IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

WRIT PETITION (PIL) NO. 108 of 2016
With
SPECIAL CIVIL APPLICATION NO. 8804 of 2016
With
SPECIAL CIVIL APPLICATION NO. 8655 of 2016
With
SPECIAL CIVIL APPLICATION NO. 9740 of 2016

FOR APPROVAL AND SIGNATURE:

HONOURABLE THE CHIEF JUSTICE
MR. R.SUBHASH REDDY
and
HONOURABLE MR.JUSTICE VIPUL M. PANCHOLI

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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DAYARAM KHEMKARAN VERMA S/O KHEMKARAN VERMA....Applicants

Versus

STATE OF GUJARAT & 1....Opponents

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Appearance:

WP(PIL) NO 108 OF 2016:

MR IH SYED with MR RAHUL SHARMA, ADVOCATE for Petitioner

MR KAMAL B TRIVEDI, ADVOCATE GENERAL with MS SK VISHEN, AGP

with MR PK JANI, ADDITIONAL ADVOCATE GENERAL with MS ML SHAH, GOVERNMENT PLEADER for Respondent No. 1
MR AMIT PANCHAL with MS SHIVANI RAJPUROHIT, ADVOCATE for Respondent No. 2

SPECIAL CIVIL APPLICATION NO 8804 OF 2016:
MR SN SHELAT, SR. ADVOCATE with MS VD NANAVATI,ADVOCATE for Petitioners
MR KAMAL B TRIVEDI, ADVOCATE GENERAL with MS SK VISHEN, AGP with MR PK JANI, ADDITIONAL ADVOCATE GENERAL with MS ML SHAH, GOVERNMENT PLEADER for Respondent No. 1
MR AMIT PANCHAL with MS SHIVANI RAJPUROHIT, ADVOCATE for Respondent No. 5
MR MIHIR THAKORE, SR. ADVOCATE with MS AMRITA M THAKORE, ADVOCATE for Respondent Nos. 6 to 9

SPECIAL CIVIL APPLICATION NO 8655 OF 2016:
MR BT RAO with MR VIJAY NANGESH, ADVOCATE for Petitioner
MR KAMAL B TRIVEDI, ADVOCATE GENERAL with MS SK VISHEN, AGP with MR PK JANI, ADDITIONAL ADVOCATE GENERAL with MS ML SHAH, GOVERNMENT PLEADER for Respondent No. 1
MR AMIT PANCHAL with MS SHIVANI RAJPUROHIT, ADVOCATE for Respondent No. 5
MR MIHIR THAKORE, SR. ADVOCATE with MS AMRITA M THAKORE, ADVOCATE for Respondent Nos. 6 to 9

SPECIAL CIVIL APPLICATION NO 9740 OF 2016:
MR SHALIN MEHTA, SR. ADVOCATE with MR HEMANG M SHAH. ADVOCATE for Petitioner
MR KAMAL B TRIVEDI, ADVOCATE GENERAL with MS SK VISHEN, AGP with MR PK JANI, ADDITIONAL ADVOCATE GENERAL with MS ML SHAH, GOVERNMENT PLEADER for Respondent No. 1
MR AMIT PANCHAL with MS SHIVANI RAJPUROHIT, ADVOCATE for Intervener.

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CORAM: **HONOURABLE THE CHIEF JUSTICE MR. R.SUBHASH REDDY**
and
HONOURABLE MR.JUSTICE VIPUL M. PANCHOLI

Date : 04/08/2016

CAV JUDGMENT

(PER : HONOURABLE THE CHIEF JUSTICE MR. R.SUBHASH REDDY)

1. In this group of petitions, filed under Article 226 of the Constitution of India, challenge is to the Gujarat Ordinance No.1 of 2016, which provides for the reservation of seats in the educational institutions in the State and of appointments and posts in the services under the State in favour of the Economically Weaker Sections of unreserved categories.

2. As common issue is involved in this batch of petitions, we have heard all the petitions together and dispose of the same by this common judgment. For the disposal of this group of petitions, we have taken up Special Civil Application No. 8804 of 2016 as lead matter and referred to the facts contained in the said petition.

3. Special Civil Application No. 8804 of 2016 is filed by two petitioners through their guardians who have completed 10 + 2 course, aspiring to get admission in the medical stream for the prayers which read as under:-

> *"(A) Your Lordships may be pleased to admit and allow the present petition;*
> *(B) Your Lordships may be pleased to issue a writ of mandamus or any other writ in the nature of mandamus, order or direction in the nature of mandamus declaring the provisions of Ordinance 1 of 2016 ultra vires the Constitution of India and invalid in law and may be pleased to restrain the*

respondents from enforcing the provisions of Ordinance 1 of 2016 forthwith.

(C) Pending the admission and final hearing of the present petition, Your Lordships may be pleased to stay operation of Ordinance 1 of 2016 forthwith and restrain the respondents from enforcing the provisions of Ordinance of 1 of 2016.

(D) Pending the admission and final hearing of the present petition, Your Lordships may be pleased to restrain the respondent Nos. 4 and 5 not to enforce the reservation policy of providing 10% reservation for economically weaker section of the society.

(E) Any other and further reliefs as deemed fit in the interest of justice may kindly be granted."

4. Before we refer to various clauses of the impugned Ordinance, which provides for the reservation of seats in educational institutions in the State and of appointments and posts in the services under the State in favour of the Economically Weaker Sections of unreserved categories, we deem it appropriate to refer to certain background facts which led to issuance of the impugned Ordinance.

4.1 There was a long-standing demand from Patidar and other communities for providing reservation in the government jobs and higher education. There was also agitation/movement as these demands were not considered for reservation. To consider such representations demanding reservation in higher education from social groups and communities, the government constituted a High Power Committee of Hon'ble Ministers headed by Shri Nitin Patel as Chair-Person. The High Power Committee prepared its report dated 25.4.2016, which is placed on record. A perusal of the Committee's report indicates that the Committee has considered representations

numbering about 225 from Patidars and other communities, castes and organizations. There was also a representation from a Trust, named Sardar Patel Seva Trust received by the High Power Committee after it was constituted. The High Power Committee also received other representations relating to reservations, the demands in such representations were as under:

(a) In Gujarat, different groups involved in the agriculture and animal husbandry, namely, Anjana Chaudhary, Koli Patidar and Patidars from South Gujarat were incorporated as ST category and are availing all benefits of reservations, whereas Kadva-Leua Patidar and Kachchhi Patidar communities do not get the benefit of reservations. It is their case that though they are also involved in the agricultural activities, they should also be included in the other backward classes.

(b) Patidars who have ceased to be a khatedar should be incorporated in Special Backward Class (SBC), claiming 5% reservations.

(c) The posts/seats meant for open category/unreserved class should be reserved for the unreserved class/caste.

(d) Reservation in the academic institutions and jobs be provided on the basis of economic criteria and not on the caste criterion, there was a request to accept the report of Rane Commission in toto and to devise a system to provide reservation based on economic criteria.

(e) The Patidars should be incorporated in the Other Backward Class (OBC) category and in case of such non-inclusion, the reservation policy should be abolished completely.

(f) The Patidars have been incorporated in SEBC/OBC in Rajasthan, Maharashtra, Madhya Pradesh and Bihar and on the same basis, such benefits should be extended in Gujarat as well.

(g) The candidates from certain categories obtaining posts/seats of general category in a considerable number, cannot be considered as backward, the government should undertake a survey for the purpose and such castes that are no more socially and educationally backward should be removed from the reserved category.

(h) Provision for reservation should be absolutely on the economic criterion because a few castes/groups from the Scheduled Tribes, Scheduled Castes and Other Backward Castes have been taking advantage of reservation also, whereas comparatively more backward castes/groups are not benefited.

3. Castes like Brahmin, Rajput, Soni, Vaishnav, Vanik, Bhavsar are economically very backward, hence, these castes should be incorporated in the OBC.

(j) The benefit of reservation should be given only once and to a single individual of a family in a generation.

4.2 In addition to the demands for reservation and inclusion in OBC category etc there were also economic demands claiming that all the benefits provided to the candidates of socially and educationally backward class should be provided to the candidates of general category also; to create the Patidar Vikas Commission by creating Sardar Patel Vikas Board; special budget should be allocated not less than Rs. 500 crore; economically weaker families should be given loans/subsidies for trade and employment from such board; free of cost training and facilities and for appearing in the competitive examinations should be provided to economically unreserved category; candidates of unreserved category have to pay a high amount towards fees for such examinations whereas reserved category candidates are exempted; exemption should be given to the unreserved category also or the standard for such fees should be uniform to all; Economic Reservation Commission should be created for considering such issues; to constitute Higher Class Development Commission and all the students should be given scholarship, uniforms, text books, educational loans, vehicles for the girls for higher education and further economically weaker families should be given loans/subsidies for trade and employment. People from unreserved category, who are not part of the creamy layer should be provided all the benefits which are available to other backward classes, including assistance for studying abroad. Various govt. schemes like Kunvarbai nu mameru, scholarships etc are to be

awarded on the basis of economic criterion without reference to castes or community.

4.3 There were also further demand related to educational issues demanding that students should be given scholarships, educational loans, vehicle for girls for higher education; number of seats be increased in the medical colleges, removal of reservation in higher training institutes and reservation should be extended to grant-in-aid academic institutions; demands relating to removal of reservation in the promotions in the services and posts and to make upper age limit uniform to all the categories.

4.4 Considering such various types of demands for reservation relating to admissions in educational institutions and of appointment and posts in services under the State, the Committee analyzed various issues. As stated in the Report, while analyzing the demands which were before the Committee, the Committee noticed that the government has already introduced Mukhyamantri Yuva Swavlamban Yojna, which provides financial support and assistance based on the quality and income, to the talented youth of unreserved category and under that scheme, children of the family whose income was below Rs.4.5 lakh were given different types of assistance for primary, secondary and higher education, and later on the government has increased the ceiling limit of annual income up to Rs. 6 lakh to extend the benefit of the scheme. Further under the Mukhyamantri

Yuva Swavlamban Yojna, the State Government has also provided financial support to students of all castes and communities, based on their merit and family income for higher education. The Committee noticed that such issues related to reservation in admission in educational institutions and direct recruitment in the government jobs still persist in spite of such benefits extended by the government by granting financial assistance to the students.

4.5 With reference to the demands before the Committee, after analyzing the schemes which were already in force and available for benefit of the students below ceiling limit income, the Committee concluded that it is necessary and proper to take some definitive decision of reservation based on income criteria. The Committee observed in its report that financial assistance alone does not suffice for providing sufficient opportunities of education and employment to the economically backward class youth of unreserved category. While considering the issue of demand of Patidars to incorporate them in the Socially and Educationally Backward Class, the Committee realized that along with the Patidars, there are many other unreserved category castes of the society whose youth are facing difficulties in getting higher education and government jobs due to weaker financial background of the family. The Committee found that economically weaker families of unreserved category and socially forward class lag behind in aggregate development of their castes as they are devoid of opportunities to higher education. The Committee

made reference to the recommendations made by Justice Rane Commission which recommended for reservation based on economic criteria. The Committee further found that provision for admission in primary education to the children belonging to Below Poverty Line (BPL) families of unreserved category has been done with implementation and enforcement of the Right to Education Act. However, the Committee found that there is no provision of reservation in the higher education for students belonging to the economically weaker families of unreserved category. The Committee further found that Social Welfare Department and Tribal Development Department have been operating a number of schemes for self-employment of youth, but such schemes are not available to the youth of economically weaker section of unreserved category, as such, they have to rely largely upon the government jobs. The Committee found that lack of opportunity for higher education and employment has infused disappointment in youth belonging to unreserved category and as such, economically weaker sections of unreserved category should be given the benefits without adversely affecting the benefits of reservation etc already given to the Scheduled Castes, Scheduled Tribes and Socially and Economically Backward Classes. The Committee therefore, recommended that such complex issues can be resolved only if justice is done to all the economically weaker families of different castes and communities by reserving 10% of the seats in appointments to the government services and in educational institutions which will serve the purpose.

Thus, the Committee made the following recommendations:-

> *"Recommendations of the Committee:-*
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> *Taking into consideration all these, with a view to ensure that the educational and economic progress of the youngsters of economically weaker unreserved category is not hampered, they get opportunity to obtain education and employment, no injustice is done to any other community and still adhering to the policy of the development of disadvantaged groups, and maintaining the spirit of "sau no saath, sau no vikaas", the Committee recommends as follows:*
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> *"Economically weaker class (with the family income of Rs.6.00 lakh per annum) of the Unreserved Category is hereby given the reservation of 10 per cent in the appointment to the Government services and in the admission to the educational institutions. This benefit will be given to them as per the standard of the reservation benefit given to the Socially and Educationally Backward Class (SEBC). This means that it will be in accordance with the present income limit of Rs. 6 lakh and the standing-presently prevalent instructions of the Social Justice and Empowerment Department, for the socially and economically backward class among the forward class.""*

4.6 Before referring to the various clauses of the impugned Ordinance by which the petitioners are aggrieved, we would also like to refer to the statement annexed to the impugned Ordinance.

4.7 In the statement annexed to the impugned Ordinance, it is stated that the State Government is following and implementing the policy of reservation for Scheduled Castes, Scheduled Tribes and Socially and Educationally Backward Classes in the admissions to educational institutions in the State and in the appointments in the services and posts under the State and because of the effective

implementation of the reservation policy for such classes, a reasonable number of persons belonging to the said classes are being benefited both socially and educationally to some extent and the existing policy of reservation for these classes in the State to continue. At the same time, economically weaker sections of unreserved categories of the society have expressed their inability to compete with higher strata who are economically sound and as a result of which, such economically weaker sections feel disadvantaged in terms of their representation in the matter of admission to educational institutions and in the services and posts under the State. It is further stated in the statement that it is the prime duty of the government to strive for inclusive development and address the reasonable requirement of such Economically Weaker Sections of unreserved categories of the society so that they may also share the fruits of the policies of the government. Thus, the government considers it necessary to provide ten per cent reservation on the basis of economic status to economically weaker sections of the society other than the Scheduled Castes, Scheduled Tribes and Socially and Educationally Backward Classes for admissions in the educational institutions and for appointments in the services and posts under the State.

5. We now refer to relevant clauses of the impugned Ordinance. Clauses 3 to 8 of the impugned Ordinance read as under:

*"**3. Reservation of seats in educational institutions in the State.-** The reservation in respect of the annual permitted strength for admission into such educational institutions and courses in the State, as may be prescribed, for Economically Weaker Sections, shall be ten per cent.*

***4. Reservation of appointments and posts in the services under the State.-**(1) The reservation of appointments and posts in the services under the State for the Economically Weaker Sections shall be ten per cent.*

(2) Notwithstanding anything contained in sub-section (1), such reservation shall not apply in the matters of promotion.

***5. No reservation in certain cases.-** Notwithstanding anything contained in section 4, there shall be no reservation in respect of the post, which is single (isolated) in any cadre or grade.*

***6. Criteria for reservation.-** For the purposes of this Ordinance, reservation under sections 3 and 4 for the Economically Weaker Sections shall be as per the criteria applicable to the Socially and Educationally Backward Classes in the State.*

***7. Power to make rules.-** (1) The State Government may, by notification in the Official Gazette, make rules for carrying out all or any of the purposes of this Ordinance.*

(2) All rules made under this section shall be laid for not less than thirty days before the State Legislature

as soon as possible after they are made and shall be subject to the recession by the State Legislature or to such modification as the State Legislature may make during the session in which they are so laid or the session immediately following.

(3) Any recession or modification so made by the State Legislature shall be published in the Official Gazette, and shall thereupon take effect.

8. Power to remove difficulties.- *If any difficulty arises in giving effect to the provisions of this Ordinance, the State Government may, by order published in the Official Gazette, make such provisions not in consistent with the provisions of this Ordinance as may appear to be necessary for removing the difficulty:*

Provided that no such order shall be made after the expiry of the period of two years from the commencement of this Ordinance."

5.1 Section 2(a) of the Ordinance defines the term "Economically Weaker Sections" to mean all such sections of the society consisting of persons belonging to unreserved category who meet with the criteria provided under section 6. Section 2(e) defines the term "unreserved category" to mean that it shall include all persons not falling within the reserved categories of Scheduled Castes, Scheduled Tribes and Socially and Educationally Backward Classes.

6. Coming to the facts of the case, it is stated in the petition that petitioner no.1 Ms. Dulari Mahesh Basarge passed her 12th Science

Semester Examination with 93.75%. She also passed her GCET examination and secured 99% marks out of 120. Petitioner no.2 also completed her 12th Standard and secured 98.97 percentile marks and secured 96.87% in the GCET examination, 2016 and both of them desire to seek admission in the medical/engineering courses. By the time the writ-petition was filed, there was no notification by the Gujarat Admission Committee constituted by the government for making admissions to medical courses. But the Admission Committee issued an advertisement dated 22.5.2016 for making admissions to technical courses. The admission procedure for the year 2016 for Bachelor of Engineering and Technological courses is also placed on record.

6.1 To implement the reservation as mandated in the impugned Ordinance, 10% seats are reserved for economically weaker sections of the unreserved category. Clause-6 of the admission brochure deals with reservation of seats which reads as under:-

"6. Reservation of Seats:-

(1) For the purpose of admission, the seats shall be reserved for the candidates who are of Gujarat origin and falling under the following categories and in following proportion, namely:-

(a) Scheduled Castes :7%
(b) Scheduled Tribes : 15%
(c) Socially and Educationally Backward Classes, including Widows and orphan of any caste : 27%

Unreserved Economically Weaker Sections: 10%

(2) A candidate seeking admission on reserved seat shall be required to produce a Certificate of inclusion in the concerned category, Provided that the candidate belonging to Socially and Educationally Backward Classes shall be required to produce a certificate to the effect of non-inclusion in Creamy Layer in addition to the caste certificate.

(3) No caste certificate shall be valid unless it is duly stamped, signed and issued by the authority empowered by the Government of Gujarat.

(4) No certificate to the effect of non-inclusion in Creamy Layer shall be valid, unless it is duly stamped, signed and issued by the authority empowered by the Government of Gujarat. Such certificate shall have been issued on or after the 1st April of the academic year in which the candidate is seeking admission.

(5) If a candidate fails to submit the certificates as required under sub-rule (2) within the stipulated time, his candidature shall be considered for admission under unreserved category.

(6) If a candidate of reserved category gets admission on unreserved seat in order of merits, he may be given admission on the unreserved seat according to his preference.

(7) The admission of a candidate of a reserved category on a reserved seat shall be valid subject to the verification of caste certificate issued to him by the authority empowered by the State Government in this behalf. In case the caste certificate is found to be invalid on verification, he shall not have right to claim his admission on reserved seat and if he has already been granted admission, such admission shall be canceled. Admission of such candidate may be continued in case of

availability of vacant unreserved seats, subject to the condition of eligibility of merit.

(8) After granting admission to all the candidates of reserved categories on respective reserved seats, the reserved category seats remaining vacant shall be transferred to the unreserved category seats."

6.2 After the issuance of the impugned Ordinance, the 1st respondent-State passed and issued Resolution No. SSP/122016/271436/A, dated 6.5.2016. The aforesaid Government Resolution is purportedly issued in exercise of powers under Section 8 of the Ordinance which empowers the State Government to issue order by publishing in the Official Gazette to remove the difficulties in giving effect to the provisions of the Ordinance. The relevant part of the aforesaid Government Resolution dated 6.5.2016 reads as under:-

Resolution

1. *For the purpose of this reservation the Unreserved Economically Weaker Sections shall be the classes / persons who are not Scheduled Castes, Scheduled Tribes and Socially and Educationally Backward Classes and who are not the classes/persons shown in the column-3 of the* ***Schedule*** *attached herewith.*
2. *For Unreserved Economically Weaker Sections, the certificate shall be in the format as attached with this resolution in Appendix – A and prescribed application form shall be in the format as attached in the Appendix – B.*
3. *The Competent Officers to issue the Unreserved Economically Weaker Section certificates shall be the*

same officers who are authorized, from time to time, to issue the non-creamy layer certificates. To issue such certificates mainly the following officers are there:

(1) District Magistrate / Addl. District Magistrate/ Collector / Deputy Commissioner / Deputy

Collector / Addl. Deputy Commissioner / First Class Stipendiary Magistrate / Sub Divisional Magistrate / Taluka Magistrate / Executive Magistrate / Addl. Asst. Commissioner (not below the First Class Stipendiary Magistrate)

(2) Chief Presidency Magistrate / Addl. Chief Presidency Magistrate / Presidency Magistrate

(3) Revenue Officer not below the rank of Mamlatdar (Tehsildar).

(4) Sub Divisional Officer

(5) Taluka Development Officer

(6) District Deputy Director (Developing Castes) and District Social Welfare Officer (Developing Castes)

4. *The procedure to issue the Unreserved Economically Weaker Sections Certificates, shall be the same as it is prevalent in the case of non creamy layer certificates.*
5. *The benefit of this reservation shall be available to the Unreserved Economically Weaker Section persons who are original natives of Gujarat State.*
6. *The validity period of such Economically Weaker Sections certificates shall be three years, including the financial years in which it is issued, as in the case of non creamy layer certificates and if there is any change in any of the parameters, it shall be the responsibility of the guardian/student/applicant/candidate to declare voluntarily the same before the competent authority as provided in the GR dt. 26/04/2016 as shown against sr. no. (12) as referred above.*
7. *When the competent authority refuses to give the Unreserved Economically Weaker Sections certificate or when such wrong certificate is issued the appellate authorities shall be as under as provided in the Resolution dt. 02/06/2014 as mentioned against sr. no.*

(9) as referred above

(1) If the decision is taken by the Mamlatdar, the appellate authorities shall be Prant Officer/Deputy Collector/Assistant Collector.

(2) If the decision is taken by the Prant Officer/ Deputy Collector/Assistant Collector, the appellate authority shall be the District Collector.

(3) If the decision is taken by the District Collector, the appellate authorities shall be the State level scrutiny committee.

8. The responsibility of the verification of such Unreserved Economically Weaker Sections Certificates shall be with the state level scrutiny committee constituted vide updated Resolution dt. 26/03/2015 as mentioned against sr. no. (10) as referred above. The responsibility to get such certificates to be verified at the stage of admissions and recruitment shall be on the concerned agency giving educational admission/recruitment committee/commission/recruiting agency or competent appointing authority.

9. The procedure of the verification of such Certificates shall be as it is presently in the case of the Socially and Educationally Backward Classes certificates and non-creamy layer certificates.

10. For the removal of difficulties in issuing such certificates, arising at the local level, shall be solved by the committee headed by the collector as provided in the resolution dt.27-4-2010 as mentioned against sr no.(7) as referred above.

11. It shall be the responsibility of the concerned competent authority to preserve the record in this regard.

12. This resolution and policy shall not be applicable for the reservation policy under the Government of India.

13. Whenever and whatever changes shall be made by the State Government in respect of the policy of non creamy layer certificates in case of the Socially and Educationally Backward Classes, the same shall be applicable mutatis mutandis in case of the certificates of the Unreserved

Economically Weaker Sections also."

6.3 It is stated in the petition that there was no reservation till last year for economically weaker sections of the unreserved category for admission to educational institutions and for employment and posts under the State services, and by the impugned Ordinance which is arbitrary and illegal, they are sought to be denied 10% of the available seats for the purpose of admission to educational institutions. It is the case of the petitioners that such ordinance is violative of their fundamental rights guaranteed under Articles 14, 15 and 16 of the Constitution and is arbitrary and runs contrary to the constitutional scheme and structure of the Constitution. It is their case that equality guaranteed under Article 14 is one of the basic tenets of the Constitution and the State policy and actions for admission and employment should be within the framework of such constitutional scheme. It is their further say that reservation provided under the impugned Ordinance is unreasonable and runs contrary to the public interest as it results in sacrifice of merit. It is further case of the petitioners that such benefit can be sacrificed only for the purpose of reservation as well as for making special provision under Article 15(4) or under Article 16(4) of the Constitution for advancement of Scheduled Caste and Scheduled Tribes and backward classes but not for making any other classification on the ground of economic criteria. It is stated that as the Ordinance has continued to retain 49% seats, that is, 7% seats for Scheduled Castes,

15% for Scheduled Tribes and 27% for Socially and Educationally Backward Classes, and further 10% reservation is provided for economically weaker sections of unreserved category for admission to educational institutions, which will come to 59% and rest of the communities have to compete only with 41% that will result in sacrificing merit and the same is not in larger public interest. While referring to case-law on the subject in the case of **Indra Sawhney vs. Union of India**, reported in **AIR 1993 SC 477** and in the case of **M. Nagaraj & Ors vs. Union of India**, reported in **AIR 2007 SC 71**, it is stated that percentage of reservation is contrary to the upper ceiling limit fixed by the Hon'ble Supreme Court in the aforesaid cases. It is further case of the petitioners that as no extraordinary jurisdiction existed there as observed by the Hon'ble Apex Court in the above judgments, compelling the government to breach the declaration of law, the impugned Ordinance is fit to be struck down as invalid. It is their say that income cannot be the criteria to constitute a class for providing reservation to economically weaker section of unreserved category and the same is a fraud on the Constitution and blatantly violating the rights of the citizens guaranteed under Article 14 of the Constitution. It is also the say of the petitioners that in the absence of any empirical data and material, the Committee considered the representations and recommended for reservation and such recommendations made are readily accepted by the government which resulted in issuance of the impugned Ordinance. In the absence of any quantifiable data and empirical study, no such

Ordinance can be issued particularly by Statute for the purpose of effecting reservation in educational institutions and of appointment and posts under the State for the persons belonging to economically weaker sections of unreserved category.

6.4 It is also the say of the petitioners that the State Government has issued resolutions on 7th October, 2015 and 5th April, 2016, granting benefit to the children whose parents' income is to the extent of Rs. 4,50,000/- for the purpose of payment of fees etc and without waiting to see the effect, has already issued the impugned Ordinance in the absence of any acceptable material on record. On the aforesaid grounds, the declaration is sought to set aside the impugned ordinance by declaring the same as *ultra vires* the Constitution of India and to restrain the respondent no.1-State from enforcing the provisions of the impugned Ordinance No.1 of 2016.

7. Additional Secretary, Social Justice and Empowerment Department has filed affidavit in reply on behalf of respondent no.1-State. In the affidavit in reply, reference is made to the constitutional provision under Articles 14, 15, 16 and Articles 38, 39 and 46 of the Constitution of India which are extracted in the affidavit. While denying various allegations made by the petitioner in the petition, it is stated that it was around June-July, 2015 that various weaker sections of society not belonging to reserved categories of Scheduled Castes, Scheduled Tribes and Socially and Educationally Backward

Classes, expressed a feeling that they were subjected to discrimination in comparison with the higher strata of people who are economically sound, and about the resultant inability to compete with them in the matters of admissions in educational institutions and in the services and posts under the State. There was series of representations given to the State Government for doing something for the benefit of such economically weaker sections. In view of such representations, the State Government appointed a High Level Committee consisting of 5 Hon'ble Ministers by Government Resolution dated 13.8.2015. The said High Level Committee considered such representations and orally heard various parties for providing level playing field in the matter of admission and employment. As a result of such consideration, to redress their grievances, the State Government issued Government Resolution dated 7.10.2015, formulating a policy by providing financial aid to the meritorious and needy students on merit-cum-means basis and such benefits flowing from the said policy are made admissible to all the candidates irrespective of categories. Such policy formulated by Government Resolution dated 7.10.2015 was exclusively dealing with the grant of financial assistance in the matter of admission and was restricted exclusively for meritorious students. The same was followed by another Government Resolution dated 5.4.2016 enlarging the scope of earlier resolutions so as to cover the Diploma students who are aspiring to get admission to recognized degree courses. It is stated that in spite of such steps taken by the government by issuing

Government Resolutions dated 7.10.2015 and 5.4.2016, still general feeling of dissatisfaction was prevailing in the State amongst the economically weaker sections of the society. In this regard, the government received plethora of representations and on considering such representations, to redress their grievances, the State Government appointed High Power Committee consisting of 5 Hon'ble Ministers under the Chairmanship of Shri Nitin Patel, the Hon'ble Minister for Health and Family Welfare, on 11.3.2016 considered 225 representations, wherein, social, caste and community groups had narrated their plights about discrimination and difficulties being faced by them while seeking admission in educational institutions and of appointments and posts in the services under the State. Reference is made to the issues which were there before the Committee for consideration. The committee recommended reservation of 10% in the government services and for admission in educational institutions for Economically Weaker Class (with family income of Rs.6 lakh per annum).

7.1 It is stated in the affidavit in reply that the aforesaid report was placed before the State Government at highest level on 25.4.2016 and further debate about the issue took place in the Cabinet meeting held on 29.4.2016.The Cabinet, after discussion and deliberations on various issues threadbare resolved to request His Excellency the Governor of Gujarat for promulgation of Ordinance for earmarking a classification to the extent of 10% for unreserved category so as to

provide a level playing field to the weaker sections of unreserved categories without disturbing the reservation provided under Articles 15 and 16 of the Constitution of India. It is further stated in the affidavit in reply that the entire file was thereafter sent to His Excellency the Governor of Gujarat on 1.5.2016 as the Legislative Assembly was not in session. His Excellency the Governor of Gujarat, in exercise of power conferred under clause (1) of Article 213 of the Constitution, on being satisfied, promulgated the Ordinance. Thereafter, various steps were taken to implement the provisions of the Ordinance.

7.2 It appears that thereafter the Social Justice and Empowerment Department issued a Government Resolution dated 6.5.2016, *inter alia,* formulating guidelines for implementation of the Ordinance. It is stated in the said Government Resolution that categories have been formulated for issuing the certificates in favour of unreserved Economically Weaker Sections. Reference is made to Circular instructions dated 7.5.2016 which also provided for parameters governing recruitment of unreserved Weaker Sections by virtue of the provisions of the Ordinance. Further reference is also made to Circular instructions dated 7.5.2016, 12.5.2016, 17.5.2016 and 18.5.2016.

7.3 Referring to various technical professional courses in the faculty of Degree Engineering/Diploma Engineering and Certificate to

Diploma Engineering, it was stated that admission process had already begun and in the hengineering degree courses total seats were to the tune of 70,799 and in response thereto, 47,897 candidates had registered and after scrutiny, 46,941 candidates were qualified for admission and the merit list of 8643 candidates belonging to unreserved Economically Weaker Sections was prepared.

7.4 In response to the main contention raised by the petitioners in the petition, it is stated in the affidavit in reply that earmarking of 10% of seats for economically weaker class in the matter of admission and appointments is *stricto sensu* not 'reservation', but a further classification in General/Open/Unreserved category of citizens of the State. While denying the allegations made by the petitioner by which challenge is made to the impugned Ordinance, it is stated that the State is enjoined to reach out to more deserving people and the task of finding out the most deserving must necessarily be a matter of continuous evolution. It is stated that the constitutional reservation available to various categories, flowing from Articles 15 and 16 is not affected in any manner by the Ordinance and the Ordinance is meant only and only for unreserved category covering all the persons not falling within the reserved categories of SC, ST and SEBC. While denying the allegation of the petitioners that by the impugned Ordinance, the object of reservation under Article 16(4) of the Constitution is defeated, reference is made to the provision under

Article 46 which deals with the directive principles of the State Policy which provides that the State shall promote with special care, the educational and economic interest of the weaker sections of people. It is stated in the affidavit in reply that the impugned Ordinance which provides for a reasonable classification with reference to General/Open/Unreserved category is permissible under Article 14 read with Article 46 of the Constitution of India. While making reference to the Resolution dated 1.1.1995 and the Resolution dated 6.5.2016 issued by the government read with the Schedule appended thereto, it is pleaded that to give benefit of Ordinance, there are five other parameters wherein sons and daughters of various functionaries of different categories would not be entitled to the benefit of the impugned Ordinance, even though their income may be less than Rs. 6 lakh *per annum*. The respondent no.1 has denied the allegation of the petitioners that income criteria alone is taken into consideration for issuance of the impugned Ordinance.

7.5 In response to the allegations of the petitioner that by issuance of the impugned Ordinance, reservations are exceeded beyond 50% and the same is contrary to the ratio laid down by the Hon'ble Supreme Court in the case of Indra Sawhney (supra). It is stated that 50% ceiling limit mentioned in the judgment of the Hon'ble Supreme Court, applies only to the reservation of SC, ST and SEBC. It is stated that such ratio of 50% ceiling was first laid down by the Hon'ble Supreme Court in the case of **Balaji vs. State of Mysore**, reported

in **AIR 1963 SC 649**. It is further pleaded that the Ordinance in question provides for only classification/categorization amongst the open category to the extent of 10%, and as such, the same cannot be construed as reservation as provided under Articles 15(4) and 16(4) of the Constitution which is made for SC, ST, SEBC and other backward classes. Further it is also stated that the Ordinance in question containing the said classification to the extent of 10% is relatable to Article 46 of the Constitution and the same is not with reference to backward class quota.

7.6 While reiterating their stand, it is stated that the impugned Ordinance is issued without affecting the reservation which has already provided for SC,ST and SEBC categories, therefore, it is pleaded that there are no merits in the petition prayed to dismiss the petition.

8. Affidavit in reply is filed on behalf of the impleaded respondent no.5. While justifying the issuance of Ordinance in question by the State, the 5th respondent has denied various allegations made by the petitioners and has pleaded that legislature of the State of Gujarat is fully competent and empowered under the Constitution to promulgate the Ordinance which is under challenge. The 5th respondent has taken a stand that the term 'reservation' as mentioned in the Ordinance is not reservation under Article 16(4) of the Constitution and is to be read down to be a reasonable

classification made under Article 14 of the Constitution. It is stated that while making reasonable classification, the State of Gujarat has protected reserved categories under Article 16(4) of the Constitution and has not disturbed their rights in any manner guaranteed under the Constitution. While making reference to the recommendations of the High Power Committee which is referred to in the affidavit in reply filed on behalf of the respondent no.1-State, it is stated that from such recommendations of the Committee, it is clear that only with a view to ensure that educational and economic progress of the economically weaker sections of unreserved category is not hampered, to provide opportunity for admission and employment to the weaker sections of unreserved category, reasonable classification is made by providing 10% of seats for them. The 5th respondent has made reference to the judgments on the subject-matter rendered by the Hon'ble Supreme Court and has prayed for dismissal of the petitions.

9. After the affidavit in reply is filed on behalf of the respondent no.1-State, there is rejoinder filed by the petitioners. Responding to the averments made in the affidavit in reply filed on behalf of the respondent no.1-State, in rejoinder, the petitioners have denied that any representations were made on behalf of the weaker sections of society alleging that they were subjected to discrimination in comparison with the higher strata of people who are economically sound. It is stated that there is continuous agitation on behalf of

Patidar community seeking reservation and no other group has made any application to the State Government or representation for seeking benefits as alleged and the agitation on behalf of the SEBC class was to protect their reservation. It is stated that the impugned Ordinance which provided for reservation of 10% to the unreserved category leading to classification amongst the socially and educationally advanced class is in breach and spirit of constitutional provision under Article 14 of the Constitution. While referring to the averments made in the affidavit in reply about the number of seats available in technical courses, it is stated that as the demand is less than available seats and there is no reason for providing reservation to such courses, as such, that itself shows non-application of mind for issuance of the impugned Ordinance and its applicability to technology courses. While referring to the provisions under Article 46 of the Constitution, it is pleaded that economically weaker sections do not constitute homogeneous class for the purpose of effecting reservation. As there is no certain likeness or common strait who are identified by some common attribute such as status, rank, occupation, residence in the locality, race, religion and like, they cannot be construed as class for the purpose of effecting reservation. While reiterating their stand that income criteria cannot be the basis for classification as it consists of heterogeneous individual, it is pleaded that the same also cannot be treated as a source for making admissions to the educational institutions.

10. Further affidavit in sur rejoinder to the affidavit of rejoinder filed by the petitioners is filed on behalf of the respondent no.1-State. In such affidavit, the 1st respondent has denied the allegation of the petitioners that there are no other representations as 225 individual representations made on behalf of the various communities and castes. It is pleaded that such representations were from various castes, communities and groups etc. covering a very fulcrum of citizens of the State, consisting of the entire unreserved category including entire Brahmin Samaj, Rajputs, Kansara Samaj, Brahmkshtriya, Lohana, Vaishnav Vanik, Brahm Samaj, Samasta Patidar Samaj, Agrawal Samaj, Bhanushalis, Anavils, forward Muslim groups etc. It is stated that such 225 representations were sent and presented through the office bearers of the said communities and groups on behalf of their entire communities. In response to the allegation of the petitioners that High Power Committee has made its recommendations without any empirical study, it is stated that having regard to representations which were made to the Committee, the Committee has fully considered various aspects and material including the recommendations of Justice Rane Commission appointed in the year 1981. It is further pleaded that such empirical study is required when one needs to determine the Socially and Educationally Backward Classes and Other Backward Classes and as much as the impugned order is issued only for classification, no empirical study is required. While denying the averment in the counter that classified group in the impugned Ordinance cannot be

construed as homogeneous group, it is stated that mere use of the word ‘reservation’ in the impugned Ordinance per se does not and cannot have the consequence of ipso facto applying the entire mechanism underlying the constitutional concept of protective reservation designed for the advancement of any Socially and Educationally Backward Classes of citizens or other backward classes of citizens. By reiterating their stand, it is prayed for dismissal of petitions.

11. Heard Mr. S.N.Shelat, learned Sr. Advocate appearing with Ms. V.D. Nanavati and Mr. Shalin M. Mehta, Mr. B.T. Rao, Mr. I.H.Syed and other learned counsel on record for the petitioners in the respective petitions and Mr. Kamal B.Trivedi, learned Advocate General with Mr. P.K. Jani, learned Additional Advocate General with Ms M.L. Shah, learned Government Pleader with Ms S.K.Vishen, learned Assistant Government Pleader for respondent no.1 State of Gujarat, Mr.Mihir Thakore, learned Sr. Advocate appearing with Ms Amrita Thakore, learned counsel for respondent nos. 6 to 9 in respective petitions and Mr. Amit Panchal with Ms Shivani Rajpurohit, learned counsel appearing on behalf of respondent no.5 and as intervener in the respective petitions.

12. Mr. S.N.Shelat, learned Sr.Advocate, appearing for the petitioners in Special Civil Application No. 8804 of 2016 has taken us through various clauses in the impugned Ordinance and other

material on record and submits that impugned Ordinance providing for reservation of 10% of seats in educational institutions in the State and of appointments and posts in the services under the State in favour of the Economically Weaker Sections of unreserved category, violates the equality clause under Article 14 of the Constitution; no classification can be made based on income criteria for the purpose of admission into educational institutions and for employment and such classification offends Article 14 of the Constitution; while effecting such reservation, the State has overlooked the merit criteria for admissions into various important educational courses and for the purpose of employment in the services under the State Government; economically weaker section of society as contemplated under the impugned Ordinance No. 1 of 2016 does not constitute either a class or source for the purpose of effecting reservation. According to the learned Senior Advocate, in the absence of any extraordinary situation, the State has exceeded the maximum cap of 50% of reservation and thus, the impugned Ordinance is contrary to the authoritative judgments of the Hon'ble Supreme Court and the other judgments of this Court.

12.1 Learned Senior Advocate, in support of his arguments has placed reliance on the following judgments:-

(1) Janki Prasad Parimoo and others v. State of Jammu & Kashmir and others, reported in AIR 1973 SC 930

(2) Indra Sawhney etc.etc. v. Union of India and others, etc.

etc., reported in AIR 1993 SC 477

(3) Division Bench judgment of this Court rendered in Letters Patent Appeal Nos. 698 and 699 of 1994

(4) Judgment of this Court in the case of Asha D. Bhatt v. Director of Primary Education and Anr., reported in 2003 (4) GLR 3991

(5) Minor A. Periakaruppan & another v. State of Tamil Nadu and others, reported in AIR 1971 SC 2303

(6) Govt. of A.P. v. P.B. Vijaykumar and another, reported in AIR 1995 SC 1648

(7) Post-Graduate Institute of Medical Education and Research, Chandigarh v. Faculty Association and others, reported in AIR 1998 SC 1767

(8) Dr.Preeti Srivastava and another v State of Madhya Pradesh and others, reported in AIR 1999 SC 2894

(9) A.I.I.M.S. Students Union v. A.I.I.M.S. and others, reported in AIR 2001 SC 3262

(10) N.T.R. University of Health Sciences, Vijayawada v. G. Babu Rajendra Prasad and another, reported in AIR 2003 SC 1947

(11) M. Nagraj & Ors v. Union of India & Ors, reported in AIR 2007 SC 71

(12) Ram Singh v. Union of India, reported in 2015 (4) SCC 697

(13) Union of India v. Elphinstone Spinning and Weaving Co. Ltd. and others, reported in AIR 2001 724

(14) Kailash Chand Sharma, etc.etc. v. State of Rajasthan and others, reported in AIR 2002 SC 2877

(15) Karamsad Medical Association v. State of Gujarat, reported in 2000 (2) GLR 1648

(16) State of Madhya Pradesh and others v. Gopal D.Tirthani and others, reported in AIR 2003 SC 2952

13. Mr. Shalin Mehta, learned Sr. Advocate, appearing with Mr Hemang M. Shah, learned counsel for the petitioner in Special Civil Application No.9740 of 2016 submits that reservation based on income criteria is already disapproved by the authoritative pronouncement of the Supreme Court in the case of **Indra Sawhney v. Union of India**, reported in **1992 Suppl. 3 SCC 217**. Reservation of 10% seats in the educational institutions and of appointments and posts in the services under the State in favour of economically weaker sections of unreserved category provided in the impugned Ordinance violates the basic tenets of the constitutional scheme under Article 14 of the Constitution of India. According to the learned counsel, a class which is sought to be created on the ground of economic criteria cannot constitute homogeneous class at all for the purpose of reservation. In any event, the reservation to the extent of 10% exceeds 50% of reservation cap determined by the Hon'ble Supreme Court in the judgment in the case of Indra Sawhney (supra) and other cases and in the absence of any extraordinary circumstances indicated in the impugned Ordinance, the impugned

Ordinance is illegal and arbitrary and is fit to be struck down as the same runs contrary to the judgment of the Hon'ble Supreme Court. It is further contended by Mr. Mehta that neither the Parliament nor the State Legislature can make any law that runs counter to the law declared by the Hon'ble Supreme Court. The impugned Ordinance is contrary to the judgment declared by the Hon'ble Supreme Court in the case of Indra Sawhney (supra) and others. The reservation which is sought to be provided is not covered either under Articles 15 and 16 or under Article 46 of the Constitution of India. It is submitted that such reservation offends Articles 14, 15 and 16 of the Constitution of India. The economically weaker sections of unreserved category are heterogeneous and therefore, such reservation is illegal and arbitrary. In support of his argument that Article 46 will not confer any right on the State to make reservation to economically weaker sections of unreserved category, Mr. Mehta placed reliance on the case of **State of Madras v. Sm. Champakam Dorairajan,** reported in **AIR 1951 SC 226**. In any event, if there is any clash between the fundamental rights and directive principles, the fundamental rights guaranteed to the citizens under Articles 14, 15 and 16 cannot be emasculated. It is also pleaded that there cannot be any presumption of constitutionality in favour of the Ordinance/Legislation when such legislation or Ordinance is ex facie contrary to fundamental rights guaranteed to the citizens under Article 14 of the Constitution of India. There was absolutely no scientific data collected by the State before effecting the reservation by way of Ordinance to the

economically weaker sections of unreserved category. Learned counsel, in support of his arguments placed reliance on the judgment of the Hon'ble Supreme Court in the case of **AIIMS Students' Union vs. AIIMS** reported in **(2002) 1 SCC 428** and in the case of **Atyant Pichhara Barg Chhatra Sangh and Anr. v. Jharkhand State Vaishya Federation and Ors.** reported in **(2006) 6 SCC 718**. Learned counsel further submits that the impugned Ordinance is issued as a knee jack reaction to the agitation of Patidars and the same is also evident from the statement of objects and reasons for issuing the impugned Ordinance.

14. Mr. B.T. Rao, learned counsel appearing for the petitioners in Special Civil Application No. 8655 of 2016 has taken us through the report of the High Power Committee pursuant to which the impugned Ordinance is issued. It is submitted that there is no scientific data collected before issuance of Ordinance and only in view of the agitation of Patidar section of citizens, the impugned Ordinance is issued.

15. Mr. I.H. Syed, learned counsel appearing for the petitioner in Special Civil Application No. 108 of 2016 submits that the impugned Ordinance is politically motivated and is not referable to any of the provisions under the constitutional scheme. Learned counsel has placed reliance on the judgment of the Hon'ble Supreme Court in the case of **Indra Sawhney v. Union of India and others,** reported in

(2000) 1 SCC 168.

16. Before making submissions, Mr. Kamal B Trivedi, learned Advocate General, pointed out the following facts leading to passing of the impugned Ordinance.

16.1 In June–July 2015, various weaker sections of society not belonging to reserved categories of SC, ST and SEBC, expressed a feeling about they being subjected to discrimination in comparison with higher strata of people who are economically sound and resultant inability to compete with them in the matter of admission in educational institutions and in the services and posts under the State. Following this, the State Government appointed a High Level Committee consisting of 7 Ministers vide G.R. dated 13.08.2015. The said Committee, after considering the grievance, made recommendations.

16.2 Pursuant to such recommendations, the government issued Government Resolution dated 07.10.2015, whereby general policy was formulated, *inter alia*, providing for financial aid to the meritorious and needy students on merit-cum-means basis. The benefits flowing from the said policy are made admissible to all the students irrespective of categories. On 05.04.2016, the government issued another Government Resolution, enlarging the scope of the earlier Government Resolution dated 07.10.2015 so as to cover the

Diploma Students, who are aspiring to get admission in the recognized degree courses. Despite having taken the aforesaid measures, there was still a general feeling of dissatisfaction amongst the economically weaker sections of the society that the policy contained in both the aforesaid Resolutions needs further strengthening by expanding its scope and purview.

16.3 On 11.03.2016, a High Power Committee was constituted consisting of five Hon'ble Ministers. The said Committee considered number of representations and ultimately made certain recommendations.

16.4 Report of the aforesaid Committee was placed before the Cabinet which was held on 29.04.2016 and after considering and after due deliberations with respect to various aspects including the element of unemployment, economic criteria, etc., request was made to His Excellency Governor for promulgation of Ordinance.

16.5 On 01.05.2016, the impugned Ordinance was promulgated in exercise of powers conferred by Clause (1) of Article 213 of the Constitution of India.

16.6 Criteria for making the benefits available to the economically weaker sections are to be as per the criteria applicable to SEBC in the State. Criteria for SEBC is prescribed vide G.R. dated 01.11.1995.

16.7 It appears that after issuance of the Ordinance, various steps have been taken by the State Government towards the implementation of the provisions of the ordinance.

17. Per contra to the arguments of the petitioners, learned Advocate General Mr. Kamal B Trivedi, appearing with Ms. SK Vishen, learned Assistant Government Pleader with Mr.P.K. Jani, learned Additional Advocate General with Ms ML Shah, learned Government Pleader, appearing for the respondent no.1-State of Gujarat has taken us to the entire various clauses in the Ordinance and detailed affidavit in reply filed and also other material placed on record. Learned Advocate General submitted that provision as regards earmarking 10% of economically weaker class in the matters of admissions and appointments is *stricto sensu* not 'reservation' but a further classification in the general/unreserved category of the citizens of the State.

18. He submits that the impugned Ordinance issued is only a classification for the purpose of promoting the interest of the economically weaker sections of unreserved category in education and services. It is submitted that such classification made in the impugned Ordinance is totally outside the scope of reservations provided under Articles 15 and 16 of the Constitution of India. By making distinction with the reservation provided under Articles 15

and 16 of the Constitution of India, it is submitted that such reservations are class centric and the classification which is made under the provisions is not based on such castes and communities, but the same is issued only with a view to promote the economically weaker sections of unreserved category as it was found that they are not able to compete with the economically rich in the field of education and employment. By making such classification, reserved category is not at all affected and the classification applies only to the area which is not covered by earlier reservation made under Articles 15 and 16 of the Constitution of India.

18.1 It is the contention of the learned Advocate General that the Ordinance in question is issued to translate the constitutional philosophy provided under the directive principles of the State Policy as laid down under Articles 38, 39(b) and 46 of the Constitution of India, which inter alia mandates the State to effect economic empowerment of the weaker sections of the society. Such Ordinance satisfies the twin test of Article 14, viz. it is based on intelligible differentia, and it has nexus with the object sought to be achieved as discernible from the Ordinance that it promotes economically weaker sections belonging to unreserved category of citizens in the matters of admissions and appointments. The judgment in the case of Indra Sawhney (supra) is with reference to the situation prevailing at the time of submission of the Mandal Commission's Report on 31.12.1980 which has recognized as many as 3743 castes as socially and

educationally backward classes and in that context, the judgment was rendered on 16.11.1992.

18.2 It is further submission of the learned Advocate General that a period of 36 years since the submission of the Mandal Commission Report and 24 years since the rendition of the judgment of the Apex Court in the said case, has passed by and even as per the said report, the same was to be reviewed after 20 years. Therefore, time has come for adopting new practices, methods and yardsticks by moving away from caste-centric definition of backward class as observed by the Apx Court in the case of **Ram, Singh v. Union of India,** reported in **(2015) 4 SCC 697**. In any event, as the judgment in the case of Indra Sawhney (supra) was only with reference to backward classes as referred in Article 16(4) of the Constitution, as such, now having regard to lapse of time and as it was found that economically weaker sections of the society are not able to get their due share in admissions and appointments, impugned Ordinance is issued by making reasonable classification which does not offend equality clause of Article 14 of the Constitution of India and the same is also in conformity with Articles 38, 39(b) and 46 of the Constitution.

19. Over and above the above submissions, the learned Advocate General made the following submissions:

19.1 Constitutional reservation available to various reserved

categories flowing from Articles 15 and 16 is not affected in any manner by the impugned Ordinance and the impugned Ordinance is meant only and only for unreserved category covering all persons not falling within the reserved categories of SC, ST and SEBC.

19.2 Similarly, no question arises with regard to the alleged violation of Article 14 of the Constitution because reasonable classification in the open/unreserved category of citizens is always permissible, when there is a rationale behind the said classification to the extent of 10%, which has nexus to the object sought to be achieved. Learned Advocate General referred the comparative chart of Article 15 and Article 16 of the Constitution of India.

19.3 It is submitted that Article 46 of the Constitution of India deals with directive principles of State policy and provides that the State shall promote with special care, the educational and economic interest of the people from weaker sections. A concept of 'weaker section' in Article 46 has no limitation, inasmuch as the individuals belonging to the weaker sections may not form a class and they may be weaker as individuals only. In this regard, the learned Advocate General referred to relevant paragraphs of the decision of the Apex Court in the case of Indra Sawhney (supra)

19.4 Provision of the Ordinance providing for reasonable classification with reference to the general/unreserved category of

citizens is permissible under Article 14 read with Article 46 of the Constitution of India. Learned Advocate General also referred to Article 38 and Article 39(b) of the Constitution of India in this regard.

19.5 Even assuming that the Ordinance in question is relatable to Article 16(1) of the Constitution, then in that case also the classification to the extent of 10% in the general/unreserved category of citizens of the State in the matters of admissions and appointments cannot be said to be based on economic criteria alone and therefore such a classification would be a reasonable classification under Article 16(1) of the Constitution of India.

19.6 Ordinance in question provides for classification/categorization amongst the open category to the extent of 10%, which is not 'reservation' as provided under Articles 15(4) and 16(4) of the Constitution of India, meant for SC, ST, SEBC and other backward classes. The said classification to the extent of 10% is relatable to Article 46 of the Constitution. Thus, so far as the contention regarding non-permissibility of crossing 50% ceiling is concerned, even in case of 'backward classes' under Article 16(4) of the Constitution, the reservation can exceed the said ceiling of 50% if the facts and circumstances of the case so warrant. In support of his submission, the learned Advocate General referred to the case of Indra Sawhney (supra).

19.7 In the present case, the Ordinance in question does not deal with the reservation provided under Articles 15(4) or 16(4) of the Constitution, whereas rule of 50% ceiling is confined to reservations made under the said Articles.

19.8 By the impugned Ordinance, reservation for various categories like SC, ST and SEBC has not been touched and therefore the said Ordinance does not seek to enhance the percentage of backward classes contemplated under Article 16(4) of the Constitution. Thus, earmarking of 10% reservation referred to in the Ordinance cannot be said to be in addition to 49% reservation in respect of SC, ST and SEBC.

19.9 225 representations were received from various institutions/communities, groups, etc. covering a very large fulcrum of citizens of the State consisting of the entire unreserved categories, several castes and communities including entire Brahmin Samaj, Rajputs, Kansara Samaj, Brahmkshtriya, Lohana, Vaishnav Vanik, Smasta Patidar Samaj, Agrawal Samaj, etc. Such representations were in fact representative in nature on behalf of entire community members. Therefore, these representations were in effect, the representations on behalf of lakhs of people.

19.10 Empirical study referred to by the petitioners is required when one needs to determine ‘Socially and Educationally Backward

Classes'. When the classification flowing from the Ordinance translating the constitutional philosophy flowing from various provisions of the directive principles of State policy is not related to the 'reservation' as contemplated under Articles 15 and 16 of the Constitution and when there is no determination of any SEBC or other backward classes, the question does not arise for any empirical study. Learned Advocate General referred to pages 2, 24, 26, 27, 56, 58, 70, 72, 88 and 92 of the Report of Justice Rane Commission in this regard. Learned Advocate General relied upon the decision rendered by the Hon'ble Supreme Court in the case of **K.G.Vasantha Kumar & Anr. v. State of Karnataka, reported in 1985 (supp) SCC 714,** more particularly para 2, 24 to 31, 79, 80, 82 and 84.

19.11 Earmarking/classification of 10% in favour of economically weaker sections belonging to unreserved category of citizens in the matters of admissions and appointments under the Ordinance in question is not a 'vertical reservation' as contemplated under Article 16(4) of the Constitution since it does not deal with SC, ST, SEBC or other backward classes. It is also not a 'horizontal reservation' under Article 16(1) since it does not cut across the 'vertical reservation' as it happens in case of other 'horizontal reservations' like reservation in cases of physically handicapped persons, women, army personnel, project affected families, etc.

19.12 Identification of backward class of citizens requires the

conduct of empirical study as was done by Mandal Commission. However, such detailed empirical study is not required in the matter of effecting classification under Article 14 of the Constitution which needs to satisfy only twin test being based on intelligible differentia and having reasonable nexus with the object of the Ordinance, to be achieved.

19.13 What is necessary for reasonable classification under Article 14 of the Constitution is that there must be a nexus between the basis of classification and the object of the Act under consideration. In the present case, promotion of interest of economically weaker sections belonging to unreserved category of citizens in the matter of admissions and appointments is the objective of the impugned Ordinance which is required to be achieved.

19.14 Mere use of the word 'reservation', *per se,* does not have the consequence of *ipso facto* applying the entire mechanism underlying the Constitutional concept of a protective reservation.

19.15 The rule of ceiling of 50% applies only to reservation in favour of backward classes made under Article 16(4) of the Constitution. In the present case, earmarking/classification to the extent of 10% in favour of economically weaker sections belonging to unreserved category of citizens is not falling under the purview of Articles 15(4) or 16(4) of the Constitution. Hence, the same is not in

addition to the reservation to the extent of 27% in favour of SEBC or in addition to 7% and 15% in favour of SC and ST respectively.

19.16 Homogeneity of the class of citizens is inevitable for determining Social and Educational Backwardness as refereed to under Article 15(4) where the words 'Class of Citizen' immediately following the expression 'Socially and Educationally' are used. However, this test of homogeneous class is not applicable in the matter of classification under Article 14 of larger category of citizens belonging to unreserved category in contradiction with the citizens belonging to reserved category of SC, ST, SEBC or other backward classes.

19.17 In support of his arguments, the learned Advocate General has placed reliance upon the following decisions:

1. I.R.Coelho v. State of Tamil Nadu, reported in (2007) 2 SCC 1
2. K.C. Vasanth Kumar v. State of Karnataka, reported in (1985) (Supp.) SCC 714.
3. Kedar Nath Bajoria v. State of West Bengal, reported in AIR 1953 SC 404
4. Mohd. Hanif Quaresh & Ors. v. State of Bihar, reported in AIR 1958 SC 731.
5. Kum. Chitra Ghosh v. Union of India, reported in (1969) 2 SCC 228
6. D.N. Chandhala v. State of Mysore, reported in (1971) 2 SCC

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7. S.S. Bedi v. Union of India, reported in (1981) 4 SCC 676
8. Indra Sawhney v. Union of India, reported in (1992) (Supp) 3 SCC 271
9. K. Duraisamy v. State of Tamil Nadu, reported in (2001) 2 SCC 538
10. Union of India v. National Federation of the Blind, reported in (2013) 10 SCC 772
11. National Legal Services Authority v. Union of India, reported in (2014) 5 SCC 438
12. Ram Singh v. Union of India, reported in (2015) 4 SCC 697
13. Rajeev Kumar Gupta v. Union of India, reported in (2016) SCC Online SC 651
14. State of Punjab v. Rafiq Mashi, reported in (2015) 4 SCC 334
15. Laxmi Devi v. State of Bihar, reported in (2015) 10 SCC 241

19.18 Learned Advocate General further submitted that the judgments relied on by the learned counsel for the petitioners are not only factually distinguishable, but most of them are with reference to protective reservation contemplated under Article 15(4) and/or Articles 16(4) of the Constitution of India and hence, would not render any support to the case of the petitioner. It is therefore, prayed for

dismissal of these petitions.

20. Mr. Mihir Thakore, learned Sr. Advocate assisted by Ms Amrita Thakore, learned counsel for respondent nos. 6 to 9 in Special Civil Application No.8655 of 2016 would contend that as per the constitutional scheme, Articles 15(4), 16(4),(4A) and 4(B) of the Constitution of India alone provide for reservation and the reservation and the impugned ordinance providing 10% reservation for the purpose of admission in educational institutions, in the services and in the employment, are only classification traceable to power under Article 14 read with Article 16 of the Constitution of India. According to Mr. Thakore, classification in respect of admission is permissible under Article 14, while in respect of employment, it is permissible under Article 14 read with Article 16(1) of the Constitution. It is contended that when such classification meets the twin criteria of test under Article 14 of the Constitution, it is permissible for the State to bring such ordinance. Reservation contemplated by ordinance is not reservation in true and strict sense, but it is classification permissible under the constitutional scheme. It is also contended that while interpreting the constitutional provision, there cannot be blanket proposition that classification done on the basis of income is *per se* illegal and *ultra vires* the Constitution of India. Such criteria for classification will have to be tested on the basis of objectives sought to be achieved by such Act and ordinance. Ratio of the judgment of the Hon'ble Supreme Court in the case of

Indra Sawhney (supra) prohibiting classification based on income is violative of Article 14 of the Constitution of India and such ratio will have to be read in the context of the object of enactment/circular which was under challenge before the Hon'ble Supreme Court. Learned counsel, in support of his arguments has placed reliance on the following decisions:

1. State of West Bengal and others v. Committee for Protection of Democratic Rights, West Bengal and others, reported in (2010) 3 SCC 571

2. Central Public Information Officer, Supreme Court of India v. Subhash Chandra Agrawal, reported in (2011) 1 SCC 496

3. Charanjit Lal Chowdhury v. The Union of India and others, reported in AIR 1951 SC 41

4. The State of W.B. v. Anwar Ali Sarkar and another, reported in AIR 1952 SC 75

5. Kathi Raning Rawat v. State of Saurashtra, reported in AIR 1952 SC 123

6. Ameerunnissa Begum and others v. Mahboob Begum and others, reported in AIR 1953 SC 91

7. Sakhawant Ali v. State of Orissa, reported in AIR 1955 SC 166

8. Shri Ram Krishna Dalmia & others v. Shri Justice S.R. Tendolkar and others, reported in AIR 1958 SC 538

9. Mohd. Hanif Quareshi and others & others v. State of Bihar & Others, reported in AIR 1958 SC 731

10. Transport and Dock Workers Union and others v. Mumbai Port Trust and Another, reported in (2011) 2 SCC 575

11. Satyawati Sharma (Dead) by LRs v. Union of India and another, reported in (2008) 5 SCC 287

12. State of Kerala and another v. N.M. Thomas and others, reported in (1976) 2 SCC 310

13. Copy of judgment of the Supreme Court in the case of Rajiv Kumar Gupta & others v. Union of India, rendered in Writ Petition (Civil) No. 521 of 2008

14. Rita Kumar v. Union of India, reported in 1973 (1) SCC 454

15. Javed Niaz Beg and another v. Union of India and another, reported in AIR 1981 SC 794

16. K. Duraiswamy and another v. State of T.N. and others, reported in (2001) 2 SCC 538

17. Pre-PG Medical Sangharsh Committee and another v. Dr. Bajrang Soni and others, reported in (2001) 8 SCC 694

18. Saurabh Chaudri and others v. Union of India and others, reported in (2003) 11 SCC 146

19. K.C. Vasanth Kumar and another v. State of Karnataka, reported in AIR 1985 SC 1495

20. Pramati Educational and Cultural Trust (Registered) and others v. Union of India and others, reported in (2014) 8 SCC 1

21. Mr. Amit Panchal, learned counsel assisted by Ms.

Shivani Rajpurohit, appearing for respondent no.5, by taking us to various clauses in the ordinance, submitted that the State of Gujarat has issued ordinance for reserving 10% of available seats for admission in educational institutions and in services and posts under the State, only to strike balance of reservation in SC, ST and ECBC and unreserved category of people. It is submitted that such ordinance is issued to protect the citizens from social injustice and to avoid exploitation by the rich against the persons belonging to economically weaker sections of the society. It is submitted that such reservation of 10% under the ordinance is not a quota, but is an additional requirement amongst the general category of people within 51% and such classification is extended only to the weaker sections of 51% people without touching the communal reservation of 49% under Articles 15 and 16 of the Constitution of India. It is submitted that such ordinance is issued in conformity with Articles 14 and 46 of the Constitution. By referring to the provision under Article 46 of the Constitution of India, it is submitted by the learned counsel that it is the duty of the welfare state to promote the educational and economic interest of SC, ST and also other weaker sections of the society. It is further contended that it is an obligation on the State to apply all directive principles under the Constitution of India for making laws. Learned counsel places reliance upon the judgment of the Hon'ble Supreme Court in the case of **State of Madras vs. Champakam Dorairajan, reported in AIR 1951 SC 226** and also in the case in **re: Kerala Education Bill reported in in 1958 SC**

956. Thus, it is submitted that this Court may not entirely ignore the directive principles and the State Policy laid down in Part-IV of the Constitution, but should adopt the principles of harmonious construction and should attempt to give effect to both as much as possible. Placing reliance on the judgment of the Hon'ble Supreme Court in the case of **Minerva Mills Ltd v. Union of India, reported in (1980) 3 SCC 625**, it is contended by the learned counsel that directive principles of Chapter-IV impose an obligation on the State to take positive action for creating socio-economic conditions in which there will be an egalitarian social order with social and economic justice to all. Learned counsel also placed reliance on the judgment of the Hon'ble Supreme Court in the case of **Ashoka Kumar Thakur v. Union of India, reported in (2008) 6 SCC 1**, in support of his argument that when a constitutional provision is interpreted, the cardinal rule is to look to the Preamble to the Constitution as the guiding star and directive principles of the Sate Policy as the book of interpretation. Learned counsel placed reliance on the publication of the Indian Constitution, Cornerstone of a Nation, published by Oxford University Press, wherein, author has discussed about the rights and obligations with reference to fundamental rights and directive principles under the State Policy.

22. Responding to the arguments of the learned Advocate General and also other learned counsel appearing for the respective respondents in this batch of petitions, Mr. S.N. Shelat, learned Senior

Advocate, in his reply-argument contends that the impugned ordinance provides reservation to the extent of 10% to the economically weaker sections of the society in the educational institutions and services and posts under the State. When the language is clear from the ordinance/legislative document, there is no reason to read such reservation as a classification as explained by the learned counsel appearing for the respondents. It is submitted that it is well-settled principle that when language is plain and unambiguous, it is to be read as it is but not to interpret in a manner contrary to the legislative intent. The said ordinance is issued for indefinite period and is not temporary measure for any particular period and also not a source for the purpose of effecting reservation. Learned counsel placed reliance on the judgment of the Hon'ble Supreme Court in the case of Shiv Shakti Co.op.Hsg.Society, Nagpur v. (M/s) Swaraj Developers & Ors, reported in 2003 (2) GLH 562, Maulvi Hussein Haji Abraham Umarji v. State of Gujarat, reported in AIR 2004 SC 3946, Rohitash Kumar and others v. Om Prakash Sharma and others, reported in (2013) 11 SC 451, (2015) 4 SCC 697, M. Nagraj & Ors v. Union of India & Ors, reported in AIR 2007 SC 71, Asha D. Bhatt v. Director of Primary Education and Anr. reported in 2003 (4) GLR 3199, Janki Prasad Parimoo and others v. State of Jammu & Kashmir and others, reported in AIR 1973 SC 930, Kailash Chand Sharma etc. etc. v. State of Rajasthan and others, reported in AIR 2002 SC 2877. It is submitted further that the reservation based on the economic criteria, is no more *res integra* in view of the

judgment of the Hon'ble Supreme Court in the case of Indra Sawhney (supra).What cannot be the criteria for the purpose of reservation under Article 16(4) of the Constitution can equally be applied for the purpose of reservation of 10% quota in unreserved category to economically weaker sections of the society and the same is violative of equality clause under Article 14 of the Constitution. Economic criteria cannot be construed as homogeneous clause for the purpose of reservation. Ordinance is issued based on the report of the Committee constituted by the government and there was no data before the Committee and the Committee has not considered the financial assistance granted earlier by the government to the students belonging to economically weaker sections of the society. In the absence of any quantifiable data before the Committee, the Committee constituted by the government just based on the representations pending before it, recommended reservation of 10% to the economically weaker sections of the society and based on such recommendations of the Committee, the impugned ordinance is issued. Thus, such ordinance is illegal, arbitrary and cannot stand the legal scrutiny as it violates the principles to meet the requirement under Article 14 of the Constitution of India. Learned counsel in support of his arguments also placed reliance on the following judgments:

1. Chitra Ghosh Kum. Chitra Ghosh v. Union of India, reported in (1969) 2 SCC 228
2. Saurabh Chaudri and others v. Union of India and others,

reported in (2003) 11 SCC 146

3. K. Duraisamy and another etc. etc. v. State of T.N and others, reported in AIR 2001 SC 717

4. A.I.I.M.S. Students Union v. A.I.I.M.S. and others, reported in AIR 2001 SC 3262.

23. Mr. S.N. Shelat, learned Sr. Advocate, would contend that the impugned ordinance clearly provides reservation of 10% quota to economically weaker sections and the same cannot be construed as a classification as projected by the learned Advocate General on behalf of the State of Gujarat. In support of his argument, he placed reliance on the judgment of the Hon'ble Supreme Court in the case of State of Madhya Pradesh v. Union of India, reported in (2003) 7 SCC 83. It is submitted that income criteria can never be the criteria for the purpose of grouping persons with income less than Rs.6 lakh to a class for the purpose of effecting reservation. Reliance is placed in this connection on the judgment of the Hon'ble Supreme Court in the case of **Deepak Sibal v. Punjab University and another, reported in AIR 1989 SC 903**.

24. Mr. Shalin Mehta, learned Sr. Advocate appearing on behalf of the petitioner in one of the petitions, responding to the arguments of the learned Advocate General, Mr. Mihir Thakore, learned Sr. Advocate and Mr. Amit Panchal, learned counsel appearing on behalf of the respective respondents in the respective

petitions, submitted that the impugned ordinance providing for 10% reservation to economical weaker sections is vertical reservation based on economic criteria only. In support of his argument, learned counsel placed on record the Admission Prospectus, 2016-17 issued for giving Admissions to Medical Educational Courses for academic years 2016-17, issued by the Chairman of Admission Committee for Professional Medical Educational Courses and submitted that quota of 10% for economical weaker sections is clearly shown under the heading of “reservation of seats along with Scheduled Castes, Scheduled Tribes, Socially & Educationally Backward Class and Economical Weaker Sections”, in the ratio of 7%, 15%, 27% and 10% respectively. In that view of the matter, it is clear that what is provided in the impugned ordinance is only reservation to class of persons who are having income of less than Rs.6 Lakhs. The learned counsel would contend that income criteria cannot be the criteria for the purpose of effecting reservations and while pleading that same runs contrary to the authoritative pronouncements of the Hon’ble Supreme Court in various judgments, it is submitted that if such income criteria is allowed for the purpose of reservation, then some people may try to reduce their income purposefully so as to gain the benefit of such reservation. Reservation to the reserved categories viz. SC, ST, SEBC, women, Physically Handicapped, Army personnel etc is definite one where there is no scope for variation, but whereas if income criteria is shown for the purpose of reservation, the same is a fluctuating factor which cannot be the basis for reservation.

Learned counsel would also contend that even assuming that it is a classification as projected on behalf of the State, the same is not based on any intelligible differentia and there is no reasonable classification for such ordinance. It is issued on the basis of the recommendation of the Committee of the Hon'ble Ministers in the absence of any empirical study, there was no material at all before the Committee of Hon'ble Ministers which was constituted to consider the representations and High-Powered Committee has made recommendations in the absence of any quantifiable data for the purpose of recommending reservations. Such reservation which is ordered by the impugned ordinance is whimsical and is a fraud on the Constitution. Learned counsel placed reliance on the judgments of the Hon'ble Supreme Court in the case of **Atyant Pichhara Barg Chhatra Sangh and Anr. v. Jharkhand State Vaishya Federation and Ors.,** reported in **(2006) 6 SCC 718** and in the case of National Legal Services Authority v. Union of India, reported in (2014) 5 SCC 438. It is also contended that in any event, if the impugned ordinance is allowed to be given effect to, it exceeds the reservation of more than 50% ceiling limit which is fixed by the Hon'ble Supreme Court in the case of Indra Sawhney (supra). As it is there are reservations for various categories to the tune of 49% and if further reservation of 10% is allowed, it will be 59%, leaving the balance of only 41% for general category and thus, results in denial of equal opportunity for meritorious personnel in the matter of admissions in educational institutions and in the services and posts

under the State. Thus, it affects the equality clause guaranteed under Article 14 of India.

24.1 It is submitted by the learned counsel that economic criteria adopted for the purpose of distinguishing the creamy layer within backward classes cannot be the criteria for the purpose of determining the economically weaker sections having annual income below the limit of Rs.6 lakhs as a class for the purpose of effecting reservations. All the families having annual income below Rs.6 lakh cannot be treated as homogeneous class in absence of empirical study. Rane Commission is constituted only for the purpose of identification of socially and educationally backward classes to extend the benefits under Articles 16(49) of the Constitution and the report of the said Rane Commission is not acted upon by the government and its recommendations are also confined only for the purpose of extending benefits of reservations to Socially and Educationally Backward Classes for providing benefits under Articles 16(4) of the Constitution. It is submitted that such ordinance/legislation is suspect one and for the purpose of classification is arbitrary and illegal and burden is on the State to show that such classification is made to meet the twin criteria under Article 14 of the Constitution of India. In support of such argument, Mr. Mehta placed reliance upon the judgment of the Hon'ble Supreme Court in the case of **AIIMS Students' Union vs. AIIMS** reported in **(2002) 1 SCC 428**. That by applying the doctrine of precedence,

ratio decided by the Hon'ble Supreme Court in the case of Indra Sawhney (supra) has to be applied to test the validity of the impugned ordinance. It is submitted that if implementation of such ordinance is allowed, it will amount to overlooking the merit. Lastly, it is submitted that so-called representations which were taken into consideration and placed before the Committee cannot be the basis for issuing ordinance and such representations and the steps taken by the Committee on such representations can be starting point to examine the issue and such representations themselves cannot be the sole material and basis for making recommendations for reservations. As the High-Powered Committee made recommendations, it is not the basis of any quantifiable data and relevant material and therefore, the ordinance is issued on the basis of such recommendations is illegal and fit to be declared as arbitrary.

25. Shri B.T. Rao, learned counsel appearing for the petitioners in one of the petitions would contend that there is no study at all before issuing impugned ordinance and in absence of any such study and empirical data, it is not open for the State to issue the impugned ordinance. Learned counsel referred to para XVI of the report of Rane Commission and also the judgment of the Hon'ble Supreme Court in the case of Indra Sawhney (supra) in support of his arguments.

26. Responding to the arguments of learned counsel for the

petitioners, Mr. Kamal B.Trivedi, learned Advocate General further contended that even in the judgment in the case of Indra Sawhney(supra) the conclusions arrived at stating that economic criteria cannot be the criteria for the purpose of identification of backward classes, cannot be construed as *ratio decidendi* as much as the same is contrary to the view of the majority in the judgment. Further, by referring to the judgment of the Hon'ble Supreme Court in the case of **Ashoka Kumar Thakur v. State of Bihar & Ors,** reported in **(1995) 5 SCC 403**, it is submitted that in the aforesaid judgment, the Hon'ble Supreme Court has approved the economic criteria for the purpose of identifying the creamy layer by approving the rule of exclusion framed by the Government of India under para 2(c) read with the Schedule of Office Memorandum quoted in the aforesaid judgment. It is submitted that when such criteria is accepted for determination of creamy layer, economic criteria can be the criteria for the purpose of identifying a class within the economically weaker sections for giving the benefit of reservation of 10% seats in educational institutions and in appointments and posts in the services under the State. Placing reliance on the judgment of the Hon'ble Supreme Court in the case of **A.I.I.M.S. Students Union v. A.I.I.M.S. and others,** reported in **AIR 2001 SC 3262**, it is submitted that classification is based by providing a source of entry and such source of entry is aimed at securing equal or proportionate distribution of seats in the educational institutions and services. It is submitted that the characteristics of the two may to some extent be

over lapping, yet the distinction is perceptible though fine. Learned Advocate General also placed reliance on the judgment of the Hon'ble Supreme Court in the case of **Janki Preasad Parimoo and others v. State of jammu & Kashmir and others,** reported in **AIR 1973 SC 930** and submitted that educational backwardness which makes a class, can be identified based on economical backwardness. In this regard, emphasis is laid by the learned Advocate General on para-23 of the aforesaid judgment. Further placing reliance on the judgment of the Hon'ble Supreme Court in the case of **Rajeev Kumar Gupta v. Union of India,** reported in **(2016) 2 SCC 445**, the learned Advocate General would contend that the principles laid down in the case of Indra Sawhney (supra) are applicable only when the State seeks to give preferential treatment in the matter of employment under the State to certain classes of citizens identified to be a backward class. As such, it is submitted that class is identified based on the economic criteria to extend the benefit for admissions in educational institutions and appointments and posts in services under the State and therefore, no empirical study is required to be made.

27. Having regard to the pleadings on record and on hearing the arguments of learned counsel appearing for the parties, we are of the view that following points arise for consideration in this group of petitions:

(1) Whether, the allocation of 10% seats in educational institutions in the State and for making appointments and posts in the services

under the State in favour of economically weaker sections of unreserved category, impugned Ordinance No. 1/2016 is a reservation or a classification?

(2) If it is to be held that such allocation is reservation of 10% of seats, whether the State is justified in providing reservation in favour of economically weaker sections of unreserved category only on the basis of economic criterion?

(3) Whether, the State is justified in issuing the impugned Ordinance providing reservation of 10% of available seats for admissions in educational institutions and appointments in services in favour of economically weaker sections of unreserved category, without carrying out any detailed scientific and technical impact assessment study by the experts and without collecting quantifiable and empirical data?

(4) Whether, the State is justified in issuing the impugned Ordinance providing 10% of reservation in favour of economically weaker sections of unreserved category, and exceeded the ceiling limit of 50% of available seats?

(5) Whether, the State is justified in issuing the impugned Ordinance on 1.5.2016, when the Government Resolutions dated 7.10.2015 and 5.4.2016 granting financial assistance to the students of economically weaker sections of unreserved category are in existence and that too without waiting for result of such benefits conferred under the resolutions?

28. **Point No.1**:

Whether, the allocation of 10% seats in educational institutions in the State and for making appointments and posts in the services under the State in favour of economically weaker sections of unreserved category, impugned Ordinance No. 1/2016 is a reservation or a classification?

28.1 With reference to the above point, it is to be noted that Preamble of the impugned Ordinance itself undertakes that such Ordinance is issued to provide reservation of seats. The impugned Ordinance is titled as "the Gujarat Unreserved Economically Weaker Sections (Reservation of Seats in Educational Institutions in the State and of Appointments and Posts in services under the State) Ordinance, 2016. Sections 3 and 4 of the impugned Ordinance read as under:

> *"**3. Reservation of seats in educational institutions in the State.-** The reservation in respect of the annual permitted strength for admission into such educational institutions and courses in the State, as may be prescribed, for Economically Weaker Sections, shall be ten per cent.*
>
> ***4. Reservation of appointments and posts in the services under the State.-**(1) The reservation of appointments and posts in the services under the State for the Economically Weaker Sections shall be ten per cent.*
>
> *(2) Notwithstanding anything contained in sub-*

section (1), such reservation shall not apply in the matters of promotion."

28.2 When it is the specific case of the petitioners that no reservation of seats in favour of economically weaker sections of unreserved category is permissible, it is pleaded in the affidavit in reply filed on behalf of the respondent no.1-State of Gujarat that it is only a classification and in *stricto sensu,* it is not reservation for Socially and Educationally Backward Classes as provided under Articles 15 and 16 of the Constitution of India. Even during the course of arguments, the learned Advocate General, appearing on behalf of the State of Gujarat, specifically argued that such Ordinance is issued only for making a reasonable classification to provide reasonable opportunities to the economically weaker sections of unserved category and it meets the twin test, to examine, whether the same is in breach of Article 14 of the Constitution of India. It is contended by the learned Advocate General that merely because the word "reservation" is used in the impugned Ordinance, the same cannot be treated as the reservation but, the same is classification, and it withstands the legal scrutiny under Article 14 of the Constitution of India and the same is to be construed as reasonable classification, within the class of unreserved category. On the other hand, it is submitted by Shri S.N. Shelat as well as Mr. Mehta, learned counsel appearing on behalf of the petitioners that when the legislative intent is clear from the Statute, it is to be read as drafted and there is no reason to construe the same as a classification as projected by the

State. It is submitted that if the background which led to issuance of the impugned Ordinance is looked at, the agitation of Patidars was for the purpose of reservation only and if the contents of the Report of the High Power Committee constituted by the State are looked at, it is clear that the Committee recommended only reservation of seats basing on which the impugned Ordinance is issued. We would like to refer to the Report of the High Power Committee and think it apt to extract the paragraph at the very beginning of the Report which reads as under:

> *"With the demand of providing reservation in the government jobs and higher education, various social groups and communities have given representations to the Government. With a view to consider these representations given by such different communities/their representatives in the backdrop of the agitation/movement for the same, the Government has decided to create a High Power Committee.*

The Committee Report also refers to various demands related to reservation in the government jobs and higher education and the said Committee has also referred to the Report of Rane Commission and finally made recommendations which read as under:-

> "***Recommendations of the Committee:***
>
> *Taking into consideration all these, with a view to ensure that the educational and economic progress of the youngsters of economically weaker unreserved category is not hampered, they get opportunity to obtain education and employment, no injustice is done to any other community and still adhering to the policy of the development of disadvantaged groups, and maintaining the spirit of "Sau no saath, Sau no vikaas", the Committee recommends as follows:*

"Economically weaker class (with the family income of Rs. 6.00 lakh per annum) of the Unreserved Category is hereby given the reservation of 10 percent in the appointment to the Government services and in the admission to the educational institutions. This benefit will be given to them as per the standard of the reservation benefit given to the Socially and Educationally Backward Class (SEBC). This means that it will be in accordance with the present income limit of Rs.6 lakh and the standing-presently prevalent instructions of the Social Justice and Empowerment Department, for the socially and economically backward class among the forward class.""

28.3 It is clear from the background facts and the contents of the Report which led to issuance of the impugned Ordinance and various clauses in the Ordinance that what is provided is 10% of seats in educational institutions and in appointments and posts in the services under the State to economically weaker sections of unreserved category is nothing but reservation and not classification. Even if dictionery meaning of reservation is seen, the reservation is nothing but an act of booking, kept blank, destined for a particular use of particular person. By virtue of the impugned Ordinance, specific number of seats/posts available to unreserved category are reserved for economically weaker sections. As it is clear from the same that every candidate belonging to unreserved community cannot compete with the quota of 10%, such allocation of 10% is nothing but reservation. From the reading of various clauses in the Ordinance and also the consequent resolutions issued by the government, it is clear that only such of the candidates having family income below Rs.6 lakh alone are entitled into the specified quota in the impugned Ordinance among available seats to unreserved

categories. In view of the aforesaid reasoning and clear and unambiguous language used in the impugned Ordinance for reservation of 10% of available seats in the educational institutions and in appointments and posts in the services under the State it is to be held as only a reservation but not classification. In this regard, it is profitable to refer to the judgment of the Hon'ble Supreme Court in the case of **Maulvi Hussein Haji Abraham Umarji v. State of Gujarat and Anr.**,reported in **AIR 2004 SC 3946**. In the said judgment, the Hon'ble Supreme Court has held that Court cannot read anything into a statutory provision which is plain and unambiguous. It is further held that a statute is an edict of the legislature and the language employed in the statute is determinative factor of legislative intent. Paras-18 and 19 of the said judgment read as under:

> *"18. It is well settled principle in law that the Court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the Legislature. The language employed in a statute is the determinative factor of legislative intent.*
>
> *19.Words and phrases are symbols that stimulate mental references to referents. The object of interpreting a statute is to ascertain the intention of the Legislature enacting it. (See Institute of Chartered Accountants of India v. M/s. Price Waterhouse and another (AIR 1998 SC 74)). The intention of the Legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. As a consequence, a construction which requires for its support, addition or substitution of words or which results in rejection of words as meaningless has to be avoided. As observed in Crawford v. Spooner (1846 (6) Moore PC 1), Courts, cannot aid the Legislatures' defective phrasing of an Act, we cannot add or mend, and by construction make up deficiencies which are left there. (See The State of Gujarat and others v. Dilipbhai*

Nathjibhai Patel and another (JT 1998 (2) SC 253)). It is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so. (See Stock v. Frank Jones (Tipan) Ltd., (1978) 1 All ER 948 (HL)). Rules of interpretation do not permit Courts to do so, unless the provision as it stands is meaningless or of doubtful meaning. Courts are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself. (Per Lord Loreburn L.C. in Vickers Sons and Maxim Ltd. v. Evans, (1910) AC 445 (HL)), quoted in Jumma Masjid, Mercara v. Kodimaniandra Deviah and others (AIR 1962 SC 847)."

28.4 Learned Advocate General, in support of his argument that 10% of allocation of seats for admissions in educational institutions and for appointments and posts in the services under the State is reasonable classification within the class of unreserved categories, has placed reliance on the judgment of the Hon'ble Supreme Court in the case of **Kedar Nath Bajoria, v. State of West Bengal,** reported in **AIR 1953 SC 404** and other authorities on the subject referred above. We have given our serious thought on the authority relied on by the learned Advocate General in the above case of Kedar Nath Bajoria (supra). In the said case, the Hon'ble Supreme Court has held that equal protection of the laws guaranteed by Article 14 of the Constitution does not mean that all the laws must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons or things for the purposes of legislation. It is further held that legislative classification must not be arbitrary but should be based on an intelligible principle having a reasonable relation to the object which the legislature seeks to attain. It is also held that further to

meet the requirement of Article 14 of the Constitution,legislative classification need not be scientifically perfect or logically complete.

28.5 In the judgment in the case of **Mohd. Hanif Qureshi and others v. State of Bihar and others,** reported in **AIR 1958 SC 731,** the Hon'ble Supreme Court held in paras 15 and 16 as under:-

> *"15. The meaning, scope and effect of Art. 14 which is the equal protection clause in our Constitution, has been explained by this Court in a series of decisions in cases beginning with Charanjitlal Chowdhury v. Union of India, 1950 S C R 869: (AIR 1951 S C 41) (C) and ending with the recent case of Ramkrishna Dalmia v. Justice Tendolkar, C A Nos. 455 to 457 and 656 to 658 of 1957 D /-28-3-1958: (AIR 1958 S C 538) (D). It is now well established that while Art. 14 forbids class legislation it does not forbid reasonable classification for the purposes of legislation and that in order to pass the rest of permissible classification two conditions must be fulfilled, namely, (i) the classification must be founded on an intelligible different which distinguishes persons or things that are grouped together from others left out of the group and (ii) such differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification, it has been held, may be founded on different bases, namely, geographical, or according to objects or occupations or the like and what is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. The pronouncements of this Court further establish, amongst other things, that there is always a presumption in favour of the constitutionality of an enactment and that the burden is upon him, who attacks it, to show that there has been a clear violation of the constitutional principles. The Courts, it is accepted, must presume that the Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds,. It must be borne in mind that the Legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest and finally that in order to sustain*

the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation. We, therefore, proceed to examine the impugned Acts in the light of the principles thus enunciated by this Court.

16. The impugned Acts, it may be recalled, have been made by the States in discharge of the obligations imposed on them by Art. 48. In order to implement the directive principles the respective Legislatures enacted the impugned Acts in exercise of the powers conferred on them by Art. 246 read with entry 15 in List II of the Seventh Schedule. It is, therefore, quite clear that the objects sought to be achieved by the impugned Acts are the preservation, protection and improvement of livestock's. Cows, bulls, bullocks and calves of cows are no doubt the most important cattle for the agricultural economy of this country. Female buffaloes yield a large quantity of milk and are therefore, well looked after and do not need as much protection as cows yielding a small quantity of milk require. As draught cattle male buffaloes are not half as useful as bullocks. Sheep and goat give very little milk compared to the cows and the female buffaloes and have practically no utility as draught animals. These different categories of animals being susceptible of classification into separate groups on the basis of their usefulness to society the butchers who kill each category may also be placed in distinct classes according to the effect produced on society by the carrying on of their respective occupations. Indeed the butchers, who kill cattle, according to the allegations of the petitioners themselves in their respective petitions, form a well defined class based on their occupation. That classification is based on an intelligible differentia which places them in a well defined class and distinguishes them from those who kill goats and sheep and this different has a close connection with the object sought to be achieved by the impugned Act, namely, the preservation, protection and improvement of our livestock. The attainment of these objectives may well necessitate that the slaughters of cattle should be dealt with more stringently than the slaughterers of, say, goats and sheep. The impugned Acts, therefore have adapted a classification on sound and intelligible basis and can quite clearly stand the test laid down in the decisions of this Court. Whatever objections there may be against the validity of the impugned Acts the denial of equal protection of the laws does not prima facie, appear to us to be one of them. In any case, bearing in mind the presumption of constitutionality attaching to all enactments founded on the recognition by the Court of the fact that the legislature correctly appreciates the needs of its own people there appears

to be no escape from the conclusion that the petitioners have not discharged the onus that was on them and the challenge under Art. 14 cannot, therefore prevail."

28.6 In the case of **Kumari Chitra Ghosh and another v. Union of India and others,** reported in **1969 (2) SCC 228**, while considering the provisions for reservation of seats for certain categories of students under the Delhi University Act, 1922, the Hon'ble Supreme Court observed that if the sources are properly classified, whether on territorial, geographical or other reasonable basis it is not for the courts to interfere with the manner and method of making the classification.

28.7 In the case of **D.N. Chanchala v. State of Mysore and others,** reported in **1971 (2) SCC 293,** the Hon'ble Supreme Court, while considering the issue that University wise distribution of seats will amount to discrimination and violative of Articles 14 and 15 of the Constitution, held that so long as the rules for selection applicable to the colleges run by the government do not suffer from any constitutional or legal infirmity, they cannot be challenged as the government can regulate admission to its own institutions. In the aforesaid judgment, the Hon'ble Supreme Court in para-43 held as under:

"43. Once the power to lay down classifications or categories of persons from whom admission is to be given is granted, the only question which would remain for consideration would be whether such categorisation has an intelligible criteria and

whether it has a reasonable relation with the object for which the rules for admission are made. Rules for admission are inevitable so long as the demand of every candidate seeking admission cannot be complied with in view of the paucity of institutions imparting training in such subjects as medicine. The definition of a 'political sufferer' being a detailed one and in certain terms, it would be easily possible to distinguish children of such political sufferers from the rest as possessing the criteria laid down by the definition. The object of the rules for admission can obviously be to secure a fair and equitable distribution of seats amongst those seeking admission and who are eligible under the University Regulations. Such distribution can be on the principle that admission should be available to the best and the most meritorious. But an equally fair and equitable principle would also be that which secures admission in a just proportion to those who are handicapped and who, but for the preferential treatment given to them, would not stand a chance against those who are not so handicapped and are, therefore in a superior position. The principle underlying Article 15 (4) is that a preferential treatment can validly be given because the socially and educationally backward classes need it, so that in course of time they stand in equal position with the more advanced sections of the society. It would not in any way be improper, if that principle were also to be applied to those who are handicapped but do not fall under Article 15(4). It is on such a principle that reservation for children of Defence personnel and Ex-Defence personnel appears to have been upheld. The criteria for such reservation is that those serving in the Defence forces or those who had so served are and were at a disadvantage in giving education to their children since they had to live, while discharging their duties, in difficult places where normal facilities available elsewhere are and were not available. In our view it is not unreasonable to extend that principle to the children of political sufferers who in consequence of their participation in the emancipation struggle became unsettled in life; in some cases economically ruined and were therefore not in a position to make available to their children that class of education which would place them in fair competition with the children of those who did not suffer from that disadvantage. If that be so, it must follow that the definition of 'political sufferer' not only makes the children of such sufferers distinguishable from the rest but such a classification has a reasonable nexus with the object of the rules which can be nothing else than a fair and just distribution of seats. In our view neither of the two contentions raised by counsel for the petitioner can be accepted with the result that the writ petition fails and is dismissed."

28.8 All the aforesaid judgments relate to classification into categories and groups. In all the cases referred above, the issue fell for consideration was whether such categorisation, reservation university wise was within the scope of reasonable classification and meets the requirements of Article 14 of the Constitution. The meaning, scope and effect of Articles 14 which is the equal protection clause in our Constitution, has been explained by the Hon'ble Supreme Court in series of decisions. It is fairly well settled that while Article 14 forbids class legislation and it does not forbid reasonable classification for the purposes of legislation and that in order to pass the test of permissible classification two conditions must be fulfilled, namely, (i) the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) such differentia must have a rational relation to the object sought to be achieved by the statute in question. By applying the above practice, such classification and categorisation was held to be reasonable in the above cases. Setting apart 10% of seats to weaker sections of unreserved category is a classification or reservation is addressed by us separately. By drawing distinction between the classification and reservation, we have already held that by the impugned Ordinance what is allocated separate quota of 10% seats in educational institutions and in appointments and posts in the services under the State is reservation but not classification.

28.9 In the case of **S.S. Bedi v. Union of India and others,** reported in **(1981) 4 SCC 676,** wherein the constitutional validity of Special Bearer Bonds (Immunities and Exemptions) Ordinance, 1981 fell for consideration before the Hon'ble Supreme Court. The said Ordinance was tested on the touchstone of equality clause under Article 14 of the Constitution and in paras-6 and 7 of the judgment, the Hon'ble Supreme Court held as under:

> *"6. That takes us to the principal question arising in the writ petitions namely, whether the provisions of the Act are violative of Article 14 of the Constitution. The true scope and ambit of Article 14 has been the subject-matter of discussion in numerous decisions of this Court and the propositions applicable to cases arising under that Article have been repeated so many times during the last thirty years that they now sound plantitudinous. The latest and most complete exposition of the propositions relating to the applicability of Article 14 as emerging from "the avalanche of cases which have flooded this Court" since the commencement of the Constitution is to be found in the judgment of one of us (Chandrachud, J., as he then was) in In re The Special Courts Bill, 1978. It not only contains a lucid statement of the propositions arising under Article 14, but being a decision given by a Bench of seven Judges of this Court, it is binding upon us. That decision sets out several propositions delineating the true scope and ambit of Article 14 but not all of them are relevant for our purpose and hence we shall refer only to those which have a direct bearing on the issue before us. They clearly recognise that classification can be made for the purpose of legislation but lay down that:*
>
> > *1. The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that differentia*

must have a rational relation to the object sought to be achieved by the Act.

2. The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them. In short, while Article 14 forbids class discrimination by conferring privileges or imposing liabilities upon persons arbitrarily selected out of a large number of other persons similarly situated in relation to the privileges sought to be conferred or the liabilities proposed to be imposed, it does not forbid classification for the purpose of legislation, provided such classification is not arbitrary in the sense above mentioned.

It is clear that Article 14 does not forbid reasonable classification of persons, objects and transactions by the legislature for the purpose of attaining specific ends. What is necessary in order to pass the test of permissible classification under Article 14 is that the classification must not be "arbitrary, artificial or evasive" but must be based on some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved by the legislature. The question to which we must therefore address ourselves is whether the classification made by the Act in the present case satisfies the aforesaid test or it is arbitrary and irrational and hence violative of the equal protection clause in Article 14.

7. Now while considering the constitutional validity of a statute said to be violative of Article 14, it is necessary to bear in mind certain well established principles which have been evolved by the courts as rules of guidance in discharge of its constitutional function of judicial review. The first rule is that there is always a presumption in favour of the constitutionality of a statute and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles. This rule is based on the assumption, judicially recognised and accepted, that the legislature understands and correctly appreciates the needs of its own people, its laws are directed to problems made menifest by experience and its discrimination are based on adequate grounds. The presumption of constitutionality is indeed so strong that in order to sustain it, the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation."

28.10 Thus, we hold on Point No. 1 that allocation of 10% of

seats for admission in educational institutions in the State and in appointments and posts in the services under the State in favour of economically weaker sections of unreserved category in the impugned Ordinance is reservation only, but not classification.

29. **Point Nos. 2 and 4:**

(2) If it is to be held that such allocation is reservation of 10% of seats, whether the State is justified in providing reservation in favour of economically weaker sections of unreserved category only on the basis of economic criterion?

(4) Whether, the State is justified in issuing the impugned Ordinance providing 10% of reservation in favour of economically weaker sections of unreserved category, and exceeded the ceiling limit of 50% of available seats?

29.1 The concept of reservation in educational institutions and reservations of posts is accepted phenomenon in our constitutional scheme. But the same is subject to certain limitations, requirements and mandates in the Constitution itself. Fundamental rights guaranteed under the constitutional scheme are in Part III of the Constitution which cover Articles 12 to 35 which include Articles 13,14, 15 and 16. Article 13 of the Constitution deals with the laws inconsistent with or in derogation of the fundamental rights. As per Article 13 (2) of the Constitution, the State shall not make any law which takes away or abridges the rights conferred by the said Part

and any law made in contravention of this clause shall, to the extent of the contravention, be void. Article 14 of the Constitution guarantees the citizens equality before the law and equal protection of laws within the territory of India. Article 15 of the Constitution prohibits discrimination on the grounds of religion, race, caste, sex or place of birth. However, by the Constitution (First Amendment) Act, 1951, clause (4) is added in Article 15 by which the State is empowered to make any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes. Further clause-5 was inserted in Article 15 of the Constitution by Constitution (Ninety-third Amendment) Act, 2005, which states that nothing in this article or in sub-clause (g) of clause (1) of Article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30. Article 16 of the Constitution provides for equality of opportunities in matters of appointments. Under Article 16(4) of the Constitution, the State is empowered to make any provision for the reservation of 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.

29.2 Whenever orders are issued by way of executive or by legislative mandate providing for reservation in educational institutions and in appointments and posts in the services unde the State, many times, such orders or mandates were under challenge before various High Courts and the Hon'ble Supreme Court.

29.3 Prior to the 1st constitutional amendment by which clause (4) was inserted in Article 15 of the Constitution, the Madras Government had issued order fixing certain percentage of seats in the State Colleges for different communities for admission into the medical colleges, which was the subject-matter of challenge before the Madras High Court, which judgment was appealed against before the Hon'ble Supreme Court in the case of **State of Madras v. Sm.Champakam Dorairajan and another,** reported in **A.I.R. 1951 SC 226**. In the aforesaid judgment, the Hon'ble Supreme Court, while considering the scope of Article 29(2) and Article 46 of the Constitution of India held that classification in the said G.O proceeds on the basis of religion and caste, is opposed to the Constitution and constitutes a clear violation of the fundamental rights guaranteed to the citizen under Article 29(2). It was further held in the aforesaid judgment that so far as there is no infringement of fundamental rights as conferred by Part III of the Constitution there can be no objection to the State acting according to the directive principles set out in Part IV subject to the legislative and executive powers and

limitations conferred on the State under different provisions of the Constitution. Thereafter clause (4) of Article 15 was brought into the Constitution by way of amendment which empowers the State to make special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes. By taking into consideration the further constitutional amendment by which clause (4) was inserted in Article 16 of the Constitution, it is clear that under Article 15(4) of the Constitution, the State is empowered for effecting reservation by making special provision for the advancement of any socially and educationally backward class of citizens so far as the educational institutions in Gujarat are concerned, and under Article 16(4) of the Constitution, the State is empowered to make any provision for the reservation of 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. Except the above powers conferred on the State under the constitutional scheme, there is no other power conferred on the State for effecting reservation in favour of any other category more particularly the economically weaker sections of unreserved category. In the absence of any specific provision which empowers the State for making special provision for advancement of economically weaker sections of unreserved category, under the guise of classification it is not open for the State to issue any order by way of Ordinance giving effect to 10% of available seats for admission in the educational institution and in the

appointments and posts in services under the State. In the absence of such specific provision empowering the State to make reservation in favour of economically backward category among unreserved category candidates, such Ordinance is in breach of equality rights guarantee under Article 14 of the Constitution of India. Unreserved category itself is a class and it is not open for the State to issue any order either by legislative action or by issuing executive order to effect the reservation on the ground that part of section in that category is economically weak. While extending the benefit of reservation to the socially and economically backward class and for removal of creamy layer, economic criterion can also be looked into. But it is not open for the State to make any reservation for section of citizens in unreserved category, only on the ground that section of such category of citizens belong to economically weak. As the economically weaker sections among unreserved category cannot constitute as homogeneous group for the purpose of reservation and such reservation will not withstand to the scrutiny of twin test under Article 14 of the Constitution of India. Further, the economic criteria being fluctuating issue, the same cannot be the basis for any classification for the purpose of affirmative action for admission to educational institutions and while filling up the posts in the services under the State. Thus, such Ordinance which itself is issued based on economic criteria and as the same is in breach of equality clause under Article 14 of the Constitution, it is to be declared as void in view of the provision under Article 13(2) of the Constitution.

29.4 As it is the case of the petitioners that the impugned Ordinance runs contrary to the ratio laid down by the Hon'ble Supreme Court in the judgment of **Indra Sawhney v. Union of India,** reported in **1992 Supp. (3) SCC 217,** we also refer to the case-law on the subject relating to reservation for backward class citizens under Articles 15(4) and 16(4) of the Constitution of India. Earlier to the judgment in the case of Indra **Sawhney v. Union of India,** reported in **1992 Supp. (3) SCC 217**, the scope of provision under Article 15(4) of the Constitution fell for consideration of the Hon'ble Supreme Court in the case of **M.R. Balaji and others, v. The State of Mysore and others,** reported in **AIR 1963 SC 649(1)**. In the said case, the orders were issued by the State of Mysore reserving seats in technical institutions for backward class. While considering the scope of constitutional provision under Articles 15(1), 15(4), 29(2) and 340 of the Constitution, the Hon'ble Supreme Court set aside the said order by holding that socially and educationally backwardness cannot be determined basing on the caste.

29.5 In the case of **Janaki Prasad Parimoo and others v. State of J. and K.**, reported in **AIR 1973 SC 930(1)**, the Hon'ble Supreme Court interpreted the word, expression and meaning of the words "backward class of citizens" with reference to the socially and educationally backwardness under Article 16(4) of the Constitution. In

the aforesaid judgment, the Hon'ble Supreme Court held that mere educational backwardness or the social backwardness does not by itself make a class of citizens backward. The Hon'ble Supreme Court further held that in order to be identified as belonging to such a class, one must be both educationally and socially backward.

29.6 In support of his argument on Issue Nos. 2 and 4 that the economic criteria can be the criteria for the propose of identifying the group, the learned Advocate General placed reliance on the judgment in the case of **K.C. Vasanth Kumar and another v. State of Karnataka,** reported in **1985 (Supp) SCC 714**, the Hon'ble Supreme Court extensively dealt with the two questions, namely, (i) how to identify the backward classes for the purpose of reservation and (ii) what should be the permissible extent of reservations. Answering the question no.1, apart from various observations and directions, the Hon'ble Supreme Court was of the opinion that economic criterion could, simultaneously take a vital step in the direction of destruction of caste structure. To the extent of reservation, the Hon'ble Supreme Court observed that reservation may not exceed 50%. In the aforesaid judgment, in opinion no.2, the Hon'ble Supreme Court observed as under:

> "*(2) The means test, that is to say, the test of economic backwardness ought to be made applicable even to the Scheduled Castes and Scheduled Tribes after the period mentioned in (1) above. It is essential that the privileged section of the underprivileged society should not be permitted to monopolise preferential benefits for an indefinite period of*

time."

29.7 Referring to the said opinion no.2, it is submitted by the learned Advocate General that economic criteria can be the criteria for the purpose of identifying the group of weaker sections within the class of unreserved categories.

29.8 In the case of **Indra Sawhney and others v. Union of India,** reported in **1992 (3) SCC 217,** which is popularly known as Mandal Commission case, special bench of 9 Judges extensively dealt with the scope of reservation under Articles 15(4) and 16(4) of the Constitution with reference to constitutional mandate under Articles 14 and 32 of the Constitution of India. Various questions had fallen for consideration which are discussed in the majority judgment written by Hon'ble Mr. Justice B.P. Jeevan Reddy. One of the questions which is relevant for the purpose of the present case was question no.4(a) which was to the effect that, whether the backward classes can be identified only and exclusively with references to economic criteria. Question no.4(b) was whether a criteria like occupation-cum-income without reference to caste altogether, can be evolved for identifying the backward classes. The Hon'ble Supreme Court answering the question no.4 (a) observed as under:

"(a) Whether backward classes can be identified only and exclusively with reference to the economic criterion?

799. It follows from the discussion under Question No.3 that a

backward class cannot be determined only and exclusively with reference to economic criterion. It may be a consideration or basis along with and in addition to social backwardness, but it can never be the sole criterion. This is the view uniformly taken by this Court and we respectfully agree with the same."

29.9 In the said judgment, out of 9 Hon'ble Judges, 8 Hon'ble Judges were of the same view and there was dissenting judgment by one of the Hon'ble Judges. Even the extent of percent of reservation in the aforesid judgment was addressed under Question 6(a) and (b) with reference to reservation under Article 15(4) of the Constitution and it was answered that reservation contemplated under clause (4) of Article 16 should not exceed 50%. Paragraphs 809 and 810 of the majority judgment read as under:

"809. From the above discussion, the irresistible conclusion that follows is that the reservations contemplated in clause (4) of Article 16 should not exceed 50%.

810. While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in farflung and remote areas the population inhabiting those areas might, on account of their being out of the mainstream of national life and in view of conditions peculiar to and characteristical to them, need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out."

Thus, it is clear that in the aforesaid judgment, the Hon'ble Supreme Court has held that economic criteria cannot be the criterion for the purpose of determination of social backwardness. Further, even with regard to cap of percentage of reservation, from the above said

judgment, it is clear that reservation cannot exceed 50% and 50% shall be the rule. Exception is carved out only in certain extraordinary situation, as referred in the above paragraph, to make some departure by some relaxation. As we do not find any such extraordinary circumstance for making departure to 50% of reservation, we hold that reservations exceeding 50% by virtue of the impugned Ordinance also cannot be sustained.

29.10 However, Shri Trivedi, learned Advocate General has taken us through the judgment of the Hon'ble Supreme Court and submitted that, the said judgment is rendered with reference to the situation prevailing at the time of submission of Mandal Commission Report on 31.12.1980 which recognized as many as 3743 castes as Socially and Educationally Backward Classes, he submitted that as further period of 36 years has passed by, time has come for adopting new practice and methods and yardsticks by moving away from caste-centric definition of backward class as observed by the Hon'ble Apex Court in the case of **Ram, Singh v. Union of India,** reported in **(2015) 4 SCC 697**. In the case of Ram Singh (supra), the Hon'ble Supreme Court held that though caste may be a prominent and distinguishing factor for easy determination of backwardness of a social group and the Supreme Court has been routinely discouraging the identification of a group as backward solely on the basis of caste. The Hon'ble Supreme Court further held that social groups who would be most deserving must necessarily be a matter of continuous

evolution. New practices, methods and yardsticks have to be continuously evolved moving away from caste centric definition of backwardness. This alone can enable recognition of newly emerging groups in society which would require palliative action. With reference to such submission made above by the learned Advocate General, we are of the view that in the absence of any amendments to the basic document of the Constitution, such submissions cannot be accepted, in view of the binding nature of ratio laid down by the Hon'ble Supreme Court, we have no other option but to accept that economic criteria cannot be the basis for effecting the reservation. It is to be noted that when the economic criterion cannot be the sole basis for determination of Socially and Economically Backward Class of citizens under Articles 15 and 16 of the Constitution, equally it cannot be accepted that such criteria adopted by the respondent-State is for giving effect of allocation of 10% reservation in educational institutions and in services to the economically weaker sections of unreserved category. What cannot be accepted as criteria to extend the benefit under Articles 15 and 16, can by all force equally apply to any other category for which reservations are sought to be given effect to.

29.11 Further contention of the learned Advocate General that the Ordinance in question is issued to translate the constitutional philosophy provided under the directive principles of the State Policy as laid down under Articles 38, 39(b) and 46 of the Constitution of

India, which inter alia mandates the State to effect economic empowerment of the weaker sections of the society. But in this regard, it is relevant to notice that in the judgment of the Hon'ble Supreme Court in the case of **A.I.I.M.S. Students Union v. A.I.I.M.S. And others,** reported in **AIR 2001 SC 3262**, the Hon'ble Supreme Court, while considering the issue of institutional reservation of 33% coupled with 50% reservation discipline-wise and percentile system and while distinguishing the reservation and source of entry, held in paras 52 and 53 as under:

> *"52. Preamble to the Constitution of India secures, as one of its objects, fraternity assuring the dignity of the individual and the unity and integrity of the nation to 'we the people of India'. Reservation unless protected by the Constitution itself, as given to us by the founding fathers and as adopted by the people of India, is sub-version of fraternity, unity and integrity and dignity of the individual. While dealing with Directive Principles of State Policy, Article 46 is taken note of often by overlooking Articles 41 and 47. Article 41 obliges the State inter alia to make effective provision for securing the right to work and right to education. Any reservation in favour of one, to the extent of reservation, is an inroad on the right of others to work and to learn. Article 47 recognises the improvement of public health as one of the primary duties of the State. Public health can be improved by having the best of doctors, specialists and super specialists. Under-graduate level is a primary or basic level of education in medical sciences wherein reservation can be understood as the fulfilment of societal obligation of the State towards the weaker segments of the society. Beyond this, a reservation is a reversion or diversion from the performance of primary duty of the State. Permissible reservation at the lowest or primary rung is a step in the direction of assimilating the lesser fortunates in mainstream of society by bringing them to the level of others which they cannot achieve unless protectively pushed. Once that is done the protection needs to be withdrawn in the own interest of protectees so that they develop strength and feel confident of stepping on higher rungs on their own legs shedding the crutches. Pushing the protection of reservation beyond the*

primary level betrays bigwigs' desire to keep the crippled crippled for ever. Rabindra Nath Tagore's vision of a free India cannot be complete unless "knowledge is free" and "tireless striving stretches its arms towards perfection". Almost a quarter century after the people of India have given the Constitution unto themselves, a chapter on fundamental duties came to be incorporated in the Constitution. Fundamental duties, as defined in Article 51A, are not made enforceable by a writ of Court just as the fundamental rights are, but it cannot be lost sight of that 'duties' in Part IVA - Article 5lA are prefixed by the same word 'fundamental' which was prefixed by the founding fathers of the Constitution to 'rights' in Para III. Every citizen of India is fundamentally obligated to develop the scientific temper and humanism. He is fundamentally duty bound to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievements. State is, all the citizens placed together and hence though Article 51A does not expressly cast any fundamental duty on the State, the fact remains that the duty of every citizen of India is the collective duty of the State. Any reservation, apart from being sustainable on the constitutional anvil, must also be reasonable to be permissible. In assessing the reasonability one of the factors to be taken into consideration would be - whether the character and quantum of reservation would stall or accelerate achieving the ultimate goal of excellence enabling the nation constantly rising to higher levels. In the era of globalisation, where the nation as a whole has to compete with other nations of the world so as to survive, excellence cannot be given an unreasonable go by and certainly not compromised in its entirety. Fundamental duties though not enforceable by a writ of the Court, yet provide a valuable guide and aid to interpretation of constitutional and legal issues. In case of doubt or choice; people's wish as manifested through Article 51-A, can serve as a guide not only for resolving the issue but also for constructing or moulding the relief to be given by the Courts. Constitutional enactment of fundamental duties, if it has to have any meaning, must be used by Courts as a tool to tab, even a taboo, on State action drifting away from constitutional values.

Conclusion

53. The upshot of the above discussion is that institutional reservation is not supported by the Constitution or constitutional principles. A certain degree of preference for students of the same Institution intending to prosecute further studies therein is permissible on grounds of convenience, suitability and familiarity with an educational environment.

Such preference has to be reasonable and not excessive. The preference has to be prescribed without making an excessive or substantial departure from the rule of merit and equality. It has to be kept within limits. Minimum standards cannot be so diluted as to become practically non-existent. Such marginal institutional preference is tolerable at post-graduation level but is rendered intolerable at still higher levels such as that of super-speciality. In the case of institutions of national significance such as AIIMS additional considerations against promoting reservation or preference of any kind destructive of merit become relevant. One can understand a reasonable reservation or preference being provided for at the initial stage of medical education, i.e., under-graduate level while seeking entry into the institute. It cannot be forgotten that the medical graduates of AIIMS are not 'sons of the soil'. They are drawn from all over the country. They have no moorings in Delhi. They are neither backward nor weaker sections of the society by any standards-social, economical, regional or physical. They were chosen for entry into the Institute because of their having displayed and demonstrated excellence at all India level competition where thousands participate but only a mere 40 or so are chosen. Their achieving an all-India merit and entry in the premier institution of national importance should not bring in a brooding sense of complacence in them. They have to continue to strive for achieving still higher scales of excellence. Else there would be no justification for their continuance in a premier Institution like AIIMS. In AIIMS where the best of facilities are available for learning with best of teachers, best of medical services, sophistication, research facilities and infrastructure, the best entrants selected from the length and breadth of the country must come out as best of all India graduates. We fail to understand why those who were assessed to be best in the country before entering the portals of the Institute fall down to such low levels as having perceptibly ceased to be best, not remaining even better, within a period of a few years spent in the Institute. They trail behind even such candidates as fall in constitutionally reserved categories and yet steal a march order them in claiming creamy disciplines. The only reason which logically follows from the material available on record is that being assured of allotment of post-graduation seats in the same institution, the zeal for preserving excellence is lost. The students lose craving for learning. Those who impart instructions also feel that their non-seriousness would not make any difference for their taughts. If that is so, there is no reason why at the point of clearing graduation and seeking entry in post-graduation courses of study they should not give way for those who deserve better, and much better, than them. AIIMS holds and conducts a common entrance examination for post-graduation wherein graduates of AIIMS

and graduates from all over the country participate and are tested by common standards. The AIIMS students trail in the race and yet are declared winners, thanks to the ingenious reservation in their favour. One who justified reservation must place on record adequate material enough, to satisfy an objective mind judicially trained, to sustain the reservation, its extent and qualifying parameters. In the case at hand no such material has been placed on record either by the institute or by the AIIMS Students' Union. The facts found by Delhi High Court, well articulated by the learned Chief Justice speaking for the Division Bench of the High Court of Delhi, visibly demonstrate the arbitrariness and hence unsustainability of such a reservation. It was an outcome of agitation-generated-pressure depriving application of mind reason and objectivity of those who took the decision. No material has been placed on record to show that Institute graduates, if asked to face all-India competition while seeking PG seats, would get none or face feeble opportunities because of the policies of other universities. The way merit has been made a martyr by institutional reservation policy of AIIMS, the high hopes on which rests the foundation of AIIMS are belied. No sound and sensible mind can accept scorers of 15-20% being declared as passed, crossing over the queue and arraigning themselves above scorers of 60-70% and that too to sit in a course where they will be declared qualified to fight with dreaded and complicated threats to human life. Will a less efficient post graduate or specialist doctor be a boon to society? Is the human life so cheap as to be entrusted to mediocre when meritorious are available? If the answer is yes, we are cutting at the roots of nation's health and depriving right to equality of its meaning. We have no hesitation in holding, and thereby agreeing with the Division Bench of High Court, that reserving 33% seats for institutional candidates was in effect 100% reservation for subjects. Coupled with 50% reservation in allocation of specialities not exceeding overall 33% reservation integrated with 65 percentile - a complex method, the actual working where of even the learned senior counsel for the parties frankly confessed their inability in demonstrating before us at the time of hearing - is a conceited gimmick and accentuated politics of pampering students, weak in merit but mighty in strength. Such a reservation based on institutional continuity in the absence of any relevant evidence in justification thereof is unconstitutional and violative of Article 14 of the Constitution and has therefore to be struck down. The impugned reservation, obnoxious to merit, fails to satisfy the twin test under Article 14. Having taken a common entrance test, there is no intelligible differentia which distinguishes the institutional candidates from others; and there is no nexus sought to be achieved with the objects of AIIMS by such

reservation. Can the Court sustain and uphold such reservation? 'Justice is the earnest and constant will to render every man his due. The precepts of the law are these: to live honorably, to injure no other man, to render to every man his due' - said Justinian. Giving a man his due, one of the basics of justice, finds reflected in right to equality. Mediocracy over meritocracy cuts at the roots of justice and hurts right to equality. Protective push or prop, by way of reservation or classification must withstand the test of Article 14. Any over-generous approach to a section of the beneficiaries if it has the effect of destroying another's right to education, more so, by pushing a mediocre over a meritorious belies the hope of our Founding Fathers on which they structured the great document of Constitution and so must fall to the ground. To deprive a man of merit of his due, even marginally, no rule shall sustain except by the aid of Constitution; one such situation being when deprivation itself achieves equality subject to satisfying tests of reason, reasonability and rational nexus with the object underlying deprivation."

29.12 In the judgment in the case of **Indra Sahwney v. Union of India and others,** reported in **(2000) 1 SCC 168**, the Hon'ble Supreme Court held in paras 64 and 65 as under:

"64. The Preamble to the Constitution of India emphasises the principle of equality as basic to our Constitution. In Keshavananda Bharati v. State of Kerala (1973) 4 SCC 225 : (AIR 1973 SC 1461), it was ruled that even constitutional amendments which offended the basic structure of the Constitution would be ultra vires the basic structure. Sikri, C.J. laid stress on the basic features enumerated in the preamble to the Constitution and said that there were other basic features too which could be gathered from the constitutional scheme (Para 506-A of SCC) : (Para 523 of AIR). Equality was one of the basic features referred to in the Preamble to our Constitution. Shelat and Grover, JJ. also referred to the basic rights referred to in the Preamble. They specifically referred to equality (Paras 520 and 535-A of SCC) : (Paras 537 and 552 of AIR). Hegde and Shelat, JJ. also referred to the Preamble (Paras 648, 652) : (of SCC) : (Paras 664, 668 of AIR). Ray, J. (as he then was) also did so (Para 886) (of SCC) : (Para 902 of AIR). Jaganmohan Reddy, J. too referred to the Preamble and the equality doctrine (Para 1159) (of SCC) : (Para 1171 of AIR). Khanna, J. accepted this position (Para 1471) (of SCC) : (Para 1482 of AIR). Mathew, J.

referred to equality as a basic feature (Para 1621) (of SCC) : (Para 1634 of AIR). Dwivedi, J. (Paras 1882, 1883) (of SCC) : (Paras 1895, 1896 of AIR) and Chandrachud, J. (as he then was) (see Para 2086) accepted this position.

65. What we mean to say is that Parliament and the Legislatures in this country cannot transgress the basic feature of the Constitution, namely, the principle of equality enshrined in Art. 14 of which Art. 16(1) is a facet. Whether 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 Art. 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. The Kerala Legislature is, therefore, least competent to perpetuate such an illegal discrimination. What even Parliament cannot do, the Kerala Legislature cannot achieve."

29.13 Though the learned Advocate General relied on other authorities of the Hon'ble Supreme Court on the point of reservations in the universities, it is to be regarded as source but not reservation as distinguished by the Hon'ble Supreme Court in the case of **A.I.I.M.S. Students Union v. A.I.I.M.S. And others,** reported in **AIR 2001 SC 3262.** In view of the same, we are of the view that that would not render any assistance to the respondents in support of their case.

29.14 Over and above the above judgments, we would like to refer to the judgments relied on by the learned Advocate General as under:

29.15 Learned Advocate General has also placed reliance on

the judgment of the Hon'ble Supreme Court in the case of **Ashoka Kumar Thakur v. State of Bihar and others,** reported in **(1995) 5 SCC 403.** In the aforesaid judgment, the criteria for identification and exclusion of creamy layer as directed by the Hon'ble Supreme Court in the case of Indra Sahwney (Mandal Case) fell for consideration before the Hon'ble Supreme Court. In the aforesaid case, the economic criteria adopted for identifying the creamy layer as per the Office Memorandum dated 8.9.93 was approved. But it is to be noted that such identification of creamy layer is within the group of permitted category of reservation in view of the provision under Article 16(4) of the Constitution of India.

29.16 In the case of **Duraisamy and another v. State of T.N. and others,** reported in **(2001) 2 SCC 538,** reservation of 50% of seats for in-service candidates for admission to Diploma and Degree courses fell for consideration before the Hon'ble Supreme Court and the Hon'ble Supreme Court held that in-service candidates could not, on the basis of merit be considered against the seats earmarked for non-service candidates. By applying the principle of doctrine of purposive construction, distinction was drawn between in-service and non-service candidates in the medical colleges.

29.17 In support of the argument that 10% of quota allocated under the impugned Ordinance cannot be said to be in violation of the judgment of the Hon'ble Supreme Court in the case of Indra

Sawhney without crossing 50% ceiling, the learned Advocate General relied on the judgment of the Hon'ble Supreme Court in the case of **Union of India and Anr. v. National Federation of the Blind and others**, reported in **(2013) 10 SCC 772,** wherein, the Hon'ble Supreme Court has considered with regard to 3% reservation for Physically Handicapped as required under Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. In the said judgment, the Hon'ble Supreme Court has held that ceiling of 50% reservation mandated in Indra Sahwney case applies only to reservation in favour of other backward classes under Article 16(4) of the Constitution, whereas reservation in favour of persons with disabilities is horizontal and is under Article 16(1) of the Constitution. Thus, it is held by the Hon'ble Supreme Court that it will not violate 50% of ceiling as mandated in the case of **Indra Sawhney vs. Union of India and others, etc.** reported in **(1992) Suppl. 3 SCC 217**.

29.18 Having regard to the nature of reservation which fell for consideration in the aforesaid judgment, we are of the view that such ratio laid down in the aforesaid judgment would not come to the aid of the respondents.

29.19 Reliance is also placed by the learned Advocate General on the judgment of the Hon'ble Supreme Court in the case of **National Legal Services Authority v. Union of India and**

others, reported in **(2014) 5 SCC 438**, wherein the Hon'ble Supreme Court has considered the rights of transgenders and issued directions to the Central Government and the State Governments to extend all the benefits available to Socially and Educationally Backward Class/Other Backward Classes.

29.20 In the judgment in the case of **State of Punjab and others v. Rafiq Masih (White Washer) and others,** reported in **(2015) 4 SCC 334,** relied on by the learned Advocate General, the Hon'ble Supreme Court has considered the embodiment of the doctrine of equality in Articles 38, 39, 39-A, 43 and 46 contained in Part IV of the Constitution, dealing with the directive principles of State Policy. In the aforesaid judgment, the Hon'ble Supreme Court has held in para-9 as under:

> *"9. The doctrine of equality is a dynamic and evolving concept having many dimensions. The embodiment of the doctrine of equality can be found in Articles 14 to 18 contained in Part III of the Constitution of India, dealing with "fundamental rights". These articles of the Constitution, besides assuring equality before the law and equal protection of the laws, also disallow discrimination with the object of achieving equality, in matters of employment; abolish untouchability, to upgrade the social status of an ostracised section of the society; and extinguish titles, to scale down the status of a section of the society, with such appellations. The embodiment of the doctrine of equality, can also be found in Articles 38, 39, 39-A, 43 and 46 contained in Part IV of the Constitution of India, dealing with the "directive principles of State policy". These articles of the Constitution of India contain a mandate to the State requiring it to assure a social order providing justice – social, economic and political, by inter alia minimising monetary inequalities, and by securing the right to adequate means of livelihood, and by providing for adequate wages so as to ensure, an appropriate*

standard of life, and by promoting economic interests of the weaker sections."

29.21 Learned Advocate General placed reliance on the judgment of the Hon'ble Supreme Court in the case of **Rajeev Kumar Gupta & Others v. Union of India & others,** reported in **2016 SCC Online SC 651,**wherein, the Hon'ble Supreme Court has recently held that the principle laid down in Indra Sawhney is applicable only when the State seek to give preferential treatment in the matter of employment under State to certain classes of citizens identified to be a backward class. But Article 16(4) of the Constitution does not disable the State from providing differential treatment to other classes of citizens under Article 16(1) if they otherwise deserve such treatment. In the aforesaid case, the Hon'ble Supreme Court was considering the claim of reservation of seats for persons with disability under the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.

29.22 All the authorities relied on by the learned Advocate General referred above relate to reservation to backward class under Article 16(4) or reservation relating to disabled persons within the meaning of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. As such, we are of the view that the aforesaid judgments are of no help to the case of the respondents as much as we have held that 10% of the group in

unreserved category cannot be considered as homogeneous group. In view of the fact that the very group is identified based on economic criteria which is disapproved by the Hon'ble Supreme Court in the case of Indra Sahwney (supra), for the purpose of effecting reservations for backward classes under Article 16(4) of the Constitution, we are of the considered view that the said ratio holds good equally for identifying the group of 10% within the class of unreserved category.

29.23 Mr. Shelat, learned Sr. Advocate, appearing on behalf of the petitioners also placed reliance on the judgment of a Division Bench of this Court in the case of **State of Gujarat v. Bindu Niranjan Doctor & Ors**, rendered in Letters Patent Appeal No. 698 of 1994, dated 29th December, 1994. In the aforesaid case, challenge was to the reservation of 2% seats to the medical colleges in the State of Gujarat for economically backward classes who live below poverty line and whose total income does not exceed Rs. 11000/- per annum who are not covered under the category of SC, ST, NT DNT and SEBC. The said reservation of 2% seats was in addition to 27% seats reserved for SEBC. When it was challenged on the ground that the said reservation was contrary to the judgment rendered in the Mandal Case, that is, **Indra Sawhney v. Union of India,** reported in **1993 SC 477**, a Division Bench of this Court Court held it to be illegal by considering the reservation based on economic criteria. The view taken by a Division Bench of this Court also supports the case of

the petitioners in this batch of petitions.

29.24 For the aforesaid reasons and in view of the authoritative pronouncements of the Hon'ble Supreme Court which we have referred above, we answer that reservation of 10% seats based on economic criteria by exceeding the limit of 50% is illegal and contrary to the ratio laid down by the Hon'ble Supreme Court in the case of **Indra Sawhney vs. Union of India**, reported in **(1992) Supp. 3 SCC 217**.

30. **Point No. 3**:

Whether, the State is justified in issuing the impugned Ordinance providing reservation of 10% of available seats for admissions and appointments in services in favour of economically weaker sections of unreserved category, without carrying out any detailed scientific and technical impact assessment study by the experts and without collecting quantifiable and empirical data?

30.1 With reference to the above point, it is the specific case of the petitioners that the impugned Ordinance is issued providing reservation of 10% of available seats in educational institutions and to fill posts in the services under the State without carrying out detailed scientific and technical impact assessment study by experts and without collecting quantifiable and empirical data. It is stated in

the affidavit in reply filed by the State that based on representations numbering about 225, High Power Committee consisting of 5 Hon'ble Ministers recommended the reservation of 10% to weaker sections in unreserved category. It is also the contention of the learned Advocate General that since such reservation is not traceable to provision under Articles 15 and 16 of the Constitution of India, no such technical impact assessment study by experts and quantifiable and empirical data is required. In this regard, it is relevant to note that apart from the fact that the respondent-State is not empowered under the constitutional scheme to make such law for reservation exclusively for economically weaker sections of unreserved category, we are of the view that there is no technical impact assessment study and quantifiable and empirical data before arriving at the conclusion that such reservation is necessary. When equality is the rule of law under the scheme of Article 14, for creating group for the purpose of providing reservation, unless detailed scientific and technical study is made, no such reservation can be permitted. Except by referring to representations based on which the High Powered Committee has recommended reservation, there is no other scientific data collected by the Committee for making recommendations for reservation. In this regard, it is relevant to refer to the judgment of the Hon'ble Supreme Court in the case of **Atyant Pichhara Barg Chhatra Sangh and Anr. v. Jharkhand State Vaishya Federation and Ors.**reported in **(2006) 6 SCC 718.** In the aforesaid judgment, while dealing with the affirmative action under Articles 15(4) and 16(4) of

the Constitution, the Hon'ble Supreme Court in paras 22 and 23 held as under:-

> *"22. The State has failed to show any new circumstances except for a bald statement that the same was done after careful application of mind and due statement that the same was done after careful application of mind and due deliberation by the highest policy-making body I.e the Council of Ministers. There are no materials or empirical data to indicate that the circumstances had been changed and the State has not undertaken any study, research or work. In such circumstances to merely suggest that the Council of Ministers had applied their minds and had reached a decision is arbitrary and unreasonable.*
>
> *23. Mandal Commission case has specifically noted that there is no constitutioal bar to a State categorising the Backward Classes as backward and more Backward Class. The State of Jharkhand by its actions seeks to disempower communities that have been extended the benefits of reservation after a conscious adoption of the Bihar Act. What GO No. 5800 seeks to do by combining the Extremely Backward Class and Backward Class into one group is to treat unequals as equals thus violating the notion of substantive equality and Article 14 of the Constitution of India bringing it within the purview of judicial review by the Court."*

From the aforesaid judgment also it is clear that unless there is empirical study on the subject, there cannot be any casual approach in the matter relating to separation of group for affirmative action contrary to the rule of equality guaranteed under Article 14 of the Constitution. Thus, the above observations in the judgment referred above, fortify the case of the petitioners. In the above view of the matter, we answer the point no. 3 in favour of the petitioners by holding that the impugned Ordinance is based on the recommendations of the High Powered Committee which has not

done any scientific analysis nor did it do any empirical study for the purpose of providing reservation to the extent of 10% in the educational institutions and in appointments and posts in services under the State to the weaker sections of unreserved category.

31. **Point No.5**:

Whether, the State is justified in issuing the impugned Ordinance on 1.5.2016, when the Government Resolutions dated 7.10.2015 and 5.4.2016 granting financial assistance to the students of economically weaker sections of unreserved category are in existence and that too without waiting for result of such benefits conferred under the resolutions?

31.1 With reference to the above point, it is the case of the petitioners that the government has issued resolutions on 5.4.2016 and 7.5.2016 granting financial assistance to the students belonging to economically weaker sections of unreserved category but without waiting for any period to assess the benefits from such Government Resolutions, the impugned Ordinance is issued in haste. But having regard to our findings recorded on point nos. 1 to 4, we are of the view that there is no need to adjudicate on the said issue any further without going into the merits of such contention, and having regard to the findings recorded on the other points, we are of the view that no other findings are required to be recorded on this point.

32. In view of the aforesaid discussion and reasons recorded herein above, we are of the view that the impugned Ordinance is fit to be quashed and set aside. Accordingly, these petitions are allowed. The impugned Ordinance No. 1 of 2016 titled as "the Gujarat Unreserved Economically Weaker Sections (Reservation of Seats in Educational Institutions in the State and of Appointments and Posts in services under the State) Ordinance, 2016, issued by the State Government is hereby quashed and set aside by declaring the same as unconstitutional and contrary to fundamental rights guaranteed to the petitioners under Articles 13(2), 14, 15 and 16 of the Constitution of India. Consequently, we direct that if any admissions are proposed by notifying 10% seats for weaker section of unreserved category under the impugned Ordinance, they shall be treated as not reserved and admissions to be made by treating such quota in unreserved category.

(R. SUBHASH REDDY, CJ)

(VIPUL M. PANCHOLI, J.)

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