

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

Date of decision: 01.09.2017

(1) CWP No. 9931 of 2016 (O&M)

Murari Lal Gupta Petitioner.

Versus

State of Haryana and others Respondents.

(2) CWP No. 11064 of 2016 (O&M)

Kumhar Maha Sabha, Kumhar Dharamshala, Premnagar Hissar ...Petitioner.

Versus

State of Haryana and another Respondents.

(3) CWP No. 13125 of 2016 (O&M)

Yadav Kalyan Sabha (Registered), Rewari Petitioner.

Versus

State of Haryana and others Respondents.

(4) CWP No. 13574 of 2016 (O&M)

Satvir Singh Saini and another Petitioners.

Versus

State of Haryana and others Respondents.

**CORAM: HON'BLE MR. JUSTICE S.S. SARON
HON'BLE MS. JUSTICE LISA GILL**

**Present: Mr. Mukesh Verma, Advocate,
for the petitioner in CWP No.9931 of 2016.**

**Mr. V.K. Jindal, Senior Advocate, with
Mr. Lal Bahadur Khawal, Advocate, and
Ms. Janya Sirohi, Advocate,
for the petitioner in CWP No.11064 of 2016.**

Mr. P.R. Yadav, Advocate,
for the petitioner in CWP No.13125 of 2016.

Mr. R.K. Chopra, Senior Advocate, with
Mr. Gaurav Sharma, Advocate,
for the petitioner in CWP No.13574 of 2016.

Mr. Jagdeep Dhankar, Senior Advocate, with
Mr. Lokesh Sinhal, Addl. Advocate General, Haryana and
Mr. Surender Singh Pannu, DAG, Haryana
for the respondent - State of Haryana.

Mr. R.S. Badhran, Advocate, and
Mr. S.S. Nara, Advocate,
for respondent No.3 in CWP No.9931 of 2016

Mr. Ramesh Hooda, Advocate,
for respondent No.3 in CWP No.13574 of 2016.

Mr. R.S. Kundu, Advocate,
for respondents No. 4 and 7 in CWP No.9931 of 2016.

Mr. Jasdev Singh Mehndiratta, Advocate,
for respondent No.4 in CWP No.13574 of 2016.

Mr. Somvir Singh, Advocate,
for respondent No. 5 in CWP No. 9931 of 2016.

Mr. Arun Gosain, Advocate, Central Government Counsel
for respondent No.5 - UOI in CWP No.13125 of 2016.

Mr. Kamal Sharma, Advocate, and
Mr. Gobind Sharma, Advocate,
for respondent No. 6 in CWP No. 13125 of 2016.

Mr. Sanjeev Roy, Advocate, for
Mr. I.P.S. Doaba, Advocate, for Union of India.

Mr. Sanjeev Kumar Arya, Advocate,
for respondent No. 8 - Ror Mahasabha, Karnal.

Mr. Jasmer Singh Rozera, Advocate,
for respondent No. 9 in CWP No.9931 of 2016.

Mr. S.N. Yadav, Advocate,
Mr. Aditya Yadav, Advocate, and
Mr. Shakti Singh, Advocate.

S.S. Saron, J.

This judgment and order will dispose of the above mentioned four writ petitions that have been filed which primarily seek the quashing and invalidation of Schedule-III (Backward Classes Block 'C') of the Haryana Backward Classes (Reservation in Services and Admission in Educational Institutions) Act, 2016 (Haryana Act No. 15 of 2016) ('2016 Act' - for short) stating the same to be contrary to the basic structure of the Constitution, *ultra vires*, contemptuous, arbitrary; besides, being null and void. . The Act was notified on 12.05.2016.

In Murari Lal Gupta's case, it is *inter alia* stated that in terms of the impugned provisions of Schedule III of the 2016 Act, reservation to six castes, i.e. Jat, Jat Sikh, Ror, Bishnoi, Tyagi, Mulla Jat/Muslim Jat has been provided by declaring them as Backward Classes Block 'C'. According to the petitioners, this reservation is without any valid and lawful basis, besides, being contrary to the Supreme Court judgment in Ram Singh and others v. Union of India, (2015) 4 SCC 697. The said provisions of Schedule III of the 2016 Act, in fact amount to circumventing the Supreme Court mandate in Ram Singh's case (*supra*) which, it is submitted, is impermissible in law. A final judgment once rendered operates and remains in force until it is altered by the Court in an appropriate proceeding. A legislation nullifying the judgment is constitutionally impermissible. Schedule III of the 2016 Act has been enacted on the basis of the report of Justice K.C. Gupta Commission, which had been set up for the identification of the backwardness of classes for the purpose of providing adequate reservation in services and in educational

institutions for their upliftment. The petitioners submit that the report of Justice K.C. Gupta Commission was not accepted by Hon'ble the Supreme Court in Ram Singh's case (supra). Besides, after the judgment was passed in the said case on 17.03.2015 till the passing of the impugned legislation, no new facts had emerged nor was there any change in the circumstances which would warrant the passing of such legislation.

An interim order, in fact, was passed by this Court in Ved Parkash and another v. State of Haryana and others (CWP No. 9132 of 2015) whereby earlier notification dated 24.01.2013 issued by the Governor of Haryana declaring Bishnoi, Jat, Jat Sikh, Ror and Tyagi as special backward classes and providing 10% reservation in jobs under Government/ Government Undertakings and Local Bodies as well as in educational institutions for these special backward classes in exclusion to the already notified 27% reservation provided for the backward classes was stayed by this Court vide order dated 27.07.2015. A somewhat similar order was also passed in CWP No. 2441 of 2014 on 29.03.2016 and during this period also, there was no change in the circumstances. The only new change in circumstances has been that there were occurrences of violent agitations and threats of repetition of more violent agitations that the impugned enactment was passed. The factual position was that the Haryana State Legislature did not have any information or materials before it concerning the backwardness of the aforesaid six castes mentioned in Schedule III of the 2016 Act. There was no material to contradict or doubt the judgment in Ram Singh's case (supra). Therefore, according to the petitioners, the legislative exercise of enacting

Schedule III to the 2016 Act amounts to overruling the Supreme Court judgment in Ram Singh's case (supra). The impugned legislation makes reservations to the extent of 10% for recruitment to Class III and Class IV posts and 6% to Class I and Class II posts, besides, there is 10% reservation for admissions in educational institutions for the six castes mentioned in Schedule III to the 2016 Act.

In Kumhar Maha Sabha, Kumhar Dharamshala v. State of Haryana (CWP No.11064 of 2016) a similar challenge to Schedule III of the 2016 Act has been made in terms of which reservations for Backward Classes Block-C has been provided which, it is stated, is contemptuous, arbitrary, null and void; besides, in violation of Articles 15 (4) and 16 (4) of the Constitution of India as also the Supreme Court judgments in Ram Singh's case (supra) and Indra Sawhney v. Union of India, 1992 Suppl. (3) SCC 217.

In Yadav Kalyan Sabha v. State of Haryana (CWP No. 13125 of 2016), the setting aside of the report dated 12.12.2012 submitted by Justice K.C. Gupta Commission providing for 10% reservations to the economically backward classes from the general category has been made. Besides, the notification dated 27.09.2013 issued by the Government of Haryana granting 10% vertical reservations to the economically backward persons from the general category on the recommendations of Justice K.C. Gupta Commission and the instructions dated 15.07.2014 have been assailed stating the same to be illegal, contrary to the provisions contained in Articles 15 (4) and 16 (4) of the Constitution of India as also the Supreme Court judgment in Indra Sawhney's case (supra). A further similar prayer has been made for quashing

Schedule III of the 2016 Act and for directing the State not to make appointments to the posts in accordance with the impugned legislation.

In Satvir Singh Saini and another v. State of Haryana and others (CWP No. 13574 of 2016), a prayer has been made for quashing the Haryana Backward Classes Commission report dated 12.12.2012, i.e. the Justice K.C. Gupta Commission's report, and also the 2016 Act being illegal and arbitrary as had already been held by the Supreme Court in Ram Singh's case (supra). A further prayer has been made that the Constitution of the Haryana Backward Classes Commission as well as the 2016 Act be declared null and void.

Written statement of Shri Shekhar Vidyarthi, Special Secretary to Government Haryana, Welfare of Scheduled Castes and Backward Classes Department has been filed in Murari Lal Gupta's case (CWP No.9931 of 2016). It is stated that the present public interest litigation was not bona fide and was actuated by extraneous circumstances inspired by vested interests. In the wake of agitation to resolve the reservation issue for special backward classes, a four member Committee under the Chief Secretary, Haryana was constituted by an order dated 16.02.2016. The said Committee held various meetings on the dates that are mentioned and the relevant issues in detail were considered on the said dates. After studying all the information and material available before the Committee, recommendations were made to the Government by the said Committee for including the six communities for being given the benefit of reservations.

It is stated in the written statement that the matter was examined by the State Government and the Department for Welfare of Scheduled Castes and Backward Classes (respondents No.1 and 2). In view of the recommendations of Justice K.C. Gupta Commission and relevant constitutional provisions enabling the State to make special provisions for the advancement of socially and economically backward classes of citizens and further to make provisions for reservation in appointments in services in favour of any backward classes of citizens, a bill was placed before the Cabinet for approval. After approval, the same was placed in the Haryana State Legislative Assembly in order to provide for reservations in services and admissions in educational institutions to persons belonging to backward classes in the State of Haryana. The Bill was passed and reservation was given.

It is further stated that in Ram Singh's case (supra), the matter pertained to Other Backward Classes ('OBCs' - for short) of nine States including Haryana for inclusion in the Central List of OBCs. The impugned 2016 Act, pertains to backward classes of the State of Haryana for inclusion in the OBCs of the State. The judgment of the Supreme Court is to be read in the context of inclusion of the Jat community in the Central List of OBCs by the Central Government. The observations of Justice K.C. Gupta Commission report are in the same context and on the basis of the findings of the National Commission for Backward Classes ('NCBC' - for short). As a matter of fact, the NCBC had further entrusted the task of survey to an expert committee constituted by the Indian Council of Social Science Research

(‘ICSSR’ - for short) and the report of ICSSR showed that the Jat community lagged behind in both school and higher education enrolment. It was also found that twelve per cent of Jat children in the age of group of five to seventeen years had never attended school, which was higher than many OBCs. At the graduation level, the Jats had about 6.5 per cent enrolment, which was less than the average level of 8.3 per cent. At the post-graduation level, enrolment of Jats was 1.7 per cent against the average of 2.26 per cent. Therefore, it is sought to be contended that the 2016 Act had been validly passed after taking the relevant factors into consideration.

Short reply by Shri Rajeev Dudeja, Secretary (Legal), Haryana Staff Selection Committee on behalf of respondent No. 4 has been filed in CWP No. 13125 of 2016. It is submitted that the petitioner prays for setting aside the report dated 12.12.2012 submitted by Justice K.C. Gupta Commission pertaining to grant of 10% reservation to economically backward persons from the general category, the notification dated 27.09.2013 issued by the Haryana Government granting 10% vertical reservation to the economically backward persons from general category is on the recommendations of Justice K.C. Gupta Commission and instructions dated 15.07.2014. It is stated that a further prayer has been made by the petitioner for directing the State of Haryana not to make appointments in jobs and admissions in educational institutions on the basis of notification dated 27.09.2013 and 15.07.2014. The Haryana State Selection Commission, it is submitted, is merely a recruiting agency and carries out the recruitment as per requisitions and relevant Service Rules sent by the respective departments.

The break-up of posts is also provided by the department. It is on receipt of requisition from various departments that the Haryana State Selection Commission issued Advertisement No. 5/2016 for various categories of posts and it was not done deliberately as alleged by the petitioner. In the said advertisement, a total number of 47 categories of posts were advertised and out of these, 13 number of categories of posts, the reservation for economically backward persons in general category had been mentioned. Even out of these 13 number of categories of posts which contained economically backward persons in general category reservation, 6 categories of posts were re-advertised, which were earlier advertised against Advertisement No.2/2013 viz. Fisheries Officer, Statistical Assistant/Inspector (NSS)/Investigator, Junior Field Investigator, Assistant Draftsman (Civil), Tracer Civil (HQ) and Charge-man and which already contained posts reserved for economically backward persons in general category and remaining posts had been advertised for the first time.

Reply has also been filed in Murari Lal Gupta's case by Dharam Pal, President, Mulla Jat Sangarsh Samiti, Haryana, village Kerba, Tehsil Indri, District Karnal (respondent No. 5). It is submitted that in Ram Singh's case (supra) in para No. 8 (of SCC), it has been mentioned that the NCBC had taken the view that as it did not have sufficient expertise in the matter, ICSSR be requested to set up an Expert Committee to conduct an extensive literature survey on the subject in order to collect sufficient materials for the impending exercise. Thereafter, NCBC forwarded all reports/documents received by it in this regard including representations for and against the inclusion of the Jat

community to ICSSR. The expert body constituted by the ICSSR submitted its report in the matter which primarily was based on the reports of the various State Commissions submitted to the respective State Governments in connection with the inclusion of the Jat Community in the OBCs list of the concerned States. The ICSSR, apparently, did not undertake any study of the other materials by way of books/literature/representations. The report of the ICSSR, noticeably, did not make any recommendations but only set out the existing facts. The said report of the ICSSR was, thereafter, discussed by the NCBC in several of its meetings. Simultaneously, the NCBC addressed letters to the State Governments for fixing public hearings in the respective State capitals. As there was no response from the States in this regard, the NCBC published notices for conducting public hearings fixing different dates for hearing the claims and counter-claims (objections). The public hearings were to be held in Siri Fort Auditorium, New Delhi on two sets of dates in February, 2014.

From the above, it is submitted that the NCBC was not a body of experts as was envisaged by the Supreme Court in *Indra Sawhney's* case (supra), in para 847, which clearly showed that the body was to be composed of experts in the field both official and non-official and was to be vested with necessary powers to make a proper and effective inquiry. However, the NCBC had itself admitted of having no expertise. Therefore, any action whatsoever taken on any reports prepared by the NCBC or its formation were in violation of *Indra Sawhney's* case (supra).

In the circumstances, it is submitted that no reliance is liable to be placed on the reports of a Commission which otherwise was not formed as per law. Its actions were without jurisdiction. It is further submitted that the State of Haryana while passing the 2016 Act had made a special provision in Section 5 that no person belonging to “creamy layer” of Backward Classes shall be considered for admissions in educational institutions and appointments in Government services. Besides, in Section 13 of the 2016 Act, a provision has been made for revision of the ‘Schedule’. The State Government, in terms of the said Section 13, is to at the expiration of ten years from the coming into force the 2016 Act and at every succeeding period of ten years thereafter, is to undertake revision of the Schedule. Some extracts of judgments have been quoted and a prayer has been made for dismissing the writ petition.

The contentions raised by learned counsel appearing for the petitioners in the cases are primarily to the effect that the reservations made for the Jat community from amongst the communities/castes mentioned in Schedule III of the 2016 Act in services and admissions in educational institutions are highly arbitrary inasmuch as they have sufficient and adequate representation in the State services. Details of the posts held by members of the Jat community in the State services have been mentioned, which, it is stated, have been gathered from the various offices of the State of Haryana under the Right to Information Act, 2005. It is submitted that the Haryana Backward Classes Commission (‘Haryana BC Commission’ - for short) on 24.02.2012 selected 157 villages in the State of Haryana for the purpose of

survey. The criterion for selecting these 157 villages was not disclosed. According to the petitioners, these villages were intentionally selected for extraneous reasons. The Haryana BC Commission, in fact, assigned the work to Centre for Research in Rural and Industrial Development ('CRRID' - for short) vide letter dated 06.02.2012. The CRRID conducted a survey and collected data from 01.03.2012 to 31.03.2012. The Haryana BC Commission gave the work of conducting the survey to the Maharishi Dayanand University, Rohtak, vide letter dated 27.04.2012. The said University, it is alleged, conducted the survey in a most casual manner. Irregularities were committed in the conduct of survey. One Khazan Singh Sangwan, who belongs to the Jat community, was appointed as Project Director. It is contended that no indicators as regards the survey to be conducted were supplied to the surveyors. In fact, no effective survey was conducted. In any case, the Haryana BC Commission submitted improper and unlawful recommendations on 12.12.2012.

The survey report was considered by the Supreme Court in Ram Singh's case (supra). The report submitted by Justice K.C. Gupta Commission, it is contended, was not accepted by the Supreme Court in Ram Singh's case (supra). However, now the same report of Justice K.C. Gupta Commission which had been discarded by the Supreme Court has again been relied upon and taken into consideration while passing the impugned legislation, i.e. Schedule III of the 2016 Act. Therefore, the same is liable to be invalidated as no fresh materials or report had been gathered. It is also contended that in any case the reservations provided by the impugned

legislation, i.e. the 2016 Act, violates the mandate of the Supreme Court in Indra Sawhney's case (supra) inasmuch as 50% of the upper limit of reservation has been breached.

In response, it is submitted on behalf of the respondents that the stand of the petitioners that the State Legislation is contrary to the Supreme Court judgment in Ram Singh's case (supra) is not tenable. In the said case, it is submitted that the challenge before the Supreme Court was only to the Central Government notification published in the Gazette of India dated 04.03.2014 by which the Jat community had been included in the Central List of various States. The report of Justice K.C. Gupta Commission was not under challenge in the said case; besides, there was no challenge to the reservations provided to the Jat community at the State level in any State. The core issue in Ram Singh's case (supra) before the Supreme Court was as to what weightage the advice/recommendation tendered by the NCBC should receive in the decision making by the Union Government, which was a crucial determination that the Court was required to make. The report of the NCBC was disagreed with by the Central Government without giving any reason. The Court considered only the reflection and perception of the NCBC with regard to the Justice K.C. Gupta Commission's report. Therefore, according to the respondents, the said report as such was never under consideration before the Supreme Court in Ram Singh's case (supra). In any case, there is nothing in the judgment of the Supreme Court in Ram Singh's case (supra) by which the State cannot legislate. Therefore, it is submitted that the contentions as raised by the learned counsel appearing for the petitioners are baseless,

besides, being devoid of merit inasmuch as the legislation providing for reservations cannot be invalidated. In any case, the judgment in Ram Singh's case does not relate to providing for reservations to the Jat caste at the State level.

We have given our thoughtful consideration to the contentions of the learned counsel for the parties and have gone through the records of the cases.

As already noticed, the challenge in these petitions is primarily to the 2016 Act that has been passed by the Haryana Legislature to provide for reservation in services and admission in educational institutions to persons belonging to backward classes in the State of Haryana and for matters connected therewith or incidental thereto. In the Preamble to the 2016 Act, it has *inter alia* been provided as follows:-

“To provide for reservation in services and admission in educational institutions to persons belonging to Backward Classes in the State of Haryana and for matters connected therewith or incidental thereto.

WHEREAS clause (4) of article 15 of the Constitution of India enables the State to make special provision for the advancement of any socially and educationally Backward Classes of citizens or for the Scheduled Castes and Scheduled Tribes;

AND WHEREAS clause (5) of article 15 of the Constitution of India enables the State to make special

provisions, by law, for the advancement of any socially and educationally Backward Classes of citizens or for the Scheduled Castes or Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private aided educational institutions whether aided or unaided by the State, other than minority educational institutions referred to in clause (1) of article 30 of the Constitution;

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 provides that 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 clause (2) of article 38 of the Constitution provides that the State shall in particular strive to minimize the inequality 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 article 46 of the Constitution, the State shall promote with special care, the educational and economic interest of the weaker sections of the people, and, in particular, of the Scheduled Castes and Scheduled Tribes, and shall protect them from social injustice and all forms of exploitations;

AND WHEREAS the State of Haryana has decided to provide for reservation of seats in educational institutions including private educational institutions aided by the State;

AND WHEREAS the State of Haryana is of the opinion that the Backward Classes of citizens in the State are not adequately represented in the services under the State and therefore, it has been decided to provide for reservation of seats in appointments in the services under the State to Backward Classes.”

Section 2 of the 2016 Act relates to ‘definitions’ and Section 2 (b), (d) and (h), which would be relevant for the present petitions, read as follows:-

“2. In this Act, unless the context otherwise require, -

- (b) “Backward Classes” means such classes of citizens as specified in Schedule I, II or III;
- (d) “creamy layer” means such class of persons within the Backward Classes as the State Government may, by notification in the Official Gazette specify for the purposes of this Act;
- (h) “Schedule” means the Schedules appended to this Act.”

Sections 3, 4, 5, 6, 13, 14 and 15 of the 2016 Act, which are also relevant, read as follows:-

- “3. Reservation in services:- While making appointment, reservation shall be made for the members of the Backward Classes as specified in the Schedule.
- 4. Reservation in educational institutions:- While making admissions in educational institutions, reservation shall be made for the members of the Backward Classes as specified in the Schedule.
- 5. Restrictions with regards to creamy layer:-
 - (1) Notwithstanding anything contained in this Act, no person belonging to the creamy layer of Backward Classes shall be —
 - (a) considered for admission in educational institutions against the seats reserved therein for Backward Classes as specified in the Schedule; or

(b) entitled to claim reservation in or be considered for appointment in services under the State against the posts reserved for Backward Classes as specified in the Schedule.

(2) The Government shall, by notification, after taking into consideration social, economic and such other factors, as deemed appropriate, specify the criteria for exclusion and identification of persons belonging to the Backward Classes as creamy layer.

(3) The criteria fixed under sub-section (2) shall be reviewed every three years.

6. Horizontal reservation:- Notwithstanding anything contained in this Act, the State Government may provide for horizontal reservation for such category or categories of persons within Backward Classes, as it may deem necessary from time to time.

13. Review of Schedule:- The Government shall at the expiration of ten years from the coming into force of this Act and at every succeeding period of ten years thereafter, undertake revision of the Schedule.

14. Overriding effect:- The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other State law for the time

being in force or any instrument having effect by virtue of any such law.

15. Validation:- Notwithstanding anything contained in any judgment, decree or order of any court or other authority, the reservation made, and anything done or any action taken on the basis of such reservation, by the Government for admission to educational institutions and for appointment in the services for the Backward Classes on the date of coming into force of this Act, shall, for all purposes be deemed to be and to have always been, validly made, done or taken in accordance with law, as if this Act had been in force at all material times when such reservation has been made and such thing done or action taken.”

Schedule III, which relates to Sections 3 and 4 of the 2016 Act and is impugned in the present petition, reads as follows:-

“SCHEDULE-III
(See sections 3 and 4)

BACKWARD CLASS BLOCK ‘C’

1. Jat
2. Jat Sikh
3. Ror
4. Bishnoi
5. Tyagi
6. Mulla Jat/Muslim Jat

- * Reservation in services:- Ten percent reservation shall be provided for Class III and IV posts and six percent in Class I and II posts.
- * Reservation in admissions:- Ten percent reservation shall be provided for admissions in educational institutions.”

A perusal of the above 2016 Act shows that it provides for reservation in services and admissions in educational institutions to persons belonging to the backward classes in the State of Haryana. ‘Backward Classes’ has been defined in Section 2 (b) to mean such class of citizens as specified in Schedule I, II or III. The castes mentioned in Schedule III which has been impugned are Jat, Jat Sikh, Ror, Bishnoi, Tyagi and Mulla Jat/ Muslim Jat. For such castes there is reservation in services to the extent of ten percent for Class III and IV posts and six percent in Class I and II posts. Besides, in admissions to educational institutions there is ten percent reservation. A noticeable feature is that ‘creamy layer’ has been defined to mean such class of persons within the Backward Classes as the State Government may, by notification in the Official Gazette specify for the purposes of the 2016 Act. The Haryana State Government has issued notification dated 17.08.2016 in exercise of powers conferred by Section 2 (d) of the 2016 Act which reads as under:-

“Notification
The 17th August, 2016

No. 808-SW (1).- In exercise of the powers conferred by
clause (d) of Section 2 of the Haryana Backward Classes

(Reservation in Service and Admission in Educational Institutions) Act, 2016 (15 of 2016), the Governor of Haryana hereby specify the following criteria for exclusion of creamy layer within the Backward Classes as per the Schedules appended to the Act, namely Schedule I, II & III.

The children of persons having gross annual income of upto Three Lakh rupees shall first of all get the benefit of reservation in services and admission in educational institutions. The left out quota shall go to that class of Backward Classes of citizens who earn more than Three Lakh rupees but upto Six Lakh rupees per annum. The sections of the Backward Classes earning above Six Lakh rupees per annum shall be considered as Creamy Layer under Section 5 of the said Act.

T.C. Gupta,
Principal Secretary to
Government Haryana
Welfare of Scheduled Castes and
Backward Classes Department.”

A perusal of the above notification shows that a criterion has been provided for exclusion of creamy layer within the backward classes as enumerated in Schedules I, II and III. The children of persons having gross income of upto Rs.3.00 lacs are first of all to get the benefit of reservation in services and admissions in educational institutions. The left out quota is to go to that class of backward classes of citizens who earn more than Rs.3.00 lacs

but upto Rs.6.00 lacs per annum. The sections of backward classes earning above Rs.6.00 lacs are to be considered as creamy layer under Section 5 of the 2016 Act. Therefore, the 'creamy layer' within the backward classes as noticed is not to be given the benefits of reservations.

In Ashoka Kumar Thakur v. Union of India, (2008) 6 SCC 1, it was said that it is to be understood that the 'creamy layer' principle is introduced merely to exclude a section of a particular caste on the ground that they are economically advanced or educationally forward. They are excluded because unless this segment of caste is excluded from that caste group, there cannot be proper identification of the backward class. If creamy layer principle is not applied, it could easily be said that all the castes that have been included among the socially and educationally backwards classes have been included exclusively on the basis of caste. It was further said that the 'creamy layer' principle is applied not as a general principle of reservation. It is applied for the purpose of identifying the socially and educationally backward classes. While summing up the position it was *inter alia* said that for implementation of the impugned statute creamy layer must be excluded. Besides, there must be periodic review as to the desirability of continuing the operation of the statute. This was to be done once in every five years. In fact, in Indra Sawhney's case (supra) also it was said that the scheme of reservation is subject to periodic review by the Government itself. The interval of the period at which the review was to be held was within the authority and discretion of the Government, but of course subject to the constitutional parameters and well settled principles of judicial review. This

has been reiterated in Ashoka Kumar Thakur's case (supra) wherein it has been held that there was no dispute and in fact it was fairly accepted in the said case by the Union of India that there was need for periodical identification of the backward citizens and for this purpose the need for survey of an entire population on the basis of an acceptable mechanism was required. What may have been relevant in the 1931 census may have some relevance but cannot be the determinative factor. Backwardness, it was said, had to be based on objective factors wherein the inadequacy had to factually exist. It was noted that nowhere else in the world did castes, classes or communities queue up for the sake of gaining backward status. Nowhere else in the world was there competition to assert backwardness and then to claim they were more backward than the other.

Therefore, it is quite evident that an exercise was/is liable to be conducted for identification of the backwardness of the castes that have been mentioned in Schedule III of the 2016 Act. Besides, whether the said castes mentioned in Schedule III of the 2016 Act were really backward. This exercise it appears has not been undertaken before the legislation and the petitioners appear to be somewhat right in asserting that according to the written statement of the respondents, the determination and identification of backward classes has been undertaken on the basis of Justice K.C. Gupta Commission's report which has not been relied upon in Ram Singh's case (supra).

In Ram Singh's case (supra), a challenge was made to a notification published in the Gazette of India dated 04.03.2014 by which the

Jat community had been included in the central list for backward classes for various States including Haryana. The said notification was issued pursuant to a decision taken by the Union Cabinet on 02.03.2014 to reject the advice tendered by the NCBC to the contrary on the ground that the said advice “did not adequately take into account the ground realities”. The NCBC had studied the claims made for inclusion of Jats in the Central List of Backward Classes for the States of Haryana, Rajasthan, Madhya Pradesh and Uttar Pradesh. The NCBC recommended inclusion of Jats in the Central List for Rajasthan except Bharatpur and Dholpur districts. After various deliberations and representations against the report of the NCBC for not including Jats in the Central List of Backward Classes, the ICSSR was approached to conduct a full-fledged survey in the States of Uttar Pradesh, Haryana, Madhya Pradesh, Rajasthan, Himachal Pradesh and Gujarat to ascertain the socio-economic status of the Jat community. The said decision was prompted by the necessity to have adequate quantifiable data to enable NCBC to consider the request of the Jat community for inclusion in the Central List of OBCs in the States concerned. The matter was thereafter deliberated upon by the government and a cabinet decision was taken asking the NCBC to reconsider its earlier decision of conducting a sample survey and to tender its advice on the basis of materials already available. The NCBC, however, took the view that it did not have sufficient expertise in the matter and the ICSSR be requested to set up an expert committee to conduct an extensive literature survey on the subject in order to collect sufficient materials for the impending exercise. The ICSSR, it was observed by the Supreme Court, apparently did not undertake

any study of the other materials by way of books/literature/representation. The ICSSR, in its report, did not make any recommendation but only set out the existing facts. The report of the ICSSR was considered by the NCBC and it gave its advice/opinion/report dated 26.02.2014 to the Central Government stating that the Jat community did not fulfill the criteria for inclusion in the Central List of OBCs. The NCBC found that the Jats were not socially backward. The Union Cabinet, however, on the advice tendered by NCBC, took a decision that the NCBC did not adequately take into account the “ground realities”. Therefore, the Cabinet resolved not to accept the said advice and instead to include the Jat community in the Central List of Backward Classes for various States including Haryana. In the State of Haryana, Jats were included as Special OBCs. The summary of findings of the ICSSR insofar as Haryana is concerned, it is mentioned as follows:-

“One of the States where Jats have sizeable population is Haryana. Our observations are based on the Haryana State OBC Commission Report, which recommended reservation for Jats as OBC in the State in 2012. The Commission based its recommendations on a sponsored study conducted by Sangwan (2012). The findings of the study indicate that on occupational structure, Jats in Haryana are a landowning community. Nearly 87% of the Jats are engaged in agriculture. The other economic activities pursued by Jats include animal husbandry and trade. In government employment, Jats have about 21%

share in the total Class I and II services in the State which is about four percentage points lower than their share in population (25%) in 2012. However, they lag behind compared to Bishnoi and Brahmins whose share in government employment in Classes I and II is higher than their respective population share. The comparable figures for Ahir/Yadava and Gujar (the other two comparable OBC communities with Jats) are not reported in Haryana Backward Classes Commission Report 2012. On the educational achievements, more than 12% Jat children in the age group of 6-14 years never attended school, which is higher than many other backward castes. At the graduation level, Jats have about 6.5% enrolment, which is less than average level of 8.3%. At the postgraduate level, enrolment of Jats is 1.71% against the average of 2.26% of the respondents. The available data, therefore, suggests that in Haryana Jats are landowning community. Their share in class I & II government service is close to their population share but they lag behind in both school and higher education enrolment.”

The Supreme Court considered the report of the Expert Committee constituted by the ICSSR which was based on a study of eight specific reports that were sent by the Group of Ministers to the NCBC at the time of seeking a review of the earlier decision of the NCBC. Insofar as the

State of Haryana was concerned, the reports of Justice Gurnam Singh Commission and Justice K.C. Gupta Commission were relevant. The relevant findings in the report of the NCBC insofar as the State of Haryana is concerned are as under:-

“The NCBC found that the report of the State Backward Commission of the year 2012 (Justice K.C. Gupta Commission Report) was the primary document pertaining to Haryana. The NCBC found certain inherent flaws in the said report which, in its view, made the same unworthy of acceptance. Some of the reasons recorded by the NCBC for taking the above view are:

- 1) Justice K.C. Gupta Commission’s report is primarily based on the survey conducted in the year 2012 by Maharishi Dayanand University (MDU), Rohtak which was a very selective study.
- 2) Apart from Justice Gupta, the Commission consisted of at least two other persons who belonged to the classes/groups which were under consideration i.e. Bishnoi and Ror who came to be included in the State List of Other Backward Classes.
- 3) The survey undertaken by the MDU, Rohtak was by one Prof. K.S. Sangwan who belong to the Jat community; the Vice-chancellor of the MDU was also a Jat. In the

public hearing conducted by the Commission, the aforesaid two persons were accused of bias.

4) The survey undertaken by MDU was a comparative study of the Jats with higher castes like Brahmins, Rajputs etc and comparable figures in relation to Ahirs, Yadavs, Kurmis and Gujars were not available. In the course of the public hearing it transpired that in comparison to the aforesaid communities i.e. Ahirs, Yadavs, Kurmis and Gujars, the Jats were superior.

5) The villages where the survey was undertaken were as per details provided by the State Commission and not independently undertaken by the MDU.

6) The representation of the Jats in the Armed Forces was not studied.

The Justice Gurnam Singh Commission Report being of the year 1990 and having been earlier considered at the time of submission of the report of the NCBC on 28.11.1997, was not considered appropriate for being considered once again.

The NCBC had evolved a set of guidelines, criteria, formats and parameters against which all claims for inclusion as Other Backward Classes are required to be considered. The said parameters were evolved on the basis of the Mandal Commission Report and the judgment in

Indra Sawhney. 11 indicators under three broad heads i.e. social, economic and educational, details of which are indicated below, were identified.

A. Social

- (i) Castes/Classes considered as socially backward by others.
- (ii) Castes/Classes which mainly depend on menial labour for their livelihood.
- (iii) Castes/ Classes where at least 25% females and 10% males above the State average get married at an age below 17 years in rural areas and at least 10% females and 5% males do so, in urban areas.
- (iv) Castes/Classes where participation of females in work is at least 25% above the State average.

B. Educational

- (v) Castes/Classes where the number of children in the age group of 5-15 years who never attended school is at least 25% above the State average.
- (vi) Castes/Classes where the rate of student drop-out in the age group of 5-15 years is at least. 25%. above the State average.
- (vii) Castes/Classes amongst whom the proportion of matriculates is at least 25% below the State average.

C. Economic

(viii) Castes/Classes where the average value of family assets is at least 25% below the State average.

(ix) Castes/Classes where the number of families living in Kuccha houses is at least 25% above the State average.

(x) Castes/Classes where the source of drinking water is beyond half a kilometer for more than 50% of the households.

(xi) Castes/Classes where the number of households having taken consumption loan is at least 25% above the State average.

Relative weight-age to each of the parameters under the aforesaid three broad heads is to be in the proportion of 3:2:1. The Justice K.C. Gupta Commission however followed 12 Social indicators, 7 Educational indicators and 5 Economic indicators. That apart, according to the Commission, backwardness that was required to be determined, is primarily social backwardness which, in turn, depended on how the other castes/classes perceived whether the Jats were socially backward or not. Justice K.C. Gupta Commission did not proceed in the matter from the aforesaid perspective. Further in its report the NCBC found that indicators like Infant Mortality Rate, Maternal Mortality Rate, Deliveries at Home etc. had been

considered to determine social backwardness. Such data, according to the NCBC, are actually Public Health Statistics and are wholly irrelevant for determination of social backwardness.

The NCBC in its report also recorded its disagreement with the views of the K.C. Gupta Commission that despite there being 26 (out of 90) MLAs belonging to the Jat community and 4 Members of Parliament (out of 15), the Jats have not progressed socially, educationally and economically. In this regard, the NCBC had also recorded that in the course of public hearing it transpired that several Chief Ministers of Haryana who held office for long periods of time belong to Jat Community and in fact there has been a Prime Minister of the country who was a Jat (Ch. Charan Singh).”

A perusal of the above report *inter alia* shows that the report of Justice Gurnam Singh Commission being of the year 1990 and having been earlier considered at the time of submission of the report of the NCBC was not considered appropriate for being considered once again. Besides, it is also mentioned that the NCBC in its report also recorded its disagreement with the views of Justice K.C. Gupta Commission.

It was concluded by the Supreme Court that undoubtedly the report of the NCBC dated 26.02.2014 was made on a detailed consideration of the various reports of the State Backward Classes Commissions, other

available literature on the subject and also upon consideration of the findings of the Expert Committee constituted by the ICSSR to examine the matter. The decision not to recommend Jats for inclusion in the Central List of OBCs of the States in question, which includes the State of Haryana, it was said by the Supreme Court that it could not be said to be based on no materials or unsupported by reasons or characterized as decisions arrived at on consideration of matters that were, in any way, extraneous and irrelevant.

The Supreme Court in Ram Singh's case (supra) further said that insofar as Haryana was concerned, the test adopted appeared to be educational backwardness. Similarly, for the NCT of Delhi also, educational backwardness had been taken into account as the determining factor for inclusion of Jats along with the fact that Jats were behind the Gujarars who were already included in the Central Lists of OBCs. Similarly, in Uttar Pradesh and Uttarakhand, the test appeared to be educational backwardness; same was the position with regard to Rajasthan. Though the States of M.P., Gujarat and Bihar had also been included in the Central Lists of OBCs by impugned notification, no apparent consideration of the cases of these States was reflected in the Minutes of the Cabinet Meeting dated 2nd March, 2014. Of course, the Cabinet, it was said, was not expected to record the manner of its consideration of each of the States but when it was done so for some of the States, the absence of any mention of the other States would be a strong basis to conclude that the States that did not find any mention in the Minutes, in fact, did not receive the consideration of the Cabinet, at all.

It was further said in Ram Singh's case (supra) that a very fundamental and basic test to determine the authority of the Government's decision in the matter would be to assume the advice of the NCBC against the inclusion of the Jats in the Central List of Other Backward Classes to be wrong and thereafter by examining, in that light, whether the decision of the Union Government to the contrary would pass the required scrutiny. Proceeding on that basis it was clear that save and except the State Commission Report in the case of Haryana (Justice K.C. Gupta Commission Report) which was submitted in the year 2012, all the other reports as well as the literature on the subject it was said would be at least a decade old. The necessary data on which the exercise had to be made had to be contemporaneous. Outdated statistics could not provide accurate parameters for measuring backwardness for the purpose of inclusion in the list of OBCs. This was because one may legitimately presume progressive advancement of all citizens on every front i.e. social, economic and education. Any other view would amount to retrograde governance. Yet, surprisingly the facts that stared at the Court indicated a governmental affirmation of such negative governance inasmuch as decade old decisions not to treat the Jats as backward, arrived at on due consideration of the existing ground realities, had been reopened, in spite of perceptible all round development of the nation. This was held to be the basic fallacy inherent in the impugned governmental decision that had been challenged in the said proceedings. The percentage of the OBCs population estimated at "not less than 52%" (Indra Sawhney) certainly, it was said must have gone up considerably as over the last two

decades there had only been inclusions in the Central as well as State OBCs Lists and hardly any exclusion therefrom. This it was said was certainly not what had been envisaged in the Constitutional Scheme.

Insofar as the contemporaneous report for the State of Haryana was concerned, the discussion that preceded indicated adequate and good reasons for the view taken by the NCBC in respect of the said Report and not to accept the findings contained therein. The same it was said would hardly require any further reiteration.

Therefore, it is quite evident that the Justice K.C. Gupta Commission report had not been accepted by the NCBC which the Supreme Court held would hardly require any further reiteration. However, the question whether it can be said to be relevant for the State legislative enactment would require consideration inasmuch it is the stand of the respondents No.1 and 2 that the Commission's report was on the basis of findings of the NCBC, which had further entrusted the task of survey to an expert committee constituted by the ICSSR and the report of the ICSSR showed that the Jat community lagged behind in both school and higher education enrolment.

In this regard, as has already been noticed, periodic review by the Government itself is to be carried out. The interval of the period at which the review is to be held in *Indra Sawhney's case (supra)*, it was said, was within the authority and discretion of the Government but of course subject to the constitutional parameters and well settled principles of judicial review. It was in fact stated in *Indra Sawhney's case (supra)* that 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 was to ordinarily be binding upon the Government. Where, however, the Government did not accept the advice, it was said that it must record its reasons therefor. It was further stated that even if any new class/group was 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 was equally desirable that each State constitutes such a body, which step would go a long way in redressing genuine grievances. Such a body could 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 were to be provided. Accordingly, a direction was issued that such a body be constituted both at Central level and at the level of the States within four months from the date of judgment. These were to become immediately operational and be in a position to entertain and examine forthwith complaints and matters of the nature as mentioned, if any, received. It was left open to the Government of India and the respective State Governments to devise the procedures to be followed by such body. The body or bodies so created could also be consulted in the matter of periodic revision

of lists of OBCs. Besides, as had been suggested in K.C. Vasanth Kumar v. State of Karnataka, 1985 Supp SCC 714, there should be a periodic revision of these lists to exclude those who had ceased to be backward or for inclusion of new classes, as the case may be.

The State of Haryana in consequence of the said direction has enacted the Haryana Backward Classes Commission Act, 2016 (Haryana Act No.9 of 2016) (hereinafter referred to as - 'BC Commission Act'). The said BC Commission Act it is stated in the 'Statement of Objects and Reasons' that as per provisions under Article 340 of the Constitution to sort out the issue of social and economic backwardness of various castes, the Haryana Government set up its First Backward Classes Commission on 07.09.1990 under the Chairmanship of Mr. Justice Gurnam Singh (Retd.). On the recommendations of the Commission, the State Government vide notification dated 05.02.1991 included ten castes, Ahir, Bishnoi, Meo, Gujjar, Jat, Jat Sikh, Ror, Saini, Tyagi and Rajput in the list of Backward Classes and provided reservations to these castes on 05.04.1991. The State Government re-examined the reservation policy and issued order on 12.09.1991 that till a final decision was taken, recruitment would be made according to the status prevalent prior to the letter issued on 05.04.1991.

The effect of the same evidently has been that the Jats were not included amongst the castes entitled for the benefits of reservations.

It has been further stated in the 'Statement of Objects and Reasons' of the BC Commission Act that on the recommendation of the second Backward Classes Commission, the State Government on 07.06.1995

included five castes namely, Ahir/Yadav, Gujjar, Saini, Meo, Lodh and Lodha in the list Backward Classes. Further on 20.07.1995, the Backward Classes were bifurcated in two Blocks 'A' and 'B' and provided twenty seven percent reservation, sixteen per cent to Block 'A' and eleven per cent to Block 'B'.

Since the State Government had been receiving various representations from various other castes including Jat, Jat Sikh, Ror, Tyagi, Bishnoi and Mulla Jats/Muslim Jats for providing reservations in Government Jobs and Educational Institutions, the Haryana Government vide its notification dated 08.04.2011 reconstituted the Haryana Backward Classes Commission under the Chairmanship of Justice (Retd.) K.C. Gupta. On the basis of the study got conducted by the Commission from the Maharishi Dayanand University, Rohtak, it submitted its recommendations on 12.12.2012 and recommended ten per cent reservation in employment in Group 'C' and 'D' posts and in admission in educational institutions for these castes in addition to the already notified twenty seven per cent reservation to the Backward Classes. Four per cent reservation was also provided in Group 'A' and 'B' on 28.02.2013 (later on increase to five per cent on 15.07.2014). A reference has thereafter been made to the said decision being challenged in this Court. Thereafter it was suggested that the State Government may give statutory status to the Haryana Backward Classes Commission on the pattern of National Commission for Backward Classes Act, whose advice it was said shall ordinarily be binding on the State Government. The matter was also examined by the Committee constituted under the Chairmanship of the Chief Secretary to Government of Haryana and it had been suggested that the steps

be taken to constitute the Haryana Backward Classes Commission by giving its statutory status.

A further mention has been made to the effect that Article 340 of the Constitution provides for appointment of a Commission to investigate the conditions of and the difficulties faced by the Socially and Educationally Backward Classes and to make appropriate recommendations. The Hon'ble Supreme Court of India in Indra Sawhney's case (supra), it is stated had directed the Government of India, State Governments and Union Territory Administrations to constitute a permanent body in the nature of a Commission or Tribunal for entertaining, examining and recommending upon requests for inclusion and complaints of over-inclusion and under-inclusion in the list of OBCs of Citizens. Under above provisions, the State Governments have the power to create a permanent mechanism in the nature of a Commission for examining the above referred issues and the matters connected to OBCs and to advise the Government whose advice shall ordinarily be binding upon the Government.

It is further stated in the statement of objects and reasons that State wide protests had erupted demanding reservations in Government employment and admission in Educational Institution. On the basis of report of the Committee constituted under the Chairmanship of Chief Secretary to Government of Haryana, the State Government decided to set up a permanent mechanism and to give a statutory status to the Haryana Backward Classes Commission by enacting a separate Legislation. Moreover, demands of inclusion, deletion or change of Blocks within the Backward Classes were

likely to arise in future also from different communities. Therefore, it had become imperative that Haryana Commission for Backward Classes be set up.

In the circumstances, it is evident that the Haryana BC Commission has been constituted under the BC Commission Act for examining requests for inclusion or exclusion of any class of citizens as a backward class and hear complaints of over inclusion or under inclusion of any backward class and tender such advice to the State Government as it deems appropriate. Besides, there has to be periodic revision of backward classes which the State Government may at any time and shall at the expiration of ten years from the coming into force the BC Commission Act and every succeeding period of ten years thereafter undertake the revision of backward classes.

The Haryana State has enacted the 2016 Act, however, necessary exercise for determining whether the Jats are a backward class has not been carried out. This exercise was/is liable to be carried out and this was the mandate in Indra Sawhney's case (supra). Besides, Section 13 of the 2016 Act provides for 'Review of the Schedule', i.e. 'the Schedules' appended to the 2016 Act¹. It is provided that the Government shall at the expiration of ten years from the coming into force the said 2016 Act and at every succeeding period of ten years thereafter, undertake revision of the Schedule. Moreover, Section 11 of the BC Commission Act also provides for 'Periodic revision of Backward Classes'. Sub-section (1) thereof envisages that the State

¹ Section 2 (h) of the 2016 Act.

Government may, at any time and shall at the expiration of ten years from the coming into force of BC Commission Act and every succeeding period of ten years thereafter, undertake the revision of Backward Classes. Sub-section (2) provides that the State Government while acting under Sub-section (1) shall consult the Haryana BC Commission.

The petitioners seek invalidation of the 2016 Act on the ground that the exercise for determining the backwardness of the Jat community was not conducted. It is, however, to be noticed that the petitioners seek invalidation of the 2016 Act in the petitions filed in the nature of PILs. A PIL is normally not to be entertained to invalidate a legislative enactment but nevertheless the dictum of the Supreme Court is to be followed and adopted. The Courts are required to be slow and act with caution and circumspection in considering the *vires* of an enactment in a PIL. By way of PILs, the very enactment of the 2016 Act is sought to be assailed and got invalidated on the ground that necessary identification of the castes that have been given the benefit of reservations have not been carried out. However, this can well be carried out at this stage as well without the need to invalidate the legislation. A legislative Act of the legislature is not to be invalidated on the mere asking.

In Subramannian Swamy v. Director, Central Bureau of Investigation and another, (2014) 8 SCC 682, it was said that where there is challenge to the constitutional validity of a law enacted by the legislature, the Court must keep in view that there is always a presumption of constitutionality of an enactment, and a clear transgression of constitutional principles must be shown. The fundamental nature and importance of the

legislative process needs to be recognized by the Court and due regard and deference must be accorded to the legislative process. Where the legislation is sought to be challenged as being unconstitutional and violative of Article 14 of the Constitution, the Court must remind itself to the principles relating to the applicability of Article 14 in relation to invalidation of legislation. The two dimensions of Article 14 in its application to legislation and rendering legislation invalid are now well recognized and these are (i) discrimination, based on an impermissible or invalid classification and (ii) excessive delegation of powers; conferment of uncanalised and unguided powers on the executive, whether in the form of delegated legislation or by way of conferment of authority to pass administrative orders – if such conferment is without any guidance, control or checks, it is violative of Article 14 of the Constitution. The Court also needs to be mindful that legislation does not become unconstitutional merely because there is another view or because another method may be considered to be as good or even more effective, like any issue of social, or even economic policy. It is well settled that the courts do not substitute their views on what the policy is.

In Rajbala and others v. State of Haryana and others, (2016) 2 SCC 445, the Supreme Court said that the courts in this country do not undertake the task of declaring a piece of legislation unconstitutional on the ground that the legislation is “arbitrary” since such an exercise implies a value judgment and courts do not examine the wisdom of legislative choices unless the legislation is otherwise violative of some specific provision of the Constitution. To undertake such an examination, it was further said, would

amount to virtually importing the doctrine of “substantive due process” employed by the American Supreme Court at an earlier point of time while examining the constitutionality of Indian legislation. It was concluded that it was not permissible for Hon’ble the Supreme Court to declare a statute unconstitutional on the ground that it is ‘arbitrary’.

Therefore, no ground is made out for invalidating the 2016 Act, especially when it is sought to be assailed on the ground that the exercise of gathering quantifiable data for the determination of backwardness of the castes mentioned in Schedule III thereof has not been undertaken. This exercise can be carried out at this stage as well. In fact, for determining the extent of reservation permissible, the Supreme Court in M. Nagaraj v. Union of India, (2006) 8 SCC 212, held that States have to identify and collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment, keeping in mind maintenance of efficiency in administration. If the State concerned, it was said, failed to identify and measure the same, then provision for reservation would be invalid. The extent of reservation had to be decided on the facts of each case.

In S.V. Joshi v. State of Karnataka, (2012) 7 SCC 41, the validity of the Tamil Nadu and Karnataka enactments that provided 69% and 73% reservations, respectively, to members of the Scheduled Castes, Scheduled Tribes and Backward Classes was assailed on the plank that the reservation therein was in excess of 50%. The question for determination before the Supreme Court was whether the quantum of reservation provided

for in Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of Appointments or Posts in the Services under the State) Act, 1993 was valid. It was noticed that subsequent to the filing of the petitions in the said case, Articles 15 and 16 of the Constitution had been amended vide the Constitution (Ninety-third Amendment) Act, 2005 and the Constitution (Eight-first Amendment) Act, 2000, respectively. The said Amendment Acts had been the subject matter of decision in M. Nagaraj's case (*supra*) and Ashoka Kumar Thakur's case (*supra*). It was *inter alia* laid down in the said case that if a State wanted to exceed 50% reservation, then it was required to base its decision on quantifiable data, which exercise had not been done in the said case. Accordingly, the State was directed to place the quantifiable data before the Tamil Nadu State Backward Commission and, on the basis of such quantifiable data amongst other things, the Commission would decide the quantum of reservation. The writ petitions were disposed of with a direction to the State Government to re-visit and take appropriate decision in the light of what was stated.

Therefore, in the facts and circumstances of the present case, it would be just and expedient that the Haryana BC Commission carries out an exercise to determine the extent of reservation, if any, to which the castes mentioned in Schedule III of the 2016 Act would be entitled to and also the quantum of reservation to be provided for them. The question regarding the 50% limit being breached by providing reservations in pursuance of the impugned legislation and whether it is so justified can also be raised and

considered by the Haryana BC Commission. For this exercise, the State Government shall place before the Haryana BC Commission the quantifiable data amongst other things, besides, the Haryana BC Commission itself would be at liberty to seek any relevant data, information, as may be required by it from the State Government, the Welfare of Scheduled Castes and Backward Classes Department and/or any other department. Any person interested or stake-holder would also be at liberty to place material before the Haryana BC Commission in this regard. The State Government, the Welfare of Scheduled Castes and Backward Classes Department and/or any other department as also any other stake-holder or interested person may submit data for or against the reservation before the Commission by 30.11.2017. The State Government shall make due and wide publication for submitting the data to the Commission by the said date. The data furnished shall be put by the Haryana BC Commission on its website. Any person desirous of raising any objection to the data shall file the same by 30.12.2017. The Haryana BC Commission shall make its report by 31.03.2018. The State Government, on receipt of the report of the Commission, shall take decision on the same in accordance with law. Till such time the exercise is complete the benefit of reservation in services and in admissions for the Backward Classes in Schedule III to the 2016 Act shall be kept in abeyance.

The other contentions that have been raised are regarding providing of reservations for economically backward persons belonging to the general category in terms of the notification dated 27.09.2013 issued by the Haryana Government, Welfare of Scheduled Castes and Backward Classes

Department are not being gone into. In terms of the notification dated 27.09.2013, there is reservation for economically backward persons belonging to the general category to the extent of 10% in jobs in Government, Government undertakings and in Local Bodies in direct recruitment to Class III and Class IV posts. There is also reservation of 4% in jobs in Government, Government undertakings and in Local Bodies in direct recruitment to Class I and Class II posts. Besides, there is reservation of 10% in admission in Government and Government aided educational institutions, where reservation is provided for in admissions. The contentions regarding reservation for economically backward persons belonging to general category are not being gone into in the present cases, as the challenge herein has primarily been to Schedule III of the 2016 Act. Besides, other connected cases, i.e. CWP Nos. 2708 of 2013, 15768 of 2013, 2441 of 2014, 6070 of 2014 and 13150 of 2014, are pending in this regard. Therefore, it would be just and proper to raise contentions for invalidation of the notification dated 27.09.2013 providing reservation to economically backward persons belonging to the general category in the said cases.

For the foregoing reasons,

- (i) the 2016 Act is upheld and sustained;
- (ii) however, the Haryana BC Commission shall carry out an exercise to determine the extent of reservation, if any, to which the castes mentioned in Schedule III of the 2016 Act are entitled to and also the quantum of reservation provided for them;

- (iii) the State Government shall place before the Haryana BC Commission the quantifiable data amongst other things, besides, the Haryana BC Commission itself would be at liberty to seek the data, information, as may be required by it from the State Government, the Welfare of Scheduled Castes and Backward Classes Department and/or any other department;
- (iv) any stake-holder or any person interested shall be at liberty to place the material before the Haryana BC Commission in this regard;
- (v) the State Government, the Welfare of Scheduled Castes and Backward Classes Department and/or any other department as also any other stake-holder or interested person may submit data for or against the reservation before the Haryana BC Commission by 30.11.2017;
- (vi) the State Government shall make due and wide publication for submitting the data to the Haryana BC Commission by the said date;
- (vii) the data furnished shall be put by the Haryana BC Commission on its website;
- (viii) any person desirous of raising any objection to the data shall file the same by 30.12.2017;
- (ix) the Haryana BC Commission shall make its report by 31.03.2018;

(x) the State Government, on receipt of the report of the Haryana BC Commission, shall take decision on the same;

(xi) till such time the exercise is complete the benefit of reservation in services and in admissions for the Backward Classes in Schedule III to the 2016 Act shall be kept in abeyance.

The writ petitions are disposed of accordingly. There shall be no order as to costs.

(S.S. SARON)
JUDGE

(LISA GILL)
JUDGE

01.09.2017
Ramesh

Note: 1. Whether speaking/reasoned : Yes
2. Whether reportable : Yes