



Anomalies in Implementation of the ‘Creamy Layer’ Segment in the Realisation of Benefits under Reservation Policies in India

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Abstract

The term ‘creamy layer’ comprises of socially advanced persons amongst the socially and educationally backward classes in India, for purposes of exclusion from reservation in the public services and education sectors. The Office Memorandum of 1993 classifies backward classes into two groups - Group A and B, for the purpose of identifying the creamy layer in the government sector, while those in other sectors are subject to a ceiling of wealth and annual income. This paper analyses two discriminatory practices relating to the implementation of the creamy layer in India. Firstly, the inequities between posts in public sector undertakings (PSU), banks, etc. vis-à-vis the government posts embedded in the creamy layer criteria. This has resulted in a denial of jobs in the civil services to candidates from Other Backward Classes, whose parents are employed in public sector undertakings. This anomaly needs to be rectified by the Ministry of Social Justice and Empowerment. Secondly, the non-application of the creamy layer to the affluent SC and STs while giving them reservation in promotions as corrected by the Supreme Court in the M. Nagaraj judgment. This has set right the existing anomaly and the government needs to retract its review petition in the Supreme Court.

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1. Introduction

The prelude to social justice is highlighted in the Preamble to the Constitution of India. The constitution contains various provisions that deal with the interests of backward classes such as Article 14 which ensures equal protection.¹ Weaker sections, as identified in Article 46, are the genus of which the SCs and STs are the species. They are the weakest and most backward of the weaker sections of our society and have a Constitutional presumption regarding their backwardness. They suffer social discrimination and disadvantage and are disempowered. The creamy layer is an application of the principle of equality through which deserving candidates get the benefits of reservation. The principle may exclude certain individuals from a class but not the class as a whole. This paper will examine this issue from the legislative, executive and judicial perspectives.

2. Mandal Commission, Other Backward Classes and the Creamy Layer

The second Commission on Backward Classes also known as Mandal Commission, which was constituted in 1979 under Article 340 of the Constitution, submitted its report on 31.12.1980. It determined that Other Backward Classes (OBCs) constituted 52% of population and based on this report the Department of Personnel & Training (DoPT) issued an order² providing 27% reservation in the Central Government for the employment of persons belonging to socially and economically backward classes, referred to as OBCs. The DoPT later issued another order³ to enable poorer sections of OBCs to receive benefits on a preferential basis

¹INDIA CONST. Art.38.cl.1; *See also*, art.46; art. 15. cl. 4, 5; art. 16. cl.4, 4A, ⁴B; art. 340; art. 342A.

² G.I., DoPT, O.M. No. 36012/31/90-Est (SCT), Aug.13, 1990.

³ G.I., DoPT, O.M. No. 36012/31/90-Est (SCT) Sept 25, 1991.

and to provide for other economically backward sections hitherto not covered.

The expert committee appointed⁴ by the Government to decide on the issue of a creamy layer submitted its report by laying it before the Parliament on 16th March 1993. Pursuant to this report, the DoPT issued an Official Memorandum (O.M.)⁵ dated 8th September 1993 which is the charter for creamy layer. The criteria for excluding the creamy layer among the OBCs as spelt out in the O.M. dated 08.09.1993 was upheld by the Supreme Court⁶ by a harmonious reading of the expression *mutatis mutanda*. Despite being employed in Public Sector Undertakings (PSUs) or government undertakings, persons falling under the service category would be considered on par with each other. Until evaluation was done, a temporary arrangement to fall back on criteria laid down under category VI was agreed upon, the process for which is still pending.

The DoPT also issued an O.M.⁷ on the subject “Revision of Income criteria to exclude socially advanced persons/sections (Creamy Layer) from the purview of reservation for Other Backward Classes (OBCs).” Further, it has issued a clarificatory letter⁸ giving explanations dealing with the application of the provisions of the Income/Wealth Test under Category-VI of the Schedule to the 1993 O.M., in case of the employees of PSUs, etc. and others. The DoPT has informed the Committee of Welfare of Other Backward Classes (2018-19) that the files and documents are untraceable and neither Ministry of Social Justice and Empowerment nor Department of Legal Affairs were consulted before issuing the same.⁹ Several candidates selected in the Civil Services Examinations of 2015, 2016

⁴ Resolution, Feb. 22, 1993.

⁵ G.I., DoPT, O.M. No. 36012/22/93 Estt. (SCT), Sept. 8, 1993.

⁶ Ashok Kumar Thakur v. Union of India, (1995) 5 SCC 403.

⁷ G.I., DoPT, O.M. No. 36033/3/2004-Estt. (Res), Mar. 9, 2004.

⁸ G.I., DoPT, O.M. No.36033/5/2004 Est-(Res), Oct. 14, 2004.

⁹ The Committee of Welfare of Other Backward Classes (2018-19), 21st Report on *Rationalisation Of Creamy Layer for Employment for OBCs In Services and Posts under the Control of Government Of India including URs, PSUs etc*, Lok Sabha Secretariat, 2019 paras 3.6.

and 2017 were not allotted services since their parents were working in Central and State Governments Undertakings, Banks, Insurance organisations, Financial Institutions and Universities, etc. as clerks, peons and labourers. They had been excluded on the basis of the aforesaid clarification letter issued by the DoPT dated 14-10-2004.

The earliest instance of the usage of term 'creamy layer' in Supreme Court decisions may be traced to Justice V. R. Krishna Iyer's observation as follows:

A word of sociological caution. In the light of experience, here and elsewhere, the danger of 'reservation', it seems to me, is three-fold. Its benefits, by and large, are snatched away by the top creamy layer of the 'backward' caste or class, thus keeping the weakest among the weak always weak and leaving the fortunate layers to consume the whole cake.¹⁰

This matter was also considered in later decisions. But in *Indra Sawhney v. Union of India*, a nine-judge bench of the Supreme Court mandated,¹¹ while upholding a 27% reservation for OBCs, that the government was to exclude the creamy layer, based on an economic criterion by fixing a proper income, property or status criteria¹² as an indicia or measure of social advancement amongst the backward class of citizens. Reservation in promotion was held to be "*constitutionally impermissible as, once the advantaged and disadvantaged are made equal and are brought in one class or group then any further benefit extended for promotion on the inequality existing prior to be brought in the group would be treating equals unequally.*"¹³ But this reasoning was removed by Parliament by way of the Constitution (Seventy-seventh Amendment) Act, 1995 which extended quotas to SCs and STs in promotions. Article 16(4B) was inserted in the Constitution to carry forward unfilled vacancies to subsequent years thus creating an exemption to the 50% cap on these vacancies. Article 335 of the Constitution was amended in 2001 to allow

¹⁰ State of Kerala v. N.M. Thomas (1976) 2 SCC 310.

¹¹ 1992 (Suppl) 3, SCC 217.

¹² *Id.* ¶697

¹³ *Id.*

relaxations in qualifying marks and lowering of standards in favour of SCs/STs. These amendments were challenged in the Supreme Court and referred to a five-judge Bench in *M. Nagaraj v. Union of India*. The *M. Nagaraj*¹⁴ case held that:

The State is not bound to make reservation for SC/ST in matter of promotions. However, if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing the backwardness of the class and inadequacy of the representation of that class in public employment in addition to compliance of Article 335 ... even if the State has compelling reasons, (namely, backwardness, inadequacy of representation and overall administrative efficiency) the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling-limit of 50% or obliterate the creamy layer or extend the reservation indefinitely.

3. *Jarnail's Reading of Indira Sawhney and Nagaraj judgments*

In *Jarnail Singh v. Lachmi Narain Gupta*,¹⁵ the Supreme Court reasoned that "*Indra Sawhney (1)*¹⁶ applied the creamy layer principle as a facet of the larger equality principle, as elucidated in *Indra Sawhney (2)*."¹⁷ There were five judgments where creamy layer was identified and excluded. Also, it took support from *Indra Sawhney (2)*¹⁸ which held 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

¹⁴ (2006) 8 SCC 212 ¶116.

¹⁵ (2018) 10 SCC 396.

¹⁶ 1992 Supp (3) SCC 217.

¹⁷ (2000) 1 SCC 168 ¶7.

¹⁸ *Id.* ¶27.

be treated as equals, that is to say, equal to the rest of the backward class.

It disagreed with K.G. Balakrishnan, C.J.'s statement in *Ashoka Kumar Thakur*¹⁹ that "creamy layer principle is inapplicable to SCs and STs as it is merely a principle of identification of the backward class and not a principle of equality."²⁰ In fact, Rajeev Dhavan held that "the proposition that the majority (Arijit Pasayat, C.K. Thakker, Raveendran and Dalveer Bandari J.J) held that since the creamy layer test went to the root of the concept of equality it was applied across the board to all backward classes, including the SCs and STs and the OBCs. All, except K.G. Balakrishnan CJ, had implicitly, if not explicitly, accepted the application of the creamy layer test to the SCs and the STs was well."²¹ Jarnail also held that "Nagaraj's application of the creamy layer principle to SCs and STs, in exercise of the basic structure review to uphold Articles 16(4-A) and 16 (4-B), did not in any manner tinker with the Presidential List under Articles 341 or 342 of the Constitution of India."²²

4. Government's stand on Exclusion of Creamy Layer from SCs

In response to a question raised by a member as to whether the government plans to exclude creamy layer from SCs, the Minister for Social Justice and Empowerment said that since "Samta Andolan Samiti has filed a Writ Petition No.2/2018 against the UOI before the Hon"ble Supreme Court praying for exclusion of creamy layer in SC/ST from the benefits of reservation, the Government has filed a reply and the matter is presently sub-judiced."²³

¹⁹ (2008) 6 SCC 1.

²⁰ (2000) 1 SCC 168 ¶27.

²¹ See, RAJEEV DHAVAN, RESERVED!: HOW PARLIAMENT DEBATED RESERVATIONS 1995-2007 (2008).

²² (2006) 8 SCC 212 ¶26.

²³ Ratan Lal Kataria, *Unstarred Q No 279 Lok Sabha* (Feb. 4, 2020) <http://loksabhaph.nic.in/Questions/QResult15.aspx?qref=11364&lsno=17>.

5. Equivalence of PSUs with Government posts for establishing Creamy Layer Criteria

The criteria enumerated in the Service Category IIA and Category II B “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 evaluation of the posts on equivalent or comparable basis in these institutions, the criteria specified in Category VI of the Schedule will apply to the officers in these institutions.”²⁴

The Income/Wealth Test²⁵ applies to the son(s) and daughter(s) of

- (a) persons having Gross Annual Income of Rs. 8 lakhs or above²⁶ for a period of three consecutive years.
- (b) persons in 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/wealth criteria mentioned in VI (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.

The Expert Committee had categorically stated²⁷ that in the event of the absence of equivalence, category II-C cannot be disentitled from availing reservation benefits as such and that, the employees under this category will get the benefit of reservation and if any exclusion

²⁴ G.I., DoPT, O.M., Category II-C of the Schedule, Sept. 9, 1993.

²⁵ G.I., DoPT O.M., VI(a) of Category VI of the Schedule, Sept. 8, 1993.

²⁶ G.I., DoPT O.M., Sept. 13, 2017.

²⁷ REPORT OF THE EXPERT COMMITTEE FOR SPECIFYING THE CRITERIA FOR IDENTIFICATION OF SOCIALLY ADVANCED PERSONS AMONG THE SOCIALLY AND EDUCATIONALLY BACKWARD CLASSES (1993).

is to be made, it shall be on basis of criteria under Item VI. Specifically, category II-C falls under category VI (b), as category VI (b) explicitly mentions that the whole category II (including II C) ought to be examined under the provisions stated in category VI(b). Hence, in the absence of equivalence there will be no disentitlement from category II-C and as the whole category cannot be disentitled and everyone from category II-C would fall under category VI (b).

6. Responses to Questions Raised in Lok Sabha

Regarding equivalence established by the Government with respect to the posts and positions in PSUs, PSBs, Insurance Companies, etc., questions were raised²⁸ in Lok Sabha. MP Ganesh Singh had sought answers on whether officers of the rank of Grade level-1 and above working in Public Sector banks, financial institutions and insurance corporations are likely to be considered equivalent to Group 'A' officer of Government of India and those claiming reservation under the OBC category are likely to be considered in creamy layer. Further he also questioned whether the Government had fixed parity among Group 'B', 'C' and 'D' officers and employees in public sector enterprises. He also sought to know whether their salaries were likely to be linked with income/property norms and the details of the number of Group 'A', 'B', 'C' and 'D' officers and employees working in all the undertakings under the administrative control of the Government whose sons and daughters had been deprived of reservation from the year 2017 till date on the basis of income/ property criteria.

The minister replied²⁹ that the Department of Financial Services had notified the principles for determining equivalence in respect of Public Sector Banks (PSBs), Public Financial Institutions (PFIs) and Public Sector Insurance Companies (PSICs) on 06.12.2017 which are as under:

²⁸ Jitendra Singh, *Unstarred Q No 3592 Lok Sabha* (Jan. 2, 2019)

<http://loksabhaph.nic.in/Questions/QResult15.aspx?qref=77241&lsno=1>

6.

²⁹ *Id.*

- (a) Junior Management Scale-I of PSBs, PFIs and PSICs will be treated as equivalent to Group A in the Government of India; and
- (b) Clerks and Peons in PSBs, PFIs and PSICs will be treated as equivalent to Group C in the Government of India.

He also affirmed that the Department of Public Enterprises had issued an O.M. on 25.10.2017 conveying the guidelines for establishing equivalence of posts in Central Public Sector Enterprises (CPSEs) with posts in the Government. As per the guidelines, all the executive level posts in CPSEs, i.e., Board level executives and below, which are managerial level posts, will be considered as "creamy layer," subject to the proviso that those executives whose annual income, as per criteria given in the DoPT O.M. dated 08.09.1993³⁰, is less than Rs. 8 lakh will not fall under the creamy layer criteria. As per the guidelines issued by the DoPT vide O.M. dated 08.09.1993, sons and daughters of the persons falling in the creamy layer are not entitled to the benefit of reservation available to the OBCs. He admitted that the data on the number of officers and employees working in Undertakings under the administrative control of the Government, (whose sons and daughters are not entitled to the benefit of reservation for OBCs), was not maintained centrally.

The Committee of Welfare of Other Backward Classes (2018-19) also sought clarifications³¹ on the above answer. Firstly, it sought to know whether Junior Management category-I of the PSBs, PFIs and PSICs had been treated equivalent to the Group-A of the Government and Clerks and Peons had been treated equivalent to Group-C of Government and also why the equivalence of the posts of Group-B officers of PSBs, PFIs and PSICs was not established with the post of Government of India.

³⁰ See, G.I., DoPT O.M. No. 36033/1/2013-Estt. (Res), Sept. 9, 2017.

³¹ The Committee of Welfare of Other Backward Classes (2018-19), *supra* note, 9.

Secondly, the Committee sought to know whether the children of such employee's who have been moved to category I can be treated within the creamy layer. The First Expert Committee too raised a similar query enquiring under which Rule would the sons and daughters whose parents are clerks and peons in PSBs, PFIs and PSICs be included, if he/she achieves Junior Grade Scale-I or Grade-A, in the PSBs, PFIs and PSICs.

In response to the first question, the Ministry of Finance (Department of Financial Services) through the DoPT, directed³² the exclusion of the creamy layer in OBC reservation and to work out the equivalence of employees and officers in PSBs, PFIs and PSICs to the Group 'A', Group 'B' and Group 'C' categories of employees and officers in the employment of the Government of India/State Governments.

In PSBs, PFIs and PSICs, the posts were categorized as officer and clerical/peon and no categorization had been drawn as Group 'A', Group 'B' or Group 'C' and Group 'D' as in the Government. However, the PSBs, PFIs and PSICs had been following the income criteria to determine creamy layer in absence of such categorization as required under the O.M. dated 08.09.1993. The Government has approved³³ the principles for determining equivalence in respect of PSBs/PFIs/PSICs, which, inter-alia, read as follows:

- i. Junior Management Scale-I of PSBs/PFIs/PSICs will be treated as equivalent to Group A in the Government of India and
- ii. Clerk and Peons in PSBs/PFIs/PSICs will be treated as equivalent to Group C in the Government of India.

In response to the second question, the DoPT dealt with the reservation for OBCs in civil posts and services under the Government of India, and informed³⁴ that Government had examined the proposal for establishing equivalence of posts in Central PSUs, Banks, Insurance Institutions with posts in the

³² G.I., DoPT O.M. No. 36012/22/93-Estt. (SCT), Sept. 8, 1993.

³³ G.I., DoPT O.M. No. 41034/5/2014-Estt. (Res.) Vol. IV-Part, Oct. 6, 2017.

³⁴ G.I., DoPT O.M. No. 41034/5/2014-Estt. (Res.) Vol. IV-Part, Oct. 6, 2017.

Government, for establishing the creamy layer criteria amongst OBCs.

It further clarified that the Cabinet in its meeting held on 08.08.2017, approved of the general principles for determination of equivalence with respect to PSUs, Banks and Public Insurance Organisations as per the following criteria:

- (a) Junior Management Grade Scale-I of PSBs, PFIs and PSICs will be treated as equivalent to Group A in the Government of India and
- (b) Clerks and Peons in PSBs, PFIs and PSICs will be treated as equivalent to Group C in the Government of India.

Officers belonging to Junior Management Grade Scale-I and above will be considered as part of the creamy layer.³⁵ For Clerks and Peons in PSBs, PFIs and PSICs, the income criteria i.e., Rs. 6 lakhs (now Rs. 8 lakhs) per annum as revised from time to time will be applicable. These will be applicable with the exception as provided vide O.M. dated 08.09.1993 of DoPT as under:

- i. Son(s) and daughter(s), if the father/mother is a clerk or peon of PSBs, FIs and PSICs employee and he gets Junior Management Grade Scale-I of PSBs, FIs and PSICs at the age of 40 or earlier,
- ii. Son(s) and daughter(s) of parents either of whom or both of whom are in Junior Management Grade Scale-I and above of PSBs, FIs and PSICs, and such parent(s) dies/die or suffer permanent incapacitation.
- iii. A lady belonging to the OBC category has got married to a person of Junior Management Grade Scale-I and above of PSBs, FIs and PSICs and may herself like to apply for a job.

In the past, several mistakes have come to light wherein an unsigned typed copy of the English version of O.M. dated 14.10.2004 was uploaded on the website of the DoPT in which there were some discrepancies in comparison to the uploaded Hindi version on the website of this department with respect to

³⁵ G.I., DoPT O.M. No. 36012/22/93-Estt. (SCT), Sept. 8, 1993.

paragraph 9. It was rightly called by the Committee as an anomalous clarificatory letter.³⁶

Similarly, it was stated in the reply to the question raised in Lok Sabha on 12.12.2018 that a discrepancy relating to the explanation under category VI(b) of the Hindi version of the O.M. dated 08.09.1993 was found and a corrigendum was issued on 05.12.2016. When the DoPT identified discrepancies in the original O.M. dated 08.09.1993 on 05.12.2016 only, it was clear that the O.M. on the basis of which persons belonging to OBCs were getting reservation prior to 05.12.2016 had resulted in arbitrary appointments.³⁷

A question was asked by Lok Sabha member Margani Bharat to the Ministry of Social Justice and Empowerment about the computation of annual income of the OBC employees working in PSUs and banks and whether the Government was taking into account 'salary' as well as 'agricultural income' together to determine whether they fall under the creamy layer and if so, the details thereof. Also, the member sought to know the reasons for following such different yardsticks for different categories of employees resulting in a denial of benefits to the wards of those working in PSUs and banks and also the steps taken by the government to rectify this anomaly; and whether the Ministry intends to remove the creamy layer for OBCs. The Minister replied that:

An Expert Committee has been constituted by the Government of India under the Chairmanship of Shri B.P. Sharma (former Secretary, DoPT) on 08.03.2019 to examine the issues related to creamy layer equivalence among the Socially and Educationally Backward Classes (SEBCs). The Committee had submitted its report to the Ministry of Social Justice and Empowerment on 17.09.2019. He said that creamy layer formula for OBCs employed with the State Governments, Central Government, PSUs and banks, for the purpose of their Government jobs, admission to Central Government jobs and their admission to Central Government educational institutions is at present

³⁶ *Supra* note 8, at 36.

³⁷ *Id.*

covered by the instructions of DoPT dated 08.09.1993 and 14.10.2004 and Department of Public Enterprises and the Department of Financial Services, vide O.M. dated 25.10.2017 and 06.12.2017, respectively.³⁸

7. Remedies and Strictures from Judicial Decisions

Successful candidates in the Civil Services examinations had to approach the courts for obtaining legal remedies for proper allocation in services to the OBC non-creamy layer candidates against the arbitrary application of the creamy layer criteria. Cases before the Delhi and Madras High Courts may be taken into account here. Before the Delhi High Court³⁹ the petitioners submitted that their parents were not officers, but employees, whose annual income was around Rs. 6 lakh and that they had been treated as part of the creamy layer of OBCs. They cited the Supreme Court decision in *Siddharth Saini v. State of Haryana*⁴⁰ to submit that salary is not to be included, but income from other sources is to be considered while determining the creamy layer status of OBC candidates.

In the case of petitioner, C. Chitharanjan [W.P.(C) 3077/2017], it was found that he belonged to the creamy layer status of professional class in terms of Category-IV of Schedule II of DoPT O.M. of 08.09.1993 and hence, the income criteria would apply. In the case of petitioner, Ketan [W.P.(C) 3073/2017] an RTI reply received disclosed that since equivalence has not been determined, the income criteria would apply with reference to O.M. 08.09.1993.

The court held that⁴¹

the Communication of 14th October 2004 takes into account the salary of parents of OBC candidates whereas as per the O.M. of September, 1993, the income from other sources is the basis to

³⁸ G.I., DoPT O.M. No. 36033/5/2004-Estt (Res), Oct. 4, 2004.

³⁹ Ketan & Ors v. Union of India & Ors., 2018 DHC 238; 2018 (2) SLJ 37 (DEL).

⁴⁰ (2001) 10 SCC 625.

⁴¹ Ketan & Ors v. Union of India & Ors., 2018 DHC 238; 2018 (2) SLJ 37 (DEL), paras 12, 13.

determine the creamy layer status of OBCs in case of PSUs, where equivalence has not been established. Undisputedly, equivalence has not been established in case of PSUs viz-a-viz the posts in the Government. In such a situation, I find that no rationale or justification is spelt out in the impugned communication of 14th October 2004 or in the counter affidavit filed by first respondent, to make the salary of OBC employees in PSUs as the basis to determine their creamy layer status.”

“...respondent’s rationale to rely upon the salary of OBC employees of PSUs is that they draw a lot of perks in comparison to the OBC employees in Government service. To say the least, the above said oral explanation does not appeal to reason. ... in the considered opinion of this Court, there is no basis to rely upon the impugned Clarification of October 2004. Thus, the impugned Communication is set at naught and first respondent is directed to verify the creamy layer status of petitioners while solely relying upon the O.M. of September, 1993.

The core contention of Rohith Nathan [W.P.Nos.6387 and 6388 of 2017] and G Babu [W.P.No.6389 of 2017] was that their parents who were employed in private sector establishments such as HCL Technologies Limited and Neyveli Lignite Corporation respectively, had no other income except their salary. During the year 2013, the creamy layer limit was fixed as Rs.4,50,000. In the process of taking into consideration their parents' income, their salary was taken as income and they were treated as creamy layer among the OBCs. As they were denied OBC reservation, they approached the Central Administrative Tribunal and got a favourable order. This was contested by the Centre in the Madras High Court.

The Court held that:⁴²

⁴² Union of India and Ors. rep. The Secretary to Government of India, Ministry of Personnel, Public Grievances and Pensions, Department of Personnel & Training & Others v. Rohith Nathan, 2017 (7) MLJ 751; 2017 MHC 6119, Appeal in SC pending in C.A. No. 2827-2829/2018.

“...We do not see it as a simple anomaly but misinterpretation of the provisions leading to selective discrimination”... “By delaying the process of evaluation, the injustice to the sons and daughters of Private Sector employees is perpetuated for more than two 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 counterparts in PSUs or the Private Sector. While so, when salary is not a criterion to eliminate creamy layer among certain Government servants, why is salary a criterion to eliminate the creamy layer of wards of Public Sector employees who are socially not considered on par with the Government servants?”...“Firstly, the failure of the writ petitioners in not formulating the equivalence and comparable test has put the sons and daughters of PSU employees, etc., in disadvantageous position compared to their counterparts in Government service. Secondly, when the 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 PSU employee as a test for identifying the Creamy Layer brings in the element of hostile discrimination.”

This clearly demonstrates how the candidates had to run pillar to post to get their reserved seat.

8. Conclusion and Suggestions

On the question posed to the Ministry of Social Justice and Empowerment on whether the government has planned for exclusion of the creamy layer of SCs from reservations, the Minister evaded the question by stating that the matter was sub-judice and the Government had filed its reply in the Supreme Court.⁴³ The

⁴³ Ratan Lal Khataria, *Unstarred Q No 279 Lok Sabha* (February 4, 2020) <http://loksabhaph.nic.in/Questions/QResult15.aspx?qref=11364&lsno=17>.

Government has clear double standards for the OBCs on one hand, and for SC/STs on the other. While it proposes the application of 'creamy layer' for OBC reservations, it opposes it when it comes to SC/STs.⁴⁴ The Government's argument is that the Mandal case says so, but the Supreme Court has held a contrary view.⁴⁵ This is a clear case of a caste based blanket reservation policy followed by successive governments and extended continuously by Constitutional amendments. Most castes seem to be carrying their backwardness till eternity. OBCs working in PSUs will not qualify for reservations, but this rule does not apply to the SC/STs. Surely just as rich and poor OBCs exist, even rich and poor SC/STs do exist. And even amongst the SC/STs certain sections are better off than others. Therefore, the state should distribute benefits amongst them in a rational and equitable manner. This was admitted by the Constitutional bench of ⁴⁶*State of Punjab* in 2020, when it differed from the Constitutional bench⁴⁷ of *E V Chinnaiah* and referred the matter to the CJI, to form a larger bench to deal with the matter, distancing from the 2004 verdict and admitting that there are unequals within SC/STs and OBCs.

SC/STs are not a homogenous lot emerging from the Presidential List and there is no cause to worry thinking that it would lead to reverse discrimination. A blanket reservation system is a pure caste-based system, which is clearly flawed. The reservation policy needs to be driven by pure income and employment status. It is education that decides the income levels as per the PRICE⁴⁸ data, which is a pan-India income and expenditure survey. This study has debunked the myth that lower caste means poverty. It has also mapped educational and labour mobility trends. According to this survey, around 6% of SC households (4 million) earn between Rs. 5-10 lakhs per annum and 7% (5 million) earn over Rs. 10 lakhs. In

⁴⁴ *Samta Andolan Samiti v. Union of India*, W. P. No. 2/2018.

⁴⁵ *M. Nagaraj v. Union of India*, (2006) 8 SCC 212.

⁴⁶ *State of Punjab v. Davinder Singh & Ors*, 2020 SCC OnLine SC 677 ¶52.

⁴⁷ *E V Chinnaiah v. State of Andhra Pradesh*, (2005) 1 SCC 394.

⁴⁸ *Ice 360, The National Survey of Indian Consumers*, (2014), <http://www.ice360.in/uploads/files/thenationalsurveyofindianconsumers-web.pdf>.

the case of ST households, 11% (3 million) earn between Rs. 5-10 lakh and 5% (1 million) earn over Rs. 10 lakhs. The Central Government notification⁴⁹ caps earnings more than Rs. 8 lakh per annum for OBCs to come under the 'creamy layer' bracket and, therefore, ineligible for reservation benefits. Based on this survey, if 22 million OBC households are 'creamy layer', 13 million SC/ST households are also 'creamy layer,' using the same income definition. In 2016, it was observed that the income levels of SC households rose from Rs. 90,285 per year to Rs. 1,38,152, when the head of the family completed primary school, as compared to when he was illiterate. Also, in families where the head of the household had completed matriculation, it was seen that the income rose to Rs. 1,86,592, and to Rs. 2,23,356 if he had completed school, irrespective of caste groups.⁵⁰

The Social Justice and Empowerment Ministry has been lethargic in undertaking the exercise of evaluating and identifying posts of equivalence vis-à-vis government posts and had kept the matter in cold storage for obvious reasons. The salary of the parents of the candidates, who are working in PSUs, PSBs etc., was taken into account for determining their creamy layer status, since equivalence was not established. This has led to situations where *bonafide* OBC candidates were denied OBC status following erroneous clarifications issued by DoPT on 14th October 2004 and still others were left in the lurch and had to resort to judicial recourse due to arbitrary interpretation of the provisions of Income/Wealth Test under Category VI of the Schedule to the O.M. dated 08.09.1993.

In consonance with the paragraph 27 of the Expert Committee Report, it is highlighted that while applying the wealth/income test to determine the creamy layer status of any candidate, income from salaries and agriculture land should not be taken into account. It is also clarified that Explanation (i) given to Category VI of the Schedule to O.M. dated 08.09.1993, according to which income

⁴⁹ G.I., DoPT O. M. No. 36033/1/2013, Estt. (Res), Sept. 13, 2017.

⁵⁰ Ice 360, *Household Survey on India's Citizen Environment and Consumer Economy*, (2016), <http://www.ice360.in/uploads/files/about-ice360survey2016-09december2016-web.pdf>.

from salaries or agricultural land shall not be clubbed, should be applicable both in respect of category VI(b) as well as VI(a).

Employees under Category II-C should not be disentitled to the benefit of reservation and their income only from other sources should be taken into account without clubbing the income from salaries and agricultural land while applying the income/wealth test in case the equivalence of their posts vis-à-vis Government posts has not been established.

Through a holistic reading of applicable precedents, *Jarnail* has rightly pointed out that as far as the creamy layer is concerned the object of reservations is to ensure that backward classes move ahead along with the rest on an equal basis. This would not be attained if the creamy layer is allowed to creep in and grab coveted jobs. The creamy layer is an equality test among the SCs and STs to ensure that the worst off among them are not obscured by the better off. Neither does the creamy layer tinker with the Presidential Lists as the castes and sub-castes identified therein will continue unaltered and only those who have come out of their backwardness by virtue of belonging to the creamy layer would be excluded from the benefits of reservation. It is illogical to assume SCs and STs to be perpetually backward and belonging to a homogenous class. As the Supreme Court aptly described it⁵¹, “in case benefit which is meant for the emancipation of all the castes, included in the list of SCs, is permitted to be usurped by a few castes, those who are adequately represented, have advanced and belonged to the creamy layer, then it would be tantamount to creating inequality whereas in case of hunger every person is required to be fed and provided bread. The entire basket of fruits cannot be given to the mighty at the cost of others under the guise of forming a homogenous class.” Hence, it is suggested that the DoPT reconsider its review petition filed in the Supreme Court seeking referral of *Jarnail* to a seven-judge bench.

⁵¹ State of Punjab v. Davinder Singh & Ors, 2020 SCC OnLine SC 677 ¶52.