

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on:16.08.2017

Pronounced on:31.08.2017

Coram

**THE HON'BLE MR.JUSTICE HULUVADI G.RAMESH
AND
THE HON'BLE DR.JUSTICE G.JAYACHANDRAN**

W.P.Nos.6387 to 6389 of 2017

1.Union of India rep.
The Secretary to Government of India,
Ministry of Personnel,
Public Grievances @ Pensions,
Department of Personnel & Training,
New Delhi.

2.The Secretary,
Government of India,
Ministry of Home Affairs,
New Delhi.

3.The Under Secretary,
Department of Personnel & Training,
Government of India,
New Delhi.

.. Petitioners in
W.P.Nos.6387 & 6388/2017

Union of India, rep by
The Secretary, Government of India,
Ministry of Personnel,
Public Grievances and Pensions,
Department of Personnel & Training,
New Delhi.

.. Petitioner in
W.P.No.6389 of 2017

/versus/

1.Rohith Nathan

2.Central Administrative Tribunal,
Rep.by its Registrar,
Madras Bench,
Chennai 600 104.

.. Respondents in
W.P.Nos.6387 & 6388/2017

1.G.Babu

2.Central Administrative Tribunal,
Rep.by its Registrar,
Madras Bench,
Chennai 600 104.

.. Respondents in
W.P.No.6389/2017

Prayer in W.P.No.6387 of 2017: Writ Petition has been filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari to call for the records of 2nd respondent and quash the order dated 12.01.2017 in O.A.No.1133/2014 as the same is unsustainable.

Prayer in W.P.No.6388 of 2017: Writ Petition has been filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari to call for the records of the 2nd respondent and quash the order dated 12.01.2017 in O.A.No.1132 of 2014 as the same is unsustainable.

Prayer in W.P.No.6389 of 2017: Writ Petition has been filed under Article 226 of the Constitution of India praying to issue a Writ of

Certiorari to call for the records of the 2nd respondent and quash the order dated 12.01.2017 in O.A.No.1375 of 2014 as the same is unsustainable.

For Petitioners :Mr.G.Rajagopalan,
(in all WPs) Additional Solicitor General of India
assisted by Mr.V.P.Sengottuvel

For Respondents :Mr.G.Masilamani, Senior Counsel
(in all WPs) for Mr.U.Karunakaran for R1
in W.P.Nos.6387 & 6388/2017
Mr.Paul and Paul for R1
in W.P.No.6389/2017
R2-Tribunal

COMMON ORDER

HULUVADI G.RAMESH, J.
and
Dr.G.JAYACHANDRAN, J.

The vexed question of identifying Creamy Layer among the other backward community for reservation in employment is agitated before this Court in these writ petitions.

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2. All these three writ petitions are preferred by the Union of India aggrieved by the common judgment passed by the Central Administrative Tribunal dated 12.01.2017 .

3. The brief facts of the case in W.P.Nos.6387 and 6388 of 2017 is as follows:

Mr.Rohith Nathan the first respondent herein is the successful applicant in O.A.Nos.1132 and 1133 of 2014 before the Tribunal. His case is that, his father Mr.Rajagopalan is an employee of M/s HCL Technologies Limited. He is designated as Head Retail Practice in grade E5. He applied for Civil Service Examination under Other Backward Classes (in short "OBC") quota and got himself qualified in the year 2012 and ranked 174. Since he applied under OBC quota, he has furnished a certificate obtained from M/s HCL Technologies Limited to the effect that his father entered grade E5 from 05.01.2004 onwards at the age of 45 years and the said post is comparable to a Group B/Class II post of the Government of India. Later, he was promoted to grade E7 on 01.10.2007 at the age of 48 years, which is comparable to Group A/Class I Officer of the Government of India. M/s HCL Technologies Limited, the employee of his father has also furnished a Certificate to that effect. Based on the Certificate furnished by him, he was allotted to the Indian Foreign Service (IFS) under OBC category. The result was published in the Internet Website of the Department and hence, he went to collect the allotment. Later, he was informed that his name was

wrongly inserted in the list and denied the letter of appointment, without assigning reason. Despite the Certificate given by the competent authority namely, Tahsildar about his OBC Non Creamy Layer status, the District Vigilance Committee enquired and reported that he was not to be considered as OBC Non Creamy Layer. Since he was not issued allotment of service of Indian Foreign Service (IFS), he approached the Tribunal by way of an application in O.A.No.810/00464/2014 calling for the records relating to the selected list for the year 2012 and direct the first respondent to issue allotment of post of Indian Foreign Service to him as per ranking in the OBC category and issue order of appointment. The said OA was disposed of with a direction to consider his representation.

4. Pursuant to the direction of the Tribunal passed in the above said O.A., he made a representation to the respondents but, no order was passed by the first respondent within a period of three months as directed by the Tribunal. Hence, a contempt application was filed and thereafter the respondent passed the impugned order dated 10.07.2014 treating him as unreserved category for the Civil Service Examination in the year 2012.

5. The impugned order being passed suppressing vital facts germane for deciding the issue of OBC status, the applicant had sought for a direction in O.A.No.1132 of 2014 to appoint him in the Indian Police Service under unreserved category, so that he may not lose his seniority. Since the next batch of candidate selected in the Civil Service Examination for the year 2013 supposed to join training, his seniority will be lost. In another application O.A.No.1133 of 2014 with almost identical averments, he has challenged Class II-C of the schedule of the Official Memorandum dated 08.09.1993 issued by Department of Personnel and Training (in short "DoPT"). In this OA, it was contended by the applicant that, as per the Official Memorandum dated 08.09.1993 bearing No.36012/93-Est.(SCT) issued by the DoPT, Government of India Ministry of Personnel, Public Grievances and Pensions, "the salary" and "the agricultural income" of Public Sector Undertaking employees cannot be taken into account to decide the issue of Creamy Layer.

6. As per Category VI(a), the phrase "gross annual income" refers only to sources of income other than the salaries or agricultural land. The same was categorically stated in Explanation I. The first respondent attempted to consider the salary of the applicant's father as

income wrongly interpreting the said category II C of the schedule of the Official Memorandum dated 08.09.1993 is amounting to discrimination and hence, it is liable to be quashed.

7. The first respondent has filed a detailed counter wherein it is stated that Shri Rohith Nathan's father was working in an organisation viz., M/s HCL Technologies Limited. The respondent has found some deficiencies in the information provided by the petitioner for his claim for OBC Non Creamy Layer status. Further, the petitioner provided a copy of a certificate from the employer of his father in which it is stated that, *"Shri S Rajagopalan joined HCL Technologies as Head Retail Practice in the grade E5 at the age of 45 years. After necessary evaluation of this post can be said to be comparable to a Group B/Class II post of the Government of India. He was promoted to grade E7 effective 1st October 2007 at the age of 48 years, which is comparable to a Group A/Class 1 Officer of the Government of India He is currently at grade E9 and his age of superannuation is 55 years."*

8. In the absence of equivalence or comparability in the Private

Sector vis-a-vis Government Service, this respondent applied the wealth test as prescribed under Rules and did not find the candidates belonging to OBC Non Creamy Layer. Since the petitioner was recommended as a General Merit Candidate, he was converted to UR for the purpose of service allocation and was accordingly, allocated to IPS.

9. The brief facts of the case in W.P.No.6389 of 2017 is as follows:-

Mr.G.Babu, the first respondent herein is the successful applicant before the Central Administrative Tribunal. His case is that he got qualification in the Civil Service Examination in the year 2013 under OBC category and ranked at 629. He was not considered as OBC-Non Creamy Layer candidate. Since the total annual income of his father was Rs.13,04,143/-, Rs.26,22,222/- and Rs.19,49,648/- respectively in the financial years 2010-2011, 2011-2012 and 2012-2013, applying the criteria given under category II-C read with income test given in category VI of DoPT Official Memorandum dated 27.05.1993, he was considered as Creamy Layer among the OBC.

10. According to G.Babu, the first respondent herein, he took up Civil Service Examination in the year 2013 and successfully got selected

with over all ranking of 629. If he is considered as OBC Non Creamy Layer status, his ranking could be 122-130. Since his father employed in Neyveli Lignite Corporation (NLC) as Executive Engineer and entered the said post at the age of 48 years, he has to be treated as OBC Non Creamy Layer candidate. When the petitioner sought for clarification regarding OBC status vide, letter dated 22.07.2014 regarding details of his father's status and comparability to the Government service, he sent a reply on 28.07.2014 along with the certificate issued by the employer (Neyveli Lignite Corporation) of his father (T.Gunasekaran) indicating that, *"the post or designation or grade held by his father is not equivalent or comparable to any criteria of State and Central Government of India from the date of joining to till date"*. However, his candidature was disqualified and not called for medical examination. While the Expert Committee has not so far submitted any Report regarding the evaluation of equivalence and comparability between the Government Servant vis-a-vis Private Sector employees, etc. the Union of India ought to have taken note of the certificate issued by the Revenue Authorities as well as the Neyveli Lignite Corporation, who is the employer of his father and ought to have considered his candidature under OBC Non Creamy Layer.

11. Since the petitioner failed to consider his request, he has approached the Central Administrative Tribunal praying to call for the records pertaining to selection list of Group A/Class I officers of the Central Service held for the year 2013 and direct the respondents/petitioners herein to declare the applicant is entitled for selection under OBC category and to allot service in accordance with his rank in the OBC category.

12. The core contention of Mr.Rohith Nathan and G.Babu, the two individuals, who have approached the Central Administrative Tribunal and succeeded is that, their parents are employed in a Private Sector Establishment and they have no other income, except their salary. While so, under Official Memorandum dated 08.09.1993, the DoPT has formulated a criteria for identifying the Creamy Layer among the OBC to exclude the Creamy Layer, for which income limit was originally fixed as Rs.1,00,000/-, later, it was increased time to time. During the year 2013, the limit was fixed as Rs.4,50,000/-. In the process of taking into consideration of their parents' income, their salary was taken as income and were treated as Creamy Layer among the Backward Class. Whereas,

the wards of Government servants, who are in the State and Central Government holding the post of Group B/Class II and not directly recruitment or got into Class II, after age of 40 years, are classified as Non Creamy Layer and given the privilege of Non Creamy Layer irrespective of the salary. Whereas, similarly placed wards of Public Sector Undertaking, who have no other income, but only salary are treated as Creamy Layer because, their salary exceeds the limit fixed by the Government for excluding Creamy Layer.

13. Precisely, the above said disparity pointed out by the aggrieved individuals is due to failure on the part of the Union of India to take a policy decision regarding equivalent or comparable posts in Public Sector Undertakings, Banks, Insurance Organizations, Universities, etc., to that of the positions under Government Employment. It is the contention of the individuals that, on a cumulative reading of Official Memorandum dated 08.09.1993, the salaried class, who fall under the service category of Group A/Class I or Group B/Class II, a direct recruit or promotee entered to Group B/Class II before attaining the age of 40, alone are to be considered as Creamy Layer and the rest of the service category should be treated as Non Creamy Layer.

14. The submission made by the individuals before the Central Administrative Tribunal that, when a similarly placed wards of Government Servants earning more than the income limit prescribed by the Government, are classified as Non Creamy Layer, the individuals, whose parents employed in Neyveli Linked Corporation (NCL) and M/s HCL Technologies Limited, cannot be excluded considering the salary income, while the explanation to category VI says, the salary income and agricultural income should be excluded for the purpose of calculating other income.

15. A Public Sector Undertaking and Private Limited Company employees, who have reached the status of Executive Engineer and E5 grade respectively (which is equivalent to Group A/Group B post in the Government), after the age of 40 years, cannot be discriminated by depriving the status of Other Backward Class Non Creamy Layer.

16. The Central Administrative Tribunal, after taking into consideration the submissions made by the Union of India regarding the classification in respect of service category spell out in Official

Memorandum dated 08.09.1993 and the clarification given by DoPT dated 14.10.2004, pointing out the hostile discrimination between wards of Government employees and wards of Private Sector employees had directed the DoPT to withdraw the clarification in para 9 of Official Memorandum dated 14.10.2004 to the extent, it is made applicable to II-C and reformulated appropriately, in the light of the observation made in the order, within the period of three months. The said direction is under challenge in these three writ petitions.

17. **Submission made on behalf of the petitioners:-**

The learned Additional Solicitor General of India appearing for the petitioners pointing out the provisions of the Official Memorandum and the clarification given by the DoPT in the year 2004 repeatedly emphasis that in the case of service category, (a) till the equivalence is arrived for the sons and daughters of Public Sector Undertaking employees, only income/wealth test as laid down in category VI(a) shall apply. The Central Administrative Tribunal has erroneously taken a view that such candidates will fall under the category VI(b) and not under category VI(a).

18. To buttress the submission of the learned Additional Solicitor General of India appearing for the petitioners, relied upon the judgment of the Hon'ble Supreme Court in ***Ashok kumar Thakur v. State of Bihar and others*** reported in **[(1995) 5 SC 403]** wherein, the criteria for excluding the Creamy Layer among the OBC spelt out in the Official Memorandum dated 08.09.1993 being upheld and also cited a judgment of the Hon'ble Supreme Court rendered in ***T.Govindaraja Mudaliar etc. v. The State of Tamil Nadu and others*** reported in **(1973) 1 SCC 336** wherein, the validity of the claim of nationalization of private bus was earlier upheld, when it was again tested on the touch stone of Article 19(1)(g) and Article 19(6). When the Acquisition Act was challenged on the ground it violates Article 19(1)(f), the Hon'ble Supreme Court has held in para 11 as under:

“11. It is common ground in the present cases that the validity of Chapter IV-A of the Act has been upheld on all previous occasions. Merely because the aspect now presented based on the guarantee contained in Article 19(1)(f) was not expressly considered, a decision given thereon will not take away the binding effect of those decisions on us.”

19. ***In Ashok kumar Thakur case***, the Hon'ble Supreme Court has upheld the criteria followed by the Government for excluding the

Creamy Layer and struck down the Government of Bihar regulation, which added several other criteria to exclude Creamy Layer.

20. Discussion:-

The case in hand, though it appears that the provision of category II C is under challenge, in fact, the interpretation made by DoPT about the category II C is under real challenge. Precisely, that has forced the Tribunal to direct the DoPT to re-formulate appropriately.

21. The Central Administrative Tribunal has vividly demonstrated, how the wrong interpretation of Class-II C has led to hostile discrimination between wards of Government employees under State and Central Government vis-a-vis Private Sector Employees. When protective discrimination is extended to weaker section, there cannot be selective discrimination among the Government employees and the Private Sector employees. The benefits enjoyed by Group B/Class II Officers of State and Central Government employees, who have not entered directly or entered the said post, after attaining age of 40 years, are not being extended to similarly placed employees of Public Sector Undertaking etc., which is enumerated under Entry II C.

22. **After Indra Sawhney v. Union of India, the Haryana Government** reported in **1992 AIR SCW 3682**, the Department of Personnel and Training through the Official Memorandum on Creamy Layer, the income criteria was first issued on 08.09.2013. The portion relevant for this case is extracted below:

Category	To whom Rule of exclusion will apply
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 Organization like UN, IMF, World Bank, etc., for a period of not less than 5 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 Organization like UN, IMF, World Bank etc., for a period of not less than 5 years. Provided that the rule of exclusion shall not apply in the following cases (a)Sons and daughters of parents either of whom or both of whom are Class-I 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.

Category **To whom Rule of exclusion will apply**

C. Employees in Public Sector undertaking etc. The Criteria enumerated in A & B above in this category will apply mutatis mutandi to officers holding equivalent or comparable posts in PSUs, banks, Insurance Organizations, Universities, etc and also to equivalent or comparable posts and positions under 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.

VI **INCOME/WEALTH TEST**

Sons(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 mentioned 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.

23. In the year 2004, when several queries raised to DoPT regarding the determination of Creamy Layer amongst OBC's, the DoPT

responded by way of clarification vide, its letter dated 14.10.2004. In the said clarification for the queries (ix) and (x), it has been clarified as below:

“(ix)How will be Income/Wealth Test apply in case of sons and daughters of parent(s) employed in PSUs etc., in which equivalence or comparability of posts has not been established vis-a-vis posts in the Government?”

9. *In regard to clause (ix) of para 4, it is clarified that the creamy layer status of sons and daughters of persons employed in organizations where equivalence or comparability of posts vis-a-vis posts in Government has not been evaluated is determined as follows:*

Income of the parents from the salaries and from the other sources (other than salaries and agricultural land) is determined separately. If either the income of the parents from the salaries or the income of the parents from other sources (other than salaries and agricultural land) exceeds the limit of Rs.2.5 lakhs per annum for a period of three consecutive years, the sons and daughters of such persons shall be treated to fall in creamy layer. But the sons and daughters of parents whose income from salaries is less than Rs.2.5 lakhs per annum and the income

from other sources is also less than Rs.2.5 lakhs per annum will not be treated as falling in creamy layer even if the sum of the income from salaries and the income from the other sources is more than Rs.2.5 lakhs per annum for a period of three consecutive years. It may be noted that income from agricultural land is not taken into account while applying the Test.

(x)What is the scope of the explanation, 'Income from salaries or agricultural land shall not be clubbed', given below the Income/Wealth Test?

10. In regard to clause (x) of para 4, it is clarified that while applying the Income/Wealth Test to determine creamy layer status of any candidate as given in Category-VI of the Schedule to the OM, income from the salaries and income from the agricultural land shall not be taken into account. It means that if income from salaries of the parents of any candidate is more than Rs.2.5 lakh per annum, income from agricultural land is more than Rs.2.5 lakh per annum, but income from other sources is less than Rs.2.5 lakh per annum, the candidate shall not be treated to be falling in creamy layer on the basis of Income/Wealth Test provided his parent(s) do not possess wealth above the exemption limit as prescribed in the Wealth Tax Act for a period of three consecutive years."

24. The clarification of the DoPT of the year 2004 spell out that if

equivalence or comparable basis is not determined, the Income/Wealth Test will apply. In such case, a ward of sector employee, if his parents annual salaried income exceeds the income limit, then he will be considered as Creamy Layer. Whereas, a ward of the Central or State Government employee, even if his parent annual salaried income exceeds the limit prescribed, he will be considered as Non Creamy Layer, if his parents do not fall under the categories I and II (A) and (B). Even though category II(C) says, the criteria enumerated in A and B *Mutatis Mutandi* apply to Public Sector Undertaking etc., in true sense for Government Employees their status/post is relevant but, for Public Sector Undertakings' the salary is the relevant yard stick to ascertain the Creamy Layer.

25. It appears in practice the provisions is not interpreted true to its letter and spirit. The Official Memorandum dated 14.10.2008, while enhancing the income limit from Rs.2.5 lakhs to Rs.4.5 lakhs; makes it clear that the 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 VI(a). While explaining other sources of income

salary and agricultural income are specifically excluded.

26. When ***Ashok Kumar Thakur v. State of Bihar and others*** reported in [(1995) 5 SC 403] was decided by the Hon'ble Supreme Court, it was hardly two years from the implementation of Official Memorandum of the year 1993 for OBC reservation. The Official Memorandum was upheld on considering and reading the expression "Mutatis Mutandi" and the term "pending the evolution" harmoniously. The validation of that category in Official Memorandum issued in the year 1993 cannot be taken as a seal of Supreme Court approval to keep the process of evaluation pending for eternity to the disadvantage of salaried income- private sector employees.

27. As of now, sons and daughters of State and Central Government employees hailing from OBC category are treated as Non Creamy Layer irrespective of their parents salary, if their parents do not fall under the category I or if they do not fall under Group A/Class I, Group B/Class II, direct recruited or entered before 40 years.

28. According to the learned Additional Solicitor General of India,

as per the interpretation of DoPT to the Official Memorandum's, the case of Public Sector Undertakings/pending evaluation, the criteria stated in category VI-A shall apply and not category VI (a) shall apply and not category VI (b). If his submission is correct, then under category VI(b) while specifying certain service category persons, the Official Memorandum could have specifically stated as category IIA and B and excluded category IIC, as it has excluded VB and VC, but included VA.

29. If in true sense DoPT wants to exclude Creamy Layer among OBC, there should not be any discrimination among the similarly placed two sets of service category namely, Government Employees, vis-a-vis Private Sector employees. More particularly, when II C read what applies to Government shall apply to Public Sector Undertakings "Mutatis Mutandi".

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30. The learned Additional Solicitor General of India was asked to demonstrated that there is no discrimination between sons and daughters of State and Central Government Employee presently drawing salary more than 6 lakhs but, does not fall under category II A, IIB and

sons and daughters of Private Sector employee getting annual income of Rs.6,00,000/- and above as salary. As a response to this query, he could only say that, once the committee constituted for evaluation of equivalence submits its report, the anomaly will be settled.

31. We do not see it as a simple anomaly but misinterpretation of the provisions leading to selective discrimination.

32. As per the Official Memorandum, the broad classification of service category II is further classified into three sub categories namely,

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

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

(C) Employees in Public Sector Undertakings etc.,

Pending evaluation, criteria specified in category VI applies. Category VI includes two sub categories:

The first sub category (a) refers about persons having gross annual income of Rs.1 lakh or the above or possessing wealth above the exemption limit.

The second sub category (b) refers about persons in categories I,II,III and VA. The explanation specifies that income from salaries or agricultural income shall not be clubbed.

33. When under category VI, the second part (b) refers persons in category II, without any restriction to sub categories A, B or C and admittedly the individuals before us are sons of the Private Sector Undertakings, who fall under category IIC, they are deemed to be considered as category VI for want of evaluation. While so, how could they fall under category VI (a) and not under category VI(b) is unexplained by the learned Additional Solicitor General of India.

34. Article 14 of the Constitution guarantees equality before law as well as equal protection under law. It also enables protective discrimination with reasonable classification. However, such classification must be reasonable relating to object sought to be achieved. While identifying Creamy Layer among service category, there cannot be any discrimination. They have to be classified as one class. However, till now, among the service class the persons serving in Government are taken as one class and non-Government Public Sector Undertakings and

others are taken as another class. There are other class of people, though may fall under service category, but not fall either of the above two classes. For instance, the son or daughter of a person, who is employed as Manager or Accountant in a Firm, income test as said in category VI (a) is to be applied, whereas for the son and daughter of a Government Servant employed in equivalent post, his salary is not to be taken as criteria for Creamy Layer. Then, the person employed in a Government Service is in advantage position compared to his counterpart in Private employment. Similarly, till equivalence is not arrived, the persons in Private Sector Undertakings etc., will also be under disadvantage position.

35. By delaying the process of evaluation, the injustice to the sons and daughters of Private Sector employees is perpetuated for more than 2 decades. When in this country, a Government servant whatever be his social or communal background, whether he is peon or sepoy or clerk or Collector or Managing Director or Secretary in the Government, undoubtedly they are high in the comparative social or economic status to that of their counter in Public Sector Undertakings or Private Sectors. While so, when salary is not a criteria to eliminate Creamy Layer among

certain Government servants why the salary income is a criteria to eliminate Creamy Layer of wards of Public Sector employees who are socially not considered on par with the Government servants.

36. In this case, one of the candidates parents is only in diploma-holder and joined in Neyveli Lignite Corporation in the entry level cadre. After putting up several years of service, he has entered the cadre of Executive Engineer at the age of 45 years. If his sons and daughters belong to Creamy Layer among OBC, then similarly placed Government Servant wards should also be treated as Creamy Layer among OBC. Citing the delay in finalising the evaluation of equivalence DoPT cannot wrongly place sons and daughters of Public Sector Undertaking employees under category VI(a) and eliminate the wards of OBC parents, who are otherwise eligible to enjoy the benefit of reservation as that of the Government servant. If the expression "Mutatis Mutandi" found in category IIC has to be given a purposeful meaning, these two sub categories under service category shall not be discriminated.

37. While the Official Memorandum clearly specify that the criteria enumerated in A and B will apply "Mutatis Mutandi" to officers holding

equivalent or comparable posts etc., it is the statutory obligation on the DoPT to draw the policy of equivalence or comparable at the earliest. Having failed to do so, even after 25 years, they should have accepted the Certificate furnished by the Public Sector undertakings etc., without resorting to criteria enumerated under category VI(a), which lay down Income/Wealth Test. The intention of incorporating the expression “pending the evaluation of posts on equivalent or comparable basis” is a conditional clause with enabling clause providing a guiding factor till evaluation on equivalence arrived. This conditional legislation cannot remain in the Official Memorandum for decades, detrimental to the service category other than the employees in the Government.

38. In this regard, it is relevant to cite the Apex Court judgment rendered in State of **Tamil Nadu v.K.Sabanayagam and another reported in [AIR 1998 SC 344]** that *the exercise of conditional legislation would depend upon satisfaction of the delegate on objective facts placed by one class of persons seeking benefit of such an exercise with a view to deprive the rival class of persons who otherwise might have already got statutory benefits under the Act and who are likely to*

lose the existing benefit because of exercise of such a power by the delegate. In such type of cases, the satisfaction of the delegate has necessarily to be based on objective consideration of the relevant data for and against the exercise of such power. May be such an exercise may not amount to any judicial or quasi-judicial function, still it has to be treated to be one which requires objective consideration of relevant factual data pressed in service by one side and which could be tried to be rebutted by the other side, who would be adversely affected, if such exercise of power is undertaken by the delegate. In such a third category of cases of conditional legislation, the Legislature fixes up objective conditions for the exercise of power by the delegate to be applied to past or existing facts and for deciding whether the rights or liabilities created by the Act are to be denied or extended to particular areas, persons or groups. This exercise is not left to his subjective satisfaction nor it is a mere ministerial exercise.

39. In the judgment of the Hon'ble Supreme Court **Siddarth Saini v. State of Haryana and others reported in (2001) 10SCC 625**, the three Judges Bench of the Hon'ble Supreme Court in a similar situation, clearly held that if the only source of income of the parent is

their salary, then the salary cannot be taken into account for executing the OBC candidate. The view expressed by the Hon'ble Supreme Court in this regard is extracted below:-

"3. Pursuant to the judgment of this Court in *Indra Sawhney v. Union of India, the Haryana Government* vide notification dated 12.10.1993 had set up the Haryana Second Backward Classes Commission.⁴ The terms of reference of the Commission were to entertain, examine and recommend upon requests for inclusion and complaints of overinclusion and underinclusion in the list of Backward Classes. Vide notification dated 26.5.1994, the Commission was also assigned the function of specifying the basis, applying the relevant and requisite socio-economic criteria to exclude socially advanced persons/sections (creamy layer) from backward Classes. A perusal of the criteria referred to above shows persons falling in certain categories as belonging to creamy layer. In this case, we are not concerned with any other category, except the category of government servant Class II post. The father of the appellant was directly recruited as Assistant Engineer (SDO) on Class II post, in the Irrigation Department of Haryana. The father of the appellant still continues to be a member of Class II service only. According to the affidavit filed by the father of the appellant, his source of income is only salary and he derives income from no other source. The Government of Haryana issued clarification Order No.22/36/2000-3GS III dated 09.08.2000 for issuance of certificate to OBCs in Haryana on 09.08.2000. In the said order, it has been clarified that income from salary is not required to be taken into account for the purpose of income/wealth test in respect of service category and while calculating income or wealth tax of a government employee of a Backward Class, who is not covered under Annexure A description of Categories I, II(a,b,c,d) III and IV he would become entitled to the benefit of reservation under Backward Classes category; his salary shall not be included but his other sources of income/wealth, be included for income/wealth test.

4. In the present case, it is the admitted case of the appellant that the only source of income of the father of the appellant is his salary. It is also not disputed that the father of the appellant is a Class II officer and that the mother of

the appellant is not a Class II officer. The amount of gross salary received by the father of the appellant, for the purpose of grant of benefit to the OBCs is irrelevant. This being the position, which has been clarified by the Government of Haryana itself, by government order dated 09.08.2000, it is obvious that the appellant should not have been refused the OBC certificate by taking the salary of the father of the appellant into account. The order of the Deputy Commissioner dated 24.06.1999, refusing grant of OBC certificate, is clearly erroneous. The judgment of the High Court, impugned before us, which upholds the order of the Deputy Commissioner is, in view of what we have said above, not sustainable."

40. In ***Ashok Kumar Thakur case***, the judgment rendered immediately after the Official Memorandum 1993, the validity of categorization was upheld, since an element of promise found in class IIC that persons falling under service category will be treated on par, whether they are employed under Government or Public Sector Undertakings. Till the evaluation is finalized as a stop gap arrangement, it was permitted to fall back on criteria laid down for category VI temporarily.

41. This judgment cannot be taken advantage to retain the conditional provision as a permanent fixture in the statute for more than 23 years. Having failed to arrive at a proper evolution regarding

equivalence even after two decades, we find that there is no error in the Central Administrative Tribunal order in directing the respondent to re-visit the provision category IIC and substitute with appropriate terms san discrimination.

42. Conclusion:

As a result, these writ petitions fail on two scores. Firstly, the failure of the writ petitioners in not formulating the equivalence and comparable test has put the sons and daughters of Public Sector Undertakings etc., employees in disadvantage position compare to their counterparts in Government service. Secondly, when salary income of the parents serving under State/Central Government in Group C and D cadre post or who have entered Group B and A post, after attaining the age of 40 years, is not a criteria to assess Creamy Layer, salary of a Public Sector Undertaking employee as a test for identifying Creamy Layer brings in the element of hostile discrimination.

43. Therefore, we find no error in the common order passed by the Tribunal. Hence, these Writ Petitions are liable to be dismissed. Accordingly, these Writ Petitions are dismissed. No costs.

[H.G.R.J.] [G.J.J.]
31.08.2017

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Index:Yes
Internet:Yes

Speaking order/non speaking order

To
The Registrar,
Central Administrative Tribunal,
Madras Bench,
Chennai 600 104.



HULUVADI G.RAMESH, J.
and
DR.G.JAYACHANDRAN, J.

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Pre-delivery common order made in
W.P.Nos.6387 to 6389 of 2017



31.08.2017

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