the words, "where the interest is available to an assessee for a period not exceeding six years from the date of Interest vests in the assessee contained in Section 2(e) 2(iii) of the Wealth Tax Act. The Court quoted with approval the above definition of "is" in the Black's Law Dictionary, observing, "the word available is preceded by the word "is" and is followed by the words, "for a period not exceeding six years." The words, "is" although normally referring to the present often, often has a future meaning, but is not synonymous with "shall have been". It may, however, have a past significance as in the sense of has been." We are of the view that in view of the words, "for a period not exceeding six years" which follow the word "available" the word "is" must be construed as referring to the present and future. In that sense it would mean that the interest is presently available and is to be available for a future for a period not exceeding six years. Besides, the aforesaid interpretation of the word "is" in the notifications as referring to "has been and in future" is in consonance with the purpose and intent of the notifications and in accordance with the well settled principles of interpretation, commending interpretation of provisions in the context in which they were used and the purpose which they achieve. **Reference may be made to S.R. Chaudhuri Vs. State of Punjab and others reported at (2001) 7 Supreme Court Cases 126. It is also in consonance with the principle of harmoniously interpreting to make the notification/statute workable and giving a meaning to all the provisions of the notification without making any one of them redundant. Reference may also be made to the decision of the Division Bench of the High Court of Judicature at Madras in Union of India Vs. D. Anil and others (Writ Petition No.12289/2001), where the Court while interpreting the same central notification held that, "the use of "is" in the entries relating to item No.2 in the Schedule to OM is, therefore, to be regarded as referring to persons, who have held the post mentioned therein and it is not to be understood as referring only to persons, who are actually holding those post at the time the claim for a reserved position is made. I am in full agreement**



with the reasoning and judgment of the Division Bench, which dealt with a similar case and the same notification. It is held that the petitioner squarely falls within the ambit of exclusion of the benefit of OBC under the notifications.

20. It is held that the words "is" and "are" in the Notification dated 8.9.1993 and 29.9.1993 are not to be interpreted as being confined to only those persons who were presently holding the posts and are also to include persons who have held such posts mentioned therein. As discussed in paras 17, 18 and 19 above, the petitioner is not entitled to the relief sought in the writ petitions. No ground is made out to assail the validity of the impugned Notifications. Considering the interpretation given to the words "is" and "are" in the Notifications, resort to the circular dated 2.2.2001 was not even necessary. In any case the clarification given in the circular is also in consonance with the interpretation given to the words used in the Notification by this Court. Hence challenge to the validity of the circular dated 2.2.2001 also fails."

The decision of the single Judge is not only convincing but also support the decision of the Apex Court in **Indra Sawhney (1<sup>st</sup>)** case (1992) Supp. 3 SCC 217, **Indra Sawhney (2<sup>nd</sup>)** case (2000) 1 SCC 168, **Ashoka Kumar Thakur (1<sup>st</sup>)** case (1995) 5 SCC 403 and **Ashoka Kumar Thakur (2<sup>nd</sup>)** case (2008) 6 SCC 1.

**42.4** Harmonious reading of clauses (a), (b) (c) (d) and (e) and provisos (a) and (b) under criteria II A of Schedule I makes it explicit that, as clarified by the Central Government in paragraph 6 of the clarification dated 14.10.2004, **sons and daughters of parents who are included in the creamy layer on the basis of service status of their parents shall**



continue to be treated in creamy layer even if their parents have retired or have died after retirement.

**43.1** Paragraphs 6 and 8 of the Clarification dated 14.10.2004 of the Central Government, namely:

- (i) that sons and daughters of parents who are included in the creamy layer on the basis of service status of their parents shall continue to be treated in creamy layer even if their parents have retired or have died after retirement; and
- (ii) that the creamy layer status of a candidate is determined on the basis of the status of his parents and not on the basis of his own status or income or on the basis or income of his/her spouse. Therefore, while determining the creamy layer status of a person the status or the income of the candidate himself or of his/her spouse shall not be taken into account

are intended to achieve the object behind the introduction of the concept of creamy layer by the Apex Court in the Indra Sawhney and Ashoka Kumar Thakur cases (supra) referred to above. The clarification in paragraphs 6 and 8 of the Clarification dated 14.10.2004, referred to above, are made applying the principles of purposive construction. It is settled law that **the Court must be strong against any construction which tends to reduce a statute's utility. The provisions of the statute must be**



construed so as to make it effective and operative and to further the ends of justice and not to frustrate the same. The Court has the duty to construe the statute to promote the object of the statute and serve the purpose for which it has been enacted and should not efface its very purpose. (Vide *S.P. Jain v. Krishna Mohan Gupta*, *RBI v. Peerless General Finance and Investment Co. Ltd.*, *Haryana SEB v. Suresh*, *Gayatri Devi Pansari v. State of Orissa*, *High Court of Gujarat v. Gujarat Kishan Mazdoor Panchayat*, *Indian Handicrafts Emporium v. Union of India*, *Ashok Leyland Ltd. v. State of T.N.*, *Ameer Trading Corpn. Ltd. v. Shapoorji Data Processing Ltd.*, *Deepal Girishbhai Soni v. United Insurance Co. Ltd.*, *Maruti Udyog Ltd. v. Ram Lal*, *Oriental Insurance Co. Ltd. v. Brij Mohan*, *Karnataka State Financial Corpn. V. N. Narasimahaiah*, and *Edukanti Kistamma (Dead) Through LRS and others v. S. Venkatareddy (Dead) Through LRS and Others* reported in (2010) 1 SCC 756)

**43.2** Accordingly, in both the cases, the petitioners, Ms. Bina Devi Sharma and Ms. Onissa Dechhen Gurung, do not belong to creamy layer. However, while issuing the OBC/MBC Certificate, the competent authority has failed to take note of the real spirit behind the notification viz. to exclude the creamy layer



from reservation and also has ignored the clarification dated 14.10.2004 issued by the Central Government in this regard.

**44.** Therefore, in my considered opinion the impugned proceedings of Sub-Divisional Magistrate, Pakyong dated 07.09.2009 cancelling the OBC Certificate of Ms. Bina Devi Sharma dated 16.08.2004 issued by the Sub-Divisional Magistrate, Pakyong and the impugned proceedings of District Magistrate, West Sikkim dated 13.01.2010 cancelling the MBC Certificate of Ms. Onissa Dechhen Gurung dated 23.11.2007 issued by the Block Development Officer, Soreng, are fully justified and supported by the rulings of the Apex Court, referred to above.

Hence, both the issues are answered in positive.

**X. What reliefs the contesting respondents are entitled to:**

**45.** The main issues, namely,

(i) Whether a daughter of a Class-I officer of the rank of Joint Secretary and above in the State Government is excluded from the reservation made for Other Backward Classes, herein after referred to as OBC, as per the Notification dated 05.12.2003 of the Government



of Sikkim, despite her marriage, on the ground that she belongs to Creamy Layer?

and

(ii) Whether a daughter of a Class-I Officer of the rank of Joint Secretary and above in the State Government is excluded from the reservation made for Most Backward Classes, herein after referred to as MBC, as per the Notification dated 05.12.2003 of the Government of Sikkim, in spite of retirement of her father, on the ground that she belongs to Creamy Layer?

are answered in positive. Therefore, (i) the impugned proceedings dated 07.09.2009 of the Sub-Divisional Magistrate, Pakyong, East Sikkim, cancelling the OBC Certificate issued to Ms. Bina Devi Sharma by the Sub-Divisional Magistrate, Pakyong, East Sikkim on 16.08.2004 and (ii) the impugned proceedings dated 13.01.2010 of the District Magistrate, West Sikkim, cancelling the MBC Certificate issued to Ms. Onissa Dechhen Gurung by the Block Development Officer, Soreng, West Sikkim 23.11.2007, are upheld.

**46.** It is not disputed that the contesting respondent, Mr. Khemraj Bhattarai, in W.P.(C) No. 28 of 2009, who is also the petitioner in W.P.(C) No. 16 of 2009, has applied for the post of Junior Grade of Sikkim State Civil Service reserved for OBC; and



he has also obtained OBC Certificate dated 18.06.2004 from the competent authority, namely, the Addl. District Collector, East District, Gangtok, who also has certified that Mr. Khemraj Bhattarai does not belong to the persons/sections (Creamy layer) mentioned in Column 3 of the Schedule to the Government of India, Department of Personnel and Training O. M. No. A16012/22/93-East (SCT) dated 8.9.1993 and the Government of Sikkim Notification No. 7/GOS-9(15) SWD dated 5<sup>th</sup> December, 2003, and the same is valid in law. Undisputed facts and materials available on record show that Mr. Khemraj Bhattarai is ranked next to Ms. Bina Devi Sharma in the OBC Merit Order.

**47.** Similarly, the contesting respondent, Kumari Baby Mukhia, in W.P.(C) No. 2 of 2010, who is also the petitioner in W.P.(C) No. 25 of 2009, has applied for the post of Junior Grade of Sikkim State Civil Service reserved for MBC; and she has also obtained MBC Certificate dated 10.01.2007 issued by the Sub-Divisional Officer, Soreng Sub-Division, West Sikkim, who also has certified that Kumari Baby Mukhia does not belong to the persons/sections (Creamy layer) mentioned in Column 3 of the Schedule to the Government of India, Department of Personnel and Training O. M. No. A16012/22/93-East (SCT) dated 8.9.1993 and the Government of Sikkim Notification No. 7/GOS-9(15)



SWD dated 5<sup>th</sup> December, 2003; and the same is also valid in law. As per the undisputed facts and materials available on record, Kumari Baby Mukhia is ranked next to Ms. Parina Gurung in the MBC Merit Order for the post reserved for MBC (W).

**48.** It is not disputed either by the Government or by any individual that they belong to OBC and MBC and that they are entitled for the benefit of reservation for OBC and MBC candidates respectively and that they do not belong to the creamy layer, as per the Office Memorandum dated 08.09.1993 of the Central Government and Notification dated 05.12.2003 of the State Government.

**49.** It is the settled law –

(a) that the plea of promissory estoppel or equity has no application in the case of employment based on Community Certificate wrongly or illegally obtained; and no sympathy and equitable considerations can come to rescue such candidates. Nor the plea of estoppel is germane to the beneficial constitutional concessions and opportunities given to the genuine tribes or castes. (Vide: **Kumari Madhuri Patil and another vs. Addl. Commissioner, Tribal Development and others** reported in (1994) 6 SCC 241);



(b) that equality clauses contained in Articles 14 and 16 of the Constitution, envisage that all the citizens of India shall get an opportunity to be considered for appointment in all the civil posts. When a public employment is obtained on a vacancy reserved for a particular category of candidate, he must fulfil the criteria laid down therefore. If the selectee does not fulfil the said basic criteria, his appointment cannot be allowed to be continued. Once the certificate on the basis whereof the respondent obtained employment stood cancelled, no question of allowing him to continue in service would arise, if he had been appointed on the basis of such a certificate. (Vide: ***Superintendent of Post Office and others vs. R. Valasina Babu*** reported in (2007) 2 SCC 335); and

(c) that the admission wrongly gained or appointment wrongly obtained on the basis of false social status certificate necessarily has the effect of depriving the genuine Scheduled Caste or Scheduled Tribe or OBC candidates as enjoined in the Constitution of the benefits conferred on them by the Constitution. The genuine candidates are also denied admission to educational institutions or appointments to office or posts under a State for want of social status certificate. Therefore, the admission or the appointment wrongly gained shall be cancelled. (Vide: ***Regional Manager, Central Bank of***



**India vs. Madhulika Guruprasad Dahir and others** reported in (2008) 13 SCC 170).

50. The above rulings of the Apex Court are squarely applicable to the facts and circumstances of the case and, therefore, the impugned proceedings dated 07.09.2009 of the District Collector, East Sikkim and the impugned proceedings dated 13.01.2010 of the District Magistrate, West Sikkim are upheld. Consequently, the contesting respondents in W.P.(C) No. 28 of 2009 and W.P.(C) No. 02 of 2010, viz. Mr. Khemraj Bhattarai and Kumari Baby Mukhia, who are also petitioners in W.P.(C) No. 16 of 2009 and W.P.(C) No. 25 of 2009, respectively, are entitled to be considered for appointment to the post of Junior Grade of Sikkim State Civil Service by the Government reserved for OBC and MBC (W), based on their OBC and MBC Certificates issued by competent authorities respectively, whereunder they are also certified that they do not belong to creamy layer, of course, subject to the compliance of other requirements, if any, under the relevant service rules.

#### Decisions

In the result, (i) the Writ Petition (C) No. 28 of 2009 filed by Ms. Bina Devi Sharma and No. 02 of 2010 filed by Ms. Onissa Dechhen Gurung are dismissed;



(ii) the proceedings dated 07.09.2009 of the Sub-Divisional Magistrate, Pakyong, East Sikkim, cancelling the OBC Certificate issued to Ms. Bina Devi Sharma by the Sub-Divisional Magistrate, Pakyong, on 16.08.2004, is upheld;

(iii) the proceedings dated 13.01.2010 of the District Magistrate, West Sikkim, cancelling the MBC Certificate issued to Ms. Onissa Dechhen Gurung by the Block Development Officer, Soreng on 23.11.2007, is also upheld;

(iv) the Writ Petition (C) No. 16 of 2009 filed by Mr. Khemraj Bhattarai and Writ Petition (C) No. 25 of 2009 filed by Kumari Baby Mukhia are ordered as indicated above, with the direction that the Government shall pass appropriate orders in the case of Mr. Khemraj Bhattarai and Kumari Baby Mukhia within 30 days from the date of receipt of this judgment; and

(v) however, no orders as to cost.

  
(P.D. DINAKARAN)  
CHIEF JUSTICE

17.09.2010

Index : Yes/~~No~~

Internet : Yes/~~No~~

pm/jk