IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 967 OF 2021

IN THE MATTER OF:

Dr. Yash Tekwani & Ors. ...Petitioners

VERSUS

Medical Counselling Committee & Ors. ...Respondents

AND IN THE MATTER OF:

Dravida Munnetra Kazhagam
367 and 369
Anna Salai, Chennai,
Tamil Nadu, Pin Code: 600018 ...**Impleading Party**

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ADVOCATE FOR THE APPLICANT/ IMPLEADOR:

R. NEDUMARA

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BRIEF FACTS

1. That the Union of India vide notice dated 29.07.2020 has implemented 27% reservation for OBC (Non-Creamy Layer) along with 10% EWS reservation in 15% UG and 50% PG in All India Quota seats State contributed Seats **("SCS-AIQ")** after an extensive legal battle by the DMK i.e. the present impleading party to implement OBC reservations in SCS-AIQ.
2. After the 93rd Constitutional amendment and introduction of the Central Educational Institutions (Reservations in Admissions) Act 2006, the Ministry of HRD vide their OM dated

12.06.2008 and Ministry of Health & Family Welfare vide OM dated 12.06.2008 provided 27% reservations for OBC in AIQ in the Central Government contributed seats in Central Educational Institutions. However reservations in the SCS- AIQ were denied by the Union Government for OBC's despite States like Tamil Nadu having 50% reservation under its State law namely Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of Appointments or Posts in the Services under the State) Act, 1993. Thus, the OBC candidates have been deprived of thousands of seats by the Union of India in the previous years. Vide the impugned notice the Union has set right the anomaly for OBCs after a period of 13 years. The granting of impugned reservations of 27% for OBC's in the SCS-AIQ would benefit around 4000 students this year and would cause a positive domino effect on the society at large.

3. That the impleading party is persistent with its core values in propagating social justice and upliftment of individuals belonging to down trodden, oppressed, suppressed and backward class through constitutional means. The impleading party has been consistently raising the issue of implementation of lawful OBC reservation in SCS-AIQ before the Parliament for time to time and it was only after repeated efforts in Parliament, the DMK party filed **W.P (C) No. 507 of 2020** before this Hon'ble Court seeking Writ of Mandamus to apply OBC reservations in SCS-AIQ.

4. That thereafter, this Hon'ble Court by order dated 11.6.2020 in the said Writ Petition felt that the issue ought to be agitated before the Hon'ble Madras High Court and granted liberty. Subsequently, a Writ Petition in W.P. No. 8326 of 2020 was filed by the DMK party. However, the Madras High Court after issuing notice in the Writ Petition accepted the stand taken by Union of India vide order dated 22.06.2020 and deferred the hearing of the Writ Petition till this Hon'ble Court decides the similar issue in ***Saloni Kumari v Director General Health Services WP(C) No 596/2015.***

5. That against the deferral of the hearing of the Writ Petition, SLP(C) No. 8081-8082 of 2020 were filed before this Hon'ble Court and this Hon'ble Court passed an order dated 13.7.2020 holding that the issue in the Writ Petition filed by the impleading party was completely different from ***Saloni Kumari (supra)*** and directed Madras High Court to proceed with the hearing of the case as expeditiously as possible.

6. That, on 27.07.2020, the Madras High Court passed order disposing of **WP No. 8326/2020** and other connected WPs holding that reservation for OBC candidates is permissible in the SCS-AIQ and there are no legal or constitutional impediment to extend OBC reservation in seats contributed by the States to All India Quota and directed the formation of a 4 member Committee to provide the terms of implementation of such reservation and such court appointed 4 member committee to give its report within 3 months and further

directed the Union of India to implement reservations for OBCs from 2021 onwards in SCS-AIQ.

7. That the impleading party filed Contempt Petition No. 181 of 2021 against the Union Government before the Hon'ble Madras High Court due to its failure to provide for OBC reservations in SSS-AIQ for NEET 2021 as directed by the Hon'ble Madras High Court. The High Court vide order dt 19.07.2020 prima-facie found that Union of Government had failed to comply with the well-reasoned order dt. 27.07.2020 made in W.P. No. 8326 of 2020 and directed the Union Government to indicate the mode and manner of implementation of OBC reservation in the State for admission to medical and dental colleges and held that the admissions can only be made after implementing such reservation quota.

8. That it was only after initiating contempt petition before the High Court by DMK, Union Government conceded to the Legal fight initiated by DMK, and issued the notice dt. 29.07.2021 declaring that 27% reservation to OBC in all state contributed seats to All India Quota. The Union in the counter affidavit filed before the Madras High Court termed that granting of reservation through notice dated 29.7.2021 as a **"policy decision"** even though it is only complying with the orders of High Court. If the stand of Union is accepted that the decision to grant reservation in the SCS-AIQ is a policy decision, then the Judicial parameters available for testing a policy decision is limited to the extent as to whether it is contrary to law or

malafide or unreasonable. (Please See 2002(2)SCC page 333 Paragraph 92; 2003(5)SCC Page 350 paragraph 13)

9. That the Petitioners in the present Writ Petition seek directions to quash the notice dt. 29.07.2021 on the grounds that the application of OBC reservation to AIQ seats in State contributed seats is arbitrary, unjustified and against public interest.

10. It is submitted that social justice is a facet of equality which is a fundamental right and policy of reservations is to setoff inequality, bridge the gap between equals and un-equals, remove manifest imbalance for those lagging behind, and remedy the past historical discrimination and injustice done to a social class of people. It is an affirmative action and positive declaration. It is not "*sucking off seats*" as described by the Petitioner's counsel. Reservation is a right of share in education and employment in order to bring a level playing field. Policy of reservation is part of the State's duty to promote socio economic justice enshrined in the Preamble of the constitution and the fundamental rights.

11. It is submitted that due to the Tamil Nadu Backward Classes, Schedules Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of Appointments or Posts in the Services under the State) Act, 1993, the reservation in the State of Tamil Nadu is at 69%, however for OBC (BC and MBC), the reservations total to 50%. Under the impugned notice 27% reservation is granted to OBC's across the country uniformly by the Union. I state that reservation is granted on the basis of

empirical data available for 27% reservation for OBC's after detailed study by Mandal Commission and tested by this Hon'ble Court and also on the basis of subsequent 93rd constitutional amendment and enactment of the Central Educational Institutions (Reservation in Admission) Act 2006. Therefore granting of 27% reservation cannot be a subject matter of litigation again and again when this Hon'ble Court had already settled the issue.

12. Regulation 9(IV) of the Post Graduate Medical Education Regulations, 2000 and the Regulation 5(5) for Under Graduate Medical Education Regulations stipulate that the reservation of seats in Medical and Dental Colleges for respective categories shall be as per applicable laws prevailing in States/ Union Territories where the medical college is physically situated. Similarly, for the UG courses, the regulations state that the reservations as prevailing in the States/UT are applicable.

13. It is submitted that a plain reading of the abovementioned MCI and DCI Regulations suggest that the reservation applies in all seats including the SCS-AIQ. The Petitioners have not challenged the aforesaid regulations and have challenged the implementation of such reservations in SCS-AIQ and hence Writ Petitions deserves to be dismissed on this score alone.

14. It is submitted that the Petitioners claim to have come from different parts of the country to file this Writ Petition under Art 32. The Petitioners are merely wearing a mask of merit in order to destroy social justice and to bring disharmony and social disorder. Their intention is to create unrest in the country and restore the injustice, illegalities and discrimination in the

society. There are no pleadings as to how their rights under Part III of the constitution have been violated except for using a term "merit". The marks obtained by them and other details are not pleaded in the Writ Petition as to how they claim themselves as meritorious. Be that as it may, this Hon'ble Court in ***Pradeep Jain vs. Union of India (1984) 3 SCC 654*** has already considered the question of what constituted merit for governing the process of selection and what are the circumstances in which such departure can justifiably be made from the principle of selection of merit as enumerated in the preceding paragraphs:

> *"12....Merit cannot be measured in terms of marks alone, but human sympathies are equally important. The heart is as much a factor as the head in assessing the social, value of a member of the medical profession. This is also an aspect which may, to the limited extent possible, be home in mind while determining merit for selection of candidates for admission to medical colleges though concededly it would not be easy to do so, since it is a factor which is extremely difficult to judge and not easily susceptible to evaluation."*
>
> *"13..... Those who are unequal, in fact, cannot be treated by identical standards; that may be equality in law but it would certainly not be real equality. It is, therefore, necessary to take into account de facto inequalities which exist in the society and to take affirmative action by way of giving preference to the socially and economically disadvantaged persons or inflicting handicaps on those more advantageously placed, in Order to*

bring about real equality. Such affirmative action though apparently discriminatory is calculated to produce equality at a broader basis by eliminating de facto inequalities and placing the weaker sections of the community on a footing of equality with the stronger and more powerful section, so that each member of the community, whatever is his births occupation or social position may enjoy equal opportunity of using to the full his natural endowments of physique, of character and of intelligence."

Interestingly the scheme of the All India Quota proposed by the Supreme Court was temporary only till the Union Government establishes Regional Institute of Medical sciences, in which event, this Hon'ble Court has observed that the scheme of AIQ will become unnecessary (Please see 1986 (3) SCC 727 - Para 14). But till today, the Central Government has not shown any keen interest in establishing RIMS.

15. It is submitted that prior to issuance of the impugned notice dt 29.07.2021, there exists an apparent discrimination in the reservation policies of Union Government in the State contributed Seats and Central Educational Institutions contributed seats to All India Quota. Reservations of 27% for OBC's were provided since 2008 by the Union only in the Seats contributed by Central Educational Institutions to All India Quota. The net result was that all States were losing OBC reservations in the seats contributed by them to All India Quota to the detriment of their OBC students.

16. It is submitted that such discrimination led to a huge loss to the students belonging to the OBC categories across the country which is detailed hereunder as on 2019 for UG and PG Courses:-

I. UG Courses

15% State contributed seats to AIQ in UG courses – 6060 Seats

27% OBC reservation on 6060 seats - 1636 Seats

II. PG Courses

50% State contributed Seats to AIQ in PG Courses- 9515 Seats

27% OBC reservation on 9515 seats - - 2569 Seats

17. It is submitted that the State of Tamil Nadu has always been far ahead of the Union Government in implementing reservation programmes for the integration and upliftment of backward classes. In August 1921, the Madras State Legislative Council recommending to the Government to take steps to increase the proportion of posts in Government offices held by the backward classes and accordingly GO No. 613, Public Department dt. 16.09.1921 was passed.

18. Thereafter career opportunities of non-forward castes were enhanced by passing GO No.658, Public Department, dt. 15.08.1922. Further, the GO.Ms.No. 1071, Public Department dt, 04.11.1927 enabled the non-forward castes to have their share in employment.

19. That it was only after the Constitution was enacted, the GO.Ms.No.2432, Public Services Department dt. 27.09.1951 was implementing reservation policies of the State of Madras

were challenged before Madras High Court which was struck down and subsequently confirmed by this Hon'ble Court in ***State of Madras v. Srimathi Champakkam Dorairajan (AIR 1951 SC 226)*** on the ground that the impugned G.O. violated Article 13.

20. That it was only after this Judgement, it was realized that special provisions could not be made in favour of backward classes unless the Constitution is amended which led to the passing of the Constitution (First Amendment) Act, 1951, due to pressure from the State of Tamil Nadu.

21. It is submitted that the scheme of All India Quota seats was devised by this Hon'ble Court in ***Pradeep Jain vs. Union of India (1984) 3 SCC 654*** wherein the Central Government and State Government voluntarily contribute seats to the All-India Quota in the ratio of 15% for UG Courses and 50% for PG Courses. At that time such seats did not have any reservation. However, after the judgement in ***Abhay Nath v Delhi University 2009 (17) SCC 705,*** this Hon'ble Court permitted communal reservations for SC and ST. Later after the 93rd Constitutional Amendment, reservations for OBCs in seats granted by Central Government to AIQ in Central Educational Institutions were provided by virtue of The Central Educational (Reservations in Admission) Act, 2006 w.e.f 2008.

22. It is submitted that after consistent attempts by the Union Government to delay and thwart the present Impleading party's **WP No. 8326/2020** before Madras High Court and the

impleading party's further legal battle before this Hon'ble Court, the Madras High Court vide a detailed judgement dt. 27.07.2020 held that there is no legal or constitutional impediment for extending the benefit of reservation to the other backward categories in the SCS-AIQ seats of UG/PG medical courses in the State-run Medical Colleges within Tamil Nadu subject to any further directions/orders of the Apex Court.

23. It is submitted that the Petitioners have conveniently challenged the impugned notice dt. 29.07.2021 without challenging the Madras High Court's judgement in WP No. 8326/2020 which led Union of India to issue such a notice in the first place. The Petitioners have been a fence sitters, watching and allowing the proceedings to complete and become final and then have come before this Hon'ble Court challenging the outcome of the legal proceedings.

24. It is submitted that the Petitioners did not challenge the provisions of The Central Educational (Reservations in Admission) Act, 2007 which clearly provide 27% reservation for OBC candidates in the Central Educational Educations which was operative since 2008 and applied to AIQ to the seats contributed by Central Educational Institutions since 20.4.2008 onwards. Thus the Petitioners are picking and choosing their challenge and there is no whisper as to why there is no challenge to reservations of 27% in Central Educational Institution AIQ seats but the challenge is only to SCS-AIQ seats alone in this Writ Petition.

25. That if the Petitioners were really concerned about upholding merit, they ought to have challenged both the reservations. This shows that the Writ Petition lacks *bonafides* and is intended to exclude reservations in State surrendered seats alone.

26. It is submitted that the present Writ Petitions are nothing but a malafide attempt to hinder the admission process of UG/PG Diploma Courses in the field of Medicine and to cause hurdle in providing admissions to the OBC candidates covered under the impugned Notice dt. 29.07.2021.

27. It is submitted that the TN Act of 1993 was enacted by the State of Tamil Nadu to provide for reservations as there was no Central Act at that point of time with an identical object. This Hon'ble Court in ***Saurabh Chaudhri vs. Union of India (2003) 11 SCC 146*** in para 63 clearly enunciated that the State, in absence of any Parliamentary Act has the legislative competence to enact a statute laying down reservation for entry in any course of studies including medical courses.

> *"63. Shifting of the entry from the State List to the Concurrent List is not, thus, relevant inasmuch the State in absence of any Parliamentary act has the legislative competence to enact a statute laying down reservation for entry in any course of studies including the medical courses."*

28. It is submitted that this Hon'ble Court in ***State of Kerala vs. NM Thomas (1976) 2 SCC 310*** explored the concept of reasonable classification vis-à-vis reservation in the matters of

employment. This Hon'ble Court opined that for the upliftment of social and backward classes, just providing equal opportunity alone wouldn't suffice but providing the underprivileged a suitable environment to facilitate their growth and true potential.

*"**23.** In the Ambica Mills case (supra) this Court explained reasonable classification to be one which includes all who are similarly situated and none who are not. The question as to who are similarly situated has been answered by stating that one must look beyond the classification to the purpose of law. The purpose of a law may be either the elimination of a public mischief or the achievement of some positive public good"*

*"**24.** Discrimination is the essence of classification. Equality is violated if it rests on unreasonable basis. The concept of equality has an inherent limitation arising from the very nature of the Constitutional guarantee. Those who are similarly circumstanced are entitled to an equal treatment. Equality is amongst equals. Classification is, therefore, to be founded on substantial differences which distinguish persons grouped together from those left out of the groups and such differential attributes must bear a just and rational relation to the object sought to be achieved."*

*"**66.** The guarantee of equality before the law or the equal opportunity in matters of employment is a guarantee of something more than what is required by formal equality. It*

implies differential treatment of persons who are unequal. Egalitarian principle has therefore enhanced the growing belief that government has an affirmative duty to eliminate inequalities and to provide opportunities for the exercise of human rights and claims. Fundamental rights as enacted in Part III of the Constitution are, by and large, essentially negative in character."

*"**75.** It is said that Article 16(4) specifically provides for reservation of posts in favour of backward classes which according to the decision of this Court would include the power of the State to make reservation at the stage of promotion also and therefore Article 16(1) cannot include within its compass the power to give any adventitious aids by legislation or otherwise to the backward classes which would derogate from strict numerical equality. If reservation is necessary either at the initial stage or at the stage of promotion or at both to ensure for the members of the Scheduled Castes and Scheduled Tribes equality of opportunity in the matter of employment. I see no reason why that is not permissible under Article 16(1) as that alone might put them on a parity with the forward communities in the matter of achieving the result which equality of opportunity would produce. Whether there is equality of opportunity can be gauged only by the equality attained in the result. Formal equality of opportunity simply enables people with more education and intelligence to capture all the posts and to win over the less fortunate in*

education and talent even when the competition is fair. Equality of result is the test of equality of opportunity.

*"**125.** The core conclusion I seek to emphasize is that every step needed to achieve in action, actual, equal, partnership for the harijans, alone amounts to social justice-not enshrinement of great rights in Part III and good goals in Part IV. Otherwise, the solemn undertakings in Arts. 14 to 16 read with Arts. 46 and 335 may be reduced to a 'teasing illusion or promise of unreality'. A clear vision of the true intendment of these provisions demands a deep understanding of the Indian spiritual-secular idea that divinity dwells in all and that ancient environmental pollution and social placement, which the State must extirpate, account for the current socio-economic backwardness of the blacked-out human areas described euphemistically as Scheduled Castes and Scheduled Tribes. The roots of our constitutional ideas-at least some of them- can be traced to our ancient culture. The noble Upanishadic behest of collective acquisition of cultural strength is in volved in and must evolve out of 'equality', if we are true to the subtle substance of our finer heritage."*

*"**141.** The basic question thus is one of social dynamics implied in Art. 16(1). Let us go to the fundamentals and ignore the frills. In a spacious sense, 'equal opportunity' for members of a hierarchical society makes sense only if a strategy by which the underprivileged have environmental facilities for developing their full human potential. This consummation is*

accomplished only when the utterly depressed groups can claim a fair share in public life and economic activity, including employment under the State, or when a classless and casteless society blossoms as a result of positive State action."

*"**143.** If Art. 14 admits of reasonable classification, so does Art. 16(1) and this Court has held so. In the present case, the economic advancement and promotion of the claims of the grossly under-represented and pathetically neglected classes, otherwise described as Scheduled Castes and Scheduled Tribes, consistently with the maintenance of administrative efficiency, is the object, constitutionally sanctioned by Arts. 46 and 335 and reasonably accommodated in Art. 16(1). The differentia, so loudly obtrusive, is the dismal social milieu of harijans. Certainly, this has a rational relation to the object set out above. I must repeat the note of caution earlier struck. Not all caste backwardness is recognised in this formula. To do so is subversive of both Art. 16(1) and (2). The social disparity must be so grim and substantial as to serve as a foundation for benign discrimination. If we search for such a class, we cannot find any large segment other than the Scheduled Castes and Scheduled Tribes. Any other caste, securing exemption from Art. 16(1) and (2), by exerting political pressure or other influence, will run the high risk of unconstitutional discrimination. If the real basis of classification is caste masked as backward class, the Court must strike at such communal manipulation. Secondly, the Constitution recognizes*

the claims of only harijans (Art. 335) and not of every backward class."

29. It is submitted that a nine Judge Constitution Bench of this Hon'ble Court in ***Indra Sawhney vs. Union of India 1992 Supp (3) SCC217*** dealt with issues pertaining to 27% OBC reservations:

a. Firstly, this Hon'ble Court while considering the Mandal Commission Report had observed that the recommended reservation of 27% reservation of all posts in Central Government for OBCs was not in par with the population as it was almost twice of the figure which was recommended. However, it was held that Art. 16(4) stipulated adequate representation and not proportionate representation and that the power conferred under Art. 16(4) should also be exercised in a fair manner and within reasonably limits - and what is more reasonable than to say that reservation under Clause (4) shall not exceed 50% of the appointments or posts, barring certain extra-ordinary situations thereby holding that the 27% reservation was well within reasonable limits. ***See para 141, 807***

b. Secondly, this Hon'ble Court rejected the contentions that the Recommendations of the Report will curtail Article 14 and destroy the basic structure of Constitution. ***See Para 148.*** Furthermore, this Hon'ble Court held that the 27% of the vacancies in civil posts and services under the Government of India shall be extended to all the SEBCs. ***See Para 235***

c. Thirdly, it was observed that the policy of reservation had to be consistent with the objective in achievement and preservation of equality for all classes of people, irrespective of their birth creed, faith or language which was one of the noble ends to which the Constitution is dedicated. ***See Para 255***

d. Fourthly, while interpreting the impugned Office Memorandum providing for 27% reservation, this Hon'ble Court also observed that the Mandal Commission had provided that 10% of the vacancies shall be reserved for other economically backward sections of the people who are not covered by any of the existing schemes of reservations however, at the time of passing the judgement, the criteria for determining the poorer sections among the backward classes or for determining other economically backward sections among the non-reserved category was not evolved. ***See Para 678***

30. That in Ashoka Kumar Thakur vs Union of India **2008(6) SCC Page 1**, this Hon'ble Court upheld the vires of 93rd Constitutional amendment and the validity of the Central Educational Institutions (Reservation in Admission) Act 2006 granting reservations for OBC at 27%. This Hon'ble Court held that *"quantum of reservation of 27% of seats to other Backward Classes in the educational institutions provided in the Act is not illegal"*. Therefore the quantum of reservation granted for OBC's at 27% cannot be re-agitated or reopened or assailed before this Hon'ble court. The empirical

data for OBC reservations in educational institutions is already approved by this Hon'ble Court.

31. That this Hon'ble Court in *Pramati Educational and Cultural Trust and others* vs. *Union of India & Ors* (2014 (8) SCC 1- Para 38) held that

"38. We accordingly hold that none of the rights under Articles 14, 19(1)(g) and 21 of the Constitution have been abrogated by clause (5) of Article 15 of the Constitution and the view taken by Bhandari, J. in Ashoka Kumar Thakur v. Union of India (supra) that the imposition of reservation on unaided institutions by the Ninety-third Amendment has abrogated Article 19(1)(g), a basic feature of the Constitution is not correct. Instead, we hold that the (Ninety-third Amendment) Act, 2005 of the Constitution inserting clause (5) of Article 15 of the Constitution is valid."

32. That in ***Abhay Nath (supra)*** this Hon'ble Court in paras 6 and 7 had already permitted reservation for SC/ST students to the extent of 22.5% of the All India Quota seats, the 27% OBC quota as applicable due to the impugned notice does not cause any impediment as the total percentage of reservation with respect to SSS-AIQ is still under the legal limit of 49.5% barring 10% EWS.

33. It is submitted that in ***Ashok Kumar Gupta & Anr. vs. State of Uttar Pradesh& Anr (1997) 5 SCC 201,*** this Hon'ble Court held that an affirmative action and protective discrimination is imperative for adjusting the competing rights, balancing the claims, rights and interest of the deprived and

disadvantaged and the general section of the society. The relevant paras are extracted as follows:

*"**26.** It is now settled legal position that social justice is a fundamental right and equally economic empowerment is a fundamental right to the disadvantaged. Article 51A(j) enjoins that it shall be the day of every citizen to strive towards excellence in all spheres of individual and collective activities so that the nation constantly rises to higher levels of endeavour and achievement. Equality of status and dignity of the individual will be secured when the employees belonging to Dalits and Tribes are given an opportunity of appointment by promotion in higher echelons of service so that they will have opportunity to strive towards excellence individually and collectively with other employees in improving the efficiency of administration. Equally they get the opportunity to improve their efficiency and opportunity to hold offices of responsibility at hierarchical levels."*

*"**28.** It would, therefore, be necessary to consider the effect of reservation in promotion to the Dalits and the Tribes vis-a-vis the employees belonging to the general categories; it is a balancing right to equality in results and adjusting the competing rights of all sections. In Ahmedabad St. Xaviers College Society & Anr. v. State of Gujarat & Anr. [(1975) 1 SCR 173 at 252] through a Bench of nine Judges, this Court Pointed out that to establish equality, it would require absolute identical treatment of both the minority and majority. That would result only in equality in law but inequality in fact. The*

distinction need not be elaborated. It is obvious that equality in law precludes discrimination of any kind whereas equality in fact may involve the necessity of differential treatment in order to attain a result which establishes and equilibrium between different situations. To give adequate representation to the Dalits and Tribes in all posts or classes of posts or services, a reality and truism. Facilities and opportunities, as enjoined in Article 38 are required to be provided to them to achieve the equality of representation in real content. In Dr. Pradeep Jain & Ors. V/s. Union of India & Ors. [(1984) 3 SCC 654] a three-judge Bench of this Court considered the concept of equality under Articles 14 and 15(1) of the Constitution and had held in para 13 at page 676 thus:

"Now the concept of equality under the Constitution is a dynamic concept. It takes within its sweep every process of equalisation and protective discrimination. Equality must not remain mere idle incantation but it must become a living reality for the large masses of people. In a hierarchical society with an indelible feudal stamp and incurable actual inequality. It is absurd to suggest the progressive measures to eliminate group disabilities and promote collective equality are antagonistic to equality on the ground that every individual is entitled to equality of opportunity based purely on merit judged by the marks obtained by him. We cannot countenance such a suggestion, for to do so would make the equality clause sterile and perpetuate existing inequalities. Equality of opportunity is not simply a matter of legal equality . Its existence depends not merely on the absence of disabilities but on the presence of

abilities. Where, therefore, there is inequality, in fact, legal equality always tends to accentuate it. What the famous poet William Blake said graphically is very true, namely, "once law for the Lion and the Ox is oppression". Those who are unequal, in fact, cannot be treated by identical standard; that may be equality in law but it would certainly not be real equality. It is, therefore, necessary to take into account de facto inequalities which exist in the society and to take affirmative action by way of giving preference to the socially and economically disadvantaged persons or inflicting handicaps on those more advantageously placed, in order to bring about reals equality. Such affirmative action though apparently discriminatory is calculated to produce equality on a broader basis by eliminating de facto inequalities and placing the weaker sections or the community on footing of equality with the stranger and more powerful sections so that each member of the community, whatever is his birth, occupation or social position may enjoy equal opportunity of using to the full his natural endowments of physique, of character and of intelligence.

*"**30.** By abstract application of equality under Article 14, every citizen is treated alike without there being any discrimination. Thereby, the equality in fact subsists. Equality prohibits the States from making discrimination among citizens on any ground. However, inequality in fact without differential treatment between the advantaged and disadvantaged subsists. In order to bridge the gap between inequality in results and equality in fact, protective discrimination provides*

equality of opportunity. Those who are unequal cannot be treated by identical standards. Equality in law certainly would not be real equality. In the circumstances, equality of opportunity depends not merely on the absence of disparities but on the presence of abilities and opportunities. De jure equality must ultimately find its raison d'etre in de facto equality. State must, therefore, resort to protective discrimination for the purpose of making people, who factually unequal, equal in specific areas. It would, therefore, be necessary to take into account de facto inequality in which exists the society and to take affirmative action by giving preferences and making reservation in promotions in favour of the Dalits and Tribes or by "inflicting handicaps on those more advantageously placed", in order to bring about equality, such affirmative action, though apparently discriminatory, is calculated to produce equality on a broader basis by eliminating de facto inequality and placing Dalits and Tribes on the footing of equality with non-tribal employees so as to enable them to enjoy equal opportunity and to unfold their full potentiality. Protective discrimination envisaged in Articles 16(4) and 16 (4-A) is the armour to establish the said equilibrium between equality in law and equality in results as a fact to the disadvantaged. The Principle of reservation in promotion provides equality in results."

"***48.*** *The Judges, therefore, should respond to the human situations to meet the felt necessities of the time and social*

needs; make meaningful the right to life and give effect to the Constitution and the will of the legislature. This Court as the vehicle of transforming the nation's life should respond to the nation's needs, interpret the law with pragmatism to further public welfare to make the constitution broadly and liberally enabling the citizens to enjoy the rights."

***51**. Therefore, it is but the duty of the Court to supply vitality, blood and flesh, to balance the competing rights by interpreting the principles, to the language or the words contained in the living and*
organic Constitution, broadly and liberally. The judicial function of the Court, thereby, is to build up, by judicial statesmanship and judicial review, smooth social change under rule of law with a continuity of the past to meet the dominant needs and aspirations of the present. This Court, as sentinel on the qui vive, has been invested with more freedom, in the interpretation of the Constitution than in the interpretation of other laws. This Court, therefore, is not bound to accept an interpretation which retards the progress or impedes social integration; it adopts such interpretation which would bring about the ideals set down in the Preamble of the Constitution aided by Part III and IV - a truism meaningful and a living reality to all sections of the society as a whole by making available the rights to social justice and economic empowerment to the weaker sections, and by preventing injustice to them. Protective discrimination is an armour to realize distributive justice. Keeping the above perspective in the backdrop of our consideration, let us broach

whether the rights of the employees belonging to the general category are violative of Article 14; inconsistent with and derogatory to right to equality and are void ab initio."

34. That it is humbly submitted that this Hon'ble Court had observed in ***Dr. Jaishri Laxmanrao Patil vs. The Chief Minister 2020 SCC Online 1208***, that the Courts have limited scrutiny on State's power in granting reservation wherein the State had compelling reasons to do so based on quantifiable data.

*"**129**. The observation was made in paragraph 4, as noted above, that the Constitution Bench in M. Nagaraj has laid down that if a State wants to exceed 50% reservation, then it is required to base its decision on a quantifiable data, which is clear misreading of judgment of the Constitution Bench in M. Nagaraj. In M. Nagaraj, the Constitution Bench has not laid down any proposition to the effect that 131 if a State wants to exceed 50% reservation, then it is required to base its decision on the quantifiable data."*

*"**173.** In Ashoka Kumar Thakur vs. Union of India, (supra), Justice Dalveer Bhandari has also laid down that the balance should be struck to ensure that reservation would remain reasonable. We are of 151 the considered opinion that the cap on percentage of reservation as has been laid down by Constitution Bench in Indra Sawhney is with the object of striking a balance between the rights under Article 15(1) and 15(4) as well as Articles 16(1) and 16(4). The cap on percentage is to achieve principle of equality and with the*

object to strike a balance which cannot be said to be arbitrary or unreasonable."

"181. *The submission of Shri Kapil Sibal that the judgment of Indra Sawhney is shackle to the legislature in enacting the law does not commend us. When the law is laid down by this Court that reservation ought not to exceed 50% except in extraordinary circumstances all authorities including legislature and executive are bound by the said law. There is no question of putting any shackle. It is the law which is binding on all."*

*"**232.** The above observation regarding quantifiable data was in relation to enabling power of the State to grant reservation in promotion to the Scheduled Caste and Scheduled Tribes. It is further relevant to notice that in the last sentence of paragraph 123 it is stated: "It is made clear that even if the State has compelling reasons, as stated above, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling limit of 50% or obliterate the creamy layer or extend the reservation indefinitely."*

*"**275.** The grant of reservation under Article 15(4) or 16(4) either by an executive order of a State or legislative measures are Constitutional measures which are contemplated to fulfill the principle of equality. The measures taken under Article 15(4) and 16(4) thus, can be examined as to whether they violate any constitutional principle, are in conformity with the rights under Article 14, 15 and 16 of the Constitution. The scrutiny of measures taken by the State either executive or*

legislative, thus, has to pass test of the constitutional scrutiny. It is true that the Court has to look into the report of the Commission or Committee with deference but scrutiny to the extent as to whether any constitutional principle has been violated or 238 any constitutional requirement has not been taken into consideration is fully permissible. As laid down in V. Balram case (supra) the judicial scrutiny is also permissible as to whether from the material collected by the Commission or committee the conclusion on which the Commission has arrived is permissible and reasonable. We are conscious of the limitation on the Court's scrutiny regarding factual data and materials collected by the Court. We without doubting the manner and procedure of collecting the data shall proceed to examine the report on the strength of facts, materials, and data collected by the Commission."

35. The Petitioners have also pleaded that rules of the game have been altered after the game has started. Interestingly the rule with regard to applicability of reservation as found in clause 11 of the information bulletin states that "it is as per the norms of GOI and State and prevailing at the time of **counselling**". The stage of counselling has not reached and therefore therefore said stand is misconceived. Clause 11 reads as follows:-

11.1 Reservation of PG seats shall be as per the norms of the government of India and respective state governments as may be applicable

11.2 A Separate handbook informing details of the counselling process and applicable reservation ***shall be released by the designated counselling authority for NEET PG 2021***.

Therefore, the rules of the game itself clearly state that the reservations as prevailing at the time of counselling will apply.

36. Further reservations for OBCs are given in DNB seats for PG courses also by the Union Government all these years and the Petitioners have not chosen to challenge the same. The judgment in **Dr Perit Sharma and others Vs Dr Bilu BS and others 2020 SCC Online SC 961** is relating to in-service reservations and the facts are entirely different which cannot be cited as a binding precedent.

37. It is submitted that much arguments were made that no reservations be provided at the level of super speciality course in view of the ratio laid down in Preethi Srivatsa & another Vs State of MP (1999 (7)SCC page 120). This ratio is doubtable after the judgment of this Hon'ble Court in 2003 (11)SCC Page 146 paragraph 63 in the case of Saurabh Chaudhary Vs Union of India and after the 93rd Constitutional Amendment and enactment of "The Central Educational Institutions (Reservations in Admissions) Act 2006". The CEI Act exempt the application of reservations only to the institutions of excellence, research institutions, and institutions of national and strategic importance specified in the schedule to the Act, Minority Educational Institutions as referred to under section 4 of CEI Act. Interestingly AIIMS, JIPMER are providing reservations in

super speciality courses. The Union provides TN State reservations of 69% in Tamilnadu for DNB courses offered by it.

38. One of the grounds urged before this Hon'ble Court is that reservations cannot be granted by the Union under the impugned Notice and should be by way of a law enacted by Parliament. This argument is without reference to Art 15(4) and 15(5) of the Constitution and the judgment of this Hon'ble Court in Indra Sawhney's case which upheld reservations granted through Office Memorandum to OBCs.

39. The petitioners had challenged the reservation policy under the Notice dated 29.07.2021 for this academic year alone and there is no legally tenable grounds as to why the reservation should be denied for this year alone.

40. It is therefore prayed that this Hon'ble Court may be pleased to dismiss the above Writ Petition in so far as it challenges the OBC reservations of 27% and pass such or further as this Hon'ble court may deem fit and proper and thus render justice.

SETTLED BY :

Mr.P.WILSON SENIOR ADVOCATE, **FILED BY :**

[redacted]

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