IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Original Side

BEFORE:-

THE HON'BLE JUSTICE TAPABRATA CHAKRABORTY

THE HON'BLE JUSTICE RAJASEKHAR MANTHA

WPO 60 of 2011
AMAL CHANDRA DAS
-VERSUS-
THE STATE OF WEST BENGAL AND OTHERS
With
WPA 22145 of 2010
NILMADHAB KARMAKAR
-VERSUS-
THE STATE OF WEST BENGAL AND OTHERS
WPA 8844 of 2020
AATMADEEP
-VERSUS-
THE STATE OF WEST BENGAL AND OTHERS
With
WPO 1160 of 2013
PURABI DAS
-VERSUS-
THE STATE OF WEST BENGAL AND OTHERS
With
WPO 578 of 2012
AMAL CHANDRA DAS
-VERSUS-
THE STATE OF WEST BENGAL AND OTHERS

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Hearing Concluded On : 09.05.2024

Judgment On : 22.05.2024

Rajasekhar Mantha J.

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I. FACTS OF THE CASE

1. The present batch of Public Interest Litigations (PILs) challenge the identification and classification of 77 classes as Other Backward Classes (OBCs) in the State of West Bengal. The said 77 classes were declared OBC by seven Executive Orders/Memoranda issued between 5th March 2010 and 11th May 2012, by the State. The petitioners also challenge the constitutional vires of some provisions of West Bengal Backward Classes, (Other than SC and ST) (Reservation in Posts) Act of 2012.

2. In the judgment in the case of ***Indra Sawhney and Ors. Union of India and Ors.*** reported in ***1992 Supp (3) SCC 847*** the process of identification, declaration, classification and reservation for Other Backward Classes other than SCs and STs was clarified and streamlined. All States and the Central Governments were directed to set up a Tribunal or Commission to aid and assist in the identification of OBCs for reservation and or special benefits under Article 16(4) of the Constitution of India.

3. Accordingly, the **West Bengal Commission for Backward Classes Act of 1993** **(hereinafter referred to as the Act of 1993)** was enacted by the State legislature. Under Section 3 of the said Act, The

West Bengal Commission for Backward Classes (hereinafter referred to as the 'Commission', was constituted under the said Act. The Commission was empowered to identify backward classes in the State and make recommendations to the State. It was invested with the powers of a Civil Court in its functioning and was empowered to regulate its own procedure. It was to hear, complaints of over-inclusion and under-inclusion of classes as OBCs. It was also empowered to advise the State even suo moto, as it deemed fit.

4. In terms of Section 9(2), the recommendations of the Commission were declared "Ordinarily binding on the State. In terms of Section 11(1) and (2), the State is mandated to revisit and revise the OBC lists on the expiry of every 10 years, and while undertaking such revision, the State was required to consult with the Commission.

5. Between 1994-2009 (15 years), on the recommendation of the Commission, the State included 66 classes as OBCs which comprised in both Hindu(54) and Muslim (12) Communities.

6. A Newspaper report dated 8th February 2010 (a year before the assembly elections in the State), indicates that the then Chief Minister of the State announced a 10% reservation in government jobs for the Muslim community. This has not been denied by the respondents.

7. Pursuant thereto in the year 2010, the State, by a slew of Notifications viz. Memo no. 771- BCW/MR436/1999 dated 5th March 2010, Memo no. 1403- BCW/MR-436/99(1) dated 26 April 2010, Memo no. 1639-BCW/MR-436/1997 dated 14th May 2010, Memo No. 1929-

BCW/MR436/99(1) dated June 2, 2010, Memo no. 2317- BCW/MR-436/99 dated July 1, 2010, Memo no. 5045-BCW/MR- 436/99(1) dated August 31, 2010, Memo no. 6305-BCW/MR- 436/99(1) dated September 24. 2010, issued by the Principal Secretary, Government of West Bengal, Backward Classes Welfare Department, included **42** classes, of which **41** were from the Muslim community as OBCs, entitling them to reservation and representation in Government Employment under Article 16 (4) of the Constitution of India. Each of the said notifications were similarly worded. The text of one such notification is set out below:-

> *"WHEREAS "Backward Classes" have been defined in clause (a) of section 2 of the West Bengal Commission for Backward Classes Act, 1993 (West Ben. Act I of 1993) (hereinafter referred to as the said Act), for the purpose of the said Act, to mean such backward classes of citizens other than the Scheduled Castes and Scheduled Tribes as may be specified by the State Government in the list;*
> *AND WHEREAS "Lists" have been defined in clause (c) of section 2 of the said Act to mean lists prepared by the Government of West Bengal from time to time for the purposes of making provisions for appointments or posts in favour of backward classes of citizens, which in the opinion of that Government are not adequately represented in the services under the Government of West Bengal and any local or Other Statutory authority within the territory of West Bengal or the Control of the Government of West Bengal;*
> *Now, THEREFORE, in pursuance of the provisions of clause (a), read with clause (c) of section 2 and sub-section (2) of section 9 of the said Act, and in continuation of Notification No. 1929-BCW dt. 2nd June, 2010, the Governor is pleased hereby to specify further, in the list below the Backward Classes for the purposes of the said Act.*
> *"NOW, THEREFORE, in pursuance of the provisions of clause (a) read with clause (c) of section 2 and subsection 2 of section 9 of the said Act, and in continuation of Notification no. 861-BCW dated 1st March 2005, the Governor is pleased hereby to specify, further in the list below the Backward Classes for the purposes of the said Act"*

8. On 24th September 2010, the State issued **memo no.6309- BCW/MR-84/10 dated 24.09.2010**, Sub-Categorizing the OBCs into two categories i.e. **56** Classes as OBC-A(more Backward) and **52** Classes as OBC-B(Backward). The said notification is set out hereunder:

"WHEREAS "backward classes" have been defined in clause (a) of section 2 of the West Bengal Commission for Backward Classes Act, 1993 (West Ben. Act 1 of 1993) (hereinafter referred to as the said Act), for the purposes of the said Act, to mean such backward classes of citizens other than the Scheduled Castes and Scheduled Tribes as may be specified by the State Government in the lists;
AND WHEREAS "lists" have been defined in clause (c) of section 2 of the said Act to mean lists prepared by the Government of West Bengal from time to time for purposes of making provisions for the reservation of appointments or posts in favour of backward classes of citizens which, in the opinion of that Government, are not adequately represented in the service under the Government of West Bengal, local and statutory authorities constituted under any State Act, Corporations in which not less than 51% of the paid up share capital is held by the State Government, Universities, Colleges affiliated to the Universities, primary, secondary and higher secondary schools and also other educational institutions which are owned or aided by the State Government and also establishments in public sector;
AND WHEREAS, the Government of West Bengal has decided to categorize the Backward Classes included in the list into two categories depending on their relative backwardness and make separate provision for reservation in services and posts in favor of the two categories' "
AND WHEREAS the Government of West Bengal has conducted a sample Survey to ascertain the relative backwardness of the classes included in the list of backward classes and the reports of the said survey have duly been received;"

9. The first Writ Petition being WPO 60 of 2011 (Amal Chandra Das v. The State of West Bengal and Ors) was filed on 18th January, 2011, praying for the following reliefs:-

"In the facts and circumstances as aforesaid, your petitioner, therefore, most humbly prays that your Lordships may graciously be pleased to:-
A) A writ of and/or in the nature of mandamus commanding the respondents to forthwith set aside/ recall and/or rescind the Memo no. 771-BCW/MR- 436/1999dated Kolkata The 5th March, 2010, Memo no. 1403-BCW/MR- 436/99(1) dated Kolkata, The 26th April, 2010, Memo no. 1639-BCW/MR- 436/1999 dated Kolkata The 14th May, 2010, Memo No. 1929-BCW/MR- 436/99(1) dated Kolkata The June 2, 2010, Memo no. 2317-BCW/MR-436/99 dated Kolkata The July 1, 2010, Memo no. 5045-BCW/MR-436/99(1) dated Kolkata August 31, 2010, Memo no. 6305-BCW/MR-436/99(1) dated Kolkata The September 24, 2010, issued by the Principal Secretary, Government of West Bengal, Backward Classes Welfare Department, Writers Buildings, Kolkata 700 001 being annexure P-6 series to this application
B) A writ of and/or in the nature of mandamus commanding the respondents to forthwith set aside, recall and/or rescind the Memo no.

6309-BCW/MR-84/10 dated Kolkata September 24, 2010 issued by the Principal Secretary, Government of West Bengal Backward Classes Welfare Department, Buildings, Kolkata Writers 700 001 being annexure P-8 to this application

C) A writ of and/or in the nature of mandamus commanding the respondents to forthwith set aside, recall and/or rescind Memo no. 6312- BCW/MR-84/10, Kolkata The September 24, 2010 issued by the Principal Secretary, Government of West Bengal Backward Classes Welfare Departinent, Writers Buildings, Kolkata 700 001 being annexure P-10 to this application

D) A writ of and/or in the nature of mandamus commanding the respondents to forthwith set aside, recall and/or rescind Memo no. 6320- BCW/MR-84/10 dated Kolkata The September 24, 2010 issued by the Principal Secretary, Government of West Bengal Backward Classes Welfare Department, Writers Buildings, Kolkata -700 001 being annexure P-11 to this application.

E) A writ of and/or in the nature of Certiorari commanding the respondents to produce the records of the case so that conscionable justice may be administered by quashing the aforesaid memos issued by the Principal Secretary, Government of West Bengal Backward Classes Welfare Deparument, Writers Buildings, Kolkata 700 001 being annexures P-6 series, P-8, P-10 and P-11 to this application.

F) RULE NISI interms of prayer (A) to (E) above.

G) Interim order restraining the respondents from giving any effect / further effect to the Memo no. 771- BCW/MR-436/1997dated Kolkata The 5th March, 2010, Memo no 1403- BCW/MR-436/99(1) dated Kolkata, The 26th April, 2010, Memo no. 1639- BCW/MR-436/1999 dated Kolkata The 14 May, 2010, Niemo-No. 1929- BCW/MR-436/99(1) dated Kolkata The June 2, 2010, Memo no. 2317-BCW/MR-436/99 dated Kolkata The July 1, 2010, Memo no 5045-BCW/MR- 436/99(1) dated Kolkata August 31, 2010, Memo no. 6305-BCW/MR- 436/99(1) dated Kolkata The September 24, 2010, issued by the Principal Secretary, Government of West Bengal, Backward Classes Welfare Department, Writers Buildings, Kolkata 700 001 being annexure P-6 series to this application

H) interim order restraining the respondents from giring any effect / further effect to the Memo no. 6309- BCW/MR-80/10 dated Kolkata September 24, 2010 issued by the Principal Secretary, Government of West Bengal Backward Classes Welfare Department, Buildings, Kolkata Writers 700 001 being annexure P-8 to this application

I) interim order restraining the respondents from giving any effect / further effect to the Memo no. 6312- BCW/MR-84/10. Kolkata The September 24, 2010 issued by the Principal Secretary, Government of West Bengal Backward Classes Welfare Department, Writers Buildings, Kolkata 700 001 being annexure P-10 to this application

J) interim order restraining the respondents from giving any effect / further effect to the Memo no. 6320- BCW/MR-84/10 dated Kolkata The September 24, 2010 issued by the Principal Secretary, Governme it of West Bengal Backward Classes Welfare Department, Writers Buildings, Kolkata 700 001 being annexure P-11 to this application

K) Pass ad-interim orders in terms of prayer (G) to(J) above;

> *L) To pass such other or further order or orders as Your Lordships may deem fit and proper.*
> *M) And your petitioner, as in duty bound, shall ever pray"*

10. In the said writ petition the declaration of **42** classes as OBCs was challenged for being based purely on religion. It was also contended that the categorization is not based on any acceptable data that the survey conducted by the Commission was unscientific and a pre-fabricated hat was made to fit the head.

11. By an application under the RTI Act 2005 dated 6th December 2010, the Writ Petitioner asked the Commission whether the Commission was consulted by the State before including the 42 Classes as OBCs as done before issuance of the earlier Notifications of 2010. The Commission was also asked to supply copies of the application of each community, the number of sittings and the dates thereof, held by the Commission before the recommendation of the said classes. The Commission was also asked to supply copies of the minutes of its meetings. Copies of the recommendations of the Commission were also asked for.

12. In a reply dated 3rd January 2011 the Commission stated that it had made recommendations to the State in respect of the 42 classes. The dates of the respective applications were however not provided. The minutes of the meetings of the Commission were also not supplied. It was stated that the documents could not be supplied without the consent of the Backward Classes Welfare Department of the State.

13. By another application under the RTI Act, 2005 dated 9th December 2010 the Commission was asked to inform the Criteria and procedure for identification of the said 42 classes as OBCs.

14. In reply thereto, the Commission vaguely stated that the Criteria applied by the Commission "were the social indicators as transpired from the hearing of the representatives of the Communities on pre-scheduled dates and field level feed backs". The recommendations were Stated to be based on unanimous resolutions of the Commissions sent to the Backward Classes Welfare Department of the State.

15. By a separate 2nd RTI Application dated 9th December 2010, the petitioner asked the Commission, whether the sub-categorization by the State on 24th September 2009 was done in consultation with the Commission. The Commission stated that **it was not consulted** *as it was not within the purview of the Commission at the relevant point of time.*

16. On the 11th May 2012, a further **Memorandum No. 1673-BCW/MR-209/11** was issued by the State of West Bengal, whereby **35** classes were categorized as backward classes and further sub-categorized into OBC Category A and OBC Category B. Thirty-four **(34)** of such Classes were from the Muslims community. The relevant extract of the memo is set out hereunder:-

> *"WHEREAS "Backward Classes" has been defined in clause (a) of Section 2 of the West Bengal Commission for Backward Classes Act, 1993 (West Bengal Act 1 of*

1993) (hereinafter referred to as the said Act), for the purposes of the said Act, to mean such backward classes of citizens other than the Scheduled Castes and the Scheduled Tribes as may be specified by the State Government in the list;

AND WHEREAS "lists" have been defined in clause (c) of Section 2 of the said Act to mean lists prepared by the Government of the West Bengal from time to time for the purposes of making provision for the reservation of appointments or posts in favour of backward classes of citizens which, in the opinion of that Government, are not adequately represented in the services under the Government of West Bengal and any local or other authority constituted under any State Act, corporations in which not less than 51% of the paid up Share Capital is held by the State Government universities, colleges affiliated to the universities, primary, secondary & higher secondary schools and also other institutions which are owned or aided by the State Government and also establishments in public sector.

Now, THEREFORE, in pursuance of the provisions of clause (a), read with clause (c) of Section 2 and sub-section (2) of section 9 of the said Act, and in continuation of Notification No: 6305-BCW, dt. September 24, 2010, the Governor is pleased hereby to specify, further, in the list placed below the Backward Classes for the purposes of the said Act. Further, the Government of West Bengal has conducted a sample survey to ascertain the relative backwardness of the classes to be included in the list of backward classes and the reports of the said survey has duly been received. Accordingly in consideration of the report of the survey, and in continuation of Notification No. 6309-BCW, dt. September 24, 2010, the Governor is also pleased to categorise the specified classes into OBC Category-A and OBC Category-B as per details below:-"

17. In a **second writ petition** being W.P.No.578 of 2012 (Amal Chandra Das Vs State of West Bengal and Ors) challenge was made to the inclusion of 35 classes as well the sub-categorization, effected by the executive notification of May 11th, 2012, and the following reliefs were prayed for:-

> *"A writ of and/or in the nature of manadamus commanding the respondents to forthwith set aside and/or to recall and/or rescind the* ***Memo no. 1673- BCW/MR-209/11 dated May 11, 2012*** *issued by the Principle Secretary, Government of West Bengal, Backward*

> *Classes Welfare Department, Writers Buildings, Kolkata 700 001 being annexure "P-10" to this application.*
>
> *A writ of and/or in the nature of certiorari commanding the respondents to produce the record of the case so that the conscionable justice may be administered by quashing the **Memo No. 1673-BCW/MR-209/11** dated May 11, 2012 being annexure "P-10" to this application."*

18. By a Gazette Notification dated **25th March 2013,** the state published the **West Bengal Backward Classes (OTHER THAN SCHEDULE CASTES AND SCHEDULE TRIBES) (RESERVATION OF VACANCIES AND POSTS) ACT of 2012 (hereinafter referred to as the 'Act of 2012')** that was passed by the State Legislature. SCHEDULE-I of the said Act of 2012 carved out two categories of OBC A (More Backward) and OBC B (Backward). The 77 OBC Classes, which were previously classified and sub-classified by executive notifications/ memoranda mentioned hereinabove, were incorporated in the schedule.

19. A 100-point roster was created in Schedule III to the said Act of 2012 and was to be applied in all recruitment to all government services. Section 19 of the said Act provided that all the earlier OBC classifications made under the previous executive orders would be deemed to have been made under the said Act 2012.

20. A third writ petition being W.P. No, 1160 of 2013 (Purabi Das and Anr.v.State of West Bengal and Ors) was filed challenging the constitutional validity of Sections 2(h), 5, 6, Schedules I and III of the Act of 2012. The following prayers were made:-

> *"a) To issue a Writ of or in the nature of mandamus commanding the Respondents to cancel or set aside or rescind and/or recall or with draw or for bear from giving any effect or further effect to the*

*notification **bearing no. 6305- BCW/MR-436./99(1) All dated 6309-BCW/MR-84/10 and 6312- B.C.W. MR-84/10 all dated 24.9.2010.** And further abstain from issuing any notification, Govt. order seeking to make any reservation for any special class or community in transgression of the recommendation of Mondal Commission.*

b) To issue a Writ of or in the nature of prohibition commanding the respondent to refrained from giving any effect to the said (& ratification of 24th September 2010 issued by the Principal Secretary Backward Classes Welfare Dept., Govt. of West Bengal.

c) To issue a Writ of or in the nature of certiorari commanding to certify and transmit the record of the case to the Learned Register of the Appellate side of this court so that same my placed before and questioned by your Lordships for dispensation of conscionable relief to the petitioner."

21. A fourth writ petition-W.P.No. 8844 of 2020 (ATMADEEP Vs State of West Bengal and Ors.) was thereafter filed by an NGO for the upliftment of society and protection of Human Rights before a Single Bench of this Court challenging Section 2(h) and Schedule I of the Act of 2012.

*"a) To issue a Writ of or in the nature of mandamus commanding the Respondents to cancel or set aside or rescind and/or recall or with draw or for bear from giving any effect or further effect to the **notification bearing no. 6305- BCW/MR-436./99(1) All dated 6309-BCW/MR-84/10 and 6312- B.C.W. MR-84/10 all dated 24.9.2010**. And further abstain from issuing any notification, Govt. order seeking to make any reservation for any special class or community in transgression of the recommendation of Mondal Commission.*
b) To issue a Writ of or in the nature of prohibition commanding the respondent to refrained from giving any effect to the said (& ratification of 24th September 2010 issued by the Principal Secretary Backward Classes Welfare Dept., Govt. of West Bengal.

c) To issue a Writ of or in the nature of certiorari commanding to certify and transmit the record of the case to the Learned Register of the Appellate side of this court so that same my placed before and questioned by your Lordships for dispensation of conscionable relief to the petitioner.

d) To issue rule NISI in terms of prayer a, b, c and make the same also write after perusing the record of the case and hearing both the sides in due cases.

e) To issue interim order in terms of prayer C till disposal of the rule.

f) To pass an under of injunction restraining the respondents from acting upon or in furtherance of above mentioned notifications dated 24th September 2010 issued by

> *Principal Secretary, Backward Class Welfare and Minority Class Dept, Govt. of Best Bengal."*

22. All the four writ petitions were tagged and heard together.

II. ARGUMENTS OF THE PARTIES:-

A. Submissions of the petitioners:-

23. Mr. G. Krishna Kumar, Learned Senior Counsel for the Petitioners would argue as follows:-

I. The executive notifications of the year 2010 classified and sub-classified 42 classes of people, 31 of whom were all Muslims. This is unconstitutional since a classification under 16(2) (4) based solely on religion is ex-facie barred. Reference is made to paragraphs 782 and 859(3)(b) of the ***Indra Sawney case*** and paragraphs 133, 134, and 142 of the ***T. Muralidhar Rao v. State of AP*** reported in ***AP (2004) SCC Online AP 717.***

II. Backwardness under Article. 16(4) is wider than that of Article. 15(4), as the former does not qualify the word 'backwardness', like the latter does. Article. 16(4) mandates that a class identified as backward must also be inadequately represented in State services. The Commission and the State have not addressed either or any of the twin tests effectively or at all.

III. The Act of 1993 and the dicta of the Supreme Court have been given a complete go-by by the State in clarifying OBCs under the subject notifications and Act of 2012, since the reports of the Commission are not Stated to have been factored in nor are referred to. The

recommendation for the classification of the 77 classes is made in undue haste. The classification is unscientific.

IV. Section 2(h) Act of 2012 confers the power of identifying OBC(s) simultaneously to the State executive and State legislature. The said Section excludes the role of the Commission in such identification. Hence, the said Section needs to be struck down as being violative of para 14 of ***Ram Singh Vs Union of India and Ors.*** reported in ***(2015) 4 SCC 697,*** which referred to paragraph 847 of the ***Indra Sawhney Case (Supra).***

V. Section 9(2) of the Act of 1993 says that the advice of the Commission will ordinarily be binding upon the State. Such advice from the Commission cannot be mechanical and must be based on acceptable scientific and identifiable data. No such data is placed before the Court.

VI. The data of the Commission and its methodology are unscientific. Yet recommendations have been made based on such inadequate data. The Commission appears to have been required to meet a political deadline set by the government. The classification therefore appears to have been done for political reasons. Such exercise of power by the State defeats the object and purpose behindArticle. 16(4). Reference is made to **paragraph 609** of the ***Indra Sawhney Case (Supra).***

VII. Using Caste or Religion as a starting point to identify backwardness may be permissible but they cannot be the sole criteria for such identification. A large number of other factors are required to be

taken into consideration to qualify as a backward class within the meaning of Articles 16(2) and 16 (4) of the Constitution. Reference in this regard is made to paragraphs 44,45,99,242(3) 779,780 781,782,784 795 to 798 of the ***Indra Sawhney (Supra).***

VIII. The Commission and State have focused only on the Muslim community for identification, which is illegal as per the dicta laid down in paragraphs 133 and 134 of the decision in the case of ***T. Muralidhar Rao (Supra).***

IX. The Commission has in some cases recommended that a class as backward because its Hindu counterpart is classified as Scheduled Caste (SC). This is illegal because SC and OBC categories cannot be equated.

X. The Commission has not compared the representation of the said 77 classes in the State service with the unreserved category classes, to ascertain whether the 77 classes are inadequately represented. This is illegal in view of the law expounded in paragraphs **609, 784, 798, 807** of the ***Indra Sawhney decision (Supra).***

XI. The State can decide as to what percentage of representation could be considered adequate, but it should be based on objective criteria, as explained in paragraphs 102 and 112 of the ***M. Nagraj and Orsv. Union of India*** reported in ***(2006) 8 SCC 212.*** The adequacy of representation of the said 77 classes in the State services was never properly considered by the Commission or the State.

XII. The Commission's affidavit disclosed that only 5% of the population has been surveyed to identify 77 classes, but according to paragraph **782** of the ***Indra Sawhney case (Supra)***, the entire population of the respective classes should have been surveyed.

XIII. The inquiry by the Commission should have been conducted through public hearings. The documents disclosed by the Commission do not indicate any such public notice or public hearings. Therefore, the documents of the Commission referred to in the affidavit and available on its website cannot be relied upon as bonafide.

XIV. The sub-classification of the 77 classes was admittedly done without consulting the Commission. This is ex-facie illegal and in violation of the Act of 1993 and the law declared by the Supreme Court. Reliance on the executive summary report of the Department of Anthropology of the University of Calcutta, by the State for this sub-classification is illegal because the said department is not statutorily authorized to conduct such studies. Reference in this regard is made to paragraph 802 of the ***Indra Sawhney Case (supra),*** paragraph 65 of the judgement of ***Chelameswar J in T Murlidhar Rao (Supra),*** and paragraphs 97 and 98 of the case of ***PMK Vs A. Meyilerumperumal*** reported in ***(2023) 7 SCC 481.***

XV. The executive summary report, found on page 31 of the opposition to W.P. 60 of 2012, reveals that the sub-classification of the 77 classes began with and was based on the backwardness of members of the Muslim Community. The Commission had (albeit illegally) already

identified the 77 classes of such religious background as Backward. The Executive summary of a department of the University of Calcutta was itself therefore redundant and irrelevant. The said executive summary was therefore used to avoid the involvement of the Commission in the process of Sub-Classification.

XVI. Once there is evidence of illegality and impropriety in the identification process, the onus shifts on the State to justify the inclusion of the classes under 16(4) in terms of the dicta in point Nos. a, b, and c of Para 204 of the decision of ***T. Muralidhar Rao Vs State of AP*** reported in ***2010 SCC Online 69.*** Paragraphs 44, 45, 99, 174, 176, 242(3), 609, 779, 780, 781, 782, 784, 795 to 798, 859 (3) (b) of ***Indra Sawhney (Supra).***

XVII. The definition of OBC under Section 2(h) and of the 2012 Act is illegal as it gives power to the Legislature to declare OBCs without consultation with the Commission. It also gives parallel and excessively delegates power to the Executive to declare OBCs. This is in derogation of Article 213 of the Constitution. Sections 2(f) and 16 of the 2012 Act are illegal for the same reason since they empower the executive parallelly with the legislature, to prepare lists and make provisions for reservation for OBCs in services of the State even without consulting the Commission.

XVIII. Section 5 of the 2012 Act is ultra vires and illegal in as much as it empowers the legislature and executive to sub-classify the OBCs

without consultation with the Commission. Such sub-clarification has been done illegally under section 5(i) of the said Act.

24. The State and Commission filed a composite affidavit in opposition to W.P. 1160 of 2013 and it was affirmed by an officer of the State. Collusion and illegal and unholy nexus between the Commission and State is writ large even before this court. The Commission has therefore clearly admitted to having acted and made recommendations of classes as OBCs at the dictates of the State.

25. Learned Advocate General has led arguments for the State and the Commission made submissions separately. The National Commission for Backward Classes has made submissions after being added as a party respondent in the course of the hearing of these writ petition.

B. Submissions of the State

26. Learned Advocate General Mr. Kishore Dutta for the State has argued as follows:-

I. The issues raised by the petitioners cannot be agitated as a PIL. Hence the writ petitions are not maintainable. It is submitted that the Calcutta High Court amended its rules on Public Interest Litigation (PIL) on 23rd August 2010 in compliance with the decision of the Supreme Court in ***State of Uttaranchal v. Balwant Singh Chaufal and Ors.*** reported in ***(2010) 3 SCC 402***. In terms of Rule 56 thereof, PILs can be filed in respect of addressing issues that affect the public, and any actual harm caused to any group of persons or persons, who cannot approach the Court. However, the

current set of PILs do not meet the criteria under definition because they do not show how the public is affected or who is impacted by the classification and sub-classification, made by the State.

II. The exception to Rule 56 allows individual cases to be considered as PILs if the issues raised affect a larger populous. The present cases do not meet that criterion either. So, they do not qualify as PILs.

III. **Section 9(1) of the 1993** Act allows any citizen to file an application/complaint with the Commission regarding inclusion or over-inclusion. Hence, the petitioners have a statutory forum to address their concerns. Hence grievances raised cannot be entertained under Article. 226 given the decision of ***Guruvayur Devosam M.C. v. C.K. Rajan and Ors.*** reported in ***(2003) 7 SCC 546*** paragraphs 58-60 and 8.

IV. On merits, Learned Advocate General submits that the petitioners have not specified which classes of citizens should have been included in the OBC list but weren't. So the grievance against inclusion of the said classes should not be entertained.

V. Section 9(2) of the 1993 Act prescribes that the recommendation of the Commission is 'ordinarily binding' on the State. This means consulting the Commission is a mere procedural step and not a mandatory requirement before the State makes any inclusions or sub-classifications.

VI. Counsel for the writ petitioners has not argued that the 2012 Act is beyond the State's legislative authority or in violation of any

fundamental rights. So, the challenge to the vires of the Act 2012 cannot be raised or entertained. Reliance is placed on the case of ***Public Service Tribunal Bar Association v. State of UP*** reported in ***(2003) 4 SCC 104.***

VII. Since the classification and sub-classification under 16(4) are in the nature of service matters/issues, a PIL cannot be filed given the decisions of ***Madan Lal v. High Court of J&K reported in (2014) 15 SCC 308*** in paragraphs 8-10 and ***Bholanath Mukherjee v. Ramakrishna Mission Vivekananda Centenary College*** reported in ***(2011) 5 SCC 464*** in paragraph 31.

VIII. A case of Fraud on the Constitution could be made out only if there is no legislative competence. The only argument that may be raised, if at all, is fraud in the exercise of power. Reliance has been placed on points p, q, and r of Para 153 of the case of ***S. S. Bola and Ors. v. B. D. Sardana*** reported in ***(1997) 8 SCC 522.***

IX. The Sachar Committee report has painstakingly and in great detail recorded the backwardness of the Muslim community with data. Hence, the State is not wrong in including the classes of Muslims as OBCs. Any impropriety of the Commission in recommending the said 77 classes is immaterial since the State's inclusion stands supported by the findings of the Sachar Committee report. In this regard, reference has been made to pages 2, 5, 189, 190, 195, 204, 213, 237, 251, and 252 of the said report.

X. Nobody has any vested right in any procedure. The Act of 1993 envisages a procedure to be followed by the State. Therefore even if the Commission and State may not have strictly followed the procedure, the inclusion of the 77 classes as OBCs made by the State cannot be challenged on the grounds of procedural impropriety.

XI. On the question of why section 2(h) of the Act of 2012 does not refer to the role of the Commission, in defining the OBC, it is argued the Act of 2012 is for declaring and listing out OBCs. On the other hand, the Act of 1993 is for enabling the Commission to identify such classes. Section 2(h), therefore, has not bypassed the Act of 1993

XII. The court must presume the Constitutionality of every statute and the legality of every official Act. Since the petitioners have not shown any class, who is prejudiced by the inclusions, the writ petitioners have failed the rebut such presumption.

XIII. On the question of why the sub-classification has been effected without consulting the Commission, he argued that the State wanted the expertise of a higher level than that of the Commission. Hence, the State obtained a survey report from the Department of Anthropology of the University of Calcutta, regarding the relative backwardness of the subject classes.

XIV. The central list for the OBC, as applicable in West Bengal, includes 36 classes out of the 77 classes. Hence, the inclusion of classes by

the State in the State list stands fortified by a concurrence of the National Commission for Backward Classes.

C. Submissions of the West Bengal Commission for Backward Classes

27. Learned Assistant Advocate General, Mr Samrat Sen, appearing for the West Bengal Commission for Backward Classes, would argue as follows:-

a) The paragraph no. 847 of ***Indra Sawhney (Supra)*** directed the constitution of the Commission, inter alia, under Article 16(4). It is by the enactment of the Act of 1993 that the Commission has been constituted. Therefore the jurisdiction and powers of the Commission must be considered only within the Act of 1993.

b) Section 9 of the Act of 1993 pre and post-amendment indicates that the Commission cannot act suo moto in matters of inclusion, under-inclusion, and over-inclusion of a class. The Commission can only act either on the request of a citizen or a reference made to it by the State under subsections 2 and 3 of the amended section 9. The Commission does not have suo moto powers to act on its own. In the present case, the petitioners have not filed any complaint as regards the over-inclusion of any class before the Commission. Hence the Commission did not have occasion to reopen any classes in the lists of the State to assess over-inclusion or under-inclusion.

c) Section 9 of the Act of 1993 was amended to clarify that the State is also empowered to request the Commission to consider the desirability of inclusion and exclusion of a class. The amendment

made to Section 9, is clarificatory in nature and has not given any new meaning nor has it expanded its scope.

d) A fundamental right to continue in services under the state has been conferred in favour of the 77 classes consequent upon their classification and sub-classification as OBCs and OBC-A & B. Therefore the said classes have a right to be heard in the present proceedings. The petitioners however have not impleaded such classes. The writ petitions are therefore bad for non-joinder of necessary parties.

e) The petitioners have not filed any complaint with the Commission alleging over-inclusion. The petitioners did not object to the inclusion of the classes, the Commission was hearing applications for inclusion of the 77 classes. The petitioners are thus estopped from challenging the inclusion of the said classes.

f) A substantial number of classes have been included by the State have also been included in the Central OBC list by the National Commission for the Backward Classes on the recommendation of the State. The National Commission is, therefore, *ad idem* with the State Commission as regards the said classes being OBCs. It is to be noted that a number of such classes from the Muslim community have been recognized as Backward for the purposes of Article 16(4) by the Mandal Commission. Such classes have been included under the Central OBC list on the recommendation of the National Commission, though not included under the State OBC list. The

State Commission has therefore not mechanically recommended the inclusion of the classes from the Muslim community, as alleged by the petitioner.

g) As regards the sub-classification it was submitted that, the Act of 1993 entrusts the Commission with the duty of the identification of the classes only. It was submitted that the Commission specifically instructed the learned Senior Counsel to submit that, the sub-classification was done by the State without consulting the Commission since it does not fall within the Commission's purview to deal with the sub-classification of the OBCs.

h) The Commission did not make any religion-specific recommendations for inclusion since it was not the Commission that approached the classes. It was the classes who approached the Commission with the applications for inclusion. The Commission disposed of such applications in accordance with law. It is merely incidental that a huge chunk of applications came to be filed by the classes belonging to the Muslim community, and the Commission dealt with the same in its usual course of business. It is not for the Commission to suspect the intent of such applications for inclusion on the ground that a majority of the applications are filed by the classes belonging to a particular community.

D. Submissions of the National Commission for Backward Classes.

28. The learned Deputy Solicitor General appearing for the National Commission for Backward Classes would argue as follows:-

I. The State Commission and State have not made public, any criteria, nor have applied any scientific criteria at the time of the identification and classification of the classes in question as OBCs.

II. The West Bengal, Backward Classes Welfare Department of the State proposed the inclusion of 77 classes of the State OBC list to be included under the Central OBC list vide letter No. SBCW- 1571/16 dated 29.08.2016. Thereafter, successive letters no. SBCW-139/MR-37/10 dated 31.05.2018 and No. 744-BCW /MR-37/10 dated 05.03.2020 were written to the National Commission reiterating the same proposal. It is thereafter only, that the National Commission started to ascertain the veracity of the inclusions made by the State in terms of Art. 338B of the Constitution of India. The National Commission conducted an inquiry between February 25, 2023 - February 26, 2023, in respect of such inclusions.

III. During the hearing on 13.09.2023, the representatives of the State requested the National Commission to make recommendations as regards the inclusion of the 87 classes under the Central OBC list whereof 78 were from the Muslim Community and 8 from the Hindu Community. Therefore, a clear pick-and-choose policy was adopted

by the State in making requests for inclusion of the classes under the Central OBC list.

IV. The National Commission conducted a review meeting on February 25, 2023, with the members of the State Commission and Cultural Research Institute, and in such a meeting, a detailed questionnaire was handed over to the State for its reply. The said reply was filed by the Department of Backward Classes Welfare, Government of West Bengal via its letter dated March 16, 2023.

V. The 'Kasai' class, was previously included under the Central OBC list and the State recommended the National Commission to continue with the said class under the Central OBC list. The NationalCommission, however, was of the view that the 'Kasai Class' does not fulfil the criteria for classification as OBC along with a 'Qureshi' Class. The State, however, by a letter dated 15.12.2017, has recommended the National Commission to include the 'Qureshi' Class under the Central OBC list. The National Commission in a discussion with the State representatives, and recorded in minutes has found the 'Qureshi' Class to be an advanced class in every sense of the term.

VI. The NCBC found that a substantial number of classes included under the State OBC list are convertees from the Hindu religion. The State Commission, when called upon to produce data or evidence as regards such conversion, has failed to produce the same. The

National Commission has consequently directed the State to revisit its OBC list qua the said convertees.

VII. The members of the Commission and Cultural Research Institute (CRI) have not been able to provide contemporaneous data as regards the inclusions made by the State. The State has also not been able to put forward any legal or statutory authority of CRI to conduct surveys as regards the identification of the Other Backward Classes.

III. ANALYSIS OF THIS COURT:-

A. MAINTAINABILITY OF THE PILs

29. Having carefully heard Ld. Counsel for the parties and considered the pleadings and documents this Court would like to first address the preliminary issues raised by the Ld. Advocate General on behalf of the State.

i. Rule 56 of the Writ Rules of the Calcutta High Court

30. Rule **56** of the Writ Rules of the Calcutta High Court reads as follows:-

> ***"56. Definition of Public Interest Litigation.*** *- Public Interest Litigation shall include a litigation the subject-matter of which is a legal wrong or a legal injury caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is, by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the Court, for relief, and for redressal of which any member of the public Not having any personal interest in the subject-matter presents an application for an appropriate direction, order or writ in this Court under Article 226.*
>
> *Notwithstanding anything contained above, in any appropriate case, though the petitioner might have moved a Court in his private interest and for redressal of personal grievances, the Court in furtherance of*

the public interest involved therein may treat the subject of litigation in the interest of justice as a public interest litigation."

31. In the ***Balwant Singh Chaufal decision (supra)*** the Hon'ble Supreme Court has held:-

> ***"43****.... We deem it appropriate to broadly divide the public interest litigation in three phases:*
> *Phase I.—It deals with cases of this Court where directions and orders were passed primarily to protect fundamental rights under Article 21 of the marginalised groups and Sections of the society who because of extreme poverty, illiteracy and ignorance cannot approach this Court or the High Courts.*
> *Phase II.—It deals with the cases relating to protection, preservation of ecology, environment, forests, marine life, wildlife, mountains, rivers, historical monuments, etc. etc.*
> ***Phase III.—It deals with the directions issued by the Courts in maintaining the probity, transparency and integrity in governance."***

32. Rule 56 stresses on harm and requires someone harmed, coupled with poverty preventing them from approaching the court for maintaining of a PIL. This aligns with the first phase of Public Interest Litigation (PIL) jurisprudence, but it does not address the other phases, referred to in the ***Balwant Singh Chaufal decision (Supra)*** thereby, limiting the scope of PILs under the High Court Rules.

33. Phase III of PIL mentioned in the ***Chaufal decision (Supra)*** addresses the lack of transparency in governance. It allows citizens to go to court when their leaders act improperly. It is aimed at ensuring eternal vigilance. This species of PILs aim to achieve transformative Constitutionalism, to empower courts to ensure full justice and prevent procedural and manifest arbitrariness.

34. The petitioners claim that the process of identification of OBCs was dishonest and violated Article 16(4) of the Constitution. They argue that the Commission and State acted malafide in their

recommendations, resulting in a flawed list of OBCs, classified for extraneous reasons namely political/electoral gains.

35. Article 13(2) of our Constitution provides that no post-constitutional law shall be permitted to violate Fundamental Rights. This is also an area where the power of judicial review comes into play. The petitioners claim a violation of Article 16(4), which consequently violates equality of opportunity in public employment i.e. violation of Article 16(1). Such violation affects the public at large, making these petitions of significant public interest, and hence calling for judicial review to examine whether the classification of the OBCs by the state violates the fundamental rights under Art. 16(1).

36. The Act of 1993 has constituted a Commission for the identification of backward classes for the purposes of Articles 15(4) and 16(4) of the Constitution of India. The Commission is a specialised statutory body invested with statutory powers to investigate, survey, and collect scientific data indicating the backwardness of the classes in society. The Commission has been given the powers of a civil court to give teeth to its authority. The wide and far-reaching powers are also meant to examine whether such backward classes are adequately represented in the services under the State. Any casual or unscientific exercise would result in an illogical recommendation. This would defeat the object of constituting the Commission. The State, on its side, upon receipt of the recommendation from the Commission is also required to apply its mind to the same.

37. Violation or infraction of the procedure under the Act of 1993 by the Commission and State could lead to disastrous consequences for the public at large. All the other classes of citizens would be deprived of participation in State employment. Undeserving classes would get jobs by reservation. Procedural infraction and impropriety must therefore definitely be a valid ground for maintaining a PIL. The argument of the State that there is no vested right in any procedure is therefore erroneous and unacceptable in the context.

38. The Supreme Court in ***Sambhaji v. Gangabai,*** reported in ***(2008) 17 SCC 117 has indeed*** held that there is no vested right to compel the State to follow any procedure. This however would not entitle the State to deviate from a procedure prescribed by statute when prejudice and arbitrariness are writ large.

39. In ***Sambhaji (Supra)*** the apex court held under **Para no. 6:-**

> "6 ......(13). No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner for the time being by or for the court in which the case is pending, and if, by an Act of Parliament the mode of procedure is altered, he has no other right than to proceed according to the altered mode. … A procedural law should not ordinarily be construed as mandatory; the procedural law is always subservient to and is in aid to justice. Any interpretation which eludes or frustrates the recipient of justice is not to be followed…"

40. In ***State of Madras v. V.G. Row,*** reported in ***(1952) 1 SCC 410,*** the apex court said**:-**

> "20. ....what is sometimes overlooked, that our Constitution contains express provisions for judicial review of legislation as to its conformity with the Constitution, unlike as in America where the Supreme Court has assumed extensive powers of reviewing legislative acts undercover of the widely interpreted "due process" clause in the Fifth and Fourteenth Amendments. If then, the courts in this country face up to such important and none too easy task, **it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in the discharge of a duty plainly laid upon them by the Constitution. This is especially true as**

> **<u>regards the "fundamental rights," as to which this court has been given the role of Sentinel on the *Qui Vive.*"</u>**

(emphasis added)

41. In this regard, reference may also be made to the decision of the apex Court in ***Hardwari Lal, Ex-M.P. (Lok Sabha) v. Ch. Bhajan Lal, Chief Minister, Haryana, Chandigarh*** reported in ***1992 SCC OnLine P&H 244***, where it was held as follows:-

> "**3.** The question, whether the petitioner has the *locus standi* to approach this Court for the relief claimed need not detain us much although Shri Sibal the learned Advocate-General. Haryana, appearing for the respondents, severely criticised the motive and purport behind this writ petition as political and only aimed at wreaking personal grievances by a political rival of the Chief Minister, yet we do not find that the locus *standi* of the petitioner to approach the Court was seriously questioned. The substance of the respondent's contention in this regard is that the Court shall not exercise any discretion in favour of a person who has approached this Court only with oblique motives, has his own axe to grind against the respondent and, therefore, could not be permitted to have access to the Court under the garb of public interest litigation. **<u>We think that the antecedents or status of a persons lose all significance if the information conveyed to the Court even by such a person is such as may justly require the Court to exercise its jurisdiction to pass orders and directions to protect the rights and liberties of the citizens.</u>** A Full Bench of the Andhra Pradesh High Court in *D. Satyanarayana* v. *N.T. Rama Rao* [A.I.R. 1988 Andhra Pradesh 144.] observed that being politician by itself is no sin. In our democratic set up, Governments are run by political parties voted to power by people. It is totally unrealistic to characterise any espousal of cause in a Court of law by a politician on behalf of the general public complaining of Constitutional and statutory violations by the political executive as a politically motivated adventure. If, however, the interests are not personal and the litigation appears to be for no-personal gains, the person approaching the Court is not a busy body nor an interloper, the relief may not be denied and the petition may not be thrown out simply because it is by a politician. We, however, leave the matter at that without commenting any further upon the petitioner's interest in approaching this Court and bringing to the Court's notice the acts of the Chief Minister which according to him do not deserve the continuance of respondent No. 1 in the office of the Chief Minister any further. We, however, express that spiteful allegations of personal nature and being politically mischievous may not be permitted to be made in the garb of public interest litigation and the Court must caution itself that it should protect its jurisdiction, authority and time from abuse of the process."

42. In the case at hand, the procedure to be adopted by the Commission is laid down by the Act of 1993. Therefore, such a procedure needs to be followed in letter and spirit to deliver substantive justice. The

petitioners specifically argue that the procedure established by law has not been followed. For the reasons aforesaid, the objection to the maintainability of the PILs is therefore rejected.

43. It is held that Rule 56 of the Writ Rules of this High Court is required to be aligned and be brought in harmony with Phases II and III of the decision of the ***Balwant Singh Chaufal (Supra)***. The High Court may therefore revisit Rule 56 above to bring about a suitable amendment.

ii. The Alternate Remedy Argument:-

44. Section 9 of the Act of 1993 provides as follows:-

> ***"Sec. 9. Functions of the Commission.****(1) The Commission shall examine requests for inclusion of any class of citizens as a backward class in the lists and hear complaints of over-inclusion or under-inclusion of any backward class in such lists and tender such advice to the State Government as it deems appropriate.*
> *(2)* ***The advice of the Commission shall ordinarily be binding upon the State Government."***

45. Section 9 of the Act of 1993 provides that an application may be made to the Commission to complain of over-inclusion or under-inclusion. The petitioners have admittedly not approached the Commission. They have applied under the RTI Act both in respect of the inclusions made in 2009-10, 2011.

46. The remedies provided under Section 9 of the Act of 1993 cannot really be characterized as statutory remedies of appeal. They could at best be described as a review of a decision already taken by the Commission. There is no procedure prescribed by the Act of 1993 to compel the Commission to review its own decision. There can be no provision of appeal against a recommendation of the Commission.

There are therefore no clear effective alternative remedies under the 1993 Act against any illegal recommendation of any class as OBC by the State.

47. The remedies under Article 226 or 32 are therefore the only remedies against the Commission or the State. The decision of ***Guruvayur Devosam Board (Supra)*** has no manner of application since in the facts of the said case, the petitioner alleged mismanagement by a Statutory body administering the Guruvayur Krishna Temple in Kerala. It is in that context that the Supreme Court observed that the remedies under the Gurvayur Devosam Act 1978 are effective alternative remedies.

48. It is the State on the recommendation of the Commission that has the power to direct inclusion of any class as OBC or sub-classify any class as more backward. The Acts of 1993 and 2012 does not provide for any appeal or any other remedy against any order of inclusion or sub-classification of any Class as OBC. Hence the petitioners cannot be non-suited on the grounds of alternative remedy.

49. The power to apply under Section 9, confers a limited remedy to an aggrieved person. The petitioners cannot be faulted for seeking the remedy under Article 226 given the grave improprieties and illegalities complained of. Section 9 of the Act enables a person to argue under-inclusion or over-inclusion. Hence, when there is an allegation of violation of the fundamental Right viz. Art. 16(4), and a case is made, calling for the interpretation of the Act of 1993 vis-a-vis- the Act of

2012, only approaching the High Court under Article 226 and the Supreme Court, under Art. 32, are the proper and comprehensive remedies. Reference in this regard may be made to **paragraph 855 (c)** of the decision of ***Indra Sawhney (Supra):-***

> "855. (c) The direction made herein for constitution of a permanent Commission to examine complaints of over-inclusion or under-inclusion obviates the need of any such scrutiny by this Court. We have directed constitution of such Commission both at Central and State level. Persons aggrieved can always approach them for appropriate redress. Such Commission, which will have the power to receive evidence and enquire into **disputed questions of fact,** can more appropriately decide such complaints than this Court under Article 32."

50. In ***Balwant Singh Chaufal (Supra)***, it was held that genuine and bonafide PILs must be encouraged. A note of caution has however been in respect of proxy litigation and those filed for collateral purposes. At **paragraph 181**, it has been summarized as follows:-

> "181. We have carefully considered the facts of the present case. We have also examined the law declared by this Court and other courts in a number of judgments. In order to preserve the purity and sanctity of the PIL, it has become imperative to issue the following directions:
> (1) **The Courts must encourage genuine and bona fide PIL and effectively discourage and curb the PIL filed for extraneous considerations.**
> (2) Instead of every individual Judge devising his own procedure for dealing with the public interest litigation, it would be appropriate for each High Court to properly formulate rules for encouraging the genuine PIL and discouraging the PIL filed with oblique motives. Consequently, we request that the High Courts who have not yet framed the rules, should frame the rules within three months. The Registrar General of each High Court is directed to ensure that a copy of the rules prepared by the High Court is sent to the Secretary General of this Court immediately thereafter.
> (3) The Courts should prima facie verify the credentials of the petitioner before entertaining a PIL.
> (4) The Courts should be prima facie satisfied regarding the correctness of the contents of the petition before entertaining a PIL.
> **(5) The Courts should be fully satisfied that substantial public interest is involved before entertaining the petition.**
> (6) The Courts should ensure that the petition which involves larger public interest, gravity and urgency must be given priority over other petitions.
> **(7) The Courts before entertaining the PIL should ensure that the PIL is aimed at redressal of genuine public harm or public injury. The Court should also ensure that there is no personal gain, private motive or oblique motive behind filing the public interest litigation.**

> (8) The Courts should also ensure that the petitions filed by busybodies for extraneous and ulterior motives must be discouraged by imposing exemplary costs or by adopting similar novel methods to curb frivolous petitions and the petitions filed for extraneous considerations."

51. The Ld. Advocate General has not been able to point out at whose instance or for whose benefit the instant PILs have been filed. On the contrary, this Court notices that the issues raised in these PILs are matters that concern the interest of the citizens of the entire State. The illegalities would have and already have had far-reaching consequences of unduly benefitting a class of persons and depriving a large portion of the residents in the State. Therefore it cannot be said that the instant PILs are proxies or at the instance of vested interests or filed for collateral purposes. The Supreme Court in ***Raja Jagadambika Pratap Narain Singh v. Central Board of Direct Taxes & Ors.*** reported in ***(1975) 4 SCC 578,*** held at paragraphs 12 and 13 **:-**

> "12. The surviving issue of some moment is whether the writ jurisdiction is muzzled by statutory finality to orders regardless of their illegality. **We think not. If the levy is illegal, the constitutional remedy goes into action**. The Privy Council ruling does not contradict this rule of law because for one thing there the case was income taxable but for a statutory exemption; here the income is agricultural and beyond the orbit of the Income-tax Act. For another, the Judicial Committee was not considering the sweep of the constitutional remedy de hors statutory changes but was construing the plea of 'nullity' with reference to an order Passed, erroneously may be but within jurisdiction and impugned before the statutory tribunals.
> 13…………..To awaken this Court's special power gross injustice and grievous departurefrom well-established criteria in this jurisdiction,have to be made out……"

52. The objection of the State that the instant PILs are not by any affected class cannot be accepted either. The absence of individual interest is a pre-condition for entertaining PILs. The fourth writ petition is one filed by a registered society whose object is to fight against the illegalities in

society. This Court is, therefore, unable to find any infraction of the Writ Rules of this Court as amended. In view of the dicta of the Supreme Court in ***Balwant Singh Chaufal (supra)*** where it was held that non-transparency in governance can be complained of by way of a PIL, the writ petitions are held maintainable.

53. Admittedly there were no effective public hearings conducted while recommending the 77 classes to be included as OBCs. No advertisement was made of such a hearing. The petitioners or the public at large therefore did not have notice of such a hearing.

54. The petitioners or the public at large did not get any chance to participate in such hearings or challenge or question the reports or cros examine the persons who conducted the surveys leading to the recommendations by the Commission.

55. The affidavit in opposition of the National Commission on pg. 125, sets out the standard procedure, adopted by the OBC certificate issuing authority, downloaded from the website of the West Bengal Backward Classes Welfare Ministry. Clauses B and C thereof refer to the prevalent situation where a person from a backward class cannot produce his or her paternal identity, which would indicate whether he is an OBC. In such a situation, public hearings and field surveys are imperative and mandatory.

56. The submission of the State Commission that, since it can formulate its own procedure, and dispense with the need for giving a public hearing, cannot be accepted. Such submission cannot be

countenanced given the fair procedure, which mandates that even to ascertain the veracity of the claim to OBC, the certificate issuing authority needs to conduct a public hearing and field survey. It follows therefrom, that to ascertain the backwardness of a class, for the purposes of Art. 16(4), a public hearing and field-level survey are mandatory.

57. The instant writ petitions are therefore maintainable as Public Interest Litigation.

iii. The Bar of service matters in PILs:-

58. The next objection on the maintainability of the PILs is based on the decision of the Supreme Court in the case of the ***Public Services Tribunal Bar Assoc Case (Supra)***. In the said case certain provisions of the UP Public Services Tribunals Act of 1978 were under challenge. The provisions were the power of Transfer, Suspension, Dismissal, Removal, and Termination were challenged on the ground that the statute did not provide any remedy against the said actions to its employees. It was in that context that it was held the remedy under Article 226 was always available to the affected employee. The act of 1978 therein did not fall foul of legislative competence in enactment and there was no violation of the provisions of Part III or any other part of the Constitution. Hence it was held that PILs cannot be maintained in service matters

59. The sweeping argument that any matter under Article 16 of the Constitution would be a Service matter and no PIL can be maintained

therefore is fallacious. The subject matter of the instant proceeding is a reservation for OBCs who have been found to be inadequately represented in the State. No benefit or disadvantage suffered by any existing State service holder is in question. The petitioners hereincontend that the reservation made for OBCs and their sub-classification between 2010 and 2011 is a fraud on the Constitution by the State.

60. The ***Madan Lal Case (Supra)*** and the ***Bholanath Mukherjee (Supra)*** were cases where inter-se seniority and a Recruitment process were under challenge. The challenge in the instant case is reservation under Article 16(4) of the Constitution. The facts of the said cases are quite different from the facts of the instant case. Consequently, the propositions of law enunciated thereunder are not applicable herein.

61. As for the argument that the petitioners have not made out a case of non-inclusion of any class, this Court is of the view that impropriety of the recommendation and inclusion of the 77 Classes and the sub-classification thereof can definitely be raised by the petitioners in a PIL and reviewed by this Court under Article 226 of the Constitution.

62. This Court therefore holds that the Writ Petitions are not concerning any individual service dispute and the issues raised are maintainable and the PILs are entertainable.

B. THE BRIEF HISTORY OF IDENTIFICATION OF THE OBCs UNDER ARTICLE 16 (4) OF THE CONSTITUTION.

63. **The *Indra Sawhney Case (Supra)*:-**

Facts- The Kaka Kalekar Commission was the first to define backward classes, focusing on caste, but its report was rejected. Then came the Mandal Commission, which considered social, educational, and economic factors, still with caste as a key starting point for identification of OBCs. It recommended 27% reservation for socially and educationally backward classes, leading to protests across the nation. Later, a modified order gave preference to poorer Sections within the Socially and Economically Backward Classes (SEBCs) and separately reserved 10% for economically backward groups not covered by existing schemes. These orders faced legal challenges, with the Supreme Court ultimately upholding the modified one.

It was, inter alia, held that:-

> **"859.** We may summarise our answers to the various questions dealt with and answered hereinabove:
>
> (1) (a) It is not necessary that the 'provision' under Article 16(4) should necessarily be made by the Parliament/Legislature. Such a provision can be made by the Executive also. Local bodies, Statutory Corporations and other instrumentalities of the State falling under Article 12 of the Constitution are themselves competent to make such a provision, if so advised. (Paras 735-737)
>
> (b) An executive order making a provision under Article 16(4) is enforceable the moment it is made and issued. (Paras 738-740)
>
> (2) (a) Clause (4) of Article 16 is not an exception to clause (1). It is an instance and an illustration of the classification inherent in clause (1). (Paras 741-742)
>
> (b) Article 16(4) is exhaustive of the subject of reservation in favour of backward class of citizens, as explained in this judgment. (Para 743)
>
> (c) Reservations can also be provided under clause (1) of Article 16. It is not confined to extending of preferences, concessions or exemptions alone. These

reservations, if any, made under clause (1) have to be so adjusted and implemented as not to exceed the level of representation prescribed for 'backward class of citizens' — as explained in this Judgment. (Para 745)

(3) (a) A caste can be and quite often is a social class in India. If it is backward socially, it would be a backward class for the purposes of Article 16(4). Among non-Hindus, there are several occupational groups, sects and denominations, which for historical reasons, are socially backward. They too represent backward social collectivities for the purposes of Article 16(4). (Paras 746 to 779)

(b) Neither the Constitution nor the law prescribes the procedure or method of identification of backward classes. Nor is it possible or advisable for the court to lay down any such procedure or method. It must be left to the authority appointed to identify. It can adopt such method/procedure as it thinks convenient and so long as its survey covers the entire populace, no objection can be taken to it. Identification of the backward classes can certainly be done with reference to castes among, and along with, other occupational groups, classes and sections of people. One can start the process either with occupational groups or with castes or with some other groups. Thus one can start the process with the castes, wherever they are found, apply the criteria (evolved for determining backwardness) and find out whether it satisfies the criteria. If it does — what emerges is a "backward class of citizens" within the meaning of and for the purposes of Article 16(4). Similar process can be adopted in the case of other occupational groups, communities and classes, so as to cover the entire populace. The central idea and overall objective should be to consider all available groups, sections and classes in society. Since caste represents an existing, identifiable social group/class encompassing an overwhelming minority of the country's population, one can well begin with it and then go to other groups, sections and classes. (Paras 780 and 785).

(c) It is not correct to say that the backward class of citizens contemplated in Article 16(4) is the same as the socially and educationally backward classes referred to in Article 15(4). It is much wider. The accent in Article 16(4) is on social backwardness. Of course, social, educational and economic backwardness are closely inter-twined in the Indian context. (Paras 786-789)

(d) 'Creamy layer' can be, and must be excluded. (Paras 790-793)

(e) It is not necessary for a class to be designated as a backward class that it is situated similarly to the Scheduled Castes/Scheduled Tribes. (Paras 794 and 797)

(f) The adequacy of representation of a particular class in the services under the State is a matter within the subjective satisfaction of the appropriate Government. The judicial scrutiny in that behalf is the same as in other matters within the subjective satisfaction of an authority. (Para 798)

(4) (a) A backward class of citizens cannot be identified only and exclusively with reference to economic criteria. (Para 799)

(b) It is, of course, permissible for the Government or other authority to identify a backward class of citizens on the basis of occupation-cum-income, without reference to caste, if it is so advised. (Para 800)

(5) There is no constitutional bar to classify the backward classes of citizens into backward and more backward categories. (Paras 801 to 803)

(6) (a) and (b) The reservations contemplated in clause (4) of Article 16 should not exceed 50%. 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 far-flung 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 the conditions peculiar to end characteristic of 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. (Paras 804 to 813)

(c) The rule of 50% should be applied to each year. It cannot be related to the total strength of the class, category, service or cadre, as the case may be. (Para 814)

(d) Devadasan [T. Devadasan v. Union of India, (1964) 4 SCR 680 : AIR 1964 SC 179 : (1965) 2 LLJ 560] was wrongly decided and is accordingly overruled to the extent it is inconsistent with this judgment. (Paras 815 to 818)

(7) Article 16(4) does not permit provision for reservations in the matter of promotion. This rule shall, however, have only prospective operation and shall not affect the promotions already made, whether made on regular basis or on any other basis. We direct that our decision on this question shall operate only prospectively and shall not affect promotions already made, whether on temporary, officiating or regular/permanent basis. It is further directed that wherever reservations are already provided in the matter of promotion — be it Central Services or State Services, or for that matter services under any Corporation, authority or body falling under the definition of 'State' in Article 12 — such reservations may continue in operation for a period of five years from this day. Within this period, it would be open to the appropriate authorities to revise, modify or re-issue the relevant rules to ensure the achievement of the objective of Article 16(4). If any authority thinks that for ensuring adequate representation of 'backward class of citizens' in any service, class or category, it is necessary to provide for direct recruitment therein, it shall be open to it to do so. (Ahmadi, J expresses no opinion on this question upholding the preliminary objection of Union of India). It would not be impermissible for the State to extend concessions and relaxations to members of reserved categories in the matter of promotion without compromising the efficiency of the administration. (Paras 819 to 831)

(8) While the rule of reservation cannot be called anti-meritarian, there are certain services and posts to which it may not be advisable to apply the rule of reservation. (Paras 832 to 841)

(9) There is no particular or special standard of judicial scrutiny applicable to matters arising under Article 16(4). (Para 842)

(10) The distinction made in the impugned Office Memorandum dated September 25, 1991 between 'poorer sections' and others among the backward classes is not invalid, if the classification is understood and operated as based upon relative backwardness among the several classes identified as Other Backward Classes, as explained in paras 843-844 of this Judgment. (Para 843-844)

(11) The reservation of 10% of the posts in favour of 'other economically backward sections of the people who are not covered by any of the existing schemes of the reservation' made in the impugned Office Memorandum dated September 25, 1991 is constitutionally invalid and is accordingly struck down. (Para 845)

(13) The Government of India and the State Governments have the power to, and ought to, create a permanent mechanism — in the nature of a Commission — for examining requests of inclusion and complaints of over-inclusion or non-inclusion in the list of OBCs and to advise the Government, which advice shall ordinarily be binding upon the Government. Where, however, the Government does not accept the advice, it must record its reasons therefor. (Para 847)

(14) In view of the answers given by us herein and the directions issued herewith, it is not necessary to express any opinion on the correctness and adequacy of the

> exercise done by the Mandal Commission. It is equally unnecessary to send the matters back to the Constitution Bench of five Judges. (Paras 848 to 850)
>
> **861.** (A) The Government of India, each of the State Governments and the Administrations of Union Territories shall, within four months from today, constitute a permanent body for entertaining, examining and recommending upon requests for inclusion and complaints of over-inclusion and under-inclusion in the lists of other backward classes of citizens. The advice tendered by such body shall ordinarily be binding upon the Government."

64. In ***Dr. Jaishri Laxmanrao Patil V. Chief Minister And Ors.*** reported in ***(2021) 8 SCC 1 (Commonly referred to as the Maratha Reservation Case)*****:-**

The Facts- Both the Kalekar and Mandal Commissions said that the Maratha community was not backward in Maharashtra. Despite multiple requests, the State Backward Commission rejected the claims of the Maratha Community's inclusionas OBCs. But later, the Gaikwad Commission disagreed and gave Marathas 16% reservation, exceeding the 50% limit set by the ***Indra Sawney case (Supra)***, citing exceptional circumstances. However, the Supreme Court ruled that Marathas weren't backward and already had enough representation, in State service so the said reservation was struck down.

It was held that:

I. The courts can check if a reservation violates any constitutional principles or requirements. They can examine if it goes against Articles 14, 15, and 16. But Courts won't get into factual disputes and will respect the Commission's recommendation for reservation, showing restraint. **Para no. 513**

II. The court can review the Backward Commission's report and determine if its conclusion is reasonable based on the evidence it gathered. Hence, when deciding on reservation, the court looks at the available evidence to see how far it can intervene. **Para no. 513**

III. While considering a class for inclusion under Article 16(4), their representation in services is compared with the unreserved category, not the reserved category. **Para no. 540**

IV. Article 16(4) aims at adequate representation, not proportionate representation. So, a class cannot be considered backward just because its representation in services does not match its population's proportion. **Para nos. 515, 520, and 522.**

V. Reservation is given based on current present real time data, so the status of the class at the time of granting reservation matters. Para nos. 548

65. ***Ram Singh And Ors. V. Union Of India*** reported in ***(2015) 4 SCC 697 (Commonly referred to as the JAT Reservation Case)***

Facts:- The National Commission for Backward Classes suggested adding only the Jats from Rajasthan (except Bharatpur and Dhaulpur districts) to the Central List of backward classes. However, the government included Jats from other States as OBCs. Despite Jats being considered backward in nine States, the National Commission refused to declare them backward all over India on the ground that the Centre cannot rely on the status of Jats in 9 States to pass such a

pan India declaration, and the Supreme Court agreed with the National Commission striking the move of the Centre.

It was held that:-

I. The courts may examine the Commission's report and can also disagree with the same, and that exercise by the court cannot be said to be exercise of an appeal over the recommendation of the Commission. **Para no. 47.**

II. The State has to follow the Commission's advice unless the reasons behind it are perverse. Then the State can ignore it. **Para no. 48**

III. The government argued that since many States consider Jats as backward, the central government is permitted to do the same. However, the court disagreed, saying present-time data on the backwardness of the community would matter because it affects people's rights under Articles 15 and 16. While the notifications by the States are relevant, they are not decisive. **Para nos. 48 and 56.**

IV. Educational and economic backwardness may contribute to social backwardness however, social backwardness as a concept is distinct. **Para no. 50.**

V. After 73 years of independence, it could have been assumed that everyone has progressed and does not need reservations. But when reservations are still made, it shows that such assumption is not true. Hence, the government needs data to prove why reservations are still necessary. It was also held that if a class is not removed

from the list for a long time, the government needs to explain why.

Para no. 52.

C. THE ROLE OF THE WEST BENGAL COMMISSION FOR THE BACKWARD CLASSES UNDER THE ACT OF 1993 AND ART.16(4)

i. The Origin of the Commission:-

66. The constitution of the Commission could be traced to the Constitution of India. At **paragraph 847** of the ***Indra Sawhney (supra)*** it was held:-

> *"**847.** We are of the considered view that there ought to be a permanent body, in the nature of a Commission or Tribunal, to which complaints of wrong inclusion or non-inclusion of groups, classes and sections in the lists of Other Backward Classes can be made. Such body must be empowered to examine complaints of the said nature and pass appropriate orders. Its advice/opinion should ordinarily be binding upon the Government. Where, however, the Government does not agree with its recommendation, it must record its reasons therefor. Even if any new class/group is proposed to be included among the other backward classes, such matter must also be referred to the said body in the first instance and action taken on the basis of its recommendation. The body must be composed of experts in the field, both official and non-official, and must be vested with the necessary powers to make a proper and effective inquiry. It is equally desirable that each State constitutes such a body, which step would go a long way in redressing genuine grievances. Such a body can be created under clause (4) of Article 16 itself — or under Article 16(4) read with Article 340 — as a concomitant of the power to identify and specify backward class of citizens, in whose favour reservations are to be provided. We direct that such a body be constituted both at Central level and at the level of the States within four months from today. They should become immediately operational and be in a position to entertain and examine forthwith complaints and matters of the nature aforementioned, if any, received. It should be open to the Government of India and the respective State Governments to devise the procedure to be followed by such body. The body or bodies so created can also be consulted in the matter of periodic revision of lists of OBCs. As suggested by Chandrachud, CJ in Vasanth Kumar [1985 Supp SCC 714 : 1985 Supp 1 SCR 352] there should be a periodic revision of these lists to exclude those who have ceased to be backward or for inclusion of new classes, as the case may be."*

67. The State of West Bengal could not have set up the Commission under **Article. 340** since only the President of India is empowered to constitute a Commission for the backward classes thereunder. The

State has constituted the Commission, in terms of the **Act of 1993**, to streamline the exercise of power, conferred by **Article. 16(4)** read with **Article. 46** and **Entries Nos. 20** (Economic and social planning) and **23** (Social security and social insurance; employment and unemployment) of the Concurrent list under Schedule VII of the Constitution of India.

68. The Commission plays a vital role in giving effect to **Article 16(4).** It is an integral and indispensable part of the reservation granting process for OBCs by the State. **Article. 16(4)** envisages a two-staged process- the first is the **identification of classes** and the second is the **classification**. The identification process is undertaken by the Commission and the classification is thereafter done by the State.

69. The Supreme Court in the ***Indra Sawhney Case (Supra)*** has recommended the constitution of the Commission for the Backward Classes, for the purpose of **Article 16(4),** for identifying such classes, which would lead to the facilitation of an objective identification process. A fortiori therefore, consultation with and the opinion of the Commission, is not only a mere safeguard but also a substantial and indispensable aid to the State in making fair and impartial classification. Such consultation is mandatory. The Commission therefore has an important, indispensable, critical and vital role in any process of identification of OBCs under the Constitution.

70. On the role of the Commission, it was held in the ***Indra Sawhney Case (Supra)*** as follows:-:-

"855. (c) The direction made herein for constitution of a permanent Commission to examine complaints of over-inclusion or under-inclusion obviates the need of any such scrutiny by this Court. We have directed constitution of such Commission both at Central and State level. Persons aggrieved can always approach them for appropriate redress. Such Commission, which will have the power to receive evidence and enquire into **disputed questions of fact,** can more appropriately decide such complaints than this Court under Article 32.

588. No further need be said as whether the Commission acted in terms of its reference and whether the identification was constitutionally permissible and legally sound, before it could furnish **basis**for any exercise, legislative or executive, to be undertaken by the government."

71. In ***T. Muralidhar Rao v. State of A.P.,*** reported in ***2004 SCC OnLine AP 717,*** the paragraph relevant in this regard is set out hereunder:--

"**44.** The obligation to consult such a Commission in my view flows from the directions of the Supreme Court in Indra Sawahaney's case (supra). Those directions are only an expression of the **implied limitations on the power of the State to identify the Backward Classes of citizens. Such an implication is inherent in the nature of the power as any irrational exercise of such power would violate the guaranteed rights of the citizens under Articles 14, 15 and 16 of the Constitution of India.**The need for such implication is more in view of the fact that in the various judgments commencing with Balaji's case (supra) to Indra Sawahaney's case (supra), the Supreme Court held that the identification of Backward Classes is well within the authority of the Executive Government and needs no legislative decision. It is only in recognition of such an obligation, the A.P. Legislature enacted Act 20/93. The obligation is embodied in Section 11(2).

23. The rationale behind the said direction, it appears to me to be that the power of the State in identifying the backward class of citizens should not be an unguided and uncanalised power,-but must be a power to be exercised on the basis of some genuine data and a rational analysis ["….The problem of determining who are socially Backward Classes is undoubtedly very complex. Sociological, social and economic considerations come into play in solving the problem, and evolving proper criteria for determining which classes are socially backward is obviously a very difficult task; it will need an elaborate investigation and collection of data and examining the said data in a rational and scientific way… "ibid P. No. 659 - para 24] of the same, **to ensure that the identification of Backward Classes of citizens is made by a body independent of the government without any concern for the political overtones of the decision and the electoral fortunes (good or bad) that accompany.** However, the Supreme Court was conscious of the fact that the recommendations made by such body composed of a few individuals, however, eminent they might be cannot be made final as in the final analysis, the implementation of the constitutional obligations is the responsibility of the elected Legislatures and the political executive which is answerable to the people through the Legislature, therefore held:

"its advice/opinion should ordinarily be binding upon the Government. Where, however, the Government does not agree with its recommendation, it must record its

reasons therefore [See para (847) of the judgment in India Sawhaney's case (supra).] ."recognizing the authority of the State to reject the recommendations of the Commission for valid reasons to be recorded.

40…… By enactment of A.P. Act 20 of 1993 and by constitution of Commission for Backward Classes, procedure for identifying the Backward Classes was sought to be regulated, to enable the State Government to correctly and accurately identify the socially Backward Classes, and it does not amount to delegating of its powers to the Commission for Backward Classes. Obviously, after the report of the Commission for Backward Classes also, it is the State Government which has to consider the same and pass appropriate orders. Further, the statutory provision contained under Section 11(2) of the A.P. Act 20 of 1993 with regard to consultation with the Commission before the Government takes a decision either to exclude the existing Backward Classes, or to include the new Backward Classes, is in tune with the judgment of the Supreme Court in Indra Sawhney (supra) wherein it was categorically held that there ought to be a permanent body, in the nature of Commission or Tribunal, to which complaints of wrong inclusion or non-inclusion of groups, classes and Sections in the lists of Other Backward Classes can be made and such body must be empowered to examine the complaints of the said nature and pass appropriate orders…."

72. Non-consultation with the Commission by the State would ipso facto negate, nullify, and/or render null and void, the inclusion of any class as OBCs and even their sub-classification or determination of the percentage of reservation by the State.

ii. Section 9 of The Act Of 1993:-

73. In the course of the hearing, it was brought to the notice of this court that section 9 of the Act of 1993 has been amended by **THE WEST BENGAL COMMISSION FOR BACKWARD CLASSES (AMENDMENT) ACT, 2010**. To notice and appreciate the changes introduced by the said Amendment, pre and post-amendment section 9 is set out hereunder:-

PRE-AMENDMENT

Functions of the Commission- *9. (1) The Commission shall examine requests for inclusion of any class of citizens as a backward class in the lists and hear*

complaints of over-inclusion or under-inclusion of any backward class in such lists and tender such advice to the State Government as it deems appropriate.

(2) The advice of the Commission shall ordinarily be binding upon the State Government.

POST-AMENDMENT

Functions of the Commission *9. (1) (a) The Commission shall examine requests for inclusion of any class of citizens as a backward class in the lists and hear complaints of over-inclusion or under-inclusion of any backward class in such lists and tender such advice to the State Government as it deems appropriate.*

(b) The advice of the Commission tendered under this sub-section shall ordinarily be binding upon the State Government.

(2) The Commission shall consider any reference from the State Government regarding inclusion of any class of citizens as a backward class in the lists or deletion of any backward class therefrom.

(3) The Commission shall, on request from the State Government, examine the social and educational conditions and problems incidental thereto of any class of citizens belonging to the backward classes within the territory of West Bengal, and advice the State Government.

74. The pre-amended section 9(1) enabled any citizen to file an application for inclusion of a class and to complain against over-inclusion and under-inclusion of a backward class. The post-amendment sub-clause (a) of sub-section 1 of section 9 is at pari-materia to the pre-amendment Section 9(1).

75. The pre-amendment sub-section 2 of section 9 provided that the advice of the Commission shall be ordinarily binding upon the State. The post-amendment sub-clause (b) of sub-section 1 of section 9, however, has confined the advice of the Commission to be binding

upon the State only in respect of the requests for inclusion or exclusion, made by a citizen.

76. By the use of the expression- '***<u>under this sub-section</u>***' in the said sub-clause (b) of sub-section 1 of the amended section 9, the advice of the Commission has been made binding only to the requests, made under the post-amendment sub-clause (a) of sub-section 1 of section 9, whereunder only the citizens, who can make requests. The said expression was not used in the pre-amendment sub-section 2 of section 9, which also dealt with the binding nature of the advice of the Commission. The relevant pre-amendment and post-amendment provisions are set out once again hereunder to notice the change:-

> ***Pre-amendment***:- *9(2) The advice of the Commission shall ordinarily be binding upon the State Government.*
>
> ***Post-amendment***:- *9(1)/(b) The advice of the Commission tendered* ***<u>under this sub-section</u>*** *shall ordinarily be binding upon the State Government.*

77. The obvious consequence thereof can understood from the post-amendment sub-sections 2 and 3 read with sub-clause (b) of sub-section 1 of Section 9.

78. While said Sub-section 2, post amendment thereof has required the State to refer cases of potential inclusion or exclusion of a class, to the Commission for its consideration, in terms of sub-section 2 that the State is not bound by the advice of the Commission under the post-amendment sub-clause (a) of sub-section 1 of section 9.

79. The said sub-section 2 reiterates the provision of section 11 of the Act of 1993, which enables the State to revise the list of the OBCs with the object of including a new class or excluding a backward class from the lists, and in such process of revision, the State is mandatorily required to consult the Commission. Sub-section 3 thereof indicates the subjects of inquiry that the Commission shall undertake as regards a backward class and advise the State accordingly. Section 9 needs careful examination to decipher its real purpose.

80. The real intention behind the amendment isclearly understood from a conjoint reading of the post-amendment sub-sections 2 and 3 and sub-clause (b) of sub-section 1 of section 9. This court notices that sub-section 3 of section 9 does not specify as to whether the advice of the Commission, would at all be binding upon the State. As already stated, the post-amendment sub-clause (b) of sub-section 1 of section 9 limits the advice of the Commission to be binding only to the requests for inclusion or exclusion made by a citizen under the post-amendment Section 9(1)/(a).

81. The effect of the sub-sections 2, 3 and sub-clause (b) of sub-section 1 of section 9 is that section 11 of the Act of 1993 stands diluted since section 11(2) mandatory consultation with the Commission required to be done by the State while revising the OBC list.

82. However, after the incorporation of subsections 2 and 3 and sub-clause (b) and subsection 1 of section 9, the State has been left with the ominous discretion and uncanalised power of choosing when to

consult the Commission and when not to. Post-amendment, if the State is willing to include or exclude a new class for the purposes of either Article 15(4) or Article 16(4), the State need not be bound by section 11 of the Act of 1993. It can directly invoke sub-sections 2 and 3 of section 9 of the Act of 1993, and obtain the advice of the Commission, without at all being bound by it.

83. The argument of the learned assistant Advocate General, therefore, that the amendment made to section 9 is clarificatory in nature, cannot be accepted. By the amendment, the whole purpose of section 9 has been diluted, if not defeated in its entirety.

84. The amendment to section 9 was brought into force on and from September 21, 2010. The sub-classification of the 42 classes + the already existing 66 classes was notified on September 24, 2010, which is 3 days after such an amendment. Therefore before bypassing the Commission as regards the sub-classification, the State brought into force the said amendment to legitimize an otherwise illegal action. The amendment to Section 9 brought by the State is, therefore, a fraud on power if not a fraud on the Constitution.

85. The criteria for the determination of the backwardness of a class should be the same regardless of whether it is a request made by the State or a citizen. Hence, the advice of the Commission must be interpreted to be binding State regardless of who makes the request. The dicta of the Supreme Court on the application of the doctrine of

contextual interpretation wpuld therefore be useful to address this situation.

86. In ***Pushpa Devi v. Milkhi Ram*** reported in ***(1990) 2 SCC 134.*** At Paragraphs 18 and 19 it was held as follows:-

> "18. It is true when a word has been defined in the interpretation clause, prima facie that definition governs wherever that word is used in the body of the statute unless the context requires otherwise. "The context" as pointed out in the book Cross-Statutory Interpretation (2nd edn. p. 48) "is both internal and external". The internal context requires the interpreter to situate the disputed words within the section of which they are part and in relation to the rest of the Act. The external context involves determining the meaning from ordinary linguistic usage (including any special technical meanings), from the purpose for which the provision was passed, and from the place of the provisions within the general scheme of statutory and common law rules and principles.
>
> 19. The opening sentence in the definition of the section States "unless there isanything repugnant in the subject or context". In view of this qualification, the court has not only to look at the words but also to examine the context and collocation in the light of the object of the Act and the purpose for which particular provision was made by the legislature."

87. In ***Jaishri Laxmanrao Patil v. State of Maharashtra*** reported in ***(2021) 8 SCC 1 (Maratha Reservation Case),*** the Apex Court held as follows:-

> "586. It is said that the statute is an edict of the legislature. The elementary principle of interpreting the Constitution or statute is to look into the words used in the statute, when the language is clear, the intention of the legislature is to be gathered from the language used. The aid to interpretation is resorted to only when there is some ambiguity in words or expression used in the statute. The rule of harmonious construction, the rule of reading of the provisions together as also rule of giving effect to the purpose of the statute, and few other principles of interpretation are called in question when aids to construction are necessary in particular context. We have already noticed the Statement of Objects and Reasons of the statute in the earlier paragraph. Para 5 of the Statement of Objects and Reasons mentions amendment of the Constitution by (a) inserting a new Article 338-B so as to constitute the National Commission for Backward Classes and (b) to insert a new Article 342-A so as to provide that the President may, by public notification, specify the socially and educationally backward classes. The Bill was moved by Thawarchand Gehlot, Minister of Social Justice and Empowerment.
> 216. Craies culled out the following principles of interpretation of legislation:
> 1. Legislation is always to be understood first in accordance with its plain meaning.
> 2. Where the plain meaning is in doubt, the courts will start the process of construction by attempting to discover, from the provisions enacted, the broad purpose of the legislation.

> 3. Where a particular reading would advance the purpose identified, and would do no violence to the plain meaning of the provisions enacted, the courts will be prepared to adopt that reading.
> 4. Where a particular reading would advance the purpose identified but would strain the plain meaning of the provisions enacted, the result will depend on the **context** and, in particular, on a balance of the clarity of the purpose identified and the degree of strain on the language.
> 5. Where the courts concluded that the underlined purpose of the legislation is insufficiently plain, or cannot be advanced without an unacceptable degree of violence to the language used, they will be obligated, however regretfully in the circumstances of the particular case, to leave to the legislature the task of extending or modifying the legislation [Craies on Legislation, 9th Edn., p. 643.] .
> 222. According to Aharon Barak, "the structure of the Constitution can be given implicit meaning to what is written between the lines of the text, but it cannot add lines to the text. To do so would be to fill a gap or lacuna, using interpretative doctrines". [Aharon Barak, Purposive Interpretation in Law, [Sari Bashi (Tr.)], (Princeton : Princeton University Press, 2005), p. 374.] There is no reason for reading Article 342-A(1) in any other manner except, according to the plain legal meaning of the legislative language. The words "Central List" used in Article 342-A(2) have created some controversy in construing Article 342-A. To find out the exact connotation of a word in a statute, we must look to the context in which it is used [Nyadar Singh v. Union of India, (1988) 4 SCC 170 : 1988 SCC (L&S) 934] . No words have an absolute meaning, no words can be defined in vacum, or without reference to some context [Professor HA Smith cited in Union of India v. SankalchandHimatlalSheth, (1977) 4 SCC 193 : 1977 SCC (L&S) 435] . Finally, the famous words of Oliver Wendell Holmes, J. Jr. "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary in colour and content according to the circumstances and the time in which it is used". [Towne v. Eisner, 1918 SCC OnLine US SC 6 : 62 L Ed 372 : 245 US 418 (1918)]

88. In this regard, reference may be made to the ***Shiv Shakti Coop. Housing Society v. Swaraj Developers***, reported in ***(2003) 6 SCC 659***, wherein the apex court held when the words can be read into a statute:-

> **19.** It is a 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. 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. Price Waterhouse [(1997) 6 SCC 312 : 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 Moo PCC 1 : 4 MIA 179] 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 State of Gujarat v. DilipbhaiNathjibhai Patel [(1998) 3 SCC 234 : 1998 SCC (Cri) 737 : 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 (Tipton) Ltd. [(1978) 1 All ER 948 : (1978) 1 WLR 231 (HL)] **] Rules of interpretation do not permit courts to do so, unless the provision as it stands is meaningless or of a 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 444 : 1910 WN 161 (HL)] , quoted in Jumma Masjid v. KodimaniandraDeviah [AIR 1962 SC 847] .)

89. In ***Girdhari Lal & Sons v. Balbir Nath Mathur*** reported in ***(1986) 2 SCC 237***, held as follows:-:-

> "9. So we see that the primary and foremost task of a court in interpreting a statute is to ascertain the intention of the legislature, actual or imputed. Having ascertained the intention, the court must then strive to so interpret the statute as to promote or advance the object and purpose of the enactment. **For this purpose, where necessary the court may even depart from the rule that plain words should be interpreted according to their plain meaning**. There need be no meek and mute submission to the plainness of the language. To avoid patent injustice, anomaly or absurdity or to avoid invalidation of a law, the court would be well justified in departing from the so-called golden rule of construction so as to give effect to the object and purpose of the enactment by supplementing the written word if necessary."

90. In ***RBI v. Peerless General Finance & Investment Co. Ltd.*** reported in ***(1987) 1 SCC 424***, held as follows:-

> "33. Interpretation must depend on the text and the context. They are the bases of interpretation. **One may well say if the text is the texture, context is what gives the colour.**Neither can be ignored. Both are important. **That interpretation is best which makes the textual interpretation match the contextual.** A statute is best interpreted when we know why it was enacted. **With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word.If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context.** With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. **No part of a statute and no word of a statute can be construed in isolation.** Statutes have to be construed so that every word has a place and everything is in its place. It is by looking at the definition as a whole in the setting of the entire Act and by reference to what preceded the enactment and the reason for it that the Court construed the expression "Prize Chit"

> in Srinivasa [(1980) 4 SCC 507 : (1981) 1 SCR 801 : 51 Com Cas 464] and we find no reason to depart from the Court's construction."

91. The principles that can be culled out from the above decisions are as follows:-

i) A word used in a statute is not absolute.

ii) The text of a statute contains its meaning. However, when the text is inconsistent with the object and purpose of a statute, such text has to be made harmonious with the object and purposes of the Statute by applying the context of the statute.

iii) The court, as a matter of first resort, shall not read words into a statute. This principle, however, would not apply to a provision of a statute which is doubtful or ambiguous.

iv) The court can fill in the gaps in a statute, left by the legislature. In the process of filling in such gaps, the court, however, cannot defeat the object and purpose of the statute.

v) Contextual interpretation is a species of Harmonious interpretation an alternative method to fill in gaps by the judiciary.

92. This Court is therefore inclined to apply the principles of 'contextual interpretation' and 'reading into' principles of interpretation to hold that even post-amendment, it is obligatory, on the part of the State, in all cases, to consult the Commission under Section 9 of the Act of 1993. It would be absurd that the advice of the Commission on a request by a citizen would be binding upon the State, but would be otherwise when the State requests the opinion of the Commission for inclusion or exclusion.

93. The post-amendment section 9 is clearly in conflict with the dicta of the Supreme Court in the case of ***Indra Sawhney (Supra). Indra Sawhney (Supra)*** has not differentiated between the advice of the

Commission rendered on a request for inclusion or exclusion by a citizen and that made by a State. The pre-amendment Section 9 indeed complied with such dicta.

94. According to the dicta of the Supreme Court, the State is allowed to disagree with the advice of the Commission for cogent and proper reasons. It would, however, appear that because of the Amendment Act of 2010 to section 9 of the Act of 1993, the State is allowed to casually and with disdain, disregard the advice of the Commission.

95. This court therefore to render context and to make sub-sections 2 and 3 of section 9 harmonious with sub-section 1(a) of section 9 and section 11 and so also harmonious with the dicta of the Supreme Court, in ***Indra Sawhney (Supra)*** under Article 141 of the Constitution, holds that the advice of the Commission given to the State in exercise of sub-section 2 and 3 of Section 9 shall ordinarily be binding upon the State like it is when the former advises the latter in the exercise of Section 9(1)(a).

96. This court holds that the advice rendered by the Commission in all the cases under Section 9 regardless of who is making the request, shall be ordinarily binding.

iii. Section 11 of the Act of 1993.

97. Section 11 of the Act of 1993 prescribes as follows:-

> *"11. (1) The State Government may at any time, and shall, at the time expiration of 10 years from the coming into force of this Act and every succeeding period of ten years thereafter, undertake revision of the lists with a view to excluding from such lists those classes who have*

> *ceased to be backward classes or for including in such lists new backward classes.*
> *(2)The State Government shall, while undertaking any revision referred to in sub-section (1), consult the Commission."*

98. Section 11 compels the State to consult the Commission whenever the State revises the OBC list with the object of including or excluding a class. While section 9(2) gives an option to the State whether to consult the Commission when it considers a class for inclusion or exclusion. Section 11 makes it mandatory for the State to consult the Commission in the process of revision every 10 years. In this regard, a reference may be made to ***T. Muralidhar Rao (Supra),*** where under para no. 67 it was held as follows:-

> "**67.** Another submission is made by the State that the requirement to consult the Commission arises only when there is a general revision of the list, but not in the case of a proposal to include a new group of backward class of citizens to the existing list. This argument is required to be rejected for more than one reason. **The expression "revision" according to the New Oxford Dictionary means reconsider and alter, re-examine and make alterations to. It has its root in the latin expression, "revisery" meaning "look at again".** It therefore need not necessarily mean in the context of Section 11 that a revision is an exercise that is required to be undertaken with reference to all the entries in the existing list. Even an examination of the part of the list with reference to some existing classes is also a revision and so would be an addition of one or two new classes of the existing list. In fact, the last clause of Section 11(1) makes the same abundantly clear. To give any other meaning to the expression "revision" such as the one as suggested by the State would, in my view, simply defeat the purpose of the mandate of consultation embedded in Section 11(2). The State in order to avoid the consultation with the Commission may never undertake the revision of the entire list at one time and resort to a piecemeal examination from time to time. Such a construction which would defeat the logical purpose behind the mandate and therefore is required to be avoided. Apart from that it was positively directed by the Supreme Court at para (847), which is already extracted earlier, that whenever the State proposes to include a new group/class, the matter must be referred to Backward Classes Commission in the first instance and action taken on the basis of its recommendation. Therefore, this submission is liable to be rejected."

99. This Court is in respectful agreement with the above view. In ***T. Muralidhar (Supra)***, it was held that revision of the OBC list will even include the inclusion of a class or an exclusion thereof. Revision is not

restricted to making cosmetic changes to the OBC list. The State has to revise the entire list; by exercise of the power of revision.

100. A contextual, conjoint, and harmonious reading of subsections 2 and 3 of the amended section 9 with section 11 of the Act of 1993, therefore would mean both in cases of inclusion or exclusion of a class or set of classes, the State has to mandatorily refer the matter to the Commission and the advice rendered would be binding upon the State unless the State has specified rational and objective reasons to depart therefrom. In this regard, the word 'consult' must be read as concurrence as used in section 11(2) of the Act of 1993.

101. The rationale for the mandatory periodic revision is to exclude the creamy layer from the Other Backward Classes since such classes have climbed the ladder by reasons of education and employment. The rationale behind these finds support in the decision of ***Jarnail Singh v. Lachhmi Narain Gupta*** reported in ***(2018) 10 SCC 396*** :-

> "25. However, when it comes to the creamy layer principle, it is important to note that this principle sounds in Articles 14 and 16(1), as unequals within the same class are being treated equally with other members of that class. The genesis of this principle is to be found in State of Kerala v. N.M. Thomas [State of Kerala v. N.M. Thomas, (1976) 2 SCC 310 : 1976 SCC (L&S) 227] . This case was concerned with a test-relaxation rule in promotions from lower division clerks to upper division clerks. By a 5 : 2 majority judgment, the said rule was upheld as a rule that could be justified on the basis that it became necessary as a means of generally giving a leg-up to Backward Classes. In para 124, Krishna Iyer, J. opined : (SCC p. 363)
> "124. A word of sociological caution. In the light of experience, here and elsewhere, the danger of "reservation", it seems to me, is threefold. Its benefits, by and large, are snatched away by the top creamy layer of the "backward" caste or class, thus keeping the weakest among the weak always weak and leaving the fortunate layers to consume the whole cake. Secondly, this claim is overplayed extravagantly in democracy by large and vocal groups whose burden of backwardness has been substantially lightened by the march of time and measures of better education and more opportunities of employment, but wish to wear the "weaker section" label as a means to score over their near-equals formally categorised as the upper brackets. Lastly, a lasting solution to the problem comes only from improvement of social

> environment, added educational facilities and cross-fertilisation of castes by inter-caste and inter-class marriages sponsored as a massive State programme, and this solution is calculatedly hidden from view by the higher "backward" groups with a vested interest in the plums of backwardism. But social science research, not judicial impressionism, will alone tell the whole truth and a constant process of objective re-evaluation of progress registered by the "underdog" categories is essential lest a once deserving "reservation" should be degraded into "reverse discrimination". Innovations in administrative strategy to help the really untouched, most backward classes also emerge from such socio-legal studies and audit exercises, if dispassionately made. In fact, research conducted by the A.N. Sinha Institute of Social Studies, Patna, has revealed a dual society among harijans, a tiny elite gobbling up the benefits and the darker layers sleeping distances away from the special concessions. For them, Articles 46 and 335 remain a "noble romance" [As Huxley called it in "Administrative Nihilism" (Methods and Results, Vol. 4 of Collected Essays).], the bonanza going to the "higher" Harijans. I mention this in the present case because lower division clerks are likely to be drawn from the lowest levels of Harijan humanity and promotion prospects being accelerated by withdrawing, for a time, "test" qualifications for this category may perhaps delve deeper. An equalitarian breakthrough in a hierarchical structure has to use many weapons and Rule 13-AA perhaps is one."
>
> (emphasis added)

D. SUB-CLASSIFICATION of OBCs BY THE STATE AND RELIANCE ON THE SACHAR COMMITTEE REPORT TO BYPASS THE COMMISSION:-

102. The Learned Advocate General has placed extensive reliance on various parts of the Sachar Committee Report. This was done to support the argument that the Muslim community is in fact backward in the State. The report was placed to justify the inclusion of 99% classes of Muslims as OBC under the subject memoranda, and to bypass the Commission in the process of sub-classification.

103. This court notes that the Sachar Committee was constituted by the PMO under the **Cabinet Secretariat O.M. No. 105/1/1/75-CF dated 20.11.1975.** It was not constituted under Art. 340 of the Constitution which empowers only the President to constitute a Commission for backward classes. Hence, the report of the Committee does not have Constitutional sanction or support.

104. From the minutes of discussion between the National Commission and the State filed before this court, annexed to the affidavit of the NCBC, appearing at **page 47** thereof, it transpires that the Commission or the State, while appearing before the National Commission to justify the inclusions made under the State OBC list, have not relied upon the Sachar Committee report. Instead the State relied upon the reports prepared by the Cultural Research Institute, which is a wing of the Backward Classes Welfare Department of the State. No member of the State Commission appeared before the National Commission.

105. The Sachar Commission report is a collection of data, which neither the State nor the Commission nor even the Central Government has ever relied upon while classifying and sub-classifying the OBCs.

106. The Sachar Committee recommended for establishment of an Equal Opportunity Commission for the Muslim community. The Central Cabinet at first approved the establishment of such a Commission but withdrew it later. Reliance on such a report by the Ld. Advocate General, appears to be an ex post facto justification for classification which cannot be permitted.

107. The data collected by the Sachar Committee was already outdated in 2010. The committee was constituted on **March 9, 2005**, and submitted its report around **October 2006.** The State included the classes in 2010 i.e. 4 years after the Sachar Committee report.

108. In the ***Ram Singh judgment (Supra) (Jat reservation)*** at paragraph 49 it was held that the inclusion of classes as OBCs must be based on present-time or contemporary data. Hence, the data of the Sachar Committee was even otherwise stale as on 2010 and 2011, when the subject classifications were made by the State. Hence the reliance by the State on such a report is misconceived. At paragraph 49 of the ***Ram Singh (Supra)*** it was held as follows:-

> "**49.** Certain other issues arising may be conveniently considered at this stage. One such issue arises from the contentions advanced on behalf of the respondents, particularly on behalf of the Union Government, that the OBC Lists of the States concerned, by themselves, can furnish a reasonable basis for the exercise of inclusion in the Central Lists. The above contention is sought to be countenanced by the further argument that the Union and the State Governments under the constitutional scheme have to work in tandem and not at cross purposes. While there can be no doubt that in the matter of inclusion in the Central Lists of Other Backward Classes, the exercise undertaken by the State Governments in respect of the State Lists may be relevant what cannot be ignored in the present case is the very significant fact that in respect of all the States (except Haryana) the inclusion of Jats in the OBC Lists was made over a decade back. A decision as grave and important as involved in the present case which impacts the rights of many under Articles 14 and 16 of the Constitution must be taken on the basis of contemporaneous inputs and not outdated and antiquated data. In fact, under Section 11 of the Act revision of the Central Lists is contemplated every ten years. The said provision further illuminates on the necessity and the relevance of contemporaneous data to the decision-making process."
>
> (emphasis added)

109. The mandate that the State cannot bypass the Commission is clear from the decision of the ***Ram Singh (Supra)*** and that of A.P. High Court in ***T. Muralidhar (Supra).*** In the ***Ram Singh Case (Supra),*** it was held as follows:-

> "**48.** Of relevance, at this stage, would be of the arguments advanced on behalf of the Union claiming a power to itself to bypass NCBC and to include groups of citizens in the Central List of OBCs on the basis of Article 16(4) itself. Undoubtedly, Article 16(4) confers such a power on the Union but what cannot be overlooked is the enactment of the specific statutory provisions constituting a Commission (NCBC) whose recommendations in the matter are required to be adequately considered by the Union Government before taking its final decision.

Surely, the Union cannot be permitted to discard its self-professed norms which in the present case are statutory in character."

110. In ***T. Muralidhar (Supra),*** it was held as follows:-

> "…That apart, if the term of the Commission for Backward Classes expired on 30.9.2002, the Government ought to have revived or reconstituted the Commission for Backward Classes and the State cannot bypass the body which is the special body constituted pursuant to the directions of the Supreme Court in Indra Sawhney (supra), more so, the State Legislature enacted the law and that the provisions of that statute got to be followed, and no other body is competent to determine the same. The Supreme Court in Indra Sawhney case (supra) evolved criteria for determination of the social and educational backwardness. That apart, Objects and Reasons of A.P. Minorities Commission Act, 1998 and the enactment of A.P. Act 20 of 1993 are entirely different. Therefore, the contention that under Section 12(f) of the Andhra Pradesh Minorities Commissions Act, 1998 the Minority Commission can give its recommendations with regard to inclusion of a class in Backward Class is meritless. In the circumstances, the contention that consultation with the B.C. Commission was not mandatory cannot be accepted. Obviously, the Government has the power to reconstitute the Commission for Backward Classes and it can do so at this stage also."

E. THE STATE COULD NOT HAVE BYPASSED THE COMMISSION EVEN WHILE SUB-CLASSIFYING THE CLASSES:-

111. On the query from the bench as to why the State did not consult the Commission while sub-classifying the classes or why it did not at the least forward the report of the Anthropology department of the University of Calcutta to the Commission for its consideration and advice,the learned Advocate General said that possibly the State wanted to have the benefit of a much higher expert body than the Commission.

112. In this regard, this court notices the composition of the Commission as indicated by Section 3 of the Act of 1993, which is set out hereunder:-

> ***"Section 3*-Constitution of the Commission for Backward Classes.** *(1) The State Government shall constitute a body to be known as the West*

Bengal Commission for Backward Classes to exercise the powers conferred on, and to perform the functions assigned to, it under this Act,

(2) *The Commission shall consist of the following Members nominated by the State Government:—*
(a) *A Chairperson, who is or has been a Judge of the High Court;*
(b) a social scientist;
(c) two persons, who have special knowledge in matters relating to backward classes; and
(d) *a Member-Secretary, who is or has been an officer of the State Government in the rank of a Secretary to the Government of West Bengal."*

113. The Commission comprises a social scientist and two persons, who have special knowledge in matters relating to backwardclasses. By no stretch of the imagination, can it be said the expertise of the Commission is inferior. The State executive may possess the wherewithal to collect more information. Once a legislation, like the Act of 1993 is in place, the executive must demonstrate deference to the collective wisdom of the legislature.

114. By enacting the said section 3 in the 1993 Act, the legislature has entrusted the duty of identification of the backward classes upon a statutory body of highly qualified experts, i.e. the Commission. It is for the Commission to decide whether they need any further assistance. The report of the Department of Anthropology of the University of Calcutta has not been placed before the Commission. The State executive has not only bypassed the Commission by sub-classifying the classes based on the report of the Anthropology Department of the University of Calcutta but has also derogated the legislative mandate under the 1993 Act in general and Section 3 thereof in particular.

115. The Supreme Court in its decision of ***Sita Soren v. Union of India*** reported in ***2024 INSC 161***, while deciding whether the "Cash for questions" would be protected and be immune by reason of privileges and immunities of members of Parliament, have referred to the role of the Legislature in a **deliberative democracy.** It was held as follows:-

> "46. In a deliberative democracy, the aspirations of the people are met by discourse in democratic institutions. The foremost among these institutions are Parliament and the State Legislatures. The object of the Constitution to give life and meaning to the aspirations of the people is carried out by its representatives through legislative business, deliberations, and dialogue. Parliament is called the "grand inquest of the nation." Not only can the actions and legislative priorities of the government of the day be scrutinised and criticised to hold it accountable, but Parliament also acts as a forum for ventilating the grievances of individuals, civil society, and public stakeholders. When the space for deliberation in the legislature shrinks, people resort to conversations and democratic actions outside the legislature. This privilege of the citizens to scrutinise the proceedings in Parliament is a concomitant right of a deliberative democracy which is a basic feature of the Constitution. Our Constitution intended to create institutions where deliberations, views and counterviews could be expressed freely to facilitate a democratic and peaceful social transformation."

116. At paragraph 802 of ***Indra Sawhney (Supra)***, the apex court held that it is for the Commission and the State to decide the need for sub-classification of the Classes. The apex court emphasized the following words-. ***Where to draw the line and how to effect the sub-classification is, however, a matter for the Commission and the State***. Paragraph 802 is set out hereunder:-

> "**802.** We are of the opinion that there is no constitutional or legal bar to a State categorising the backward classes as backward and more backward. We are not saying that it ought to be done. We are concerned with the question if a State makes such a categorisation, whether it would be invalid? We think not. Let us take the criteria evolved by Mandal Commission. Any caste, group or class which scored eleven or more points was treated as a backward class. Now, it is not as if all the several thousands of castes/groups/classes scored identical points. There may be some castes/groups/classes which have scored points between 20 to 22 and there may be some who have scored points between eleven and thirteen. It cannot reasonably be denied that there is no difference between these two sets of castes/groups/classes. To give an illustration, take two occupational groups viz., goldsmiths and vaddes (traditional stone-cutters in Andhra Pradesh) both included

> within Other Backward Classes. None can deny that goldsmiths are far less backward than vaddes. If both of them are grouped together and reservation provided, the inevitable result would be that goldsmiths would take away all the reserved posts leaving none for vaddes. In such a situation, a State may think it advisable to make a categorisation even among other backward classes so as to ensure that the more backward among the backward classes obtain the benefits intended for them. <u>Where to draw the line and how to effect the sub-classification is, however, a matter for the Commission and the State — and so long as it is reasonably done, the Court may not intervene</u>. In this connection, reference may be made to the categorisation obtaining in Andhra Pradesh. The Backward Classes have been divided into four categories. Group A comprises "Aboriginal tribes, Vimuktajatis, nomadic and semi-nomadic tribes etc." Group B comprises professional group like tappers, weavers, carpenters, ironsmiths, goldsmiths, kamsalins etc. Group C pertains to "Scheduled Castes converts to Christianity and their progeny", while Group D comprises all other classes/communities/groups, which are not included in Groups A, B and C. The 25% vacancies reserved for backward classes are sub-divided between them in proportion to their respective population. This categorisation was justified in Balram [(1972) 1 SCC 660 : (1972) 3 SCR 247] . This is merely to show that even among backward classes, there can be a sub-classification on a reasonable basis."

117. Sub-classification of the OBCs involves the demarcation of such lines. Such demarcation involves determination of the percentage of reservation to be enjoyed by the classes of a sub-category. The role of the Commission is therefore an indispensable part of even sub-classification of the OBCs.

118. It has been submitted by the State Commission that it does not have the jurisdiction and power to advise the State as regards the need for the sub-classification of the classes, which are identified as backward by it for the purposes of Article 16(4). This is exfacie fallacious.

119. The rationale behind the sub-classification of the Other Backward Classes i.e. the segregation between more backward and backward classes among the Other Backward Classes is explained by the Supreme Court at paragraph 803 of ***Indra Sawhney (Supra)***. At paragraph 803, it was held as follows:-

> **“803.** There is another way of looking at this issue. Article 16(4) recognises only one class viz., “backward class of citizens”. It does not speak separately of Scheduled Castes and Scheduled Tribes, as does Article 15(4). Even so, it is beyond controversy that Scheduled Castes and Scheduled Tribes are also included in the expression “backward class of citizens” and that separate reservations can be provided in their favour. It is a well-accepted phenomenon throughout the country. What is the logic behind it? It is that if Scheduled Tribes, Scheduled Castes and Other Backward Classes are lumped together, OBCs will take away all the vacancies leaving Scheduled Castes and Scheduled Tribes high and dry. The same logic also warrants categorisation as between more backward and backward. We do not mean to say — we may reiterate — that this should be done. We are only saying that if a State chooses to do it, it is not impermissible in law.”

120. It is, therefore, laid down that the expression 'backward class of citizens' includes the Scheduled Castes, the Scheduled Tribes, and Other Backward Classes. The State therefore cannot grant reservation by clubbing the said 3 classes. Reservation is granted to the SCs, STs, and OBCs after segregating them inter alia by different percentages. The reason for such segregation is that if all the said 3 classes are integrated under the label of the Backward Classes and are granted a consolidated and uniform percentage of reservation, affirmative action would be proportionate and uniform. The legislature would address varying degrees of harm faced by each of such caste, tribe, and class, with equitable distribution of the percentage of reservation. It is therefore to appreciate and specifically address the inequalities faced by the similarly situated classes, the compartmentalization of classes into distinct categories, granting them different percentages of reservation, is adopted and made by the State. This is based on scientific data and due analysis.

121. Sub-classification of OBCs, made by the State, has addressed the divergent degrees of inequalities faced by the Other Backward Classes.

Such divergence can be identified and analyzed by reference to the materials collected by the Commission. The role of the Commission therefore in sub-classification of the classes becomes vital, imperative, critical and absolutely indispensable.

122. In the ***Indra Sawhney decision (Supra),*** at paragraph 290 it was held as follows-

> "**290.** The concept of equality is not inconsistent with reservation in public services because the Constitution specially says so, but, in view of its exclusion of others irrespective of merits, it can be resorted to only where warranted by compelling State interests postulated in Article 16. The State must be satisfied that in order to achieve equality in given cases, reservation is unavoidable by reason of the nature and degree of backwardness. Reservation must be narrowly tailored to that end, and subjected to strict scrutiny."

123. At paragraph 313 of ***Indra Sawhney (Supra),*** it was held as follows:-

> **313.** It is possible that large segments of population enjoying well entrenched political advantages by reason of numerical strength may claim "backward class" status, when, on correct principles, they may not qualify to be so regarded. If such claims were to be conceded on extraneous consideration, motivated by pressures of expediency, and without due regard to the nature and degree of backwardness, the very evil of discrimination which is sought to be remedied by the Constitution would be in danger of being perpetuated in the reverse at the expense of merit and efficiency and contrary to the interests of the truly backward classes of citizens who are the constitutionally intended beneficiaries of reservation. In the words of Krishna Iyer, J : [(1981) 1 SCC 246, 289 : 1981 SCC (L&S) 50 : (1981) 2 SCR 185, 234] (SCC p. 264, para 22)
>
> "… To lend immortality to the reservation policy is to defeat its raison d'etre, to politicise this provision for communal support and Party ends is to subvert the solemn undertaking of Article 16(1)…".

124. In ***Mohd. Shujat Ali v. Union of India*** reported in ***(1975) 3 SCC 76,*** it was held as follows:-

> "24. We thus arrive at the point at which the demand for equality confronts the right to classify. For it is the classification which determines the range of persons affected by the special burden or benefit of a law which does not apply to all persons. This brings out a paradox. The equal protection of the laws is a "pledge of the protection of equal laws". But laws may classify. And, as pointed out by Justice Brewer, "the very idea of classification is that of inequality". The court has tackled this paradox over the years and in doing so, it has neither abandoned the demand for equality nor denied the legislative right to classify. It has adopted a middle course of realistic reconciliation. It has resolved the contradictory demands of legislative specialisation and constitutional generality by a doctrine of reasonable classification. This doctrine recognises that the legislature may classify for the purpose of legislation but

> requires that the classification must be reasonable. It should ensure that persons or things similarly situated are all similarly treated. The measure of reasonableness of a classification is the degree of its success in treating similarly those similarly situated. ["The Equal Protection of the Laws", 37 California Law Review 341.]

125. In ***Janhit Abhiyan v. Union of India (EWS Reservation)*** reported in ***(2023) 5 SCC 1,*** it was held as follows:-

> "**392.**Ambica Mills [State of Gujarat v. Shri Ambica Mills Ltd., (1974) 4 SCC 656 : 1974 SCC (L&S) 381] justified overinclusiveness on the grounds of recognition of degrees of harm, administrative convenience, and legislative experimentation. Reference was made to Oliver Wendell Holmes, J.'s observation in Missouri, Kansas & Texas Railway Co. of Texas v. May [Missouri, Kansas & Texas Railway Co. of Texas v. May, 1904 SCC OnLine US SC 118 : 48 L Ed 971 : 194 US 267 at p. 269 (1904)] , that : (Ambica Mills case [State of Gujarat v. Shri Ambica Mills Ltd., (1974) 4 SCC 656 : 1974 SCC (L&S) 381] , SCC p. 676, para 56)
>
> "56. … legislation should not be disturbed by the Court unless it can clearly see that there is no fair reason for the law which would not require with equal force its extension to those whom it leaves untouched",toState that the judiciary must exercise self-restraint in such cases.""

126. A common line of argument advanced by the State of West Bengal and the State Commission is that the reports of some Committees set up by the Central government have also identified the classes from the Muslim community as backward. Therefore, the Muslim community classes are undisputedly backward. The State Commission, therefore, does not need to conduct any detailed survey or inquiry as regards their backwardness or inadequate representation of the classes in the service in the State. The learned AAG has placed reliance on the report of the Mandal Commission, which was prepared and tabled in the Parliament in the 1990s. It was argued that the said report has already identified certain classes of the Muslim community as backward. The argument cannot be sustained as the State would then have included such classes from the Muslim Community under the State OBC list in 1992 itself.

127. As discussed in the preceding paragraphs, present-time data is a must for making reservation for the OBC. That apart, this Court takes judicial notice of the fact that the reports of the committees placed by the State and Commission before this Court, were never been relied upon by the State and the Commission in 2010. Such reports did not form the basis of consideration by the State and Commission in the process of making provisions for OBC reservation. Reliance on such reports by the State and Commission is an ex-post attempt to cover up their failures and omissions.

128. The Supreme Court in the decision of ***P. Ramachandra Rao v. State of Karnataka,*** reported in ***(2002) 4 SCC 578*** has held such an *ex-post facto* reliance is subjective, and therefore cannot be taken note of by the court:-

> "**24.** In a monograph "Judicial Activism and Constitutional Democracy in India", commended by Professor Sir William Wade, Q.C. as a "small book devoted to a big subject", the learned author, while recording appreciation of judicial activism, sounds a note of caution—
>
> "it is plain that the judiciary is the least competent to function as a legislative or the administrative agency. For one thing, courts lack the facilities to gather detailed data or to make probing enquiries. Reliance on advocates who appear before them for data is likely to give them partisan or inadequate information. On the other hand if courts have to rely on their own knowledge or research it is bound to be selective and subjective. Courts also have no means for effectively supervising and implementing the aftermath of their orders, schemes and mandates. Moreover, since courts mandate for isolated cases, their decrees make no allowance for the differing and varying situations which administrators will encounter in applying the mandates to other cases. Courts have also no method to reverse their orders if they are found unworkable or requiring modification".
>
> Highlighting the difficulties which the courts are likely to encounter if embarking in the fields of legislation or administration, the learned author advises
>
> "the Supreme Court could have well left the decision-making to the other branches of government after directing their attention to the problems rather than itself entering the remedial field".

129. This Court also noticed that in 2010, when the 42 classes were recommended for classification as OBC, there was no sub-classification in the State. In 2011, however, when the Commission recommended the classification of the 35 classes as OBC, sub-classification was done for the first time. The Commission must and should have been consulted for recommending classification and sub-classification of the said 35 classes. Could the Commission recommend for classification simplictor when there are already in existence of two sub-categories amongst the OBCs? Was the Commission unaware of the two sub-categories?

130. The submission of the learned AAG that he was instructed by the Commission to submit that the Sub-classification of the classes did not fall within the domain of the Commission at the relevant point in time when the sub-classification of the 42 and the 35 classes was made, is contradicted and belied by the reply of the State to the affidavit-in-opposition of the National Commission, wherein under **para-IV-page.no. 6**, it was stated as follows:-

> *"Inclusion of any class in the State List of OBCs for the State of West Bengal is done on the recommendation of the WBCBC consideration of relative social, educational and economic backwardness of the particular class. The State follows a policy of segregating OBCs into 'Category-A' and 'Category-B' exclusively on the basis of their socio- economic backwardness. There is a set of objective criterion derived from the recommendation of the Mandal Commission by which the Classes belonging to OBC are evaluated in a 22-point scale in regard to their relative backwardness vis-a-vis their prevailing social, educational and economic standing. Classes securing 15.5 points and above are considered as 'More Backward' i.e. 'Category -A' while the classes securing 11 or above but less than 15.5 points are*

considered as 'Backward' i.e. 'Category-B'. In West Bengal, therefore, the criterion for being declared as OBC is only the relative backwardness of the particular class and strictly neither religion or conversion to any religion is taken into consideration."

131. The above would show that the Commission was in fact consulted by the State as having the expertise and jurisdiction to ascertain the relative backwardness of the classes. This is further confirmed by the fact that the sub-classification of the 36 classes made after 2012 was on the recommendation of the Commission, One of the executive orders sub-classifying the classes on the recommendation of the Commission namely **ORDER No. 2102-BCW/MR-209/11, dated the 1st June, 2015** which is set out hereunder:-

"WHEREAS it has been made to appear to the Governor that the West Bengal Commission for Backward Classes has recommended 6 (six) new classes of people as Other Backward Classes, amongst them, three classes have been identified as Other Backward Classes under More Backward (Category A) and other three classes have been identified as Other Backward Classes (Category B), respectively; NOW, THEREFORE, in exercise of the power conferred by section 16 of the West Bengal Backward Classes (Other than Scheduled Castes and Scheduled Tribes) (Reservation of Vacancies in Services and Posts) Act, 2012 (West Ben. Act XXXIX of 2012) (hereinafter referred to as the said Act) and in continuation of order No. 183-BCW/MR-209/ 11, dt. 16-01-2015, the Governor is pleased hereby to make, with immediate effect, the following amendment in the Schedule I appended to the said Act:-"

132. At this juncture, it may also be relevant to point out that under **paragraph number iii- page no. 5** of the reply of the State to the affidavit in opposition of the National Commission, wherein it has been stated as follows:-

> *"Prior to recommendation of a class/community for inclusion in the State OBC list, open applications are invited by the West Bengal Commission for Backward Classes (WBCBC), the Respondent No 2 herein. Thereafter hearings are held of the applicant according to procedure by conducting a proper hearing of the applicant community as well as the objector or objectors, if any. Extensive field survey by competent technical agencies like the Cultural Research Institute (CRI) or the Anthropology Department under Calcutta University, is conducted and thereafter the WBCBC recommends for inclusion of such communities in the State list. There is no intention or attempt from the part of either the State Government ororWBCBC to prioritise any community based on religious affiliation for inclusion in the State OBC list. It is quite unsurprising that, having been left out from consideration for reservation under SC as Stated hereinabove, most different backward classes who approach the WBCBC are from the Muslim community."*

133. This was an attempt to justify that the Commission had the option either to get the research done by the CRI or the Anthropological Department of the University of Calcutta. **Paragraph V-page no. 5** of the reply of the State to the Affidavit-in-opposition, is an attempt to glorify the authority of the CRI and its expertise to conduct such a survey. The State has also tried to justify that the CRI is the appropriate authority for conducting surveys before the National Commission. The said **para no. 4** is set out hereunder:-

> *"The Cultural Research Institute (CRI) is under the administrative control of the Backward Classes Welfare Department (BCWD). The CRI is a competent agency with Per technical expertise and know-how to conduct surveys and field studies regarding the determination of the socio- economic status of any caste, class or community. As the Rules of Business of the BCWD, as notified by the State West Bengal on 28th November, 2013 vide No. 865- Home (Cons)/R2R (Cons) - 08/2013 and dated 19.05.2015 vide No. 1*
> *880-BCW/5E-38/2014 by Backward Classes Welfare Department, stating that CRI is under the control of the BCWD and conducts all the survey and research related*

> *work for inclusion of any class or community in the State List of OBCs upon directions received from time to time from the WBCD. A copy of the said Notification dated 28th November, 2013 and 19.05.2015 are together annexed hereto and marked "R2"."*

134. This court at this juncture also takes judicial notice of the fact that it is the State who is deciding who would be the surveying authority for ascertaining the backwardness and the inadequate representation of the classes in the services under the State. Such conduct of the State is in direct conflict with and in violation of the dicta of ***Indra Sawhney (supra)*** and the Act of 1993. The independence of the Commission has been flagrantly compromised. The State has, in derogation of the 1993 Act and the law declared under Article 141 of the Constitution, decided who would be the surveying and data-collecting authority for the Commission. The Commission has been reduced to a handmaiden and or a compulsively obedient pet by the State.

135. The State is required to maintain an arms-length distance from the Commission to enable it to act independently and identify and make recommendations on the classes without any interference from the State. Section 3 of the Act 1993 prescribes the composition of the Commission, It includes a Member-Secretary, who is or has been an officer of the State Government in the rank of a Secretary to the Government of West Bengal. In compelling the Commission to accept the research and data of the CRI the State appears to have clearly diluted the functions of the Commission.

F. THE PRESUMPTION OF CONSTITUTIONALITY:-

136. The said principle obliges the court to presume the true existence of the conditions necessitating the need for the law. In ***Ram Krishna Dalmia v. S.R. Tendolkar, AIR 1958 SC 538:-,*** it was held as follows:-

> "11. (b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;
>
> (c) that it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;
>
> (e) **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 concieved existing at the time of legislation; and**
>
> (f) that while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, **if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and un-known reasons for subjecting certain individuals or corporations to hostile or discriminating legislation."**

137. In this regard, the research paper titled as 'RETHINKING THE PRESUMPTION OF CONSTITUTIONALITY by F. Andrew Hessick, an American Jurist and Professor of Law at the University of Carolina, makes interesting reading:-

> *"The presumption, in other words, involves a form of factual deference. In constitutional adjudication, the principal form of deference that courts provide to legislatures is a form of factual deference. That deference is known as the presumption of constitutionality. Under the presumption, in evaluating the constitutionality of legislation, courts assume facts necessary to satisfy the constitutional test under which the legislation is being evaluated. Whether legislation reasonably implements a government power depends on the State of the facts justifying the legislation. The presumption of constitutionality operates to supply the facts necessary to establish a law"s reasonableness."*
>
> *Courts have based the presumption of constitutionality on three reasons: to show due respect to the judgments of legislators, who are bound by an oath to support*

the Constitution; to promote democracy by preventing courts from interfering with decisions rendered by the elected legislature; and to take advantage of the legislature"s superior institutional design. None of these reasons provides a principled basis for adopting a factual presumption of constitutionality but refusing to defer to legislative interpretations of the Constitution.

And legislatures are better equipped than the courts to make he sorts of empirical findings relevant to legislation. Legislatures have more resources than courts to gather information—they have large staffs, general subpoena power, and large institutions such as the Congressional Research Service to facilitate their factfinding—and members of the legislature are more likely to be aware of local issues than judges because of the electoral process.

More than that, to the extent that the legislature does make good-faith findings of fact, it is reasonable to think that those findings focus more on the factual conditions that need rectifying, rather than on whether facts exist justifying the constitutionality of a statute. For example, if members of Congress were contemplating a ban on hand- guns at high schools, they would likely focus more on whether the ban would reduce gun violence than on how the reduction in violence would impact interState commerce (at least, that would have been their focus before Lopez). In short, in enacting legislation, a legislature is unlikely to have devoted much attention to whether the factual circumstances underlying the legislation satisfy the Court's constitutional test

Confirming that the legislature"s superiority at finding facts does not actually underlie the presumption of constitutionality is that the Supreme Court has refused on occasion to defer to Congress"s findings of facts. Consider Morrison, in which the Court struck down VAWA, which created a private cause of action for anyone who was thevictim of a gender motivated crime,118 as unauthorized by the Commerce Clause. Although Congress supported the legislation with factual findings that violence against women substantially impacted interState commerce, the Court found those findings insufficient, stating that "„whether particular operations affect interState commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question."

Without the presumption of constitutionality, courts would be required to comb legislative records and gather evidence to determine the constitutionality of an act."

138. The apex court in a recent decision in the case of ***Association for Democratic Reforms & Anr. v. Union of India & Ors.*** reported in ***2024 INSC 113*** held as follows:-

"17. On the question of burden of proof, I respectfully agree with the observations made by the Hon'ble Chief Justice, that once the petitioners are able to prima facie establish a breach of a fundamental right, then the onus is on the State to show that the right limiting measure pursues a proper purpose, has rational nexus with that

> purpose, the means adopted were necessary for achieving that purpose, and lastly proper balance has been incorporated.
>
> 18. The doctrine of presumption of constitutionality has its limitations when we apply the test of proportionality. In a way the structured proportionality places an obligation on the State at a higher level, as it is a polycentric examination, both empirical and normative. While the courts do not pass a value judgment on contested questions of policy, and give weight and deference to the government decision by acknowledging the legislature's expertise to determine complex factual issues, the proportionality test is not based on preconceived notion or presumption. The standard of proof is a civil standard or a balance of probabilities; where scientific or social science evidence is available, it is examined; and where such evidence is inconclusive or does not exist and cannot be developed, reason and logic may suffice."

139. The learned Advocate General has canvassed before this court that the petitioners have not been able to, demonstrate a prima facie case since they have not shown who is the person or classes of persons, prejudiced due to the enactment of the Act of 2012. The petitioners have not rebutted the presumption of Constitutionality since they did not argue that the State legislature does not have the competence to enact the Act of 2012.

140. Paragraphs 17 and 18 of the case of ***Associated Democratic Reforms (Supra)*** as quoted hereinabove, lays down the principles governing the burden of proof and presumption of constitutionality. The prima facie establishment of breach of fundamental rights would be enough for this Court to launch an enquiry.

141. In the facts of the present case, the petitioners have successfully shown and this Court has foundthat the State did not consult with the Commission while making the sub-classification of the classes. The petitioners have also demonstrated that the classification of the

classes by the State is not supported by cogent and scientific reports or recommendations by the Commission.

142. This court in the course of the hearing has noticed that Section 9 of the Act of 1993 has been amended by the State for diluting, and to some extent negating the advice of the Commission. Therefore the petitioners have successfully made out a prima facie case of a violation of the fundamental right under Article 16(1). This also indicates a possible infraction of Article 16(4).

143. It appears at this stage that, the State has been making an invidious attempt to negate and ignorethe advice of the Commission. This is also evident from the amendment of Section 9 of the 1993 Act. The court therefore needs to examine as to whether the Commission has fulfilled its obligation in advising the State in the process of classifying and sub-classifying classes as OBCs.

144. The presumption of constitutionality of a statute is not unqualified. At paragraph 18 of the ***Associated Democratic Case (supra)***, the Supreme Court held that the principle of presumption has its own limitations. The caveat therefore is that the court must show due respect and deference to the determination of complex social issues by the legislature. It is, however, also clarified that when a legislation may be questioned by the courts to determine as to whether the procedure adopted for such a determination has factored in constitutional principles.

145. The so-called reports of the Commission are challenged by the petitioners for being unscientific. Therefore, this court finds that the very foundation of the subject executive Action and legislation, i.e. the determination of social factors, is to justify the need for any action or legislation.

146. This court therefore needs to examine by of judicial review, whether a polycentric examination both empirical and normative, has at all been conducted by the Commission and the State qua such classification and sub-classification. This court, therefore, is of the view that in the present facts of the case, the doctrine of presumption of constitutionality cannot shut the gates of Judicial Review and the Constitutional validity of certain sections of the Act of 2012.

G. RIGHT TO RESERVATION IS NOT A FUNDAMENTAL RIGHT AND THE ADDITION OF THE AFFECTED CLASSES

147. It was urged by the learned AAG, before us, to consider the point of non-impleadment of the 77 classes by the petitioner in the present proceedings, which, according to him, is although a technical, however a point worth consideration. In this regard, the submission of the Commission that, once the State has provided the classes with reservation, a fundamental right to continue in service under the State vests in the classes, needs consideration.

148. It is to be noted that Art. 16(4) is enabling provision in that it enables the State to make provision for reservations for the backward classes of citizens who are also inadequately represented in the services under

the State notwithstanding the Art. 16(1), which mandates the creation of a level playing field for all the citizens in public employment. In this regard, reference may be made to the decision ***Mukesh Kumar v. State of Uttarakhand*** reported in ***(2020) 3 SCC 1*** of the Supreme Court wherein it was held as follows:-

> "Articles 16(4) and 16(4-A) do not confer fundamental right to claim reservations in promotion [Ajit Singh (2) v. State of Punjab, (1999) 7 SCC 209 : 1999 SCC (L&S) 1239] . By relying upon earlier judgments of this Court, it was held in Ajit Singh (2) [Ajit Singh (2) v. State of Punjab, (1999) 7 SCC 209 : 1999 SCC (L&S) 1239] that Articles 16(4) and 16(4-A) are in the nature of enabling provisions, vesting a discretion on the State Government to consider providing reservations, if the circumstances so warrant. It is settled law that the State Government cannot be directed to provide reservations for appointment in public posts [C.A. Rajendran v. Union of India, (1968) 1 SCR 721 : AIR 1968 SC 507] . Similarly, the State is not bound to make reservation for Scheduled Castes and Scheduled Tribes in matters of promotions. However, if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing inadequacy of representation of that class in public services. If the decision of the State Government to provide reservations in promotion is challenged, the State concerned shall have to place before the Court the requisite quantifiable data and satisfy the Court that such reservations became necessary on account of inadequacy of representation of Scheduled Castes and Scheduled Tribes in a particular class or classes of posts without affecting general efficiency of administration as mandated by Article 335 of the Constitution. [M. Nagaraj v. Union of India, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013]
>
> **18.** The direction that was issued to the State Government to collect quantifiable data pertaining to the adequacy or inadequacy of representation of persons belonging to Scheduled Castes and Scheduled Tribes in government services is the subject-matter of challenge in some appeals before us. In view of the law laid down by this Court, there is no doubt that the State Government is not bound to make reservations. There is no fundamental right which inheres in an individual to claim reservation in promotions. No mandamus can be issued by the Court directing the State Government to provide reservations. It is abundantly clear from the judgments of this Court in Indra Sawhney [Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1] , Ajit Singh (2) [Ajit Singh (2) v. State of Punjab, (1999) 7 SCC 209 : 1999 SCC (L&S) 1239] , M. Nagaraj [M. Nagaraj v. Union of India, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013] and Jarnail Singh [Jarnail Singh v. LachhmiNarain Gupta, (2018) 10 SCC 396 : (2019) 1 SCC (L&S) 86] that Articles 16(4) and 16(4-A) are enabling provisions and the collection of quantifiable data showing inadequacy of representation of Scheduled Castes and Scheduled Tribes in public service is a sine qua non for providing reservations in promotions. The data to be collected by the State Government is only to justify reservation to be made in the matter of appointment or promotion to public posts, according to Articles 16(4) and 16(4-A) of the Constitution. As such, collection of data regarding the inadequate representation of members of the Scheduled Castes

> and Scheduled Tribes, as noted above, is a prerequisite for providing reservations, and is not required when the State Government decided not to provide reservations. Not being bound to provide reservations in promotions, the State is not required to justify its decision on the basis of quantifiable data, showing that there is adequate representation of members of the Scheduled Castes and Scheduled Tribes in State services. Even if the under-representation of Scheduled Castes and Scheduled Tribes in public services is brought to the notice of this Court, no mandamus can be issued by this Court to the StateGovernment to provide reservation in light of the law laid down by this Court in C.A. Rajendran [C.A. Rajendran v. Union of India, (1968) 1 SCR 721 : AIR 1968 SC 507] and Suresh Chand Gautam [Suresh Chand Gautam v. State of U.P., (2016) 11 SCC 113 : (2016) 2 SCC (L&S) 291] . Therefore, the direction given by the High Court that the State Government should first collect data regarding the adequacy or inadequacy of representation of Scheduled Castes and Scheduled Tribes in government services on the basis of which the State Government should take a decision whether or not to provide reservation in promotion is contrary to the law laid down by this Court and is accordingly set aside. Yet another direction given by the High Court in its judgment dated 15-7-2019 [Vinod Kumar v. State of Uttarakhand, WP (S/B) No. 291 of 2019, decided on 15-7-2019 (Utt)] , directing that all future vacancies that are to be filled up by promotion in the posts of Assistant Engineer, should only be from the members of Scheduled Castes and Scheduled Tribes, is wholly unjustifiable and is hence set aside."

149. Therefore the right to reservation is not a fundamental right and the court cannot issue a mandamus directing the State to even consider the request of the class for getting a reservation.

150. The argument of the Commission however is that reservation assumes the character of a fundamental right after it has been granted by the State. The Supreme Court held that a decision as regards the grant of the reservation is the State's discretion. Hence even after reservation is granted by the State to a class, the State would continue to exercise discretion to withdraw such reservation in changing circumstances. Art. 16(4) cannot be interpreted to mean that after the grant of reservation, the State would lose its discretion to withdraw the reservation. It is essentially for that purpose, that periodic revision of the OBC lists has been mandated by section 11 of the Act of 1993.

Section 11, inter alia, enables the State to exclude a class from the list.

151. Therefore no class of citizens has the right to continue to enjoy reservation for eternity. The right to apply for a reservation is provided by section 9 of the Act of 1993. Whether or not a class is inadequately represented in the services under the State, falls within the subjective satisfaction (albeit based on objective criteria) of the State.

152. It is, therefore, held that the right to reservation and to continue to enjoy reservation does not crystallize as a right much less a fundamental right, even after the grant of reservation to a class. The said affected classes need not have been impleaded in these proceedings. The State is competent to represent such classes and defend the reservation made for them.

H. THE CONSTITUTIONAL VALIDITY OF CERTAIN SECTIONS OF THE WEST BENGAL BACKWARD CLASSES (OTHER THAN SCHEDULED CASTES AND SCHEDULED TRIBES) (RESERVATION OF VACANCIES IN SERVICES AND POSTS) ACT, 2012.

(i) The Object and Purpose of the Act of 2012

153. The preamble of the Act of 2012, is as follows:

> *An Act to provide for the reservation of vacancies in services and posts for the Backward Classes of citizens other than the Scheduled Castes and Scheduled Tribes.*
>
> *WHEREAS clause (4) of article 15 of the Constitution enables the State to make any special provisions for the advancement of any socially and educationally Backward Classes of citizens;*

AND WHEREAS clause (4) of article 16 of the Constitution enables the State to make any provision for the reservation of appointments or posts in favour of any Backward Classes of citizens which in the opinion of the State is not adequately represented in the services under the State;

AND WHEREAS clause (1) of article 38 of the Constitution States that, the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may, a social order in which justice, social, economic and political, shall inform all the institutions of the national life;

And WHEREAS under clause (2) of article 38 of the Constitution, the State shall, in particular, strive to minimize the inequalities in income and endeavour to eliminate inequalities in status, facilities and opportunities not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations;

AND WHEREAS under clause (b) of article 39 of the Constitution, the State shall in particular, direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

AND WHEREAS under clause (c) of article 39 of the Constitution, the State shall in particular direct the policy towards securing that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;

AND WHEREAS under article 46 of the Constitution, the State shall promote, with special care the educational and economic interests of the weaker sections of the people, and shall protect them from social injustice and all forms of exploitation;

AND WHEREAS the members of the Backward Classes of citizens other than the Scheduled Castes and Scheduled Tribes who are socially and economically backward, are not adequately represented in the services and posts within the State of West Bengal;

AND WHEREAS it is expedient to provide for the reservation of vacancies in services and posts for them;

It is hereby enacted in the Sixty-third Year of the Republic of India, by the Legislature of West Bengal, as follows:—"

154. The power to make a reservation for the backward classes not adequately represented in services under the State is already conferred by **Article 16 (4)** under Part III of the Constitution of India, read with **Article 46** under **Part IV** and **Entries 20** and **23** of the **Seventh Schedule.** The State, therefore, did not need any separate legislation to provide for such reservation.

155. In response to the queries from the bench, as regards the object and purpose of the Act of 2012, the Learned Advocate General has submitted that the Act of 2012 is for the declaration of backward classes, as opposed to the object of the Act of 1993, which is aimed at identification of the backward classes.

156. This court, however, notices that the provisions of the Act of 2012, appear to be aimed at both the classification and the implementation of reservation for the Other Backward Classes after they have been identified by the Commission for the purposes of Article 16(4).

157. The Act of 2012, in addition to prescribing reservation, inter alia creates Roster points for enabling reservation for OBCs, de-reservation of the reserved seats in contingencies, identification of persons falling in the creamy layer, issuance of OBC certificates by the concerned authority, and prescribing penalties for violation of reservation by the authorities under the State.

158. It is in this backdrop, therefore, that the discussion hereinafter with regard to the legality and constitutional vires of certain sections of the Act of 2012 is undertaken.

(ii)The Act of 2012 does not make any reference to, or prescribe for the application of the Act of 1993

159. It would appear from a plain reading of the Act of 2012 as a whole, that the State by enacting the Act of 2012 has reserved the power of classification/sub-classification and reservation of backward classes, both in the hands of the State legislature and Executive, without

reference to, involvement of, or consultation with, the Commission constituted under the Act of 1993.

160. The Act of 2012 to the extent that it excludes the application of the Act of 1993 and the role of the Commission thereunder in the process of identification and declaration of classes as OBC, is in direct conflict with and violation of, the dicta of the Hon'ble Supreme Court in the case of ***Indra Sawhney (Supra)*** and several other decisions referred hereinabove.

161. The Act of 2012 and the Act of 1993 Act are in force concurrently without the former referring to or applying or affirming or repealing the Act of 1993. It, therefore, appears that the State has reserved to itself, an uncanalised power of picking and choosing at its convenience as to when it would or would not consult the Commission for the purpose of identification of the backward classes for the purpose of reservation under Art.16(4). The discussion as regards the amendment of Section 9 of the Act of 1993 in the preceding paragraphs, also bears testimony to the exclusion of the role of the Commission, effected by the State, by first amending Section 9 and then enacting the Act of 2012.

(iii) Fraud on the constitutional power:-

162. Section 2(h) of the Act of 2012 defines Other Backward Classes. It is also noticed from **Section 2(h) of the Act of 2012** that the State has reserved an independent power to declare classes as backward,

entitled to reservation, even without any reference to the Commission. Section 2(h) of the Act of 2012 is set out hereunder:-

> **"Sec. 2(h).***"Other Backward Classes" shall mean such classes of citizens as specified in Schedule I, other than Scheduled Castes and Scheduled Tribes, and includes such classes as the State Government may, by notification in the Official Gazette, specify from time to time;"*

163. This, by itself, would amount to a fraud on the Constitutional power of the State under Art. 16(4) since after the judgment in ***Indra Sawhney (supra)*** and with the consequent upon, coming into force of the Act of 1993, the State is barred from declaring who are the Other Backward Classes without consulting the Commission. The State by enacting **Section 2(h) of the Act of 2012** is in complete derogation of Art. 16(4) of the Constitution insofar as it has excluded the role of the Commission in identifying OBCs.

164. Such exclusion of the role of the Commission, and arrogating to itself the power to ignore the Commission at its own sweet will whim and fancy therefore tantamounts to an exercise of fraudulent legislative power and consequently a fraud on Constitutional power under Art. 16(4). It appears that the Act of 2012 has been enacted for the oblique purpose of bypassing the Commission or at the least to render the mandatory requirement of consulting the Commission optional.

165. In ***S. R. Bommai v. Union of India*** reported in ***(1994) 3 SCC 1,*** at paragraph 374 it was held that:-

> **"374.** Without trying to be exhaustive, it can be Stated that if a Proclamation is found to be mala fide or is found to be based wholly on extraneous and/or irrelevant grounds, it is liable to be struck down, as indicated by a majority of learned Judges in the State of Rajasthan [(1977) 3 SCC 592 : AIR 1977 SC 1361 : (1978) 1 SCR 1] . This holding must be read along with our opinion on the meaning and scope of

Article 74(2) and the further circumstance that clause (5) which expressly barred the jurisdiction of the courts to examine the validity of the Proclamation has been deleted by the 44th Amendment to the Constitution. In other words, the truth or correctness of the material cannot be questioned by the court nor will it go into the adequacy of the material. It will also not substitute its opinion for that of the President. Even if some of the material on which the action is taken is found to be irrelevant, the court would still not interfere so long as there is some relevant material sustaining the action. The ground of mala fides takes in inter alia situations where the Proclamation is found to be a clear case of abuse of power, or what is sometimes called fraud on power — cases where this power is invoked for achieving oblique ends. This is indeed merely an elaboration of the said ground. The Meghalaya case, discussed hereinafter, demonstrates that the types of cases calling for interference cannot either be closed or specified exhaustively. It is a case, as will be elaborated a little later, where the Governor recommended the dismissal of the Government and dissolution of the Assembly in clear disregard of the orders of this Court. Instead of carrying out the orders of this Court, as he ought to have, he recommended the dismissal of the Government on the ground that it has lost the majority support, when in fact he should have held following this Court's orders that it did not. His action can be termed as a clear case of mala fides as well. That a Proclamation was issued acting upon such a report is no less objectionable."

166. In ***Krishna Kumar Singh v. State of Bihar,*** reported in ***(2017) 3 SCC 1***, it was held in paragraph 57:-

57. Applying the principles which emerge from the judgment of Jeevan Reddy, J. in Bommai [S.R. Bommai v. Union of India, (1994) 3 SCC 1] , there is reason to hold that the satisfaction of the President under Article 123(1) or of the Governor under Article 213(1) is not immune from judicial review. The power of promulgating Ordinances is not an absolute entrustment but conditional upon a satisfaction that circumstances exist rendering it necessary to take immediate action. Undoubtedly, as this Court held in Indra Sawhney v. Union of India [Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1] the extent and scope of judicial scrutiny depends upon the nature of the subject-matter, the nature of the right affected, the character of the legal and constitutional provisions involved and such factors. Since the duty to arrive at the satisfaction rests in the President and the Governors (though it is exercisable on the aid and advice of the Council of Ministers), the Court must act with circumspection when the satisfaction under Article 123 or Article 213 is challenged. The Court will not enquire into the adequacy, or sufficiency of the material before the President or the Governor. The Court will not interfere if there is some material which is relevant to his satisfaction. The interference of the Court can arise in a case involving a fraud on power or an abuse of power. This essentially involves a situation where the power has been exercised to secure an oblique purpose. In exercising the power of judicial review, the court must be mindful both of its inherent limitations as well as of the entrustment of the power to the head of the executive who acts on the aid and advice of the Council of Ministers owing collective responsibility to the elected legislature. In other words, it is only where the court finds that the exercise of power is based on extraneous grounds and amounts to no satisfaction at all that the interference of the court may be warranted in a rare case. However, absolute immunity from judicial review cannot be supported as a matter of first principle or on the basis of constitutional history.

167. The process of identification involves not only the ascertainment of backwardness but also an assessment of whether a backward class is inadequately represented in the services under the State by comparing the same with the entire populace including the unreserved classes. The role of the Commission, is therefore, indispensable since any process of classification and sub-classification is required to be preceded by, the identification of the classes. Such identification involves the analysis of the degree of harm, faced by the Other Backward Classes, which warrants an appreciation of a complex web of factors, for which a permanent Commission has been constituted by and under the Act of 1993.

(iv) The exclusion and/or non-reference to the role of the Commission is MANIFESTLY ARBITRARY

168. The exclusion of the role of the Commission, therefore, from the definition of the Other Backward Classes, as noticed hereinabove, dispenses with an independent, transparent, and unbiased identification and classification of the backward classes for the purposes of reservation in services under the State. Such exclusion is ex facie illegal and indicates manifest arbitrariness since the said definition is inconsistent with the object and purpose of Article 16(4) of the Constitution, the Enactment of the Act of 1993 and dicta of in the ***Indra Sawhney (Supra)***.

169. Manifest arbitrariness has been explained by the Supreme Court in the case of ***Shayara Bano v. Union of India, (2017) 9 SCC 1*** and

Association for Democratic Reforms & Anr. v. Union of India &Ors. reported in ***2024 SCC OnLine 150 (Electoral Bond Case)***.

170. In ***Shayara Bano(Supra)***, the Apex Court held as follows:-

> *"87. The thread of reasonableness runs through the entire fundamental rights chapter. What is manifestly arbitrary is obviously unreasonable and being contrary to the rule of law, would violate Article 14. Further, there is an apparent contradiction in the three-Judge Bench decision in McDowell [State of A.P. v. McDowell and Co., (1996) 3 SCC 709] when it is said that a constitutional challenge can succeed on the ground that a law is "disproportionate, excessive or unreasonable", yet such challenge would fail on the very ground of the law being "unreasonable, unnecessary or unwarranted". The arbitrariness doctrine when applied to legislation obviously would not involve the latter challenge but would only involve a law being disproportionate, excessive or otherwise being manifestly unreasonable. All the aforesaid grounds, therefore, do not seek to differentiate between State action in its various forms, all of which are interdicted if they fall foul of the fundamental rights guaranteed to persons and citizens in Part III of the Constitution.*
>
> *95. On a reading of this judgment in Natural Resources Allocation case [Natural Resources Allocation, In re, Special Reference No. 1 of 2012, (2012) 10 SCC 1] , it is clear that this Court did not read McDowell [State of A.P. v. McDowell and Co., (1996) 3 SCC 709] as being an authority for the proposition that legislation can never be struck down as being arbitrary. Indeed the Court, after referring to all the earlier judgments, and Ajay Hasia [Ajay Hasia v. Khalid Mujib Sehravardi, (1981) 1 SCC 722 : 1981 SCC (L&S) 258] in particular, which Stated that legislation can be struck down on the ground that it is "arbitrary" under Article 14, went on to conclude that "arbitrariness" when applied to legislation cannot be used loosely. Instead, it broad based the test, stating that if a constitutional infirmity is found, Article 14 will interdict such infirmity. <u>And a constitutional infirmity is found in Article 14 itself whenever legislation is "manifestly arbitrary" i.e. when it is not fair, not reasonable, discriminatory, not transparent, capricious, biased, with favouritism or nepotism and not in pursuit of promotion of healthy competition and equitable treatment. Positively speaking, it should conform to norms which are rational, informed with reason and guided by public interest, etc."</u>*

(emphasis added)

171. In ***Association for Democratic Reforms (Supra)*** the Apex Court held as follows:-

> **"193.** In Joseph Shine v. Union of India, a Constitution Bench of this Court expressly concurred with the doctrine of manifest arbitrariness as evolved in ShayaraBano (supra). In Joseph Shine (supra), one of us (Justice D Y Chandrachud) <u>observed that the doctrine of manifest arbitrariness serves as a check against State action or legislation "which has elements of caprice, irrationality or lacks an adequate determining principle." In Joseph Shine (supra), the</u>validity of Section 497 of the Penal Code, 1860 was challenged. Section 497 penalized a man who has sexual intercourse with a woman who is and whom he knows or has a

> reason to believe to be the wife of another man, without the "consent and connivance of that man" for the offence of adultery. Justice Nariman observed that the provision has paternalistic undertones because the provision does not penalize a married man for having sexual intercourse with a married woman if he obtains her husband's consent. The learned Judge observed that the provision treats a woman like a chattel:
>
> "23. […] This can only be on the paternalistic notion of a woman being likened to chattel, for if one is to use the chattel or is licensed to use the chattel by the "licensor", namely, the husband, no offence is committed. Consequently, the wife who has committed adultery is not the subject matter of the offence, and cannot, for the reason that she is regarded only as chattel, even be punished as an abettor. This is also for the chauvinistic reason that the third-party male has seduced her, she being his victim. What is clear, therefore, is that this archaic law has long outlived its purpose and does not square with today's constitutional morality, in that the very object with which it was made has since become manifestly arbitrary, having lost its rationale long ago and having become in today's day and age, utterly irrational. On this basis alone, the law deserves to be struck down, for with the passage of time, Article 14 springs into action and interdicts such law as being manifestly arbitrary.""
>
> 195. Justice DY Chandrachud in his opinion observed <u>that a provision is manifestly arbitrary if the determining principle of it is not in consonance with constitutional values. The opinion noted that Section 497 makes an "ostensible" effort to protect the sanctity of marriage but in essence is based on the notion of marital subordination of women which is inconsistent with constitutional values.</u>200 Chief Justice Misra (writing for himself and Justice AM Khanwilkar) held that the provision is manifestly arbitrary <u>for lacking "logical consistency" since it does not treat the wife of the adulterer as an aggrieved person and confers a 'license' to the husband of the woman</u>."

172. This Court finds that the Act of 1993 is in aid of Article 16(4) of the Constitution and aims at giving direction and efficacy for the proper and effective implementation of Article 16(4). The Act of 2012 to the extent that it excludes the operation of the Act of 1993 and excludes the role of the Commission in its implementation, is Manifestly Arbitrary. The exclusion of the role of the Commission by the Act of 2012 is not based on any principle or any adequate determining principle.

173. Since the Act of 1993 is aimed at giving necessary efficacy to Article 16 (4) of the Constitution, it stands on a high pedestal. It has been

enacted to give effect to the dicta of the Supreme Court under Article 141 of the Constitution, in the case of ***Indra Sawhney (Supra).*** The Act of 2012 to the extent that it seeks to bypass the Commission is ultra vires to the Constitution of India.

I. CONTEXTUAL READING OF SECTION 2(h) TO INCLUDE THE COMMISSION AND THE 1993 ACT IN ITS DEFINITION

174. Instead of striking down Section 2(h), this Court seeks to once again apply the doctrine of contextual interpretation already discussed hereinabove. This Court holds that the Commission and the 1993 Act must be an integral part of Section 2(h) in the process of identification of OBCs.

175. The Act of 1993 and the Act of 2012 are in aid of Article 16(4) of the Constitution of India. The Act of 2012 does not provide for any overriding effect on the Act of 1993. The Act of 2012 must therefore be read in addition to and not in derogation of the 1993 Act.

176. This Court therefore declares that the Act of 1993 must be read into the definition of the Backward Classes under Section 2(h) of the Act of 2012, to the extent of the making role of the Commission mandatory in the latter Act.

J. THE SECOND PART OF SECTION 2(h) AND SECTION 16 OF THE ACT OF 2012 IS HIT BY EXCESSIVE and ILLEGAL DELEGATION AND IS IN DEROGATION OF ART. 213 OF THE CONSTITUTION:-

177. The State legislature on one hand, by reason of the first part of Sec. 2(h), has taken over the power to identify and declare classes as

backward, under Art. 16(4) of the Constitution. Yet a parallel power, on the other hand, has been conferred on the Executive to declare classes as OBCs, by the Legislature, by the enactment of the second part of Sec. 2(h),.

178. As already discussed hereinabove, the State executive was already conferred with the power to declare classes as OBC under, inter alia, under Article 16(4) read with Article 46 of the Constitution. The State legislature, in its wisdom, chose to enact law and streamline the process of declaring classes as OBCs and make provisions for its implementation by way of the Act of 2012. To therefore parallelly reserve similar powers once again to the executive under a statute, is ex facie illegal and arbitrary. In this regard, reference may be made to in ***Sidhartha Sarawgi v. Kolkata Port,*** reported in ***(2014) 16 SCC 248*:**

> "9. The Constitution confers power and imposes duty on the legislature to make laws and the said functions cannot be delegated by the legislature to the executive. The legislature is constitutionally required to keep in its own hands the essential legislative functions which consist of the determination of legislative policy and its formulation as a binding rule of conduct. After the performance of the essential legislative function by the legislature and laying the guiding policy, the legislature may delegate to the executive or administrative authority, any ancillary or subordinate powers that are necessary for giving effect to the policy and purposes of the enactment. In construing the scope and extent of delegated power, the difference between the essential and non-essential functions of the delegate should also be borne in mind. While there cannot be sub-delegation of any essential functions, in order to achieve the intended object of the delegation, the non-essential functions can be sub-delegated to be performed under the authority and supervision of the delegate."

179. By the enactment of the Act of 2012, the State legislature has recognized that the power of classifying and providing for reservation for the Other Backward Classes for the purposes of Art.16(4) an

essential legislative function. Therefore to parallelly and further empower and enable the executive to notify OBCs is not an ancillary or subordinate power, and hence the second part of Section 2(h) suffers from the vice of excessive and fraudulent delegation. What has been parallelly conferred on the Executive is not any ancillary or substantive power. It is the main function that has been parallelly conferred upon the Executive which is manifestly and grossly and ex facie illegal.

180. This Court is conscious of **paragraph 860(6)** of the ***Indra Sawhney case (supra)*** where it was held that the Executive can make provision for reservation and the State legislature need not make any law to that effect. However, once the 2012 Act was enacted the State executive cannot be conferred under the garb of delegation parallel powers to declare classes as OBCs, and that too without factoring in Art. 213 of the Constitution. There cannot even otherwise be any urgency or emergent need for the declaration of OBCs without a discussion in the legislature.

181. In ***Ashwani Kumar v. Union of India***, reported in ***(2020) 13 SCC 585*** it was held that executive power is coextensive with the legislative power. The State executive can therefore make appropriate provisions on the subjects of the State list and concurrent list of seventh schedule to the Constitution of India, <u>in the absence of a law by the legislature.</u>

182. In the present case, however, the State legislature has enacted a detailed law (the 2012 Act) on the subject of reservation for the OBCs under Article 16(4). The State legislature has conferred upon itself the power of making such classification and reservation. The State legislature, therefore, by the Act of 2012 or any other law for that matter, could not have parallelly empowered the State executive to make provisions for reservation in the services under the State.

183. **Paragraph 860(6)** of ***Indra Sawhney case (supra)*** is set out hereunder:-

> "860. For the sake of ready reference, we also record our answers to questions as framed by the counsel for the parties and set out in para 681. Our answers question-wise are:
>
> (6) A 'provision' under Article 16(4) can be made by an executive order. It is not necessary that it should be made by Parliament/Legislature."

184. In ***Ashwani Kumar (supra),*** the apex court held:-

> "12. The executive has the primary responsibility of formulating government policies and proposing legislations which when passed by the legislature become laws. By virtue of Articles 73 and 162 of the Constitution, the powers and functions of the executive are wide and expansive, as they cover matters in respect of which Parliament/State Legislature can make laws and vests with the executive the authority and jurisdiction exercisable by the Government of India or the State Government, as the case may be. As a delegate of the legislative bodies and subject to the terms of the legislation, the executive makes second stage laws known as "subordinate or delegated legislation". In fields where there is no legislation, the executive has the power to frame policies, schemes, etc., which is coextensive with the power of Parliament or the State Legislature to make laws. At the same time, the political executive is accountable to the legislature and holds office till they enjoy the support and confidence of the legislature. Thus, there is interdependence, interaction and even commonality of personnel/members of the legislature and the executive. The executive, therefore, performs multifunctional role and is not monolithic. Notwithstanding this multifunctional and pervasive role, the constitutional scheme ensures that within this interdependence, there is a degree of separation that acts as a mechanism to check interference and protect the non-political executive. Part XIV of the Constitution relates to "Services under the Union and the States", i.e. recruitment, tenure, terms and conditions of service, etc., of persons serving the Union or a State and accords them a substantial degree of protection. "Office of profit" bar, as applicable to legislators and prescribed vide

> Articles 102 and 191, is to ensure separation and independence between the legislature and the executive."

185. The second part of section 2(h) also seeks to expand the power of the Executive beyond the power of issuing ordinances under Art. 213 of the Constitution of India. The State legislature, by the reason of section 2(h) of the Act of 2012 has sought to derogate Art.213 of the Constitution of India since an executive order under the second part of Section 2(h) does not have to limit its life span to 6 months. Hence such inclusions of OBCs by Executive Orders could operate indefinitely without the need for tabling it before the State Legislature for ratification. The 2012 Act to this extent smacks of an attempt at overreaching the power under Article 368 of the Constitution of India which the State legislature does not possess. Hence, the enactment of the second part of section 2(h) would therefore constitute a fraud on the Constitution.

186. The Object and reasons of the Act of 2012 cite and quote various articles under Part IV of the Constitution entitled Directive Principles of State Policy, as regards affirmative action. The word 'State' has been used in such Articles to convey that it is the state that has the power to make provisions for affirmative action. The fact that the legislature referred to such Articles to indicate its power to make provisions for reservation goes on to show that it has assumed the seat of power of the State thereby filling up the legislative void.

Hence, once the legislative void is filled up, no other organ, can ordinarily step into such a field.

187. In ***Lilly Kutty v. Scrutiny Committee, S. C. and S. T. and others*** reported in ***(2005) 8 SCC 283***, the apex court held:-

> "28. Any action by the authorities or by the people claiming a right/privilege under the Constitution which subverts the constitutional purpose must be treated as a fraud on the Constitution. The Constitution does not postulate conferment of any special benefit on those who do not belong to the category of people for whom the provision was made."

188. In ***Rustom Cavasjee Cooper (Banks Nationalisation) v. Union of India*** reported in ***(1970) 1 SCC 248***, the apex court held that it is the effect of the law that needs to be appreciated along with its object, in the following terms:-

> "49. We have carefully considered the weighty pronouncements of the eminent Judges who gave shape to the concept that the extent of protection of important guarantees, such as the liberty of person, and right to property, depends upon the form and object of the State action, and not upon its direct operation upon the individual's freedom. But it is not the object of the authority making the law impairing the right of a citizen, nor the form of action taken that determines the protection he can claim: it is the effect of the law and of the action upon the right which attracts the jurisdiction of the Court to grant relief. If this be the true view and we think it is, in determining the impact of State action upon constitutional guarantees which are fundamental, it follows that the extent of protection against impairment of a fundamental right is determined not by the object of the Legislature nor by the form of the action, but by its direct operation upon the individual's rights."

189. In ***Bennett Coleman & Co. v. Union of India,*** reported in ***(1972) 2 SCC 788***, it was held as follows:-

> "41. This Court in the Bank Nationalisation case laid down two tests. First it is not the object of the authority making the law impairing the right of the citizen nor the form of action that determines the invasion of the right. Secondly, it is the effect of the law and the action upon the right which attracts the jurisdiction of the court to grant relief. The direct operation of the Act upon the rights forms the real test."

190. In ***Krishna Kumar Singh v. State of Bihar,*** reported in ***(2017) 3 SCC 1*** said that a re-promulgation of an ordinance would constitute

fraud on the Constitution. Re-promulgation of an ordinance, in effect, means that the executive expands the limited 6-week life span of an ordinance after the Legislature commences business by the issuance of consecutive ordinances and does not table such ordinances before the legislature of the State for its ratification.

> "60. A reasonable period is envisaged by the Constitution for the continuation of an Ordinance, after the reassembling of the legislature in order to enable it to discuss, debate and determine on the need to enact a law. Repromulgation of an Ordinance, that is to say the promulgation of an Ordinance again after the life of an earlier Ordinance has ended, is fundamentally at odds with the scheme of Articles 123 and 213. Repromulgation postulates that despite the intervening session of the legislature, a fresh exercise of the power to promulgate an Ordinance is being resorted to despite the fact that the legislature which was in seisin of a previously promulgated Ordinance has not converted its provisions into a regularly enacted law. What if there is an exceptional situation in which the House of the legislature was unable to enact a legislation along the lines of an Ordinance because of the pressure of legislative work or due to reasons? Would the satisfaction of the Governor on the need for immediate action be arrived at for an act of repromulgation, after a legislative session has intervened?
>
> 61. Repromulgation of Ordinances is constitutionally impermissible since it represents an effort to overreach the legislative body which is a primary source of law-making authority in a parliamentary democracy. Repromulgation defeats the constitutional scheme under which a limited power to frame Ordinances has been conferred upon the President and the Governors. The danger of repromulgation lies in the threat which it poses to the sovereignty of Parliament and the State Legislatures which have been constituted as primary law-givers under the Constitution. Open legislative debate and discussion provides sunshine which separates secrecy of Ordinance-making from transparent and accountable governance through law-making.
>
> 99. The requirement of an Ordinance being laid before the legislature cannot be equated with the laying of subordinate legislation. An Ordinance is made in the exercise of the legislative power of the Governor which is subordinate to and not a stream which runs parallel to the power of law-making which vests in the State Legislatures and Parliament. Any breach of the constitutional requirement of laying an Ordinance before the legislature has to be looked upon with grave constitutional disfavour. The Constitution uses the expression "cease to operate" in the context of a culmination of a duration of six weeks of the reassembling of the legislature or as a result of a resolution of disapproval. The Framers introduced a mandatory requirement of an Ordinance being laid before the legislature upon which it would have the same force and effect as a law enacted by the legislature, subject to the condition that it would cease to operate upon the expiry of a period of six weeks of the reassembling of the legislature or earlier, if a resolution of disapproval were to be passed. The "cease to operate" provision is hence founded on the fundamental requirement of an Ordinance being placed before the legislature. If the executive

> has failed to comply with its unconditional obligation to place the Ordinance before the legislature, the deeming fiction attributing to the Ordinance the same force and effect as a law enacted by the legislature would not come into existence. An Ordinance which has not been placed before the legislature at all cannot have the same force and effect as a law enacted and would be of no consequence whatsoever.
>
> 101. The judgment of the Constitution Bench in D.C. Wadhwa [D.C. Wadhwa v. State of Bihar, (1987) 1 SCC 378] was delivered on 20-12-1986. The Constitution Bench made it clear, as a matter of constitutional principle, that the executive cannot subvert the democratic process by resorting to a subterfuge of repromulgating Ordinances. The Constitution Bench held that it would be a colourable exercise of power for the Government to ignore the legislature and to repromulgate Ordinances. Perhaps there is justification in the critique of the judgment that the Constitution Bench ultimately left the matter (having invalidated one of the Bihar Ordinances which still held the field) to an expression of hope which read thus : (SCC p. 395, para 7)
>
> "7. … We hope and trust that such practice shall not be continued in the future and that whenever an Ordinance is made and the Government wishes to continue the provisions of the Ordinance in force after the reassembling of the legislature, a Bill will be brought before the legislature for enacting those provisions into an act. There must not be Ordinance-Raj in the country."

191. A close reading of the second part of section 2(h) shows us that the executive has been conferred with the power of promulgating an executive order for an indefinite period and such order does not need to be placed before the State legislature for its ratification. The second part of section 2(h) therefore has the aforesaid re-promulgation effect, hence would constitute a fraud on the Constitution as held in ***Krishna Kumar (Supra):-***

> "105.8.Re-promulgation of ordinances is a fraud on the Constitution and a sub-version of democratic legislative processes, as laid down in the judgment of the Constitution Bench in D C Wadhwa;"

192. The conferment of legislative power to the State executive by the reason of the second part of section 2(h) also violates the doctrine of separation of powers, which is an integral part of parliamentary democracy and part of the basic structure of the Constitution. In this

regard, reference may be made to paragraphs 14 and 15 of the case of ***Ashwani Kumar (Supra),*** wherein it was observed:-

> "14. Constitution Bench judgments in Kesavananda Bharati v. State of Kerala [Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225] , State of Rajasthan v. Union of India [State of Rajasthan v. Union of India, (1977) 3 SCC 592] , I.R. Coelho v. State of T.N. [I.R. Coelho v. State of T.N., (2007) 2 SCC 1] and State of T.N. v. State of Kerala [State of T.N. v. State of Kerala, (2014) 12 SCC 696] have uniformly ruled that the doctrine of separation of powers, though not specifically engrafted, is constitutionally entrenched and forms part of the basic structure as its sweep, operation and visibility are apparent. Constitution has made demarcation, without drawing formal lines, amongst the three organs with the duty of the judiciary to scrutinise the limits and whether or not the limits have been transgressed. These judgments refer to the constitutional scheme incorporating checks and balances. As a sequitur, the doctrine restrains the legislature from declaring the judgment of a court to be void and of no effect, while the legislature still possesses the legislative competence of enacting a validating law which remedies the defect pointed out in the judgment. [Shri Prithvi Cotton Mills Ltd. v. Broach Borough Municipality, (1969) 2 SCC 283] However, this does not ordain and permit the legislature to declare a judgment as invalid by enacting a law, but permits the legislature to take away the basis of the judgment by fundamentally altering the basis on which it was pronounced. Therefore, while exercising all important checks and balances function, each wing should be conscious of the enormous responsibility that rests on them to ensure that institutional respect and comity is maintained.
>
> 15. In BinoyViswam v. Union of India [BinoyViswam v. Union of India, (2017) 7 SCC 59] , this Court referring to the Constitution had observed that the powers to be exercised by the three wings of the State have an avowed purpose and each branch is constitutionally mandated to act within its sphere and to have mutual institutional respect to realise the constitutional goal and to ensure that there is no constitutional transgression. It is the Constitution which has created the three wings of the State and, thus, each branch must oblige the other by not stepping beyond its territory.

193. In ***Kalpana Mehta and Ors. v. Union of India and Ors.*** reported in ***(2018) 7 SCC 1***, it was held that:-

> "256. This discussion leads to the conclusion that while the separation of powers, as a principle, constitutes the cornerstone of our democratic Constitution, its application in the actual governance of the polity is nuanced. The nuances of the doctrine recognise that while the essential functions of one organ of the State cannot be taken over by the other and that a sense of institutional comity must guide the work of the legislature, executive and judiciary, the practical problems which arise in the unfolding of democracy can be resolved through robust constitutional cultures and mechanisms. The separation doctrine cannot be reduced to its descriptive content, bereft of its normative features. Evidently, it has both normative and descriptive features. In applying it to the Indian Constitution, the significant precept to be borne in mind is that no institution of governance lies above the Constitution. No entrustment of power is absolute."

194. Before the Commencement of the Act of 2012, the State Executive used to make provisions for reservation for the Other Backward Classes in the exercise of the powers under Section 2(a), 2(c) read with Section 9 of the Act of 1993. The Act of 2012, however, has transferred such power of making reservation for the purposes of Article 16(4) from the State Executive to the State Legislature. Therefore, even though the Act of 1993 has not been explicitly repealed by the Act of 2012, the object and operation of the Act of 2012 would deprive the State Executive of the power to make any provision for reservation for Other Backward Classes either under the Act of 1993 or the Act of 2012. The Act of 1993 at present stands to compel the State Legislature under the Act of 2012 to mandatorily consult the Commission before making any inclusion or exclusion and be ordinarily bound by the advice, rendered by it.

195. The second part of Section 2(h) of the Act of 2012 is therefore liable to be struck down as ultra vires the Constitution of India.

K. SECTION 16 OF THE ACT OF 2012 FALLS FOR CONSIDERATION AS AN OBVIOUS CONSEQUENCE OF THE CHALLENGE MADE TO SECTION 2(h).

196. Section 16 of the Act of 2012 must also be seen in the context of the aforesaid discussion in respect of Section 2(h) of the Act.

197. This court has already found that the second part of Section 2(h) of the Act of 2012 is hit by illegal and excessive delegation, and has,

therefore, consequently struck it down. Hence, Section 2(h) after the said striking down stands as the following:-

> "*Other Backward Classes" shall mean such classes of citizens as specified in Schedule I, other than Scheduled Castes and Scheduled Tribes,...*"

198. While considering the Act of 2012 this Court has come across Section 16 of the Act of 2012. Section 16 is set out hereunder:-

> *"16. Power to amend any Schedule. The State Government may, by order published in the Official Gazette, add to, amend or alter any Schedule."*

199. A plain reading of Section 16 would demonstrate that the State government, which means the Executive of the State of West Bengal, is conferred with the power to amend any schedule that would include even the schedule-I of Act of 2012, which according to the first part of Section 2(h), only the legislature of a State can amend. For the reasons already recorded in respect of the discussion in respect of the second part of Section 2(h) Section 16 is bad for excessive parallel and illegal delegation of power to unilaterally include classes as OBC, and hence is liable to be struck down.

200. This Court is conscious of the fact that Section 16 has not been challenged by the petitioners before us. However, Section 2(h) of the Act of 2012 has been challenged on the ground of excessive delegation. The second part of section 2(h) has been struck down on ground excessive delegation. Section 2(h) therefore is vitally interlinked and connected with Section 16 since the latter also confers the power of amending the law to the Executive/State Government.

201. It is now well settled that a statute must be read in its entirety when any provision of a statute is challenged. In ***Maneka Gandhi v. Union of India*** reported in ***1978 SCC (1) 248*** he need for inter-weaving between Articles 14, 19, and 21, for a meaningful and liberal understanding of 'personal liberty', which would further the contours and valves of liberty was expressed in the following terms.

> **"5**…….If a person's fundamental right under Article 21 is infringed, the State can rely upon a law to sustain the action, but that cannot be a complete answer unless the said law satisfies the test laid down in Article 19(2) so far as the attributes covered by Article 19(1) are concerned….
>
> 'the fundamental rights conferred by Part III are not distinct and mutually exclusive rights. Each freedom has different dimensions and merely because the limits of interference with one freedom are satisfied, the law is not freed from the necessity to meet the challenge of another guaranteed freedom.
>
> but this theory was overturned in R.C. Cooper case [(1970) 2 SCC 298 : (1971) 1 SCR 512] where Shah, J., speaking on behalf of the majority pointed out that "Part III of the Constitution weaves a pattern of guarantees on the texture of basic human rights. The guarantees delimit the protection of those rights in their allotted fields they do not attempt to enunciate distinct rights."
>
> that even where a person is detained in accordance with the procedure prescribed by law, as mandated be Article 21, the protection conferred by the various clauses of Article 19(1) does not cease to be available to him and the law authorising such detention has to satisfy the test of the applicable freedoms under Article 19, clause (1). This would clearly show that Articles 19(1) and 21 are not mutually exclusive, for, if they were, there would be no question of a law depriving a person of personal liberty within the meaning of Article 21 having to meet the challenge of a fundamental right under Article 19(1)
>
> We may point out even at the cost of repetition that this Court has said in so many terms in R.C. Cooper case [(1970) 2 SCC 298 : (1971) 1 SCR 512] that each freedom has different dimensions and there may be overlapping between different fundamental rights and therefore it is not a valid argument to say that the expression "personal liberty" in Article 21 must be so interpreted as to avoid overlapping between that article and Article 19(1)
>
> **89.** It is a mark of interpretative respect for the higher norms our founding fathers held dear in effecting the dearest rights of life and liberty so to read Article 21 as to result in a human order lined with human justice. And running right through Articles 19 and 14 is present this principle of reasonable procedure in different shades. A certain normative harmony among the articles is thus attained, and I hold Article 21 bears in its bosom the construction of fair procedure legislatively

> sanctioned. No Passport Officer shall be mini-Caesar nor Minister incarnate Caesar in a system where the rule of law reigns supreme.
>
> 96…… Be that as it may, the law is now settled, as I apprehend it, that no article in Part III is an island but part of a continent, and the conspectus of the whole part gives the direction and correction needed for interpretation of these basic provisions. Man is not dissectible into separate limbs and, likewise, cardinal rights in an organic constitution, which make man human have a synthesis. The proposition is indubitable that Article 21 does not, in a given situation, exclude Article 19 if both rights are breached."

202. It follows from the above that a judicial inquiry in respect of a statute must not be limited to an Article or two of the Constitution which the petitioner alleges that the statute violates. The court has to examine as to whether such a law violates any other rights provided by Part III of the Constitution. It is on the same lines that it is held that when a provision of a statute is challenged on a particular legal ground, the court must, in an appropriate case, also to enquire into whether any other provision of the statute is hit by the same malady.

203. The doctrine of pith and substance is generally applied to ascertain whether a legislature has made a law on a subject that falls within its competence in a situation where there is an overlap between the entries of the State list and the Union list. The said doctrine is relevant for examining the entire length and breadth of excessive and illegal delegation spread across the Act of 2012.

204. In this regard, it is necessary to consider the reply of the State to the affidavit in opposition of the National Commission. At paragraph number (vi) of page 7 thereof, the concurrent power of the State legislature and State executive to define the Other Backward Classes in the exercise of the power under section 2(h) of the Act of 2012 is

averred. The said paragraph also refers to Section 16 of the act of 2012, as regards the executive power of the State to define the Other Backward Classes by amending any schedule including the schedule-I thereof. The State, therefore asserts the interconnection between Section 2(h) and Section 16 of the Act of 2012.

205. This court therefore cannot shut its eyes to the presence of Section 16 in the Act of 2012 more so when Section 2(h) has been challenged on the ground of excessive delegation which equally applies to Section 16 of the Act of 2012.

206. In the present case, it cannot be said that there is no pleading in the true and meaningful sense of the expression, as regards the challenge to Section 16. The grounds urged by the petitioners for attacking Section 2(h) of the Act of 2012 are also applicable to address the illegality of Section 16. Therefore, the State has not been taken by surprise in this regard.

207. This Court in the course of the hearing has also pointed out to the State respondents and the petitioners that given the challenge made to section 2(h) on the ground of excessive delegation, Section 16 is also required to be examined. Each party was therefore put to notice that section 16 is going to be examined by the court on the ground of excessive delegation of legislative power. No formal submission or time to respond to the same by way of pleading has been made by the parties.

208. Sections 2(f) and Section 5(a) of the Act of 2012 are hit by excessive and illegal delegation, as first found in Section 2(h). The first part of Section 2(h) and 16 clearly overlap each other. This court, therefore, appreciating the true object and purpose of the Act of 2012, holds that it is only the State legislature that would have the power to make provisions for reservation and amend the Act of 2012. This Court therefore strikes down section 16 of the Act of 2012.

209. The sub-categorized list of OBCs does not contain only 143 classes but 180 classes as would be evident from the list of OBCs, appearing at page no. 57-61 of the Affidavit of the National Commission. These classes have been sub-categorized by the State executive in the exercise of Section 16 of the Act of 2012, which has been struck down herein. Therefore, the said classes are liable to be struck off from the State OBC list and are hereby struck off.

L. SECTION 2(f) MUST BE READ TO INCLUDE THE ROLE OF THE COMMISSION AND THE 1993 ACT

210. Section 2(f) of the 2012 Act excludes the role of the Commission. Section 2(f) reads as follows:-

> "2(f) "lists" means list prepared by the Government of West Bengal from time to time for purposes of making provision for the reservation of appointments or posts in favour of Backward Classes of citizens which, in the opinion of the Government, are not adequately represented in the services under the Government of West Bengal or any local or other authority within the territory of the State of West Bengal or under the control of the Government of West Bengal;"

211. The definition of 'lists' under the Act of 1993 includes the role of the Commission given that the said Act comprises Sections 3, 8, 9 and 10, which charts out the role of the Commission. Whereas the definition

of "lists' under the Act of 2012 Act is unqualified in the sense that to prepare the 'lists' under the Act of 2012, the Act of 2012 does not mandate the State to consult with the Commission. It therefore completely excludes the role of the Commission in the preparation and declaration of reservation for any classes as OBCs in the State.

212. For the reasons already stated in the paragraphs hereinabove the definition of 'lists' in the Act of 2012 cannot also be sustained that it suffers from excessive and illegal delegation and also excludes the role of the Commission under the Act of 1993.

213. In this regard, reference may be made to the ***Shiv Shakti Coop. Housing Society v. Swaraj Developers, (2003) 6 SCC 659*** of the apex court, wherein the apex court held when the words can be read into a statute:-

> "19. It is a 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. 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. Price Waterhouse [(1997) 6 SCC 312 : 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 Moo PCC 1 : 4 MIA 179] 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 State of Gujarat v. DilipbhaiNathjibhai Patel [(1998) 3 SCC 234 : 1998 SCC (Cri) 737 : 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 (Tipton) Ltd. [(1978) 1 All ER 948 : (1978) 1 WLR 231 (HL)]] Rules of interpretation do not permit courts to do so, unless the provision as it stands is meaningless or of a 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 444 :

1910 WN 161 (HL)] , quoted in Jumma Masjid v. KodimaniandraDeviah [AIR 1962 SC 847] .)"

214. Section 2(f) inter alia, therefore would also enable the State Government to make provisions for reservation in service. This is impermissible given the State legislature stands empowered to provide for reservation in services under the State. Hence, section 2(f) calls for interference by the court. In this regard, reference may be to the decision of the ***Rai Sahib Ram Jawaya Kapur v. State of Punjab,*** reported in ***AIR 1955 SC 54*:-**

> "12. It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away. The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another. The executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature. It can also, when so empowered, exercise judicial functions in a limited way. The executive Government, however, can never go against the provisions of the Constitution or of any law. This is clear from the provisions of Article 154 of the Constitution but, as we have already Stated, it does not follow from this that in order to enable the executive to function there must be a law already in existence and that the powers of the executive are limited merely to the carrying out of these laws."

215. The first part of Section 2(h) of the Act of 2012 defines the 'Other Backward Classes'. The State legislature is enabled to define the OBCs by putting them under Schedule I of the Act of 2012. Section 2(f) thereof defines 'lists' whereby the Government of West Bengal is empowered to make provisions for reservation for the inadequately represented 'Other Backward Classes', in services under the State.

216. Therefore the first part of section 2(h) deals with the first condition of Art. 16(4)- which is the ascertainment of backwardness of a class to

examine whether that class is eligible to be backward. Section 2(f), however, deals with the second condition of the Art. 16(4) which is whether that class, defined as backward, is also inadequately represented in the services under the State.

217. The inconsistency, between the first part of section 2(h) and section 2(f), arises from the expression 'lists' as defined by section 2(f). This court notes that since section 2(h) has already indicated the place namely Schedule- I wherein the Other Backward Classes are to be listed out. Section 5(a) provides that reservation is to be granted in 10% and 7% to the classes set out under the two sub-categories OBC-A and OBC-B respectively, under Schedule-I thereby making section 2(f) redundant.

218. The need for section 2(f) i.e. the definition of 'lists', however, arises only when the State executive wants to make provisions for reservation for the purposes of Art. 16(4). The State executive cannot add or subtract any class to and from Schedule I (where the Other Backward Classes can be listed by the State legislature) since that would amount to amendment of law by the executive. Section 16 of the Act of 2012 which enabled the executive to amend any Schedule of the Act of 2012, has already been struck down hereinabove.

219. This Court's view as regards the illegality of the power conferred on the State Government Executive under Section 2(f) defining lists, under the Act of 2012, to make provision for reservations, is fortified by the fact that the Act of 1993 also defines lists under Section 2(c).

The State executive before the commencement of the Act of 2012 used to invoke the definition of lists, as provided by and under the Act of 1993, to make provisions for reservation of OBCs.

220. The definition of 'lists' as provided in the Acts of 1993 and 2012 are parimateria with one another. The definition of 'lists' in both the Acts are set out hereunder:-

> *"2(c) of the Act of 1993 "lists" means list prepared by the Government of West Bengal from time to time for purposes of making provision for the reservation of appointments or posts in favour of Backward Classes of citizens which, in the opinion of the Government, are not adequately represented in the services under the Government of West Bengal or any local or other authority within the territory of the State of West Bengal or under the control of the Government of West Bengal;*
>
> *2(f) of the Act of 2012- "lists" means lists prepared by the Government of West Bengal from time to time for purposes of making provision for the reservation of appointments or posts in favour of backward classes of citizens which, in the opinion of that Government, are not adequately represented in the services under the Government of West Bengal and any local or other authority within the territory of West Bengal or under the control of the Government of West Bengal."*

221. Reading down section 2(f) of the Act of 2012 in the manner indicated above, would enable the State legislature to exclusively have the power to make provisions for reservation. It would also empower the Legislature to determine the percentage of reservation either by classification or sub-classification even in the absence of sub-clause (a) of section 5. In this regard, reference is made to the decision of the case of ***Central Bank of India v. Shanmugavelu,*** reported in ***2024 SCC OnLine SC 92***, where it was held as follows:-

> "94. The principle of "reading down" a provision refers to a legal interpretation approach where a court, while examining the validity of a statute, attempts to give a narrowed or restricted meaning to a particular provision in order to uphold its constitutionality. This principle is rooted in the idea that courts should make every effort to preserve the validity of legislation and should only declare a law invalid as a last resort.

> 95. When a court encounters a provision that, if interpreted according to its plain and literal meaning, might lead to constitutional or legal issues, the court may opt to read down the provision. Reading down involves construing the language of the provision in a manner that limits its scope or application, making it consistent with constitutional or legal principles.
>
> 96. The rationale behind the principle of reading down is to avoid striking down an entire legislation. Courts generally prefer to preserve the intent of the legislature and the overall validity of a law by adopting an interpretation that addresses the specific constitutional concerns without invalidating the entire statute.
>
> 97. It is a judicial tool used to salvage the constitutionality of a statute by giving a provision a narrowed or limited interpretation, thereby mitigating potential conflicts with constitutional or legal principles."

222. This Court is however, conscious that since section 5(a) of the Act of 2012 is struck down (carefully discussed hereafter), the Act of 2012 could become infructuous in not permitting the State legislature to define and classify the OBCs for the purposes of Art. 16(4). The chain link of the provisions namely section 2(h), section 5(a), and schedule-I would stand broken. Therefore, this court is inclined to read down Section 2(f), which was otherwise, therefore liable to be struck down.

223. This court therefore to avoid striking down section 2(f) of the Act of 2012 reads down section 2(f) to mean that the expression-'Government of West Bengal' shall mean the State of West Bengal in discharge of its legislative functions, in consultation with the Commission under the Act of 1993.

M.THE LEGALITY OF SUB-CLASSIFICATION UNDER SECTION 5(a)OF THE ACT OF 2012

224. Section 5 (a) of the Act of 2012 prescribes reservation of 17% for the Other Backward Classes is to be distributed into 10% and 7% in two

categories namely a) More Backward (OBC-A) and b) Backward (OBC-B). Section 5(a) of the Act of 2012 is set out hereunder:-

> **"Section 5.***Reservation for Other Backward Classes in vacancies to be filled up by direct recruitment:- After the commencement of this Act, all appointments to services and posts in establishments which are to be filled up by direct recruitment shall be regulated in the following manner, namely,—*
>
> *(a) subject to the other provisions of this Act, ten per cent of the vacancies shall be reserved for candidates belonging to the Other Backward Classes denoted as "Other Backward Classes Category A" category and seven per cent of the vacancies shall be reserved for candidates belonging to the "Other Backward Classes Category B" category of the Other Backward Classes in the manner set out in Schedule-I*
> *Provided that the State Government may, from time to time, by notification in the Official Gazette, increase the percentage in the manner that the overall reservation for the Scheduled Castes, the Scheduled Tribes and Other Backward Classes shall not exceed fifty per cent,"*

225. As already discussed in the previous paragraphs hereinabove, in the context of the dicta of the Supreme Court and other courts in the case of ***Indra Sawhney (Supra), Ram Singh (Supra),*** and ***T. Murlidhar Rao (Supra)*** respectively, the sub-classification of OBCs must and can only be done in consultation with the Commission for Backward Classes.

226. Whether there is a need for the sub-classification of the Other Backward Classes is ascertained by measuring the relative backwardness and inadequacy of representation in the services under the State amongst and between the Other Backward Classes. Such an assessment is made by awarding marks on the relative backwardness and inadequate representation of the Other Backward Classes.

227. The Commission, therefore, has to play a determinative, pivotal, and decisive role in ascertaining the varying degrees of harm faced by a class or classes amongst the Other Backward Classes. Hence, not consulting the Commission on whether there exists a varying degree of harm among the Other Backward Classes is fatal to an equitable distribution of percentage of reservation among the Other Backward Classes.

228. Hence, the sub-classification made by section 5(a) of the Act of 2012 is ex facie illegal and ultra vires the Constitution of India. Section 5(a) defeats the very object of the dicta of ***Indra Sawhney (Supra)*** and Article 16(4). As discussed in the preceding paragraphs, the apex court in inter alia ***Indra Sawhney (Supra)*** has read, and directed the constitution of a permanent Commission, for giving a proper and objective direction to the provisions for reservation under Article 16(4). Excluding the Commissionon the subject of sub-classification, which involves a determination of a complex web of factors before subclassification, therefore defects the object and purpose of Article 16(4).

229. The exclusion of the Commission in the process of ascertaining the degrees of harm faced by a class has not only led to a violation of the dicta of ***Indra Sawhney (Supra)*** but also designates Article **16(4)** as the non-consultation with the Commissionnegates the effective evaluation of the Classes concerned for the sub-classification.

230. Consequently, the sub-categorization of the backward classes into OBC A and OBC B, as done by the State Legislature under Section 5(a) is manifestly and ex facie arbitrary and illegal insofar as it excludes, and negates the role of the Commission. Section 5(a) of the Act of 2012 declared ultra vires to the Constitution of India and is liable to be struck down, and hereby struck down.

231. In view of the above, and as an obvious consequence of the striking down of section 5(a), Schedule-I of the Act of 2012, sub-classifying the Other Backward Classes, is also liable to be struck down and is hereby struck down.

i. The Proviso To Section 5(a) and the Doctrine of Manifest Arbitrariness-

232. The proviso to section 5(a) empowers the State Government (the State Executive) to increase the percentage of reservation in the reserved posts not exceeding 50% for the Other Backward Classes, Schedule Caste, and Schedule Tribes. The said proviso is set out hereunder:-

> *"Provided that the State Government may, from time to time, by notification in the Official Gazette, increase the percentage in the manner that the overall reservation for the Scheduled Castes, the Scheduled Tribes and Other Backward Classes shall not exceed fifty percent."*

233. It would therefore appear that the said proviso completely excludes the role of the Commission in determining the percentage of reservation for the Other Backward Classes.

234. As already discussed hereinabove, the Commission has an inevitable role to play in deciding the percentage of reservation under Article 16

(4) of the Constitution of India. A class is declared as OBC not only because it is backward, based on scientific and identifiable data, but also on the basis of such class being inadequately represented in the services under the State. Such inadequacy is required to be assessed vis-a-vis the population as a whole including other unreserved classes.

235. The exercise of fixation on the percentage of reservation has a direct impact on the principle that every citizen, regardless of their background, is entitled to an equal opportunity in the services of the State as conferred by Article 16(1). An irrational and extravagant percentage of reservations under Art. 16(4) would destroy the level playing ground in the competition of entering into the service of the State. The role of the Commission therefore in advising the State in fixing the percentage of reservations is crucial and indispensable.

236. There is a vital nexus between the inadequate representation of a backward class in the services under the State and the percentage of reservation that is to be fixed for addressing such inadequacy. Whether a class is inadequately represented or not indeed falls within the subjective domain of the State. However such subjective satisfaction is required to be based on objective criteria. The Commission is the assessor of such objective criteria by culling out identifiable data and making recommendations based thereon.

237. It may be argued that whether a class is not adequately represented in the services under the State depends on the subjective satisfaction of

the State. Therefore it would seem that the State, at first glance, may have had the exclusive jurisdiction and power to decide what should be the quantum percentage of reservation of OBCs to compensate for such inadequate representation.

238. The Supreme Court in the following decisions has laid down the principle that subjective satisfaction should always be based on objective criteria and factors. The very purpose for which the Commission has been constituted is to make available to the State, objective materials and its opinion, based on which the State is to take the final call. It is to instil a certain degree of objectivity in the classification of the OBCs and their relative inadequate representation in the services under the State, that the Commission was entrusted with the duty and power of identification of the Classes for the purposes of Article 16(4).

239. In ***Barium Chemicals Ltd. v. Company Law Board,*** reported in ***1966 SCC OnLine SC 53,*** it was held as follows:-

> "28. These grounds limit the jurisdiction of the Central Government. No jurisdiction, outside the section which empowers the initiation of investigation, can be exercised. An action, not based on circumstances suggesting an inference of the enumerated kind will not be valid. In other words, the enumeration of the inferences which may be drawn from the circumstances, postulates the absence of a general discretion to go on a fishing expedition to find evidence. No doubt the formation of opinion is subjective but the existence of circumstances relevant to the inference as the sine qua non for action must be demonstrable. If the action is questioned on the ground that no circumstances leading to an inference of the kind contemplated by the section exists, the action might be exposed to interference unless the existence of the circumstances is made out. As my brother Shelat has put it trenchantly:
>
> "It is not reasonable to say that the clause permitted the Government to say that it has formed the opinion on circumstances which it thinks exist…."
>
> Since the existence of "circumstances" is a condition fundamental to the making of an opinion, the existence of the circumstances, if questioned, has to be proved at

least prima facie. It is not sufficient to assert that the circumstances exist and give no clue to what they are because the circumstances must be such as to lead to conclusions of certain definiteness. The conclusions must relate to an intent to defraud, a fraudulent or unlawful purpose, fraud or misconduct or the withholding of information of a particular kind. We have to see whether the Chairman in his affidavit has shown the existence of circumstances leading to such tentative conclusions. If he has, his action cannot be questioned because the inference is to be drawn subjectively and even if this Court would not have drawn a similar inference that fact would be irrelevant. But if the circumstances pointed out are such that no inference of the kind Stated in Section 237(b) can at all be drawn the action would be ultra vires the Act and void."

240. In ***Sadhu Roy v. State of W.B.,*** reported in ***(1975) 1 SCC 660***, the principle of subjective satisfaction based on objective criteria, was explained as follows:-

> "4. The question is whether, in the facts and circumstances of the case, the order can be impugned as colourable or callous exercise of power based on illusory or extraneous circumstances and therefore void. An examination of the surrounding set of facts, serving as backdrop or basis, becomes necessary to appreciate the argument that the subjective satisfaction of the authority did not stem from any real application of his mind but as a ritualistic recital in a routine manner....
>
> 5...........For, the legal label that the satisfaction of the executive authority about potential prejudicial activity is "subjective" does not mean that it can be irrational to the point of unreality. Subjective satisfaction is actual satisfaction, nevertheless. The objective standards which courts apply may not be applied, the subject being more sensitive; but a sham satisfaction is no satisfaction and will fail in court when challenged under Article 32 of the Constitution. If material factors are slurred over, the formula of "subjective satisfaction" cannot salvage the deprivatory order. Statutory immunology hardly saves such invalidity. After all, the jurisprudence of detention without trial is not the vanishing point of judicial review. The area and depth of the probe, of course, is conditioned by the particular law, its purpose and language. But our freedoms are not wholly free unless the judiciary have a minimal look at their executive deprivation, even though under exceptional situations."

241. The aforesaid test has been approved in the case of ***Indra Sawhney (Supra)*** in paragraph 798.

242. The percentage of reservation that may be finally fixed by the State for the purposes of Article 16(4) would have a direct impact on Article 16(1). Article 16(4) is not an exception but a facet of Artice 16(1). However, the State cannot be permitted to arbitrarily and

unreasonably fix any percentage of reservation which may extinguish the level playing field as envisaged by Art. 16(1). This court therefore holds that the fixation of the percentage of reservation shall be done by the State after consulting the Commission and the advice rendered thereupon shall be ordinarily binding upon the State.

243. The apex court in ***Jayshri Laxmanrao Patil (Maratha Reservation)*** referred to the fact of how an unreasonable percentage of the reservation will lead to extravagant reservation, thereby leading to the destruction of the general competition in the following terms:-

> "369. the Constitution Bench also after noticing the judgment of this Court in Southern Railway v. Rangachari [Southern Railway v. Rangachari, AIR 1962 SC 36 : (1962) 2 SCR 586] , observed that what is true in regard to Article 15(4) is equally true in Article 16(4). The following observations were made in para 37 : (M.R. Balaji case [M.R. Balaji v. State of Mysore, 1963 Supp (1) SCR 439 : AIR 1963 SC 649] , AIR p. 664)
>
> "37. … Therefore, what is true in regard to Article 15(4) is equally true in regard to Article 16(4). There can be no doubt that the Constitution-makers assumed, as they were entitled to, that while making adequate reservation under Article 16(4), care would be taken not to provide for unreasonable, excessive or extravagant reservation, for that would, by eliminating general competition in a large field and by creating widespread dissatisfaction amongst the employees, materially affect efficiency. Therefore, like the special provision improperly made under Article 15(4), reservation made under Article 16(4) beyond the permissible and legitimate limits would be liable to be challenged as a fraud on the Constitution."

244. In ***State of Kerala and another v. N.M. Thomas and others,*** reported in ***1976 (2) SCC 310***, held as follows:-

> "191. This means that the reservation should be within the permissible limits and should not be a cloak to fill all the posts belonging to a particular class of citizens and thus violate Article 16(1) of the Constitution indirectly. At the same time clause (4) of Article 16 does not fix any limit on the power of the Government to make reservation. Since clause (4) is a part of Article 16 of the Constitution it is manifest that the State cannot be allowed to indulge in excessive reservation so as to defeat the policy contained in Article 16(1). As to what would be a suitable reservation within permissible limits will depend upon the facts and circumstances of each case and no hard and fast rule can be laid down, nor can this matter be reduced to a mathematical formula so as to be adhered to in all cases."

245. In ***T. Devadasan v. Union of India and another***, reported in ***AIR 1964 SC 179*** held as follows:-

> "16. The startling effect of the carry forward rule as modified in 1955 would be apparent if in the illustration which we have taken there were in the third year 50 total vacancies instead of 100. Out of these 50 vacancies 9 would be reserved for the Scheduled Castes and Tribes, adding to that, the 36 carried forward from the two previous years, we would have a total of 45 reserved vacancies out of 50, that is, a percentage of 90. In the case before us 45 vacancies have actually been filled out of which 29 have gone to members of the Scheduled Castes and Tribes on the basis of reservation permitted by the carry forward rule. This comes to about 64.4% of reservation. Such being the result of the operation of the carry forward rule we must, on the basis of the decision in Balaji case [AIR 1963 SC 649] hold that the rule is bad. Indeed, even in General Manager Southern Railway v. Rangachari [(1962) 2 SCR 586] which is a case in which reservation of vacancies to be filled by promotion was upheld by this Court, Gajendragadkar, J., who delivered the majority judgment observed:
>
> "It is also true that the reservation which can be made under Article 16(4) is intended merely to give adequate representation to backward communities. It cannot be used for creating monopolies or for unduly or illegitimately disturbing the legitimate interests of other employees. In exercising the powers under Article 16(4) the problem of adequate representation of the backward class of citizens must be fairly and objectively considered and an attempt must always be made to strike a reasonable balance between the claims of backward classes and the claims of other employees as well as the important consideration of the efficiency of administration;…."
>
> It is clear from both these decisions that the problem of giving adequate representation to members of backward classes enjoined by Article 16(4) of the Constitution is not to be tackled by framing a general rule without bearing in mind its repercussions from year to year. What precise method should be adopted for this purpose is a matter for the Government to consider. It is enough for us to say that while any method can be evolved by the Government it must strike "a reasonable balance between the claims of the backward classes and claims of other employees" as pointed out in Balaji case [AIR 1963 SC 649] ."

246. The ratio that can be culled out from the line of decisions is that the percentage of reservation for the Other Backward Classes shall be determined vis-a-vis their present inadequacy of representation in the services under the State. In such a process of determination, the method to be adopted has to be objective. The Commission, therefore, has to formulate an objective methodology for such determination.

247. The exclusion of the Commission from the process of determining the percentage of reservation by the Act of 2012, therefore, would be ultra vires to the law declared by the Supreme Court in the above-cited decisions, and so also ultra vires to Art. 16(4) since it mandates an objective and fair percentage of reservation, which is not possible without the aid and advice of the Commission.

248. The proviso to section 5(a) enables the State executive to determine the percentage of reservation for the Other Backward Classes. It is irrational and illogical that the classification and declaration of the Other Backward Classes for the purposes of Article 16(4) can be made by the State legislature given the power under first psrt of Section 2(h), while the percentage of reservation would have to be fixed by the State executive. Hence such provision, apart from suffering from the excessive delegation, would also suffer from manifest arbitrariness given the dicta of the Supreme Court in the ***Electoral Bond Case (Supra).***

249. This court therefore to avoid striking down the said proviso to the sub-clause (a) of section 5 read the words- “the State Legislature shall mandatorily have due regard to the opinion of the Commission constituted under the Act of 1993, before fixing the percentage of reservation for the Other Backward Classes and the advice rendered thereupon shall be ordinarily binding upon the State” in the said proviso.

250. The court also needs to read down the expression 'State government' as used in the said proviso to Section 5, to mean only the 'State of West Bengal in exercise of Legislative function', in consulation with the Commission under the Act of 1993, since after the enactment of the Act of 2012, the State executive can no longer make any provisions for reservation. This court adopts this principle of contextual interpretation since it is well-settled that the courts must avoid as far as possible striking down a provision. The first resort of the court when it is faced with an inconsistent provision, must be to make such a provision consistent and harmonious with the other sections of a statute and its the object and purposes to give effect to the intention of the legislature.

N. THE REVIVAL OF THE EXECUTIVE ORDERS ISSUED BY THE STATE BETWEEN APRIL 2010 AND MAY 2012

251. The next question that comes for consideration is what would be the fate of the executive orders issued by the State between April and September 2010 classifying and sub-classifying the classes given that this court has struck down the sub-classification of the 143 classes based on which reservation of 17% was granted by the Act of 2012. In other words, do such executive orders revive in view of the Act of 2012 becoming unable to grant reservations to the classes?

252. Section 19 of the Act of 2012 deals with the executive orders passed before the Commencement of the Act of 2012. Section 19 needs to be noted:-

> *"**Saving. 19**. Actions taken in pursuance of any notifications, orders etc. issued for the purpose prior to coming to force of this Act shall be deemed to have been taken under the provisions of this Act."*

253. The marginal note of the said section is entitled "saving". The language of section 19 indicates that such executive orders shall be deemed to have been passed under the provisions of the Act of 2012 implying that the executive orders stood subsumed in the Act of 2012. The State legislature sub-classified the classes and made provision for 17% of reservation for them under Section 5 is essentially based on the executive orders that classified and sub-classified the classes for the purposes of Article 16(4).

254. Therefore the Act of 2012 derived support from and was based on, the said executive orders. Hence the executive orders could not have been and have been, repealed by the Act of 2012. In this regard, reference may be made to paragraphs 7 and 8 of the decision of ***Koteswar Vittal Kamath v. K. Rangappa Baliga & Co.,*** reported in ***(1969) 1 SCC 255:-***

> "7. The question of validity of the contracts, in these circumstances, will clearly depend on whether future contracts in coconut oil were prohibited by any law or orders or notifications which continued in force in 1952, after the Essential Supplies (Temporary Powers) Act 24 of 1946 had come into force in the State of Travancore-Cochin on 17th August, 1950. This opens the question whether any prohibitory order was validly in force on the 17th August, 1950. In turn, the answer to this question will depend on whether a valid prohibitory order was in force on 30th March, 1950, which could continue in force under Section 73(2) of Act 5 of 1950. The only two earlier prohibitory orders were the Prohibition Order of 1119 and the Prohibition Order of 1950. On this aspect, reliance was placed on behalf of the respondent on the circumstance that, under Entry 48 of List I of the Seventh Schedule to the Constitution, the Parliament had the exclusive power to legislate on the subject of stock exchanges and future markets, and this Court has already held in Waverly Jute Mills Co. Ltd. v. Raymon& Co. (India) Private Ltd. [(1963) 3 SCR 209] that a legislation on Forward Contracts would be a legislation on future markets, so that a State Legislature is not competent to legislate in respect of

Forward Contracts under its power of legislation conferred by Entry 26 of List II, which relates to trade and commerce within the State. On this basis, it was argued that the State Government, on 8th March, 1950, was not competent to issue the Prohibition Order of 1950, as that Order was very clearly a piece of legislation on Forward Contracts. It appears to us that, in the present case we need not express any final opinion on this question. If it is held that the Government of Travancore-Cochin was competent to pass this Prohibition Order of 1950, because the power was derived under Act 8 of 1122, which was validly in force in the State on 8th March, 1950, then that would be the Order which would continue in force under Section 73(2) of Act 5 of 1950. On the other hand, if it be held that the State Government could not competently pass the Prohibition Order of 1950, because it was a piece of legislation on Forward Contracts, that Order would have to be treated as void and non est. Thereupon, the earlier Prohibition Order of 1119, would continue in force right up to 30th March, 1950. Act 8 of 1122, had continued in force the Prohibition Order of 1119, with the qualification that it was to remain in force until it was superseded or modified by the competent authority under the provisions of this Act 8 of 1122. When the Prohibition Order of 1950, was purported to be issued on 8th March, 1950, it was not laid down that it was being issued so as to supersede the earlier Prohibition Order of 1119. If it had been a valid Order, it would have covered the same field as the Prohibition Order of 1119, and, consequently, would have been the effective Order under which the rights and obligations of parties had to be governed. On the other hand, if it be held to be void, this Order will not have the effect of superseding the earlier Order of 1119. Learned counsel for the respondent, however, urged that the Prohibition Order of 1119, cannot, in any case, be held to have continued after 8th March, 1950, if the principle laid down by this Court in Firm A.T.B. Mehtab Majid &Co.v. State of Madras [(1963) Supp 2 SCR 435] is applied. In that case, Rule 16 of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939, was impugned. A new Rule 16 was substituted for the old Rule 16 by publication on September 7, 1955 and this new rule was to be effective from 1st April, 1955. The court held that the new Rule 16(2) was invalid, because the provisions of that rule contravened the provisions of Article 304(a) of the Constitution. Thereupon, it was urged before the court that, if the impugned rule be held to be invalid, the old Rule 16 gets revived, so that the tax assessed on the basis of that rule will be good. The court rejected this submission by holding that:

"Once the old rule has been substituted by the new rule, it ceases to exist and it does not automatically get revived when the new rule is held to be invalid.

8. On that analogy, it was argued that, if we hold that the Prohibition Order of 1950, was invalid, the previous Prohibition Order of 1119, cannot be held to be revived. This argument ignores the distinction between supersession of a rule, and substitution of a rule. In the case of Firm A.T.B. Mehtab Majid & Co., the new Rule 16 was substituted for the old Rule 16. The process of substitution consists of two steps. First, the old rule it made to cease to exist and, next, the new rule is brought into existence in its place. Even if the new rule be invalid, the first step of the old rule ceasing to exist comes into effect, and it was for this reason that the court held that, on declaration of the new rule as invalid, the old rule could not be held to be revived. In the case before us, there was no substitution of the Prohibition Order of 1950, for the Prohibition Order of 1119. The Prohibition Order of 1950, was promulgated independently of the Prohibition Order of 1119 and because of the provisions of law it would have had the effect of making the Prohibition Order of

> 1119 inoperative if it had been a valid Order. If the Prohibition Order of 1950 is found to be void ab initio, it could never make the Prohibition Order of 1119 inoperative. Consequently, on the 30th March, 1950, either the Prohibition Order of 1119 or the Prohibition Order of 1950 must be held to have been in force in Travancore-Cochin, so that the provisions of Section 73(2) of Act 5 of 1950 would apply to that Order and would continue it in force. This further continuance after Act 5 of 1950, of course, depends on the validity of Section 3 of Act 5 of 1950, because Section 73(2) purported to continue the Order in force under that section, so that we proceed to examine the argument relating to the validity of Section 3 of Act 5 of 1950."

255. In the aforesaid decision of ***Koteswar Vittal Kamath (Supra)***, the apex court dealt with the distinction between the substitution of a rule and supersession thereof. The court therein was dealing with two prohibitory orders, which were passed independently of each other without one substituting the other. The court finally held that since there has been no substitution of one prohibitory order by the other the first prohibitory was not made to cease to exist by the second prohibitory order but merely became inoperative due to the promulgation of the second prohibitory order. Then, on the second prohibitory order being held as invalid, the first prohibitory would become operative and the court went on the examine the validity of the first prohibitory order.

256. The law laid in the above decision squarely applies to the present case. The Act of 2012 has not extinguished the executive orders. The Act of 2012 relied on executive orders to make the sub-classification of the classes and provide for their reservation. The executive orders classifying and sub-classifying the classes were passed under the Act of 1993, thereby independent of the Act of 2012. The said executive

orders have not been merely substituted by the Act of 2012 but have been superseded by the said Act.

257. In this regard, it could also be argued that the executive orders stood eclipsed by the Act of 2012. Therefore on the relevant provisions of the Act of 2012, providing for reservation, being held as invalid the executive order would be revived.

(i) The sub-classification by Executive Order dated 24th September 2010

258. The executive order dated 24th September 2010 that sub-classified the classes, is liable to be held illegal since the said sub-classification was made without consulting the Commission, and hence, such executive orders sub-classifying the classes are hereby struck down.

259. This Court need not examine the executive orders, which classified the 66 classes before April 2010 since such classification has not been challenged before this court. The validity of the executive orders that classified the 77 classes between April and September 2010, therefore, needs to be examined.

O. HAS THE STATE APPLIED ITS MIND TO THE RECOMMENDATIONS OF THE COMMISSION WITH RESPECT TO THE 77 CLASSES BETWEEN APRIL AND SEPTEMBER 2010?

260. The law as it stands as per the dicta of ***Indra Sawhney (Supra)*** is that the State needs to render cogent reasons when it disagrees with the recommendations of the Commission. It therefore may be

argued that when the State agrees with the advice of the Commission, the State need not assign its **own reasons**.

261. If the amended Section 9 of the Act of 1993 is interpreted to mean that the State has to render its own reasons also in cases where it accepts the advice of the Commission, then one of the purposes of the Act of 1993 i.e to reduce the burden on the State in conducting a survey on ad hoc basis for making provisions for reservation under Article 16(4) will be defeated.

262. Since the State is the final authority for the grant of reservation under Art. 16(4), it therefore follows that the State is required to apply its mind to the recommendations of the Commission and express its opinion on the same whether it accepts or rejects it.

263. Useful parallels may be drawn in cases for sanction to prosecute under the Prevention of Corruption Act 1988.

264. In ***Central Bureau of Investigation v. Ashok Kumar Aggarwal*** reported in ***(2014) 14 SCC 295***, it was held as follows:-

> "16.1. The prosecution must send the entire relevant record to the sanctioning authority including the FIR, disclosure Statements, Statements of witnesses, recovery memos, draft charge-sheet and all other relevant material. The record so sent should also contain the material/document, if any, which may tilt the balance in favour of the accused and on the basis of which, the competent authority may refuse sanction.
>
> 16.2. The authority itself has to do complete and conscious scrutiny of the whole record so produced by the prosecution independently applying its mind and taking into consideration all the relevant facts before grant of sanction while discharging its duty to give or withhold the sanction.
>
> 16.3. The power to grant sanction is to be exercised strictly keeping in mind the public interest and the protection available to the accused against whom the sanction is sought.

> 16.4. The order of sanction should make it evident that the authority had been aware of all relevant facts/materials and had applied its mind to all the relevant material.
>
> 16.5. In every individual case, the prosecution has to establish and satisfy the court by leading evidence that the entire relevant facts had been placed before the sanctioning authority and the authority had applied its mind on the same and that the sanction had been granted in accordance with law."

265. In ***Association for Democratic Reforms & Anr. v. Union of India & Ors.*** reported in ***2024 INSC 113,*** wherein the court observed the need for transparency to create and sustain a democratic setup in the following terms:-

> "63. This principle was further elucidated in SP Gupta v. Union of India. The Union of India claimed immunity against the disclosure of the correspondence between the Law Minister, the Chief Justice of the High Court of Delhi, and the Chief Justice of India on the reappointment of Additional Judges. Justice P N Bhagwati while discussing the position of law on claims of non-disclosure, observed that the Constitution guarantees the "right to know" which is necessary to secure "true facts" about the administration of the country. The opinion recognised accountability and transparency of governance as important features of democratic governance. Democratic governance, the learned Judge remarked, is not restricted to voting once in every five years but is a continuous process by which the citizens not merely choose the members to represent themselves but also hold the government accountable for their actions and inactions for which citizens need to possess information."

P. HAS THE COMMISSION ACTED INDEPENDENTLY AND BONAFIDE IN TERMS OF THE MANDATE UNDER THE 1993 ACT AND THE DICTA OF THE SUPREME COURT IN MAKING THE RECOMMENDATIONS IN THE YEAR 2009-2010 TO THE STATE?

i. The Procedure Of Identification Adopted By The Commission Qua The Classification Of 77 Classes:-

<u>The Haste</u>

266. The submission of the petitioners is that the Commission has acted in undue haste and with lightning speed in making recommendations for the classification of the 77 classes to make the public announcement of the then CM a reality. According to the Petitioners, the Commission

appeared to be in a tearing hurry to fulfill the wishes of the Chief Minister made in a political rally.

267. The annual reports of the Commission, annexed to the petitions and some retrieved by the Court from its website are relevant for examining the aforesaid submission of the petitioner. The annual reports of the Commission are tabulated hereunder:-

Annual Year	**Number of applications, filed for inclusion.**	**The number of applications actually entertained by the Commission, carrying forward the pending applications of the previous year.**	**Number of classes recommended for inclusion as OBCs.**
April, 2003-March, 2004. **Ref**-Pg.no. 65 of WP. NO 60 of 2011	16	140+16= 156	**NIL**- no disposal has been effected.
2004-2005 **Ref**.annexure at pg.66 of the WP.	10	156+10=166	One class namely **Devanga**was recommended for inclusion while disposing of 14 applications.
2005-2006 **Ref.** annexure at pg.67 of the WP	4	152+4-156	No class was recommended while disposing of 24 applications for inclusion.
2006-2007 **Ref.** See annexure at pg.68	TheCommission says that 5 applications for inclusion are pending before it, however, it appears that during the financial year of 2005-2006, 156 applications were pending, out of which 24 had been disposed of in the year.	**5**	NIL

2007-2008	**7**	**7**	NIL
2008-2009	**1**	111	2, while disposing of 9 applications.
2009-2010	79	79	15 applications for inclusion have been considered, and all 15 were We may note that the number of applications indicated by the annual report of 2009-2010 only reflects the number of applications, which were filed till **31st March 2010,** the allegation being that the Commission recommended classes for inclusioneven after March 2010 and within September 2010, indicates, therefore, the actual disposal and recommendation rate would be reflected from the conjoint reading of 2009-2010 & 2010-2011's annual reports recommended for inclusion.
2010-2011	119	119+142=261	At least, 27 classes had to be recommended for inclusion. 216 applications were disposed of.

268. The Commission between the years **2010-2011** achieved heights qua the disposal rate of applications. It disposed of **216** applications while recommending only **27** classes for inclusion. As many as **189** applications were received by the Commission and rejected. Therefore it is seen that the disposal rate during 2009-2010 & and 2010-2011-was exceedingly high.

269. It is not known which classes and religious denominations were there in the said 189 applications. Secondly, how come during a span of 6 months viz. **April 2010- September 2010,** the Commission recommended **27** classes for inclusion (out of that series of 42 classes), **99%** of which classes, were from the Muslim community. It is not known if the Commission, hence, received **79 applications** for inclusion by **March 31, 2010**, which *exponentially exceeds* the number of applications, received by the same in the preceding years.

270. The unusually high number of applications received for the said period, the speed, process, manner, and procedure of recommendations, and the mechanical inclusion of the said classes (comprising 99% of Muslims) leave serious doubts as regards their bonafides. They seem to bear an uncanny and illegal nexus with the political announcement by the Chief Minister of the State before the impending State Assembly elections for the year 2011.

271. The rate of recommendation for inclusion, during such period, was also **100%** since it recommended **15** classes for inclusion while disposing of 15 applications for inclusion.

ii. A summary of the reports of the Commission:-

272. In the backdrop of the above, a summary of the reports of the Commission is setout hereinbelow for ascertaining whether the recommendations made by the Commission were premised on any adequate determining principle and objective factors. A summary of the reports of the Commission recommending the inclusion of the 42

classes is tabulated hereunder. The summary is based on the information on the website of the Commission, the pleadings on record, and the documents annexed thereto.

Name of the Class/Caste	**The nature of the identification process adopted by the Commission.**
CHASATTI(CHASA)	The class is the sub-caste of Hindus, people whereof are not disrespected by the SC and ST. Therefore, this caste may be said to correspond to SC. The population of this sub-caste is 25,000. The survey report claims that it has reached out to 20,000 people without mentioning the numerical strength of the survey team, therefore giving rise to the suspicion that whether the team had the strength to reach out to 20,000 people. This sub-caste lives in a district. An administrative report from the DM was called for, therefore, the survey report appears to be inconclusive. No criteria were indicated based on which backwardness was ascertained.
BELDAR MUSLIM	The survey covered 1270 families in 4 villages. The numerical strength of, and questionnaire used by, the survey team is not disclosed. The submissions of the representatives of the class were unreliable, hence the Commission conducted a survey. The class lives in the village. The survey report revealed extreme backwardness, however, the criteria based on which such a conclusion was arrived at, has not been disclosed by the Commission. The duration of time consumed for the completion of such a survey, is not disclosed.
Khotta(Muslim)	The survey covered 30,000 people from 5000 families covering 15 villages. The total population of this class is 10 lakhs. The survey, therefore, did not cover even 1 percent of the total population.

Sardar(Muslim)	The field survey was Stated to have been restricted to one district, however, the people belonging to this class are residing not in that one district only but other districts also, and therefore, the survey report is incomplete, hence inconclusive.
NIKARI	The total population of this class in the State is more than 5 lakhs with North 24- Parganas registering a concentration of more than1.5 lakhs thereof. The survey was conducted in different villages in the Basirhat-I Block of North 24-Parganas district covering more than 1500 families. The sample size therefore is inadequate.
MAHALDAR	The survey covered more than 2200 families in Ward No. 4 of the Dhuliyan Municipality and some villages of Suti-II Block in Murshidabad district and Kaliachak Block in Malda district, which does cover the full population. The representatives of the class say that their income ranges from 2000-5000 per month but the survey report says that the income is 1000-1500 per month. The education standard at the city level of this class has been said to be good but at the village level abysmal. Hence, the level of income as Stated is inconsistent.
DHUKRE(Muslim)	The survey was conducted on 250 families residing in two districts namely South 24 and North 24 Parganas. The Commission, however, chose not to rely on the survey report while arriving at the conclusion. The Sardar(Mulsim) treats this class with contempt, how come the Sardar class which has been classified as Backward by the State, treats its similarly situated class with contempt?
BASNI/BOSNI(Muslim)	The total population of this class in the State is more than 10 lakh. The CommissionStated to have conducted a survey on a good number

	of people.
ABDAL(Muslim)	A survey was conducted covering more than 250 families, and the total population of the same in the State is 75,000. Therefore, whether a substantial portion of the class was covered by the survey, cannot be discerned.
KAN(Muslim)	The survey covered a few villages of Raghunathganj-II Block in the district of Murshidabad. The figure of the entire populace of the class is not disclosed.
TUTIA(Muslim)	The survey covered more than 300 families covering different villages. The entire populace of the class is however not disclosed. The survey does not record facts and figures.
GAYEN(Muslim)	The total population of Gayen class in Bhangar I Block is about 8000 and in Bhangar II, it is about 2000. The survey covered nearly 100 families. The education standards have been said to be satisfactory.
BHATIA MUSLIM	Interesting to note that in 2007,one Mr.BazelyRahaman, Secretary of M.M. Muslim Unnayan Samity applied for inclusion for Cooch Behari Bhatia Muslim. A hearing was granted to the Cooch Behari Bhatia Muslim on 17.09.2009, which is after the lapse of almost 2 years from the date of filing of the said application. Thereafter, the same Mr. BazelyRahaman filed another application for inclusion, on behalf of BHATIA MUSLIM. The Commission notes that the removal of the words Cooch Behari from Bhatia Muslim is done to avoid localization of the class. Therefore, why did the Commission grant a hearing 2 years after from the date of filing of the first application? Why did the Commission, which kept the first application pending for two years, instantly recommend the class for inclusion on the filing of second

	application? What is the connotation of localization? Was it to wipe out the first application from the record? The survey covered 2500 families.
MIDDE(Muslim)	The class is a convert from the Hindu Backward class. The survey covered more than 100 families, spread over different villages in the different Blocks and different Wards of Rajarhat Municipality in the district of North 24- parganas. At the hearing, it appeared that the people from the **Middle** class treats the class namely Nikari, classified as backward by the State, with contempt. It appears from the report that the conversion of the class has been the sole ground for the Commission to make the recommendation for inclusion.
MALLICK(Muslim)	The total population of this class in the State crosses the figure of 2 lakhs. The survey revealed that this class is a convert from the from the Hindus. It appears the sole ground which weighed with Commission for recommending their inclusion, is that the class is a convert from the Hindus.
KALANDER(Muslim)	A survey was conducted on 100 families. The class was in the occupation of entertaining the crows on the streets with the assistance of animals however with the enforcement of the Prevention of Cruelty to Animals Act, such occupation came to be prohibited. The total population of this class of people is not disclosed in the report, therefore whether a substantial portion of the population of the class was surveyed or not cannot be ascertained. It appears that there is a pattern being followed in the preparation of every Commission's report, which will be elaborated on later.
LASKAR(Muslim)	The Laskar class of people are convertees from backward and downtrodden Hindu communities, however, from which caste the

	class is converted, is not mentioned. The survey covered about 5,000 people from 350 families spread over different villages in Bhangar-I and Basanti Blocks and Rajarhat Municipality. The total population of this class in the State is unmentioned therefore whether a substantial portion of the class is covered or not, cannot be ascertained.
BAIDYA (Muslim)	The report says the inferior classes treat this class as inferior. The survey covered about 1,500 people in different villages in Basanti Block of South 24Parganas district. However, the Baidya Muslim class mostly resides in the districts of North and South 24 Parganas Districts. Therefore, the survey did not cover the north. Interesting to note, the traditional occupation of this Baidya class is Ayurvedic treatment, however, the advancement of science has been said to have made this treatment useless.
JAMADAR(Muslim)	The survey was conducted on 100 families spread over different villages in the Blocks of Canning-II and Diamond Harbour in the district of South 24-Parganas, however the report itself notes the class does have a presence in the North as well, hence the survey becomes incomplete. This class is treated as inferior by the other inferior classes, who are already classified as backward, as noted by the Commission. The survey report does not throw light on the educational status, or social or economic status, all these have been dealt with by the Commission by relying on the submissions made on oath by the representatives of the class. The total population of this class is unmentioned in the report.
CHHUTOR MISTRI(Muslim)	The survey covered more than 750 families spread over different villages in Panskura Block in the district of Purba Medinipur, Karimpur Block in the district of Nadia, and

	Rajarhat Municipality in the district of North 24-Parganas, and Beldanga and Naoda Blocks in the district of Murshidabad. However, it did not survey the south, where the community has a presence. The survey report reiterated the submissions made by the representatives of the class. The total population of the class is not disclosed. The question, therefore, arises is how come the representatives of the class can provide the Commission with statistics of dropout from school, marriages, etc.?
DAFADAR(Muslim)	The survey covered about 350 families spread over different villages. The total population of the class in the State is not mentioned in the report. The Commission says that the survey report does not contradict the materials submitted by the Commission. It appears very difficult to fathom whether in reality, any survey was at all ever conducted.
MAL	The class is said to be a convert from the Hindu. The survey covered a large number of people in different villages in Hasnabad and Bangaon Blocks in North 24- Parganas and Bhangar-I and Bhangar-II Blocks in South 24-Parganas districts. However the sample size thereof was not mentioned. The total population thereof was disclosed as 25, 000.
PATNI / MAJHI(Muslim)	The survey covered about 200 families in different villages of Haroa-I and Haroa-II Blocks in the district of North 24-Parganas, Bhangar-I Block in the district of South 24 Parganas and Samserganj Blockin the district of Murshidabad. The total population of the class is not mentioned. Therefore, the materials collected by the survey remain and continue to be not compared with the State level of backwardness.

MUCHI-CHAMAR(MUSLIM)	Cannot be downloaded from the website.
NEHARIYA	The survey was confined to the municipal area of Howrah since the community reportedly was identified in the Howrah Municipal area, however, the survey report itself said that the Nehariya class of people mainly resides in the district of Howrah and the Ghatal Subdivision in the district of Purba Medinipur. Neither the sample size of the survey is mentioned nor the total population of the class in the State.
MUSLIM HALDAR	The class is converted from Hindu Kaiaband Hindu Haldar. The report notes that neighboring classes enjoy reservation and therefore, the former considers the latter as inferior. The sample size of the survey and the total population of the class are not disclosed in the report.
SIULI (MUSLIM)	The survey was conducted in South 24 Parganas, Nadia, and North 24 Parganas having a concentration of Siuli(Muslim) class of people. It covered about 12,000 people in 1500 families. The Siuli(Muslim) class of people mostly reside in the districts of Nadia, South 24- 24- Parganas, Howrah, and North 24- Parganas. Therefore, Howrah was not covered by the survey. Interesting to note that it has been said that 12000 people from 1,500 families have come under the purview of the survey, if that is so, then how come the Commission notes that most family comprise 7-8 members, if that is so, then 1500 multiplied by 7 is 10,500 which is far lesser than 12000 people.
MUSLIM MANDAL	The Commission notes that the applications filed from different parts of Bengal have convinced it about the backwardness of this class; however, it has conducted a survey. The survey covered about 2500 families. It noted that the Mandal Muslim class of people mostly reside in the districts of North

	24- Parganas, South 24-Parganas, Murshidabad, Malda, Bankura, and Burdwan. However, the Commission never did disclose whether the survey covered all of those areas. The total population of the class is not disclosed.
MUSLIM SANPUI/ SAPUI	The survey covered more than 200 families living in the south. The Muslim Sanpui / Sapui class of people mostly reside in the Districts of North & South 24-Parganas, therefore, the survey is incomplete. The education standard at one stage has been said to be encouraging, and in another stage, it has been said to be deplorable. The total population of this class is not disclosed.
MUSLIM BISWAS	The survey covered nearly 500 families. The total population of the class is not mentioned.
MUSLIM MALI	The survey covered the different villages of Rajarhat Block in the district of North 24-Parganas having a habitational concentration of the Muslim Mali Class of people. The survey covered more than 50 families spread over 15 villages in all. Muslim Mali Class of people mostly reside in the districts of North 24-Parganas, South 24Parganas, Nadia, and Murshidabad. Therefore, the survey is incomplete. Education at the primary level has been said to be encouraging but at the secondary level disappointing. The males have been more forward than the females in this class.
GHOSHI	The survey covered more than 1000 families spread over different villages in Barrackpore-II Block in North 24-Parganas district and Matiaburj, Kolkata, and Salkia, Howrah with a concentration of the Ghoshi Class of people. The total population of this class is not mentioned in the report. what specifically the survey report wishes to convey is not comprehensible as a combined reading of the submissions, made by the class, and the survey report persuaded the Commission to hold that they are backward. No statistics,

	compared with the State average of backwardness, have been provided by the Commission.
DARJI/OSTAGAR/IDRISHI	The Dorjee Class of people mostly resides in the districts of South 24 Parganas, North 24 Parganas, Howrah, Purba Medinipur Metiabruz, Kolkata, etc, however, the survey was conducted in different areas in the districts of South 24 Parganas, and Howrah having a habitational concentration of Darji/ Ostagar/ Idrishi class of people. Therefore, the survey is incomplete. The total population and even the number of families or people on whom the survey was conducted are not mentioned.
RAJMISTRI	The Rajmistri class of people mostly resides in the districts of Murshidabad, Purba Medinipur, Nadia, Howrah, and South 24-Parganas, however, the survey was confined to different blocks in the districts of Purba Medinipur, Murshidabad, and Howrah. The survey covered 17,000 families without mentioning the total population of this class in the State. Therefore, the survey appears to be incomplete. One May be curious to ask why some places where a class lives have been omitted to be surveyed by the Commission, does that indicate that the class living in those omitted places is better off or well off?
BHATIYARA	The Bhatiyara class of people mostly reside in Khanakul, Arambagh, Phrsura, Goghat, and Tarakeswar Police Stations in the districts of Hooghly and the districts of Murshidabad and Bankura, however, the survey was confined to the families spread over different blocks in the district of Hooghly only. Therefore the survey becomes incomplete. The occupation of this class has been said to be cake making and they have been said to be working in big bakeries however, they are thrown out from employment when the market of cake

	making goes off-season. No sample size of the survey has been provided in the report.
MOLLA	The said class are convertees from low caste Hindus. The survey does not mention the sample size. The total population of this class in the State is not mentioned in the report.
DHALI (MUSLIM)	The people of Dhali (Muslim) community are converted from lower caste Hindus, who are recognized as S.C. community in the State of West Bengal. It is surprising to note that the Commission says that previously the class was enjoying reservation, so why the class would convert? Would it convert only because of social ostracization? The survey was conducted in different areas in districts of South 24-Parganas and North 24-Parganas which has a habitational concentration of the people of the community, however, the survey did not extend to Nadia where the class also has a presence.
TAL-PAKHA BENIA	The report does not mention the sample size of the survey and the report goes sans disclosing the total population of the class in the State. In such circumstances, the veracity and intention of the survey becomes debatable.
MUSLIM PIYADA	The Muslim Piyada class of people mostly reside in Mathurapur-II Block in the districts of South 24- Parganas, Baduria Block in North 24- 24-Parganas, Nadia, and Hooghly as revealed during the survey, however, the survey was confined to the different villages of different blocks in the district of South 24-Parganas only, which has been said to accommodate a huge number of people of the Piyada Muslim community. The survey covered more than 200 families, however, it did not even bother to mention whether 200 families of the class can be said to constitute

	the South 24 Parganas. The total population of the class is not disclosed.
MUSLIM BARUJIBI/BARUI CLASS	The Commission says that even before the conduction of the survey, the Commission was convinced about the backwardness of the class, therefore, it appears that the application was filed with a lot of information thereto, how a backward class can get hold of educative materials, was the class assisted by the State in collecting materials? The survey report revealed that the class resides in Murshidabad, Midnapur, Nadia, and Howrah, however, the survey did not extend its purview to Howrah. 200 families were surveyed however, the total population of the class in the State is not disclosed.
BEPARI/ BYAPARI MUSLIM	Albiet the report of the Commission says that a field survey is conducted, it does not mention at least the leader of the team, which conducted such survey. it does not have the survey sample size, and it does not mention the total population of the class.
PENCHI	The Penchi class of people mostly reside in the districts of Malda, Murshidabad, Uttar Dinajpur, and Dakshin Dinajpur, however, the survey was confined to Murshidabad. It surveyed 5000 families. The Commission noted that the tentative population of the community in the State gathered from the representatives of the community, is said to be maximum in Malda to the extent of 50000 to 60000 and an appreciable number in some pockets of Murshidabad. The survey team did not survey the people of the class living in Malda.

273. A summary of the reports of the Commission recommending the inclusion of the 35 classes is tabulated hereunder:-

Name of the Caste	DEFICIENCIES NOTED IN THE IDENTIFICATION PROCESS OF THE COMMISSION
BHANGI (MUSLIM)	The Commission notes that this class is at par with the Jamadar class, already included under the OBC list, however the Commission has reached this conclusion without conducting any survey but upon relying on the submissions of the representative of this class, and therefore, a survey which instills objectivity in the ultimate conclusion, is absent in this case.
DHATRI/DAI (MUSLIM	The Dhatri / Dai (Muslim) class mostly live in the districts of Murshidabad, Nadia, Malda, Uttar Dinajpur, Dakshin Dinajpur, North & South 24- Parganas, however, they mostly live in Domkal in Murshidabad & Kumarganj in Dakshin(south) Dinajpur, as evident from the applications in prescribed formats, therefore, the Commission has conducted a field survey in South Dinajpur and Murshidabad only. The proforma applications are been filed by the people of this class living in a particular region, and therefore, they would stress the fact that it is the said region that mostly accommodates the said class, therefore the Commission conducted survey only in such places, making the survey report incomplete. The report does not indicate the total population of this class and as well as the sample size of the survey has not been disclosed. One fact also needs to be noted, as noted by the Commission as well, that this class is recognised as SC as this class also belongs to the Hindu religion as well, therefore, can it be questioned that the fact that Hindus of this class are getting reservation, has swayed the Commission to classify its Muslim counterpart as OBC?

GHARAMI (MUSLIM)	The sample size was 250 families sans any mention of the total population of this class in the State. The survey team confined its survey to certain areas only, on the ground that it is in those areas only, the most number of people from this class live. This class is a convert to Muslim while having Hindu neighbours thereby giving rise to the question as to why a class would convert to Muslim when its neighbours are all non- Muslim. Astonishing to note that the literacy rate of the women in this class is more than men, however, the report says the said greatness is diluted by the fact the people from this class including the women do not reach the madhyamik and higher secondary levels.
GHORKHAN (Muslim)	No survey was conducted by the Commission on the ground that this class corresponds with the BELDAR(Muslim), who has already been included under the OBC list.
GOLDAR/GOLDER (MUSLIM	No survey was conducted, and no reason for such non-conduction is given.
HALSANA (MUSLIM) CLASS	No survey was conducted, and no reason for such non- conduction is given.
KAYAL (MUSLIM)	The sample size of the survey has not been disclosed as well as a total population of the class is also not mentioned.
NAIYA((MUSLIM)	This class has been said to be at par with the notified backward class Majhi / Patni Muslim. The total population of this class is 75000 however the sample size of the survey has not been disclosed.

SHIKARI / SIKARI (MUSLIM) CLASS	No survey was conducted, and no reason for such non- conduction is given.
ADALDAR (MUSLIM)	This class of people mostly reside in Hasnabad Block in the district of North 24-Parganas and Diamond Harbour Block-I in the district of South 24- Parganas, however, the survey was confined only to South 24- Parganas, therefore the survey becomes incomplete, and the sample size of the survey is not disclosed and total population of the class is not mentioned.
AKHAN/ AKAN/ AKUNJI (MUSLIM)	The sample size of the survey has not been disclosed as well as a total population of the class is also not mentioned.
BAG (MUSLIM)	This class is a convert from the Hindu. No indication regarding the conduction of the survey had been given in the report albeit the total population of this class is mentioned as 1000.
CHAPRASI (MUSLIM) CLASS	The sample size of the survey is not disclosed so also the total population of the class.
CHURIHAR(MUSLIM)	The report says that the Commission has undertaken its usual exercise in respect of this class, now what is such usual exercise cannot be comprehended.
DAPTARI (MUSLIM)	This class is convert to Muslims. The sample size of the survey is not disclosed so also the total population thereof. Pertinent to note that the report mentions that there are graduates and postgraduates from this class, however they do not get jobs.
DEWAN (MUSLIM)	No survey was conducted, and no reason for such non- conduction is given.

DHABAK (MUSLIM)	The sample size of the survey is not disclosed so also the total population of the class.
GAZI (MUSLIM)	The sample size of the survey is not disclosed so also the total population of the class. Furthermore, the survey did not cover all the areas, wherein the people from this class live.
KHAN (MUSLIM)	No survey was conducted, and no reason for such non-conduction is given. The report, however, notes that the approximate literacy rate is 55% for the males and 40% for the female.
KOLU (MUSLIM)	A survey was conducted on 350 families, however, the total population of this class is not mentioned, therefore whether the survey on 350 families could be considered to have covered a substantial portion of the class's total population cannot be ascertained, in this circumstances, the root may not be relied upon. The fact that the Hindu counterpart of Kolu (Muslim) has already been included in the list of Other Backward Classes was taken into consideration by the Commission while making the recommendation.
Majhi(Hindu)	No survey was conducted. The Commissionwhile recommending this class for inclusion has cautioned the government that this class has previously prayed for inclusion under SC list before different authorities.
MALITA / MALITHA / MALITYA (MUSLIM)	No survey was conducted, however the total population of this class is said to be 40,000 The literacy rate is 45% for the males and 15% for the females.
MISTRI (MUSLIM) CLASS	A survey was conducted; however the sample size thereof was not disclosed. The survey revealed that this class lives mostly in the districts of South 24 Parganas and Nadia, however, the survey was confined only to the

	districts of the South 24 Parganas. The Commission has expressly noted that this class shares bonhomie with its neighbors. The Hindu counterpart of this class is added under SC list has been considered by the Commission. This class is a convert from Hindus to Muslims.
PAIK (MUSLIM)	A survey was conducted in the district of South 24-Parganas. This class is a convert to Islam religion from original SC Hindu community. The Hindu counterpart of this class enjoys reservation; therefore why this class does converted itself to Muslim. The Commission notes that this class does not face social discrimination.
PAILAN (MUSLIM)	The report merely States that, ***"the Commission decided to undertake an enquiry by the Amiya Biswas, Deputy Secretary, about this community".*** No sample size and total population of this class are provided in the report.
PURKAIT (MUSLIM)	A survey was conducted on 60 families in the district of South24 Paraganas, however the report notes that this class mostly live in South and North 24 parganas, therefore on that count, the survey remains incomplete. Furthermore, this class is a convert from Hindu PURKAIT, reserved as SC, and the Commission notes that due to fact of their conversion, this class is looked down by its neighbours, therefore, why did the class convert to Muslim when it was enjoying reservation as SC and face discrimination due to such conversion.
SANA (MUSLIM)	The sample size of the survey was not disclosed so is the total population of this class.
SARANG (Muslim)	No survey was conducted.

SARKAR (MUSLIM	A survey was conducted but the sample size thereof is not disclosed. This class is a convert from Hindu SC, therefore, in the absence of the survey and in the circumstance of conversion, this report cannot be relied on, there seems to be pattern where the Hindus, who are enjoying reservation as SC are converting
SHAH(FAKIR), SHAH, SHA(MUSLIM), SAHAJI (MUSLIM), FAKIR CLASS	No clear indication regarding the conduction of survey exists, and furthermore, the Commission says that this class has claimed that they are at par with **'FAKIR, SAIN'** who has been included under the OBC list in 1996 however, the Commission notes that their social status may have changed over the years but still the Commission, without disclosing the nature of records, said that the available records show that this class may be equated with FAKIR,SAIN'.
TARAFDER (MUSLIM CLASS	A survey was conducted however the sample size was not disclosed but the total population of this class was estimated at 10,000. The literacy rate of the males of this class is 45%. Therefore, the report cannot be relied on.
GAVARA COMMUNITY	No survey was conducted. This class belongs from Andhra Pradesh. The Commission notes that this class is not discriminated against by its neighbours.
MOULI (MUSLIM	No survey was conducted and no reason for such non-conduction was given.
SEPAI (MUSLIM)	A survey was conducted. The Sepai (Muslim) class of people mostly resides in Hooghly and South 24 Parganas, however, the survey was confined to Hooghly. The sample size of the survey was not disclosed.

iii. The deficiencies in the Commission's reports:-

274. Two facts need to be noted at the outset. Firstly, the minutes of discussion submitted before the court show that the Commission merely says that it is approving the draft reports, which have been summarized hereinabove. The said minutes do not disclose whether the Commission had at all deliberated on the contents of the reports. Some of such minutes do say that the Commission has deliberated on the draft reports.

275. Such deliberation, however, does not reflect any of the contents of such reports on which the Commission may have deliberated upon. The discussions are a mere lip service and appear to be casual and mechanical. The reports cannot said to be reports of the Commission. The reports do not reflect any independent application of mind.

276. It may also be noted that the reports, which the Commission had merely approved without any deliberation, are the reports of the Cultural Research Institute (a wing of the Backward Classes department of the State), as submitted by the State before the National Commission. This further goes to establish the fact that the reports which are showcased as the reports of the Commission are, in fact, the reports of the Cultural Research Institute, to and from which the Commission has neither added nor subtracted anything and most importantly, has not applied an independent mind.

277. Secondly, the reply of the Commission to the letter dated April 13th, 2010, says that the Commission, after long deliberation, has

concluded that the reply should be that the Commission does not rely on survey reports in the true sense of the term. Why did the Commission take a long time to decide whether it relies on survey reports or not? The non-reliance on the Survey reports indicates that the Commission did not go by any data much less identifiable or acceptable data. These two facts go on to show that the Commission has made subjective recommendations without any objective material at all.

278. The minutes of the discussion between the State and National Commission filed before this court by the latter have revealed that the representatives of the State had deposed before it that the State has relied upon the reports of the CRI to make classification and sub-classification of the classes. This Statement made on oath is in direct conflict with what the StateCommission has said in the said RTI reply.

279. Admittedly, the State has relied on the study conducted by the Anthropological Department University of Calcutta, while making sub-classification of the 77 classes. The averments and arguments of the State that it has relied on the reports of CRI are, therefore seriously inconsistent with what it has said before this court.

280. Having noted such startling facts, we proceed to indicate the deficiencies in such reports:-

A) The Commission has not disclosed the names and number of people of a class, surveyed. In cases, where the Commission's reports have mentioned the number of the people, surveyed by it, it is clear that

the total population of the concerned class has not at all been surveyed.

B) The strength of the survey team, in most of the surveys, is not disclosed. In the cases- wherein the strength is disclosed, the reports say two to three people have surveyed the members of the concerned class. It is clearly not possible for 2 or 3 persons to survey the entire class of persons in a community or class that too within a short period.

C) The so-called Surveys indicate the names of districts wherein a class resides. However, they expressly say that the team of the Commission has not covered all the districts since it has covered only those districts, where the surveyed class lives in the majority. Hence it cannot be ascertained whether the minority number of the surveyed class falls within the creamy layer thereby becoming ineligible for reservation.

D) With regard to some classes, no survey at all has been done, as admitted in the said reports.

E) The Commission has not recorded the percentage of the existing representation of a surveyed class in the State services, let alone having compared such representation with that of the unreserved category classes of citizens in the State services, which comparison is mandated by paragraph 540 of ***Jaishree Laxman Rao Patil (Supra) (The Maratha reservation case)***.

F) The Commission has not set forth any criteria in the reports, based on which, it has arrived at the conclusion that a surveyed class is backward.

G) The State in its affidavit has admitted in its affidavit that, as many as 3 classes-Mahaldar, Kan, and Abdal, have been heard on the same date. 8 Classes are recommended on the 1st of April 2010. 7 Classes on the 6th of April 2010. 7 Classes on the 17th of June 2010. 5 Classes on the 26th of July 2010.

H) It is not humanly possible for the members of the Commission to consider all material collected and analyse the data, look into proceedings of hearings assess the evidence on record, and recommend the inclusion of so many classes in one day.

I) There is a set of classes who once belonged to the Hindu religion, and are stated to have been converted to Islam. The Commission does not, however, advert to the question of why such classes converted. As to when and whether such conversion was done for getting reservation in the State services has not been considered by the Commission.

J) Most importantly, some of the said classes were enjoying reservation as SC, when they were Hindus. The question therefore that would arise is why a class, who is already under the reservation scheme, would convert to the Mulsim religion and will get a reservation based on the ground of the class having previously

enjoyed reservation. There are therefore serious doubts on the bona fides of the surveys and the recommendation of the Commission.

K) The recommendations by the Commission for the inclusion of certain classes are premised on the ground that since the Hindu counterpart of the concerned Mulsim classes are categorized as Scheduled Castes, the said classes must also, therefore, be considered backward. Therefore the reports expose the Commission's tendency to justify its recommendations with respect to certain classes, who have converted from the Hindu religion, categorized as SC. The said attempt of the Commission to equalize the status of a Schedule Caste and Other Backward Classes defies the distinction between the two, as explained by the Supreme Court in the case of ***Jarnail Singh v. Lachhmi Narain Gupta,*** reported in ***(2018) 10 SCC 396*** in the following terms:-

> "23.This brings us to whether the judgment in Nagaraj [M. Nagaraj v. Union of India, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013] needs to be revisited on the other grounds that have been argued before us. Insofar as the State having to show quantifiable data as far as backwardness of the class is concerned, we are afraid that we must reject Shri Shanti Bhushan's argument. The reference to "class" is to the Scheduled Castes and the Scheduled Tribes, and their inadequacy of representation in public employment. It is clear, therefore, that Nagaraj [M. Nagaraj v. Union of India, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013] has, in unmistakable terms, Stated that the State has to collect quantifiable data showing backwardness of the Scheduled Castes and the Scheduled Tribes. We are afraid that this portion of the judgment is directly contrary to the nine-Judge Bench in Indra Sawhney (1) [Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1] . Jeevan Reddy, J., speaking for himself and three other learned Judges, had clearly held:
>
> **"[t]he test or requirement of social and educational backwardness cannot be applied to the Scheduled Castes and the Scheduled Tribes, who indubitably fall within the expression "backward class of citizens"." (See SCC p. 727, paras 796 to 797.)**
>
> Equally, Dr Justice Thommen, in his conclusion at para 323(4), had held as follows : (SCC pp. 461-62)"323. Summary

(4) Only such classes of citizens who are socially and educationally backward are qualified to be identified as Backward Classes. To be accepted as Backward Classes for the purpose of reservation under Article 15 or Article 16, their backwardness must have been either recognised by means of a notification by the President under Article 341 or Article 342 declaring them to be Scheduled Castes or Scheduled Tribes, or, on an objective consideration, identified by the State to be socially and educationally so backward by reason of identified prior discrimination and its continuing ill effects as to be comparable to the Scheduled Castes or the Scheduled Tribes. In the case of the Scheduled Castes or the Scheduled Tribes, these conditions are, in view of the notifications, presumed to be satisfied."

34. We have already seen that, even without the help of the first part of Article 16(4-A) of the 2012 Amendment Bill, the providing of quantifiable data on backwardness when it comes to Scheduled Castes and Scheduled Tribes, has already been held by us to be contrary to the majority in Indra Sawhney (1) [Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1] . So far as the second part of the substituted Article 16(4-A) contained in the Bill is concerned, we may notice that the proportionality to the population of Scheduled Castes and Scheduled Tribes is not something that occurs in Article 16(4-A) as enacted, which must be contrasted with Article 330. We may only add that Article 46, which is a provision occurring in the Directive Principles of State Policy, has always made the distinction between the Scheduled Castes and the Scheduled Tribes and other weaker sections of the people. Article 46 reads as follows:

"46. Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections.—The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."

This being the case, it is easy to see the pattern of Article 46 being followed in Article 16(4) and Article 16(4-A). Whereas "Backward Classes" in Article 16(4) is equivalent to the "weaker sections of the people" in Article 46, and is the overall genus, the species of Scheduled Castes and Scheduled Tribes is separately mentioned in the latter part of Article 46 and Article 16(4-A). This is for the reason, as has been pointed out by us earlier, that the Scheduled Castes and the Scheduled Tribes are the most backward or the weakest of the weaker sections of society, and are, therefore, presumed to be backward. Shri Dwivedi's argument that as a member of a Scheduled Caste or a Scheduled Tribe reaches the higher posts, he/she no longer has the taint of either untouchability or backwardness, as the case may be, and that therefore, the State can judge the absence of backwardness as the posts go higher, is an argument that goes to the validity of Article 16(4-A). If we were to accept this argument, logically, we would have to strike down Article 16(4-A), as the necessity for continuing reservation for a Scheduled Caste and/or Scheduled Tribe member in the higher posts would then disappear. Since the object of Articles 16(4-A) and 16(4-B) is to do away with the nine-Judge Bench in Indra Sawhney (1) [Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1] when it came to reservation in promotions in favour of the Scheduled Castes and Scheduled Tribes, that object must be given effect to, and has been given effect by the judgment in Nagaraj [M. Nagaraj v. Union of India, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013] . This being the case, we cannot countenance an argument which would indirectly revisit the basis or foundation of the constitutional amendments themselves, in order that one small part of Nagaraj [M. Nagaraj v. Union of India, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013] be upheld, namely, that there be quantifiable data for judging backwardness of the

> Scheduled Castes and the Scheduled Tribes in promotional posts. We may hasten to add that Shri Dwivedi's argument cannot be confused with the concept of "creamy layer" which, as has been pointed out by us hereinabove, applies to persons within the Scheduled Castes or the Scheduled Tribes who no longer require reservation, as opposed to posts beyond the entry stage, which may be occupied by members of the Scheduled Castes or the Scheduled Tribes."

281. Summarising the above, there is a strong doubt, therefore, as to whether any survey at all has been conducted by the Commission. If it was in fact conducted then it is clearly inadequate for want of an adequate determining principle. The Commission was clearly therefore in a tearing hurry. It further appears a pre-identified set of classes who appear to have made applications with a set of huge data. It is difficult to believe that an applicant of a particular community would have access to all such information. Admittedly, they possess little or no education at all. Such data may have been supplied to them by vested interests.

282. In the backdrop of the above discussion on the deficiencies, traced in such reports, recommending the inclusion of the 77 classes, it is now necessary to refer to the scope of the reports. The ingredients that are expected to be present in a report must be understood. In this regard, reference may be made to the decision of the division bench of the Bombay High Court in ***G. N. Saibaba v. State of Maharashtra Neutral*** reported in ***2024:BHC-NAG:2711-DB***:

> "58. Words employed in the section itself conveys the legislative intent, that recommendation by an independent authority is prerequisite for grant of sanction. The Sub-clause (2) is specific, and mandates that the authority shall make an "independent review" of the evidence gathered and submit its recommendations. It is a prerequisite for Sanctioning Authority to consider the "report" of the independent authority before grant of sanction. The term report has its own significance. The word "report" does not mean to pass on assent, but is to be read in

context. It is generally understood that a report is a concise piece of writing that refers to facts and evidence to look at issues, situations, events or findings. Reports are informative texts that aim at analyzing material with a specific purpose and audience in mind."

283. In view of the above and the deficiencies noted in the reports of the Commission, it, by no stretch of the imagination, can be said that the said reports contain all the ingredients and the criteria required to be addressed.

iv. The Art. 16(4)'s Backwardness And Inadequate Representation:-

284. The reports of the Commission as noted and discussed hereinabove, do not refer to the objective factors that the Commission applied for ascertaining the backwardness of a class. The Commission also did not advert to, analyze, and compare the representation of a class in the services under the State meaning that the Commission has not factually ascertained the representation of a class in the services under the State.

285. The apex court in ***Jarnail Singh Case (Supra)*** has explained the requirements of Article 16(4), the fulfilment of and compliance with which, will render the identification process and the consequent provisions for reservations, of the classes fair and objective in the following terms:-

(1) **Yardstick for arriving at quantifiable data**

12. Articles 16(4) and 16(4-A) are enabling provisions. It was held in M. Nagaraj [M. Nagaraj v. Union of India, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013] that the discretion of the State to provide reservation is subject to the existence of backwardness and inadequacy of representation in public employment. It was further held that backwardness has to be based on objective factors whereas inadequacy has to factually exist. There is no fixed yardstick to identify equality, justice and efficiency which are variable factors and it depends on the facts and circumstances of each case. This Court was of the further opinion that the concepts

> of efficiency, backwardness, inadequacy of representation are required to be identified and measured on the basis of data.In case of a challenge made to reservations provided by the State Government, it is incumbent on the State Government to satisfy the Court that the decision is supported by quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment, in addition to compliance with Article 335 of the Constitution of India.
>
> 13. The exercise of identifying and measuring concepts of efficiency, backwardness and inadequacy of representation on the basis of data depends on numerous factors. It is for this reason that the enabling provisions are required to be made because each competing claim seeks to achieve certain goals. How best one should optimise these conflicting claims can only be done by the administration in the context of local prevailing conditions in public employment. [U.P. Power Corpn. Ltd. v. Rajesh Kumar, (2012) 7 SCC 1 : (2012) 2 SCC (L&S) 289]

286. The backwardness of the classes is to be ascertained based on objective factors. An illustrative but not exhaustive list of such factors has been indicated by the Mandal Commission is as follows:-

Social Indicators:

i. Castes/Classes considered as socially backward by others.

ii. Castes/Classes which mainly depend on manual labour for their livelihood.

iii. Castes/Classes where at least 25 per cent females and 10 per cent males above the State average get married at an age below 17 years in rural areas and at least 10 per cent females and 5 per cent males do so in urban areas.

iv. Castes/Classes where participation of females in work is at least 25 per cent above the State average.

Educational Indicators:-

I. Castes/Classes where the number of children in the age group of 5-15 years who never attended school is at least 25 per cent above the State average.

II. Castes/Classes where the rate of student drop-out in the age group of5-15 years is at least 25 per cent above the State average.

III. Castes/Classes amongst whom the proportion of matriculates is at least 25 per cent below the State average.

Economic Indicators

I. Castes/Classes where the average value of family assets is at least 25 per cent below the State average.

II. Castes/Classes where the number of families living in kutcha houses is at least 25 per cent above the State average.

III. Castes/Classes where the source of drinking water is beyond half a kilometer for more than 50 per cent of the households.

IV. Castes/Classes where the number of households having taken consumption loan is at least 25 per cent above the State average.

287. Mere assessment of backwardness would not be enough. It was held that a class must not only be found backward as above but there must also be identifiable and acceptable data that the class is not adequately represented in the services of the State. In this regard, the following decisions may referred to:-

288. In the ***Indra Sawhney Case (Supra)*** it was held as follows:-

> "798. … The language of clause (4) makes it clear that the question whether a backward class of citizens is not adequately represented in the services under the State is a matter within the subjective satisfaction of the State. This is evident from the fact that the said requirement is preceded by the words "in the opinion of the State". **This opinion can be formed by the State on its own i.e. on the basis of the material** it has in its possession already or it may gather such material through a Commission/Committee, person or authority. **All that is required is, there must be some material upon which the opinion is formed.** Indeed, in this matter the court should show due deference to the opinion of the State, which in the present context means the executive. The executive is supposed to know the existing conditions in the society, drawn as it is from among the representatives of the people in Parliament/Legislature. **It does not, however, mean that the opinion formed is**

beyond judicial scrutiny altogether. The scope and reach of judicial scrutiny in matters within subjective satisfaction of the executive are well and extensively Stated inBarium Chemicals Ltd. v. Company Law Board [Barium Chemicals Ltd. v. Company Law Board, 1966 Supp SCR 311 : AIR 1967 SC 295] which need not be repeated here. Suffice it to mention that the said principles apply equally in the case of a constitutional provision like Article 16(4) which expressly places the particular fact (inadequate representation) within the subjective judgment of the State/executive."

289. In ***M. Nagaraj v. Union of India*** reported in ***(2006) 8 SCC 212***, it was held as follows:-

> "49…… Equality in Article 16(1) is individual-specific whereas reservation in Article 16(4) and Article 16(4-A) is enabling. The discretion of the State is, however, subject to the existence of "backwardness" and "inadequacy of representation" in public employment. **Backwardness has to be based on objective factors whereas inadequacy has to factually exist. This is where judicial review comes in.However, whether reservation in a given case is desirable or not, as a policy, is not for us to decide as long as the parameters mentioned in Articleicles 16(4) and 16(4-A) are maintained.** As stated above, equity, justice and merit (Article 335)/efficiency are variables which can only be identified and measured by the State."

290. In ***B.K. Pavitra v. Union of India*** reported in ***(2019) 16 SCC 129***, the apex court indicated the parameters which shall be kept in mind while dealing with reports of the decision-making body:-

> **"100.**it is relevant for this Court **to recognise the circumspection with which judicial power must be exercised on matters which pertain to propriety and sufficiency, in the context of scrutinising the underlying collection of data by the State on the adequacy of representation and impact on efficiency.** The Court, is above all, considering the validity of a law which was enacted by the State Legislature for enforcing the substantive right to equality for the SCs and STs. **Judicial review must hence traverse conventional categories by determining as to whether the Ratna Prabha Committee Report considered material which was irrelevant or extraneous or had drawn a conclusion which no reasonable body of persons could have adopted.In this area, the fact that an alternate line of approach was possible or may even appear to be desirable cannot furnish a footing for the assumption by the Court of a decision-making authority which in the legislative sphere is entrusted to the legislating body and in the administrative sphere to the executive arm of the Government."**

291. In ***B.K. Pavitra (Supra)*,** the apex court referred to the value and combined significance of the empirical and normative study in the field of research:-

> "**102.** Collection of data and its analysis are governed by varying and often divergent approaches in the social sciences. An informative treatise on the subject titled Empirical Political Analysis — Quantitative and Qualitative Research Methods [9th Edn., Richard C. Rich, Craig Leonard Brians, Jarol B. Manheim and Lars B. Willnat, Longman Publishers.] distinguishes between obtaining knowledge and using knowledge.The text seeks to explain empirical analysis on the one hand and normative analysis on the other hand:
>
> "Social Scientists distinguish between obtaining knowledge and using knowledge. Dealing with factual realities is termed empirical analysis. Dealing with how we should use our knowledge of the world is termed normative analysis.
>
> Empirical analysis is concerned with developing and using a common, objective language to describe and explain reality. It can be quantitative or qualitative. Quantitative analyses are based on math-based comparisons of the characteristics of the various objects or events that we study. Qualitative analyses are based on the researcher's informed and contextual understanding of objects or events.
>
> Normative analysis is concerned with developing and examining subjective values and ethical rules to guide us in judging and applying what we have learned about reality. Although the emphasis in this book is on empirical analysis, it seeks to develop an appreciation of the larger, normative perspective within which knowledge is acquired, interpreted, and applied through a discussion of the ethics of research.
>
> Normative analysis without an empirical foundation can lead to value judgments that are out of touch with reality. Empirical analysis in the absence of sensitivity to normative concerns, on the other hand, can lead to the collection of observations whose significance we are not prepared to understand fully. The objective in undertaking political inquiry is to draw upon both types of analysis — empirical and normative — so as to maximize not only our factual knowledge, but also our ability to use the facts we discover wisely."

292. Therefore an empirical analysis must be complementary to normative analysis and vice-versa. An empirical analysis involves the collection of materials and the analysis of the realities of society based on such materials. Whereas a normative analysis is essentially the moral values, in our country. The normative analysis would include interalia constitutional morality namely secularism, equality, and the principle of reasonableness which should influence the analysis of materials, collected by an empirical study.

293. It is therefore extremely vital that a research work that may be conducted by any Commission, shall not only focus on collecting the materials, facts, and figures, but at the same time, the analysis of such materials must be inspired and influenced by a sense of respect for the constitutional values. This empirical exercise influenced by normative concerns would lead to a fair conclusion as regards the identification of the classes. The consequence of an empirical study uninfluenced by normative concerns is captured in the last part of paragraph 102 of the ***B.K. Pavitra (Supra) is*** already setout and is once again setout for ready reference:-

> "Normative analysis without an empirical foundation can lead to value judgments that are out of touch with reality. Empirical analysis in the absence of sensitivity to normative concerns, on the other hand, can lead to the collection of observations whose significance we are not prepared to understand fully. The objective in undertaking political inquiry is to draw upon both types of analysis — empirical and normative — so as to maximize not only our factual knowledge, but also our ability to use the facts we discover wisely."

294. Therefore, the requirement of Art. 16(4)'s inadequate representation will not be fulfilled only on the subjective satisfaction of the State being formed based on materials, but the said satisfaction shall also be informed by normative concerns viz. Constitutional Morality- impartial, secular, and reasoned. The reports do not deal with adequate representation at all.

v. No effective public hearings were even notified

295. The learned Senior Counsel, for the petitioners, has submitted that the Commission has not notified the date and time of the hearing in any newspaper or has not informed the public that the Commission is

going to hear the application for inclusion of the classes. He, therefore, has argued that by not notifying such a date and time, the Commission has violated the principles of natural justice.

296. Section 10 of the Act of 1993 has entrusted the powers of a civil court to the Commission. Section 10 is set out hereunder:

> *"10. The Commission shall, while performing its functions under sub-section (1) of section 9, have all the powers of a civil court trying a suit and in particular, in respect of the following matters, namely:—*
>
> *(a) summoning and enforcing the attendance of any person from any part of India and examining him on oath;*
>
> *(b) requiring the discovery and production of any document;*
>
> *(c) receiving evidence on affidavits;*
>
> *(d) requisitioning any public record or copy thereof from any court or office;*
>
> *(e) issuing Commissions for the examination of witness and documents; and*
>
> *(f) any other matter which may be prescribed."*

297. The Act of 1993 and so also Section 10 do not mandate the Commission to give any notice of a public hearing. This court, however, is conscious that there is no need for a statute to codify the principles of natural justice since it is a given that the said principles are to be complied with according to the facts and circumstances of each case. However, the Commission under the 1993 Act is entitled to determine its own procedure. In this regard, reference may be made to the decision of the Supreme Court in ***Managing Director, ECIL, Hyderabad & Ors. v. B. Karunakar & Ors.*** reported in ***(1993) 4 SCC 727*:-**

> "20. The origins of the law can also be traced to the principles of natural justice, as developed in the following cases: In A. K. Kraipak v. Union of India, (1969) 2 SCC 262 : (1970) 1 SCR 457, it was held that the rules of natural justice operate in areas not covered by any law. They do not supplant the law of the land but supplement it. They are not embodied rules and their aim is to secure justice or to prevent miscarriage of justice. If that is their purpose, there is no reason why they should not be made applicable to administrative proceedings also especially when it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial ones. An unjust decision in an administrative inquiry may have a more far reaching effect than a decision in a quasi-judicial inquiry. It was further observed that the concept of natural justice has undergone a great deal of change in recent years. <u>What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the inquiry is held and the constitution of the tribunal or the body of persons appointed for that purpose. Whenever a complaint is made before a Court that some principle of natural justice has been contravened, the Court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case. The rule that inquiry must be held in good faith and without bias and not arbitrarily or unreasonably is now included among the principles of natural justice.</u>

298. The need for giving a public hearing is dependent on the nature of the inquiry to be undertaken by the Commission. The provision for reservation made for the purposes of Article 16(4) impacts the mandate of equal opportunity in public employment, as conferred to the citizens by and under Article 16(1). Therefore, all the denizens of a State have the right to know and in a given case, participate in the hearings, conducted by the Commission in the exercise of its power under the Act of 1993 and Article 16(4).

299. Insofar the ascertainment of backwardness of a class is concerned, the Commission, inter alia, has to enquire whether a class is considered backward by the other classes. In that regard, the other classes may need to be heard by the Commission. This court notices

that under Section 10(a), the Commission is empowered to summon any person.

300. The legislature therefore has contemplated a situation where the Commission may need to hear a person of any designation with experience relevant to the subject of inquiry to be conducted by the Commission. This court therefore is of the view that the Commission should've notified the denizens of the State about the hearing, allegedly to have been conducted by the Commission.

301. The argument of the learned assistant Advocate General that no complaint against over-inclusion of any class had ever been filed before the Commission pales into insignificance to some extent since at the stage.The applications for inclusion were filed before the Commission and the Commission had not given any public notice of such applications or hearings thereof. The public at large was unaware of the fact that such a number of applications for inclusion had been filed. Had the petitioner known through the advertisement of the proposed hearing, they could have approached the Commission with appropriate submissions.

302. It was only when the executive notified the inclusion of the classes under the OBC list that the public got to know of the same. It came to know that the State on the recommendation of the Commission has made a number of inclusions. Even if complaints are made after the declarations it is unlikely that the State would review its own decision or withdraw such advice. Moreso when it is alleged that the State and

the Commission have joined hands in favouring the Muslim community. No such review has been undertaken by the State and the Commission even after filing of the writ petition.

Q. RELEVANCE OF THE REPORT OF THE NATIONAL COMMISSION TO PRESENT CASE

303. After the incorporation of the Art. 338B to the Constitution, the National Commission for Backward Classes (NCBC) has been constituted with pan-India supervisory powers over the policy concerning social and educational backward classes. has been conferred upon it. Sub-article 9 of the Art. 338B has mandated the State to consult the NCBC before taking any call affecting the socially educationally backward classes. Subsequently, it, however, came to be clarified by incorporating a proviso to sub-article 9 that the mandate of sub-article 9 would not be applicable when the State is preparing an OBC list for the services under the State.

304. It would appear from minutes of discussion before the NCBC on pg. No. 47 of its Affidavit-in-opposition that, the NCBC specifically asked the State as to what was the procedure adopted by the State in identifying and classifying the classes from Muslim religion as Other Backward Classes in the State. The NCBC thereafter at pg. no. 62 in the Minutes of discussion observed that several classes, who previously belonged to the Hindu religion, had converted to the Muslim religion, however, the State was not been able to furnish details as regards such conversion. The NCBC then observed that a

majority of the classes in the State OBC list are occupied by the classes from the Muslim religion, and therefore, directed the State to revise the State OBC list and furnish the NCBC with the details regarding such conversion.

305. In this regard, the attention of the court has been invited to the **para no. ii of page no. 5** of the reply by the State, wherein it was stated:-

> *"In the State of West Bengal, according to the population, Muslims comprise the second highest community. Inasmuch as most of the backward communities from the Hindu religion have already been included in Scheduled Caste (SC) list, the Muslim community was left out from reservation as SC. In order to accord welfare facilities to the entire backward population of the State, the State Government provides other reservation facilities through the Other Backward Class (OBC) status as permissible under law, not only to members of the Muslim community, but also to members of other religious communities outside the coverage of SC reservation facility such as from the Hindu, Buddhist and Jain communities."*

306. Therefore, the State proceeded on the premise that since the Backward Hindu classes and castes are covered by the reservation given to the Schedule Caste, the Muslim classes must be compensated under the OBC category. It may be mentioned that the concept of Schedule Caste is not religion-specific in that only the classes and castes from Hindus can be considered. It is rather premised on the fact that since the Constitution includes such cases by way of presidential notifications and only then do such classes, and castes come to be included as SCs.

307. This court however before parting away from head of discussion, takes notice of a letter dated 29.08.2016 (appearing on page. no.

35A of the Affidavit-in-opposition of the Commission) written by the Principal Secretary of the State of West Bengal to the Chairperson of the NCBC, wherefrom it appears that the Centre has included as many as 37 classes under the Central OBC list during 2010-2011.

308. This court, however, finds no mention of such 37 classes in the report of the National Commission. It is most likely, that the 37 classes, that were included under the Central OBC List during 2010-2011, are those classes, some of whom may have struck out from the State OBC list by the effect of this judgment. It may be also relevant to mention that the field inquiry, which has been alleged to have been conducted by the NCBC, is supported by the letter of their visit to the State of West Bengal, but not by any actual report prepared by it, reflecting the figures and facts, collected during such survey.

R. THE REPORTS OF THE COMMISSION ARE VITIATED BY PROCEDURAL IMPROPRIETY, MANIFEST ARBITRARINESS, AND DOCTRINE OF PROPORTIONALITY.

i. Procedural Impropriety.

309. The reports of the Commission adhere to a pattern that indicates the fact of the Commission being wanted or directed to grant benefits to a particular Community namely the Muslim Community. This pattern is hit by **PROCEDURAL IMPROPRIETY.**

310. As already discussed hereinabove, the reports of the Commission suffer from procedural impropriety and non-application of mind and

want of transparent identifiable data, since the Commission has accepted the draft reports without any deliberation**.** In ***Rajeev Suri v. DDA*** reported in ***(2022) 11 SCC 1*****,** the apex court held:-

> "Pg.143-under Para no- 183- Apart from noting that judicial review is warranted only in cases of illegality, irrationality and procedural impropriety, Lord Diplock in Council of Civil Service Unions [Council of Civil Service Unions v. Minister for the Civil Service, 1985 AC 374 : (1984) 3 WLR 1174 : (1984) 3 All ER 935 (HL)] prophetically noted that the categories of review could not be exhaustive in a society where administrative action is making inroads in all spheres of human activity and that "proportionality" could emerge as yet another ground of review in future.
>
> P.g.no. 222- para no- 406-The requirement of due application of mind is one of the shades of jurisprudential doctrine that justice should not only be done but seen to be done.It requires a decision-making body, judicial or quasi-judicial, to abide by certain basic tenets of natural justice, including but not limited to the grant of hearing to the affected persons. They are means to an end and not end in themselves…..In order to ascertain that due application of mind has taken place in a decision, the presence of reasons on record plays a crucial role. The presence of reasons would fulfil twin objectives of revealing objective application of mind and assisting the adjudicatory body. in reviewing the decision. The question that arises here is, whether the Statement in the recorded minutes of the CVC meeting ("the features of the proposed Parliament building should be in sync with the existing Parliament building") is or is not indicative of application of mind.
>
> P.g.no. 170-para no.263- Notably, the respondents in the present case have recognised the importance of openness and have placed elaborate data before us to demonstrate how all steps of the project including all permissions, orders, invitations, approvals etc. were made available for direct public access online from time to time at the earliest available opportunity. We shall be examining the same at an appropriate stage."

311. John Rawls, another American Jurist and Philosopher, in his book entitled "A Theory of Justice" (1971), has explained fair procedure in the following terms:-

> *"A distinctive feature of pure procedural justice is that **the procedure for determining the just result must actually be carried out; A fair procedure translates its fairness to the outcome only when it is actually carried out. Pg.no.98"***

312. The procedure established by law has neither been carried out by the Commission nor by the State, hence the outcome has not been like

what John Rawls has demonstrated by an example in the following words:-

> *"A number of men are to divide a cake: assuming that the fair division is an equal one, which procedure, if any, will give this outcome? Technicalities aside, the obvious solution is to have one man divide the cake and get the last piece, the others being allowed their pick before him. He will divide the cake equally, since in this way he assures for himself the largest share possible. This example illustrates the two characteristic features of perfect procedural justice. First, there is an independent criterion for what is a fair division, a criterion defined separately from and prior to the procedure which is to be followed. And second, it is possible to devise a procedure that is sure to give the desired outcome. Of course, certain assumptions are made here, such as that the man selected can divide the cake equally, wants as large a piece as he can get, and so on. But we can ignore these details. The essential thing is that there is an independent standard for deciding which outcome is just and a procedure guaranteed to lead to it. Pretty clearly, perfect procedural justice is rare, if not impossible, in cases of muchpractical interest." Pg.no.-97*

ii. Colorable Exercise Of Power:-

313. The Commission's reports are not in accordance with the **Constitutional value of the impartial and secular reservation.** Althoughthe reports of the Commission are prepared to show that it has not made a religion-specific reservation, it appears otherwise to this Court.

314. In ***Indra Sawhney (supra)*** the apex court noted that religion can be the starting point of the process of identification of the backward classes but has to end with other justifiable factors, necessitating reservation. Paragraph 591 of the said decision is quoted hereunder:-

> "591. Would the consequences be different if race, religion or caste etc. are coupled with some other factors? In other words, what is the effect of the word „only" in Article 16(2). In the context it has been used it operates, both, as permissive and prohibitive. It is permissive when State action, legislative or executive, is founded on any ground other than race, religion or caste. Whereas it is prohibitive if it is based exclusively on any of the grounds mentioned in Article 16(2)...........When it comes to any State action on race, religion or caste etc. the word, „only" mitigates

> the constitutional prohibition. That is if the action is not founded, exclusively, or merely, on that which is prohibited then it may not be susceptible to challenge. What does it mean? Can a State action founded on race, religion, caste etc. be saved under Article 16(2) if it is coupled with any factor relevant or irrelevant. What is to be remembered is that the basic concept pervading the Constitution cannot be permitted to be diluted by taking cover under it. **Use of word, „only" was to avoid any attack on legitimate legislative action by giving it colour of race, religion or caste. At the same time it cannot be utilised by the State to escape from the prohibition by taking recourse to such measures which are race, religion or caste based by sprinkling it with something other as well. .....Similarly identification of backward class by such factors as dependence of group or collectivity on manual labour, lower age of marriage, poor schooling, living in kutcha house etc. and applying it to caste would be violative of Article 16(2) not only for being caste-based but also for violation of Article 14 because it excludes other communities in which same factors exist only because they are not Hindus. Further the group or collectivity, thus determined would not be caste coupled with other but on caste an**d caste alone."

315. The Commission by allegedly preparing such reports has done indirectly what it cannot do directly, that is making recommendations based on religion only.

iii. Manifest Abitrariness

316. The said pattern is vitiated by manifest arbitrariness, arising from Article. 14. The Supreme Court in ***Association for Democratic Reforms & Anr. (Supra)*** has referred to the meaning and contours of manifest arbitrariness in the following quoted paragraphs:-

> "189. ……this Court held that manifest arbitrariness "must be something done by the legislature capriciously, irrationally and/or **without adequate determining principle."** It was further held that a legislation which is excessive and disproportionate would also be manifestly arbitrary. The doctrine of manifest arbitrariness has been subsequently reiterated by this Court in numerous other judgments
>
> 193. Justice DY Chandrachud in his opinion observed that a provision is manifestly arbitrary **if the determining principle of it is not in consonance with constitutional values.The opinion noted that Section 497 makes an "ostensible" effort to protect the sanctity of marriage but in essence is based on the notion of marital subordination of women which is inconsistent with constitutional values.**200 Chief Justice Misra (writing for himself and Justice AM Khanwilkar) held that the provision is manifestly arbitrary for lacking "**logical consistency**" since it does not treat the wife of the adulterer as an aggrieved person and confers a 'license' to the husband of the woman.

> 194. This Court has applied the standard of "manifest arbitrariness" in the following manner:
>
> a. A provision lacks an "adequate determining principle" if the purpose is not in consonance with constitutional values. In applying this standard, Courts must make a distinction between the "ostensible purpose", that is, the purpose which is claimed by the State and the "real purpose", the purpose identified by Courts based on the available material such as a reading of the provision201; and
>
> b. A provision is manifestly arbitrary even if the provision does not make a classification.202"

317. The **real purpose** of the Commission was to grant religion-specific reservation, however, the reports have been prepared to press into service the **ostensible purpose** of granting reservation to the backward classes.

318. The Commission has not disclosed the criteria based on which the classes have been identified as a backward class. The Commission has not recorded the percentage of representation of the classes in the State service, which it has to, since inadequate representation has to factually exist according to paragraph *49* of ***M. Nagaraj v. Union of India*** reported in ***(2006) 8 SCC 212***:-

> ***"Backwardness has to be based on objective factors whereas inadequacy has to factually exist. This is where judicial review comes in."***

319. For the sake of argument, if one takes that the survey reports of the Commission as good in law, then also the survey reports would not pass muster as regards normative study since the same has been made for unsecular and partial reasons. The Supreme Court ***B.K. Pavitra (Supra)*** referred to the consequence of the absence of

normative concerns in the empirical study as setout twice hereinabove.

S. CAN RELIGION BE THE SOLE BASIS OF THE RECOMMENDATION OF THE COMMISSION UNDER ARTICLE 16 (4) OF THE CONSTITUTION AND THE ACT OF 1993?

320. **Paragraph 591** of decision of ***Indra Sawhney (Supra)*** is set out hereunder:-

> "591. Would the consequences be different if race, religion or caste etc. are coupled with some other factors? In other words, what is the effect of the word „only" in Article 16(2). In the context it has been used it operates, both, as permissive and prohibitive. It is permissive when State action, legislative or executive, is founded on any ground other than race, religion or caste. Whereas it is prohibitive if it is based exclusively on any of the grounds mentioned in Article 16(2)...........When it comes to any State action on race, religion or caste etc. the word, „only" mitigates the constitutional prohibition. That is if the action is not founded, exclusively, or merely, on that which is prohibited then it may not be susceptible to challenge. What does it mean? Can a State action founded on race, religion, caste etc. be saved under Article 16(2) if it is coupled with any factor relevant or irrelevant. What is to be remembered is that the basic concept pervading the Constitution cannot be permitted to be diluted by taking cover under it. **Use of word, „only" was to avoid any attack on legitimate legislative action by giving it colour of race, religion or caste. At the same time it cannot be utilised by the State to escape from the prohibition by taking recourse to such measures which are race, religion or caste based by sprinkling it with something other as well. …..Similarly identification of backward class by such factors as dependence of group or collectivity on manual labour, lower age of marriage, poor schooling, living in kutcha house etc. and applying it to caste would be violative of Article 16(2) not only for being caste-based but also for violation of Article 14 because it excludes other communities in which same factors exist only because they are not Hindus. Further the group or collectivity, thus determined would not be caste coupled with other but on caste an**d caste alone."

321. It has been argued by the petitioners that the starting point of the identification process and so also the ending point has been religion and religion only. In that regard, the petitioners have relied upon the public announcement made by the then Chief Minister of West Bengal coupled with the fact that a huge chunk of applications for inclusions came to be filed consequent thereto, by the classes from the Muslim

community, the breakneck speed with which the Commission made recommendations and conducted hearings without any public notice and the completion of survey in a very short period, and in some cases with no survey being done at all, have been collectively canvassed before this court by the petitioners to demonstrate the complicity of the Commission and the State.

322. The learned Advocate General, for the State, however, argued that the public announcement of the then Chief Minister of West Bengal cannot be attached much importance since the court must look at the situation of the Muslim classes in the State of West Bengal and the methodology adopted by the State Commission in support of their recommendations. He has further argued that religion may have been the starting point as a matter of obvious consequence, since the majority of the applications filed before the Commission were from a particular community, and the Commission and State cannot be blamed for that.

323. The learned AAG, for the State Commission, while adopting the said submission of the learned A.G. has also added that the starting point of any identification process has to be some identification mark- and in this regard, such mark has been the Muslim community since several applications have been filed by the classes from that community.

324. On a plain reading of articles 16(4) and 16(2) read with the dicta of ***Indra Sawhney (Supra)*** and ***T. Muralidhar (Supra),*** it is now well

settled that the identification of the backward classes should start with their respective occupation. However, at the same time, it must be mentioned that the Constitution and decisions of the courts do not prohibit an identification process to start with religion. What is, however, prohibited is the sole reliance on religion for the purpose of making provisions for reservation.

325. This court, however, is not concerned with the starting point of the identification process, conducted by the Commission since indeed the Commission was faced with a huge number of applications, filed by the classes belonging to a particular community. The Commission should have taken appropriate precautions and have been vigilant while dealing with the applications, filed by the classes from a particular community, regardless of the nomenclature of the community, since it cannot be expected that the Commission was totally unaware of the public announcement, made by the then Chief Minister of West Bengal.

326. Admittedly within four months of the recommendation and declaration of the first set of these classes as OBCs the State procured and relied on an executive Summary of the Anthropology department of the University of Calcutta, to sub-classify the classes. The State must have known of the said study months earlier as a study of this nature takes many months to prepare. Such study itself was aimed at determining the reasons for the backwardness of the Muslim Community in the State.

327. This would justify the joining of dots and notice the curious timeline. The announcement by the Chief Minister, the recommendation of the 77 classes in lightening speed by the Commission the immediate declaration by the State of such Religious Classes as OBCs, and the Executive Summary of the Anthropology Department of Calcutta University and the subclarification based on the same. All this in a span of 5 months could raise doubts in the mind of any reasonable man that the events are closely interlinked and were part of a common intention. Religion indeed appears to have been the sole criterion for declaring these communities as OBCs.

328. Reference in this regard may be made to paragraph 9 of the decision of ***Joshine Anthony v. Smt. Asifa Sultana and Ors. Criminal Appeal no. 1046 of 2024, SLP (Criminal) No. 911 of 2019 decided on 20th February 2024.***

329. This Court, in the present case, however, is really concerned with what followed after the filing of such applications, namely whether the Commission has conducted any empirical analysis informed by normative concerns while collecting and analyzing the materials.

330. It is also for the court to see whether the backwardness of a class has been ascertained by the Commission based on objective factors and criteria and whether the Commission has taken pains to find and see what is the factual representation of a class in the services under the State. Neither of which has unfortunately been done by the Commission, in the present case, as clearly evident from its reports.

331. It appears that the primary and sole consideration for the Commission had been to make religion-specific recommendations. To curtain and hide such religion-specific recommendations, the Commission has prepared the reports for the ostensible purpose of granting reservation to the backward classes to hide the real purpose behind such recommendations. The purpose was to grant a religion-specific reservation. Therefore, while the Commission purports to show by way of such reports, (which however has not been relied upon by the State and Commission before the Court), that it had complied with section 9 of the Act of 1993 read with article 16(4) of the Constitution of India.

332. This Court is of the view that the selection of 77 classes of Muslims as Backward is an affront to the Muslim Community as a whole. This Court's mind is not free from doubt that the said community has been treated as a commodity for political ends. This is clear from the chain of events that led to the classification of the 77 Classes as OBCs and their inclusion to be treated as a vote bank. Identification of the classes in the aid community as OBCs for electoral gains would leave them at the mercy of the concerned political establishment and may defeat and deny other rights. Such reservation is therefore also an affront to Democracy and the Constitution of India as a whole.

T. THE PRINCIPLE OF PROSPECTIVE OVERRULING AND THE POWER OF THE HIGH COURT TO MOULD RELIEF

333. At this juncture, the question that would arise for consideration is what would be the fate of citizens from such 77 classes, who have

been admitted to the services under the State based on such illegal classification and subclassification in pursuit of Article 16(4).

334. Since 2010 till to date, the citizens from the said 77 classes have been admitted to the services under the State by way of reservation. This court cannot be unmindful of the fact that when a person gets employed in the services under the State by reservation, it may have a cascading effect on generations of the family of that person. It is indeed true that the IT revolution in our country may have, to some extent, diluted the craze for government jobs. Government service continues to command a status of assurance and repute amongst citizens. It shelters a family with assurance and blossoms it with happiness. By reason of having obtained a job with the State, some citizens may have irrevocably altered their positions.

335. In this regard, reference may be made to a recent decision of the Apex court in ***Satyanand Singh Vs. Union Of India &Ors.*** reported in ***2024 SCC OnLine SC 236,*** wherein the court observed the consequences of the severance of an employer and employee relationship in the following words:

> "12. The severance of the employer – employee relationship can never be said to be an easy choice, for it not only results in the employee losing his livelihood, but also affects those who depend on him for their survival. And if the employer happens to be the Indian Army, the loss is even greater, since it has the effect of suddenly displacing a soldier from the regimented lifestyle of the military. The appellant, who was trained to live a disciplined life since the tender age of 19, was unnecessarily and without cogent reason thrust into civilian life with little warning or preparation. The psychological trauma that such displacement can bring about

needs no elaboration. However, the cruel passage of time has unfortunately rendered the appellant's original hopes of reinStatement an unrealised dream."

336. In ***Jasbhai Motibhai Desai v. Roshan Kumar, Haji Bashir Ahmed & Ors.*** reported in ***(1976)1 SCC 671*** where it was observed that the jurisdiction of the High Court under Art.226, shall be exercised to adapt to the special conditions of our diverse society in the following terms:-

> *"11. As explained by this Court in Dwarka Nath v. Income-tax officer, Kanpur(1) the founding fathers of the Constitution have designedly couched the Article in comprehensive phraseology to enable the High Court to reach injustice wherever it is found. In a sense, the scope and nature of the power conferred by the Article is wider than that exercised by the writ courts in England. However, the adoption of the nomenclature of English writs, with the prefix "nature of" superadded, indicates that the general principles grown over the years in the English Courts, can, shorn of unnecessary technical procedural restrictions, and adapted to the special conditions of this vast country, in so far as they do not conflict with any provision of the Constitution, or the law declared by this Court, be usefully considered in directing the exercise of this discretionary jurisdiction in accordance with well-recognised rules of practice."*

(emphasis added)

337. When this court has declared the classification and sub-classification of classes as illegal and unconstitutional, the beneficiaries thereof namely the citizens from such 77 classes, who have been absorbed into the services under the State based on such illegal classification and sub-classification, would be seriously prejudiced and deprived of such benefits.

338. Having regard to the dicta in ***Jasbhai (Supra)*** and being also at the same time, reminded of the principle of prospective overruling, directs that the services and benefits derived by the citizens from the said 77 classes should not be affected. The principle of prospective overruling

is explained and referred to, by the apex court in the case of ***Golak Nath v. State of Punjab,*** reported in ***1967 SCC OnLine SC 14***:-

> "**52.** As this Court for the first time has been called upon to apply the doctrine evolved in a different country under different circumstances, we would like to move warily in the beginning. We would lay down the following propositions : (1) The doctrine of prospective overruling can be invoked only in matters arising under our Constitution; (2) it can be applied only by the highest Court of the country i.e. the Supreme Court as it has the constitutional jurisdiction to declare law binding on all the courts in India; (3) the scope of the retroactive operation of the law declared by the Supreme Court superseding its "earlier decisions is left to its discretion to be moulded in accordance with the justice of the cause or matter before it.
> **51.** Our Constitution does not expressly or by necessary implication speak against the doctrine of prospective overruling. Indeed, Articles 32, 141 and 142 are couched in such wide and elastic terms as to enable this Court to formulate legal doctrines to meet the ends of justice. The only limitation thereon is reason, restraint and injustice. Under Article 32, for the enforcement of the fundamental rights the Supreme Court has the power to issue suitable directions or orders or writs. Article 141 says that the law declared by the Supreme Court shall be binding on all courts; and Article 142 enables it in the exercise of its jurisdiction to pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it. These articles are designedly made comprehensive to enable the Supreme Court to declare law and to give such directions or pass such orders as are necessary to do complete justice. The expression "declared" is wider than the words "found or made". To declare is to announce opinion. Indeed, the latter involves the process, while the former expresses result. Interpretation, ascertainment and evolution are parts of the process, while that interpreted, ascertained or evolved is declared as law. The law declared by the Supreme Court is the law of the land. If so, we do not see any acceptable reason why it, in declaring the law in supersession of the law declared by it earlier, could not restrict the operation of the law as declared to future and save the transactions, whether statutory or otherwise that were effected on the basis of the earlier law. To deny this power to the Supreme Court on the basis of some outmoded theory that the Court only finds law but does not make it is to make ineffective the powerful instrument of justice placed in the hands of the highest judiciary of this country."

339. The ratio that can be culled out from the ***Golak Nath decision (Supra)*** is twofold. Firstly, the rationale of the application of the doctrine of prospective overruling is premised on the probable social and economic consequences and impact that a judgment and order of

a court could produce. Secondly, it is only the highest court of the land that is the Supreme Court of India that, in the exercise of Article 142, can apply the doctrine of prospective overruling to the facts of the case. Therefore the doctrine of prospective overruling cannot be applied by this court to the facts of the case.

340. However, a subsequent decision of the apex court in the case of ***P.V. George v. State of Kerala*** reported in ***(2007) 3 SCC 557*** has come to the notice of this Court, wherein it was held as follows:-

> "**14.** For the views we propose to take, it is not necessary for us to consider all the decisions relied upon by Mr Rajan. The legal position as regards the applicability of doctrine of prospective overruling is no longer res integra. This Court in exercise of its jurisdiction under Article 32 or Article 142 of the Constitution of India may declare a law to have a prospective effect. The Division Bench of the High Court may be correct in opining that having regard to the decision of this Court in Golak Nath v. State of Punjab [AIR 1967 SC 1643] the power of overruling is vested only in this Court and that too in constitutional matters, **but the High Courts in exercise of their jurisdiction under Article 226 of the Constitution of India, even without applying the doctrine of prospective overruling, indisputably may grant a limited relief in exercise of their equity jurisdiction."**
>
> (emphasis added)

341. While the High Court cannot apply the doctrine of prospective overruling by itself, it will not prevent the High Court in an appropriate case, to mould the relief, and thereby grant a limited remedy. The decision of ***M. Sudakar v. V. Manoharan,*** reported in ***(2011) 1 SCC 484*** is relevant in this regard:-

> "**14.** The power to mould relief is always available to the court possessed with the power to issue high prerogative writs. In order to do complete justice it can mould the relief, depending upon the facts and circumstances of the case. In the facts of a given case a writ petitioner may not be entitled to the specific relief claimed by him

> but this itself will not preclude the writ court to grant such other relief which he is otherwise entitled. Further delay and laches do not bar the jurisdiction of the court. It is a matter of discretion and not of jurisdiction. The learned Single Judge had taken note of the relevant facts and declined to dismiss the writ petition on the ground of delay and laches."

342. Reliance on the decision of ***Indra Sawhney (Supra)*** has been placed across the bar in support of their rival submissions, which were limited to the interpretation of Art. 16(4) and the role of the Commission. It has however been noticed by this court that the decision of ***Indra Sawhney (Supra)*** also applied the doctrine of prospective overruling to the decision of the court, wherein it was held that reservation in the promotion cannot be provided in the exercise of Art. 16(4), and accordingly, the court held that reservation in promotion already accrued to the respective officers before the date of judgment, will not be affected by the said decision but will be operative from the date of the judgment.

343. It was in that regard that Parliament incorporated sub-article 4A to Art. 16, thereby expressly enabling the State to make provisions for reservation in promotion under the State services. At para 242 & 829 of ***Indra Sawhney (Supra)***, it was held as follows:-

> "**242.** Hence, I share the view of my learned brother B.P. Jeevan Reddy, J [infra para 859(7)] holding that:
> "Article 16(4) does not permit provision for reservations in the matter of promotions and that this rule shall, however, have only prospective operation and shall not affect the promotions already made, whether made on regular basis or on any other basis."
> and the direction given by him that wherever reservations are provided in the matter of promotion such reservation may continue in operation for a period of five years from this day.
> **829.** It is true that Rangachari [(1962) 2 SCR 586 : AIR 1962 SC 36] has been the law for more than 30 years and that attempts to re-open the issue were repelled in Karamchari Sangh [(1981) 1 SCC 246, 289 : 1981 SCC (L&S) 50 : (1981) 2 SCR

> 185, 234] . It may equally be true that on the basis of that decision, reservation may have been provided in the matter of promotion in some of the Central and State services but we are convinced that the majority opinion in Rangachari [(1962) 2 SCR 586 : AIR 1962 SC 36] to the extent it holds, that Article 16(4) permits reservation even in the matter of promotion, is not sustainable in principle and ought to be departed from. However, taking into consideration all the circumstances, we direct that our decision on this question shall operate only prospectively and shall not affect promotions already made, whether on temporary, officiating or regular/permanent basis. It is further directed that wherever reservations are already provided in the matter of promotion — be it Central Services or State Services, or for that matter services under any corporation, authority or body falling under the definition of 'State' in Article 12 — such reservations shall continue in operation for a period of five years from this day. Within this period, it would be open to the appropriate authorities to revise, modify or re-issue the relevant Rules to ensure the achievement of the objective of Article 16(4). If any authority thinks that for ensuring adequate representation of 'backward class of citizens' in any service, class or category, it is necessary to provide for direct recruitment therein, it shall be open to it do so."
>
> (emphasis added)

344. This court, therefore, taking into account the economic consequences that may unleash on the citizens from the said 77 classes, on the termination of their respective services under the State on account of such illegal classification and sub-classification for the purposes of Article 16(4), holds that the citizens, from the said 77 backward classes, who have already been appointed to the services and have benefitted otherwise from such reservation under the State for the purposes of Art. 16(4) before the date of delivery of this judgment, and sub-classification, and therefore their services cannot be terminated and the benefits derived cannot be revoked.
345. In the same vein, the services of the 37 classes, who have been illegally sub-categorised for reservation, in the exercise of section 16 of the Act of 2012, based on which they have already been absorbed into service, shall remain unaffected by this judgement.

346. However, from the date of the pronouncement of this judgement, the citizens from the said 77 classes and 37 classes cannot be appointed under the State services or derive any other benefit of any reservation, under the Act of 2012 or any executive order for the purposes of Art. 16(4) until the Commission and the State conduct fresh exercise for the purposes of Art. 16(4) in accordance with law.

U. THE PERCENTAGE OF RESERVATION TO BE ENJOYED BY THE 66 CLASSES OF OBCs BEFORE APRIL 2010.

347. At this juncture, a question that would arise for consideration is what would be the percentage of reservation that would be enjoyed by the 66 Other Backward Classes given the classification and sub-classification of the said 77 classes have been struck down.

348. By the executive **order No. 6312-BCW/MR-84/10 dated 24th September 2010,** issued by the GOVERNMENT OF WEST BENGAL BACKWARD CLASSES WELFARE DEPARTMENT WRITERS' BUILDINGS, KOLKATA - 700 001, the percentage of reservation for the Other Backward Classes has been increased from 7% to 17%. The reason for such an increase in the percentage of reservations has been Stated to be the inclusion of a good number of classes as would be evident from the said memo, which is set out hereunder:-

> *“WHEREAS by this department order No. 1056-BCW/EC/MR-302/97 Calcutta, the 6th November, 1997, the Order No. 347-TW/EC/M-6/82(1), dated the 13th July, 1994, published in Part I of the Calcutta Gazette, Extraordinary, dated the 13th July, 1994 (hereinafter referred to as the said order), providing for reservation of 5% vacancies in services and posts under the Government of West Bengal, the local and statutory authorities constituted under any State*

Act, Corporations in which not less than 51% of the paid up share capital is held by the State Government, Universities, Colleges affiliated to the Universities, Primary, Secondary and Higher Secondary Schools, other educational institutions owned or aided by the State Government, and public sector in favour of the Backward Classes of Citizens, as specified in the list in this department Notification No. 346-TW/EC, dated the 13th July, 1994, was subsequently amended to increase the reservation of vacancies in services and posts to 7% in the manner appearing in the said notification;

AND WHEREAS, by this department's Notification No. 6309- BCW/MR-84/10, dated the 24th September, 2010, the Governor has been pleased to categorise the Other Backward Classes notified for the purpose of the West Bengal Commission for Backward Classes Act, 1993 (West Ben. Act 1 of 1993) into two groups, namely, Category-A and Category-B and has brought 56 classes under Category- A and 52 Classes under Category-B;

AND WHEREAS, consequent upon addition of a good number of classes in the lists of Other Backward Classes, the Governor has been pleased to decide that the percentage of such reservation would be increased by another 10%, thereby increasing the percentage of such reservation of vacancies in services and posts to 17% and also that separate quota of reservation shall be provided for the Category-A and the Category-B of the other backward classes;

Now. THEREFORE, in pursuance of the provision of clause (c) of section 2 of the West Bengal Commission for Backward Classes Act, 1993 (West Bengal Act 1 of 1993), the Govenor is pleased hereby to make the following amendment in the said notification:-

Amendment

In the said Order, for clause (a), the following clause shall be substituted,

"(a) 10% and 7% of the vacancies in services and posts under the Goverment of West Bengal, the local and statutory authoritics constituted under any State Act, Corporations in which not less than 51% of the paid up share capital is held by the State Government, Universities, Colleges affiliated to the Universities, primary, secondary and higher secondary schools, other educational institutions which are owned or aided by the State Government and public sector to be filled up by direct recruitment shall be reserved for the backward classes of citizens belonging to Category-A and Category-B respectively;".

By order of the Governor,

SK. NURUL HAQUE

Principal Secretary to the Government of West Bengal”

349. It would appear from a plain reading of the said executive order that the Commission was not consulted by the State in deciding the desirability of an increase in the percentage of reservation. Therefore, given the law laid down hereinabove the State has to consult the Commission before fixing the percentage of reservation. This Court is of the view that executive order no.6312-BCW/MR-84/10 dated 24th September 2010 is liable to be struck down on the ground of non-consultation with the Commission by the State, and is hereby struck down.

350. An increase of 10% in the percentage of reservation was due to the subsequent inclusion of classes, made from the year 2010. Therefore, since the inclusion of the classes made from 2010 has been struck down by this Court, the purpose of the said executive order no longer survives, hence, on this count, the said executive order has become infructuous.

351. Hence, it is accordingly held that the 66 classes would be enjoying a 7% percentage of reservation.

IV. CONCLUSIONS AND DIRECTIONS

A. CONCLUSIONS

352. The role of the West Bengal Commission for Backward Classes is to collect materials by survey or other means, hear the parties, and render its advice, based on objective criteria and materials, to the State. The advice of the Commission is ordinarily binding upon the

State subject to the disagreement by the latter by providing cogent and JUSTIFIABLE reasons.

353. Section 2(a) and 2(c) of the Act of West Bengal Commission for Backward Classes of 1993 enables the State to provide for reservation, inter alia, for the purposes of Art. 16(4) only in consultation with and with the aid advice and recommendation of the Commission.

354. The consultation with and advice of the Commission must be read into Section 9 of the 1993 Act as mandatory, regardless of whether a citizen or a State makes a request for inclusion or exclusion of a class or complains of under-inclusion.

355. The Commission comprises, inter alia, experts in the field of social science and backwardness as indicated by section 3(2) of the Act of 1993. It is therefore for the Commission to decide whether it needs any other expert body/organization to supplement its duty. The State has to trust the Commission in its expertise. The State cannot rely on any report of anybody or persons, not considered and dealt with by the Commission.

356. After the commencement of the **West Bengal Backward Classes (OTHER THAN SCHEDULE CASTES AND SCHEDULE TRIBES) (RESERVATION OF VACANCIES AND POSTS) ACT of 2012** only the State Legislature is empowered to make provisions for reservation in the State services thereunder or under Art. 16(4). The State executive, therefore, is no longer permitted either under the Act of 1993 or even

under Art. 16(4) to make provisions for reservation for OBCs in State services.

357. The consultation with the Commission is mandatory both for the purposes of sub-classification of the OBCs and determining the percentage of reservation for the Classes or the Sub Classes.

358. The Act of 2012 was enacted to empower only the State Legislature to declare and codify the Reservation in the State services for the other backward classes. It also provides for the other incidents of reservation namely de-reservation and penalties for contravention of the Act of 2012.

359. The Act of 1993 at present stands to compel the State Legislature to consult the Commission before making any inclusion or exclusion of the classes of OBCs.

360. The Commission must adopt a fair, transparent and just procedure in the process of identification of Backward Classes in the State. Public advertisement, present time data, survey of the population as a whole, detailed scientific survey methods, and comparison with the whole population are some proper methods to be followed.

361. The actual representation of the class in the services of the State and its instrumentalities must be undertaken before making recommendation to the State.

B.DIRECTIONS

a) The opinion and advice of the Commission is ordinarily binding on the State legislature, under section 9 and 11 of the act of 1993

irrespective whether a request to look into over-inclusion or under-inclusion is made by citizens or a body or the State.

b) The expressions "Government of West Bengal" and the "Government" in section 2(f) of the Act of 2012 is read down to mean the State of West Bengal in discharge of its Legislative functions having due regard to reports of the Commission under the Act of 1993.

c) The second part of section 2(h) of the Act of 2012, which reads as *"and includes such classes as the State Government may, by notification in the Official Gazette, specify from time to time;"* (emphasis applied) is struck down.

d) Section 16 of the 2012 Act, is struck down since it empowers the State executive to amend any schedule of the Act of 2012 including Schedule I. Consequently, the 37 classes included in the exercise of Section 16 by the State executive, are struck out from Schedule–I of the Act of 2012.

e) Section 5(a) of the Act of 2012, which distributes the percentage of reservation in 10% and 7% to the sub-classified classes is struck down. Consequently, the sub-classified classes listed in the two categories namely OBC-A and OBC-B are struck down from Schedule I of the Act of 2012.

f) The proviso to section 5(a) of the Act of 2012 is read down contextually to read the expression State Government to mean the State of West Bengal in exercise of its legislative functions, having due

regard to the reports of the the Commission constituted under the Act of 1993.

g) The **executive orders i.e No. 6309-BCW/MR-84/1024th September 2010 and No. 1673-BCW/MR-209/11 dated 11th May, 2012,** issued by the Government Of West Bengal Backward Classes Welfare Department, sub-classifying the 143 classesare struck down.

h) The executive orders classifying the 66 classes prior to 2010 are not interfered with since the same have not be challenged.

i) The executive orders classifying the **42** classes made by the State **being Nos. 771- BCW/MR436/1999 dated 5th March, 2010, Memo no. 1403- BCW/MR-436/99(1) dated 26 April, 2010, Memo no. 1639- BCW/MR-436/1997 dated 14th May, 2010, Memo No. 1929- BCW/MR436/99(1) dated The June 2, 2010, Memo no. 2317- BCW/MR-436/99 dated July 1, 2010, Memo no. 5045- BCW/MR- 436/99(1) dated August 31, 2010, Memo no. 6305- BCW/MR- 436/99(1) dated September 24. 2010,** and the **executive order No. 1673-BCW/MR-209/11 dated 11th May 2012**, inter alia, classifying the **35** classes for the purposes of reservation under 16(4) are quashed, with prospective effect, in view of the illegality of such reports, recommending such classification.

j) The Backward Classes Welfare department of the State, in the exercise of powers under Section 11 of the Act of 1993, shall, in consultation with the Commission, place a report before the Legislature, with

recommendations, for inclusion of new classes or for exclusion of the remaining classes, in the State List of OBCs.

k) The services of citizens from the 77 classes and 37 classes (added in the exercise of Section 16) struck down above, who are already in the service of the State, or have already availed the benefit of reservation or have succeded in any selection process in the State, shall not be affected by the reason of this judgment.

(Rajasekhar Mantha, J.)

<u>Tapabrata Chakraborty, J:</u>

1. I have had the advantage of reading the draft judgment prepared by brother Mantha, J. I express my respectful concurrence with the reasons assigned by His Lordship for the conclusions reached in such judgment. However, my concurrence notwithstanding, and with respect again, I wish to add a few words, mainly by way of emphasis.

I. Maintainability of the writ petitions

2. On the issue of maintainability of the present petitions, the learned Advocate General has raised three specific objections: *firstly,* the petitioners have a statutory forum to address their concerns in view of Section 9(1) of the West Bengal Commission for Backward Classes Act 1993 (hereinafter referred to as the 1993 Act), which provides for a mechanism whereby any citizen can file an application/complaint with the Commission regarding inclusion or over-inclusion; *secondly*, the issues raised by the petitioners, cannot be agitated as a Public Interest Litigation (hereinafter referred to as PIL) and *thirdly*, grievances in service matters cannot be agitated in PILs.

3. The first objection, which is premised on the existence of alternative remedy as a bar to a writ petition under Article 226 of the Constitution must fail due to the following reasons:

   (a) Whilst arguing on the issue of maintainability on the ground that alternative remedy exists, the Learned Advocate General has laid stress on Section 9(1) of the 1993 Act which provides that '*The*

Commission... shall hear complaints of over-inclusion or under-inclusion of any backward class in such lists and tender such advice to the State Government as it deems appropriate.' At the same time, however, whilst advancing arguments on the merits of the issues raised in this batch of writ petitions, learned Advocate General has contended that the words '*ordinarily binding'* in Section 9(2) of the Act of 1993, impart a diluted meaning as regards the degree to which the State Government is bound by the advice of the Commission and as a corollary thereof, he contended that consultation with the Commission is a mere procedural formality.

(b) Such arguments are contradictory. If this Court were to accept the learned Advocate General's submission that Section 9(1) provides an efficacious alternate remedy, then the argument that consultation with the Commission is merely procedural, having no binding effect upon the Government would not be acceptable and vice-versa. Even if such apparent incongruity/contradiction is cast aside, it is no longer *res integra* that existence of alternative remedy is not an absolute bar against maintainability of a writ petition under Article 226 of the Constitution of India. The existence and pursuit of an alternative remedy before invoking writ jurisdiction under Article 226, as held by the Supreme Court on numerous occasions, is more of a rule of convenience than a rule of law. The jurisdiction of this Court cannot be fettered by a mechanical

tendency to retreat from exercise of the plenary powers vested in this Court by Article 226 of the Constitution.

4. The second objection is styled as a protest against maintainability of these writ petitions as PILs. Such objection must also fail, in view of the following reasons:

(a) In a democracy such as ours, every citizen harbours a legitimate expectation and has faith that every State action would abide by the principles of good governance. As held by the Supreme Court in the case of ***Manoj Narula v. Union of India*** reported in ***(2014) 9 SCC 1***:

> '... *faith of the people is embedded in the root of the idea of good governance which means reverence for citizenry rights, respect for fundamental rights and statutory rights in any governmental action, deference for unwritten constitutional values, veneration for institutional integrity and inculcation of accountability to the collective at large.*'

(b) This Court as the conscience of the Constitution, cannot resort to a hyper technical approach and shackle itself from delving into issues raised in these writ petitions which effectively strike at the root of good governance. Reservation is one of the tools used for preserving and promoting the essence of equality in State employment and education. The benevolent rationale behind reservation, would be thrown out of gear in the event, the process of classification and sub-classification of castes is tainted due to violation of statutory provisions, non-application of mind or violation of law laid down by

the Supreme Court. In short, the present batch of writ petitions raise issues which are intrinsically linked with public welfare and the constitutional goal of establishing a truly egalitarian society. Distinct from a pursuit of individual interest, these writ petitions raise the pertinent question as to whether or not, the impugned State action in classification and sub-classification of the 77 classes manifests equity, fair play, and justice.

(c) The learned Advocate General has sought to interpret Rule 56 of the Writ Rules in contending that the present writ petitions do not fall within the definition of public interest litigation. Such contention is devoid of merit. A cursory glance of Rule 56 indicates that the definition of public interest specified therein, commences with the word *'include'*. It is a well-settled principle of statutory interpretation that any definition which commences with the word *'include'*, the said definition cannot be regarded as exhaustive but be treated as an inclusive one. In view thereof, even if the present writ petitions and the issues canvassed therein, do not satisfy the rudiments of Rule 56 in verbatim, the same cannot be viewed as an embargo against their maintainability as PILs.

5. As regards the third objection, the same has been raised on the basis of a Supreme Court decision in the case of *Public Services Tribunal Bar Association (supra).* The factual matrix involved in the said case, was quite distinct from facts and circumstances of these writ petitions. It is well settled that even a single factual addition or alteration in a

particular case, may lead to a completely different conclusion. No recruitment process has been challenged here. In view thereof, the third objection against maintainability is cast aside. In view of the reasons discussed above, the arguments advanced against the maintainability of the present writ petitions, fail.

II. Sections 9 & Section 11 of the 1993 Act:

PRE-AMENDMENT

Functions of the Commission- 9. (1) The Commission shall examine requests for inclusion of any class of citizens as a backward class in the lists and hear complaints of over-inclusion or under-inclusion of any backward class in such lists and tender such advice to the State Government as it deems appropriate.

(2) The advice of the Commission shall ordinarily be binding upon the State Government.

POST-AMENDMENT

Functions of the Commission- 9. (1) (a) The Commission shall examine requests for inclusion of any class of citizens as a backward class in the lists and hear complaints of over-inclusion or under-inclusion of any backward class in such lists and tender such advice to the State Government as it deems appropriate.

(b) The advice of the Commission tendered under this sub-section shall ordinarily be binding upon the State Government.

(2) The Commission shall consider any reference from the State Government regarding inclusion of any class of citizens as a backward class in the lists or deletion of any backward class therefrom.

(3) The Commission shall, on request from the State Government, examine the social and educational conditions and problems incidental thereto of any class of citizens belonging to the backward classes within the territory of West Bengal, and advice the State Government.

6. At the outset, reference is drawn to the pre-amendment version of Section 9 of the Act of 1993, as set out above. A perusal of the said provision would reveal that advice of the Commission tendered in respect of requests for inclusion or complaints regarding exclusion or over-inclusion, would be *'ordinarily binding'* on the State Government. Since the concerned statute does not define the term *'ordinarily'*, reliance may be placed upon a line of judicial decisions which have held that it conveys the idea of something which is done generally i.e., the general norm subject to certain exceptions. In the context of pre-amended Section 9(2), such exception would mean instances where the State Government may be allowed to disagree with the advice tendered by the Commission. In this regard, reliance is placed upon the judgment delivered in *Ram Singh (supra)* reported in *(2015) 4 SCC 697*, wherein the Supreme Court in interpreting Section 9 of the National Commission for Backward Classes Act which is *parimateria* to pre-amended Section 9 of the Act of 1993, had held that the advice

of the Commission may be ignored only for strong and compelling reasons which are required to be in writing. In short, it is only for compelling reasons or exceptional circumstances that the State Government may be allowed to disagree with the advice of the Commission.

7. In the post-amendment version of Section 9, two sub-sections (2) and (3) have been inserted and sub-section (1) has been divided into sub-clauses (a) and (b) which contain the provisions of sub-sections (1) and (2) of pre-amendment Section 9. The words *'ordinarily binding'* remains in Section 9(1)(b) in its present form but is conspicuously absent in newly added sub-Sections (2) and (3). As a consequence, the State Government is not required to consider the advice of the Commission at all, in case of any references made to it by the State Government in terms of sub-Section (2) or in case of any examination of the social and educational conditions and problems incidental thereto of any class of citizens belonging to the backward classes within the territory of West Bengal in terms of sub-section (3). Such consequential result of the amendment is also clear from the inclusion of the words *'under this sub-section'*, appearing under the post-amendment Section 9(1)(b) meaning thereby that only in respect of complaints of under or over-inclusion made by a citizen before the Commission, the advice tendered by it would be ordinarily binding on the State Government but the same would not bind the State

Government to any extent in cases covered under the newly added sub-sections (2) and (3).

8. The newly inserted sub-section (2) of Section 9, specifically deals with inclusion only. By inserting the word *'consider'*, it could be reasoned that the legislature has consciously placed a responsibility upon the Commission that while answering any reference made to it, by the State Government under this sub-section, it must look at it closely and carefully; think or deliberate on such reference [See the judgment delivered in the case of *Oriental Bank of Commerce vs. Sunder Lal Jain*, reported in *(2008) 2 SCC 280*]. In the same breath, the legislature has chosen to exclude the words *'advise'* or *'ordinarily binding'* and placed no compulsion upon the State Government to be bound by the answer provided by the Commission to such reference, unless there exist exceptional circumstances justifying deviation.

9. The executive power of the State Government to revise *'lists'* as defined under Section 2(c) must be tempered with the deliberative consideration by the Commission. This is because unbridled discretion afforded to the State Government by way of newly inserted sub-section (2) read with Section 2(c) of the Act of 1993, runs contrary to the tenets of rule of law in a constitutional order. It is well-settled that the absence of arbitrary power is the chief plinth of rule of law, upon which our constitutional order has been erected.

10. Whilst deliberating on the subject of Section 9, it may be useful to note that the erstwhile Section 9 made provision for guidance to be

offered by the Commission to the State Government in matters of inclusion of classes within the category of OBCs upon receipt of applications demanding inclusion within the said category. Distinct from newly added sub-section (2), no provision existed whereby the State Government could make a reference to the Commission regarding matters of inclusion. The State Government had neither any express nor implied power of including persons within the OBC category by itself and was ordinarily bound by the recommendations tendered by the Commission in respect of applications made in terms of pre-amended Section 9(1).

11. Attention is now drawn to newly inserted sub-section (3). The said sub-section provides that upon a request made by the State Government, the Commission shall examine the social and educational conditions and problems incidental thereto of any class of citizens belonging to the backward classes. A natural deduction upon a plain reading of this sub-section would be that it has nothing to do with inclusion of classes within the OBC category. It would also be a natural conclusion that the necessity of examining social and educational conditions of existing OBC classes would arise only if the State Government wished to remove and/or exclude such classes who may no longer be in need of OBC reservation. Such provision has a familial resemblance with the exercise of revision of lists every ten years as contemplated under Section 11 of the Act of 1993, except the specific time interval of ten years. What follows is that if the State

Government wishes to exclude existing OBC classes from the lists prepared under the Act of 1993 in between the time interval of ten years, it may do so by making a request to the Commission in terms of sub-section (3) and in the absence of the phrase *'ordinarily binding'* or *'consult'*, it may proceed to carry out its wishes with or without the blessings of the Commission, thereby, diluting the persuasive powers of the Commission under Section 11 in matters involving exclusion of existing OBC classes. It must be borne in mind that in *Ram Singh (supra)*, the terms *'consult'* and *'ordinarily binding'* have been synonymised insofar as the binding nature of the Commission's advice is concerned.

12. In the said conspectus, this Court does not find any merit in the contention that the amendment to Section 9 was clarificatory and not substantive. It is well-settled that even if it were expressly specified in the amendment that the same was clarificatory in nature, the Court would not be precluded from examining the true nature of the amendment [See the judgment delivered in the case of *Som Raj vs. State of Haryana,* reported in *(1990) 2 SCC 653*].

13. Upon an examination of the ramifications of the present amendment, there is no doubt that the same was substantive in nature. Given the absurdity that arises upon a literal interpretation of the amended Section 9 inasmuch as advice of the Commission rendered in terms of sub-section (1)(b) is ordinarily binding whereas advice rendered in terms of sub-sections (2) and (3) is not; I find myself in agreement

with my learned brother's reasoning of adopting contextual interpretation.

14. Context, in this sense, is to be interpreted in a wide manner, as including not only other enacting provisions of the statute but also its preamble, existing state of the law, other statutes in *parimateria* and the mischief sought to be tackled by the statute. This principle was fully adopted by a Constitution Bench of the Supreme Court in *Union of India v. Elphinstone Spinning and Weaving Co. Ltd.* reported in *(2001) 4 SCC 139*. There is little doubt that the *'key to the opening of every law is the reason and the spirit of the law- it is the animus imponentis, the intention of the law-maker, expressed in the law itself, taken as a whole'* (quotation taken from *Brett v. Brett (1826) 3 Add 210*). Such rule was stated in similar words by the Supreme Court in the case of *CET v. Darshan Surendra Parekh* reported in *AIR 1968 SC 1125* (particularly, see page 1229).

15. The modern approach to statutory interpretation insists that context be considered in the first instance, not merely at some later stage when some ambiguity might be thought to arise and uses context in its widest sense [See the judgment delivered by a 3-Judge Bench of the Supreme Court of India in *Gurudevdatta VKSS Maryadi v. State of Maharashtra &Ors.* reported in *AIR 2001 SC 1980*].Given the contextual circumstances surrounding promulgation of the 1993 Act including the legal principles enunciated in *Indra Sawhney (supra)* and subsequent judgments of the Supreme Court, I am in agreement

with the reasoning offered by my learned brother in support of *'reading into'* Section 9, the requirement of construing the advice tendered by the Commission in all respects to be binding upon the Government unless reasons reduced in writing, indicating the exceptional circumstances which have compelled the State Government to ignore/disregard such advice. To achieve the true objectives, the consultation with and advice of the Commission must be read into Section 9 of the 1993 Act as mandatory. Equality is not violated by mere conferment of discretionary power. It is violated by arbitrary exercise by those on whom it is conferred. This is the theory of *'guided power'*. In the event of arbitrary exercise by those on whom the power is conferred, would be corrected by the Courts.The Constitutional Court's authority to exercise such jurisdiction is such a deeply entrenched constitutional aphorism, which need not be burdened by quotational jurisprudence.

III.West Bengal Backward Classes (Other Than Scheduled Castes and Scheduled Tribes) (Reservation Of Vacancies In Services And Posts) Act, 2012:-

16. A challenge has been raised against the constitutionality of various provisions of the West Bengal Backward Classes (Other than Scheduled Castes and Scheduled Tribes) (Reservation of Vacancies in Services and Posts) Act, 2012 (hereinafter referred to as the 2012 Act).

17. At the outset, the learned Advocate General has argued that since the 2012 Act does not violate any fundamental rights and that the same

has been promulgated by the State legislature in excess of its jurisdiction, its constitutionality cannot be challenged. Such argument takes into consideration only two out of three grounds based on which, one may challenge the constitutionality of a statute thereby, ignoring the third ground, namely, *'manifest arbitrariness'* which enables/allows the Courts to strike down legislation.

18. Other Backward Classes has been defined in Section 2(h) of the 2012 Act as follows:

> *'Other Backward Classes shall mean such classes of citizens as specified in Schedule I, other than Scheduled Castes and Scheduled Tribes, and includes such classes as the State Government may, by notification in the Official Gazette, specify from time to time'*;

Section 16 of the 2012 Act runs as follows:

> *'The State Government may, by order published in the Official Gazette, add to, amend or alter any Schedule'.*

19. A perusal of Section 2(h) read with Section 16 of the 2012 Act reveals that State Government has been provided with *carte blanche* authority, in respect of specifying/declaring classes as backward who may be entitled to reservation. Such declaration/specification is undergirded by the overarching objective of the 2012 Act which is *inter alia*, to provide for the reservation of vacancies in services and posts for the members of the Backward Classes of citizens other than the Scheduled Castes and Scheduled Tribes, who are socially and

economically backward and are not adequately represented in the services and posts within the State of West Bengal.

20. The learned Advocate General has argued that the 2012 Act does not refer to the role of the Commission in defining OBC because the said Act is for declaring OBCs. Such declaration is distinct from identification of classes as OBC. The 2012 Act was promulgated merely for the purpose of listing out classes as OBCs is not acceptable. This is because, based on the classes enlisted under Schedule I of the 2012 Act or notified by the State Government from time to time, the State Government stands empowered to make reservations for purposes of including such classes in the services under the Government. Thus, the purport of the 2012 Act is not restricted to mere listing of classes as OBC but includes within its ambit, extension of reservation to those listed under Schedule I.

21. Furthermore, to *'declare'*, means to announce formally; or to clearly announce some opinion or resolution [See *P. RamanathaAiyar Concise Legal Dictionary*]. Therefore, such announcement/declaration of opinion must be preceded by a formation of opinion. In other words, declaration of a particular class as OBC must be preceded by the twin process of identifying the same as a backward class and ascertaining the adequacy of its representation in the services and posts under the Government of West Bengal. Under the scheme the 2012 Act and the Supreme Court's dicta in *Indra Sawhney* (supra), such identification and inquiry into adequacy of representation must be carried out by

the Commission whose recommendations would be ordinarily binding upon the State Government. The 2012 Act does not even allude to the role of the Commission, let alone lay down any express provision that the classes of citizens specified in the Schedule or those notified by the State Government, in the Official Gazette would be subject to the rigours of Section 9 of the Act of 1993.

22. There is a complete lack of legislative policy within the scheme of 2012 Act which guides the power of the State Government under Section 2(h) read with Section 16 of the Act [See the judgment delivered in the case of *Agricultural Market Committee v. Shalimar Chemical Works Ltd.*, reported in *(1997) 5 SCC 516*]. The legislature has to lay down the legislative policy and principle to afford guidance for carrying out the said policy before it delegates its subsidiary powers in that behalf [See the judgment delivered in the case of *Vasanlal Maganbhai Sanjanwala* v. *State of Bombay,* reported in *AIR 1961 SC 4 : (1961) 1 SCR 341*]. the legislature must retain in its own hands the essential legislative functions and what can be delegated is the task of subordinate legislation necessary for implementing the purposes and objects of the Act concerned.

23. A class is declared as OBC not only because it is backward, based on scientific and identifiable data, but also on the basis of such class being inadequately represented in the services under the State. Such inadequacy is required to be assessed vis-a-vis the population as a whole including other unreserved classes. However, the *pro forma*

published by the Commission and as annexed to the writ petition (WP No.60 of 2011) does not conform to the provisions of the 1993 Act. There are deficiencies galore in the said *pro forma.* The clause *'General Introduction'* provides that *'information should be furnished Block-wise separately for each Block'.* Surprisingly, clause 2(a) calls for '*geographical distribution of the class in the State'*. From the said *pro forma* it is also not clear whether the same is required to be filled up by any particular person belonging to any class or by any class of people.

24. Records would reveal that on or about 8th February, 2010 it was published on all leading newspapers that the Government has announced 10% reservation for Muslim community. Within a period of 6 months thereafter, the Commission recommended 42 classes as OBC out of which 41 communities belonged to Muslim religion. Following such recommendation, State immediately included the same in the list. Thereafter *vide* memo no. 1673 dated 11th May, 2012, State further included 35 classes (9 in OBC-A category and 26 in OBC-B category). The Commission and State acted in undue haste and with lightning speed in making recommendations for the classification of the 77 classes to make the public announcement of the then Chief Minister a reality. According to the petitioners, the Commission appeared to be in a tearing hurry to fulfil the wishes of the Chief Minister made in a political rally. No proper enquiry was conducted by the Commission inviting application for inclusion in the

lists and even after purported preparation of the list, no notification was issued inviting objections in general from the people at large. Thus, the authorities have violated the constitutional provisions and had practiced protective discrimination in deviation to the constitutional norms. No data was disclosed on the basis of which it was ascertained that the concerned community is not adequately represented in the services under the Government of West Bengal. The said reports were never published and as such none could avail the opportunity to file any objection to the same. It would be explicit from the reports that for '*determining factors for the appraisal of the extent of backwardness'* of the concerned community, only one member of the KAN Class was granted an opportunity of hearing.

25. The *'vesting of the power'* by an enabling provision may be constitutionally valid and yet *'exercise of the power'* by the State in a given case may be arbitrary, particularly, if the State fails to identify and measure backwardness and inadequacy. The concept of *'equality of opportunity'* in public employment concerns an individual, whether that individual belongs to the general category or Backward Class. The conflicting claim of individual right under Article 16(1) and the preferential treatment given to a Backward Class has to be balanced. Both the claims have a particular object to be achieved. The question is of optimisation of these conflicting interests and claims. The concepts of *'equity'*, *'justice'* and *'merit'* in public employment depends upon quantifiable data in each case.If the State wishes to exercise its

discretion under Article 16(4), it is required to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment.

26. Article 16(4) of the Constitution has two wings, one is determination of backwardness and the other is whether the concerned class is adequately represented in the services under the State. No reasonable procedure has been followed for determination of such backwardness. For such determination there ought to have been a survey of the entire populace, identification of an existing social group spread over and overwhelming majority of the country's population. There had been no proper identification of any class in the backdrop of proper survey, consideration of objections upon publication of the notifications in the official gazette. The Hon'ble Full Bench of this Court in the case of *Collector of Customs &Ors. –vs- Jindal Strips Ltd. & Ors*, reported in *2000 (1) CHN 332* has observed that if publication is required to be through a gazette, then mere printing of it in the gazette would not be enough. Unless the gazette contains the notification and is made available to the public, the notification cannot be said to have been duly published. In the instant case, however, there had been no publication of the notifications and survey reports and as such none could respond and file any objection whatsoever. As a model employer, the State Government must conduct itself with high probity and candour and ensure that the

populace do not succumb to any discriminatory practice in the procedural rigmarole.

27. If history and realities of life provide any guide it would be axiomatic to say that human ingenuity has no limits in finding out the ways of avoiding and circumventing the provisions of law much more in cases where confidence of the people at large rests upon the government. The society at large has a stake in proper application of the yardsticks pertaining to reservation. The allegations in the instant case are neither skirmishes nor bald, but speak of overt acts indicating non-compliance of the statutory provisions and the law as laid down by the Hon'ble Supreme Court. Strict adherence to the rule of law is to be ensured and the same cannot be allowed to be flouted in the hands of the executives who dressed in little brief authority and in exercise of its discretion cripples the constitutional guarantee of fairness and reasonableness.

28. With these observations in elucidation of the conclusion arrived at by my learned brother, I agree with the directions issued.

29. There shall be no order as to costs.

30. Urgent Photostat Certified server copy of this judgment, if applied for, be supplied to the parties on urgent basis.

(Tapabrata Chakraborty J.)

1. After the judgments are delivered, Ld. Counsel for the State seeks stay of its operations.
2. The prayer is considered and refused.

(Tapabrata Chakraborty, J.)

(Rajasekhar Mantha, J.)