

**Central Administrative Tribunal
Principal Bench: New Delhi**

OA No.3096/2015

With

MA No.2736/2015

Reserved on :27.10.2015
Pronounced on:27.04.2016

Hon'ble Shri Sudhir Kumar, Member (A)
Hon'ble Shri Raj Vir Sharma, Member (J)

Neeta Kumari Yadav @ Neeta Kumari
Aged about 38 years
W/o Late Sh. Dinesh Kumar
R/o: Village-Dhamlawas, Post Pithrawas,
Distt-Rewari, Haryana.

...Applicant.

(By Advocate:Shri Amit Kumar)

versus

Union of India and Others, through;

1. The Secretary, Govt. of India,
Ministry of Personnel, Public Grievance
& Pensions, Department of Personnel
& Training, CGO Complex, Block-12,
Lodhi Road, New Delhi-110504.
2. The Chairman,
Staff Selection Commission (SSC),
Northern Region,
CGO Complex, Block-12,
Lodhi Road, New Delhi-110504.
3. The Regional Director (NR),
Staff Selection Commission (SSC),
CGO Complex, Block-12,
Lodhi Road, New Delhi-110504.

(2)

4. The Naib Tehsildar-cum-Executive Magistrate,
Manethi, Tehsil & District- Rewari.
Harayana. ...Respondents.

(By Advocate: Shri Gyanendra Singh)

ORDER

Per Sudhir Kumar, Member (A):

MA No.2736/2015

This MA, filed by the applicant praying for exemption from filing of English Translation of Hindi documents, is allowed.

OA No.3096/2015

The applicant of this OA is before this Tribunal aggrieved by the Respondent Nos.2 & 3, representing the Staff Selection Commission (SSC, in short) in not allowing her to appear at the interview on 07.08.2015, despite her name having been shortlisted, and her having been called for the interview initially, vide letter dated 10.07.2015, for recruitment for the Post of Senior Library and Information Assistant under Post Category No.IB-05. The applicant is particularly aggrieved that the SSC had declared her certificate to be defective on the following grounds noted by two of its Officers:-

“(1) This certificate has been issued by the Naib Tehsildar. She is a widow and her OBC Certificate is in her husband’s name. Therefore, she is not fit for interview. However, because of her being a widow

(3)

and she would not be able to sit in any examination/Interview in future due to Age difficulties. Hence, this case may be considered.

-Sd/-

(2) As per 'A' OBC Certificate can't be accepted, also Certificate is issued by Naib Tehsildar.

-Sd/-"

2. When she was denied from her chance for appearing at the Interview, immediately thereafter she had submitted a representation to the respondents, submitting that her Caste Certificate had been issued by the Competent Authority. However, she had submitted that if it was not acceptable, she needed some more time be given to her to bring another Caste Certificate, as she belongs to caste "AHIR", which has been recognized as "OBC" in the State of Haryana, and also by the Government of India. Since the respondents did not consider her representation favourably, she has filed the present OA, praying for the following reliefs:

(i) Quash and set aside the objections raised by the respondents in denying interview to the applicant for appointment to the post of Senior Library and Information Assistant.

(ii) Direct the respondents to appoint the applicant to the post of Senior Library and Information Assistant with all consequential benefits.

(4)

(iii) Pass such other or further order(s)/direction(s) as deem fit in the facts & circumstances of the case.

(iv) Award Cost of litigation to the applicant.”

3. The facts of this case lie in a very narrow compass. The respondents No.2 & 3 had published an advertisement inviting applications for recruitment to the various Group 'B' & 'C' Non-Gazetted Posts for various Ministries/Offices of the Respondent No.1 Government of India, including the above-mentioned post, with closing date of receipt of applications being 31.10.2014. The applicant being a widow, and being "OBC" by her caste, she had applied along with the copies of her testimonials pertaining to the essential qualifications, Caste Certificate, Residence and Experience Certificate as per Annexure A-3 (Colly).

4. The applicant has also mentioned that even her parents, who are residents of Village Sanauli, Block Kishangarh, District Alwar (Rajasthan) also belong to 'AHIR' Community under the "OBC" category, and that after her marriage on 05.02.1999, she had been residing with her husband at her matrimonial home in Village Dhamlawas, Post Pithrawas, District Rewari, Haryana, before his untimely demise on 10.09.2013. She had further

(5)

submitted that the Naib Tehsildar is the Competent Authority for issuance of "OBC" Certificate to her.

5. The applicant reached along with the original documents/certificates, and her documents/certificates were examined on 07.08.2015, and the respondents declared her caste certificate to be defective, with the notings as already mentioned above in the opening paragraph.

6. The applicant has taken the ground that when she had applied under three categories, i.e. Female, OBC and Widow, and she also fulfilled all the requisite qualifications at the time of submission of her application, therefore, she ought to have been interviewed for the post of Senior Library and Information Assistant, and denial of opportunity to her of her being interviewed amounts to an infringement of her fundamental rights enshrined under Articles 14, 16 and 21 of the Constitution, because the respondents' reasons for denying her an interview are highly unreasonable, arbitrary and illegal, and hence the actions of the respondents are liable to be quashed and set aside.

7. It was further submitted that because she was born on 01.07.1977, and she was well within the prescribed maximum

(6)

age on the cut-off-date, i.e., on 31.10.2014, therefore, she is bound to suffer loss of opportunity of appearing in the future examinations, as the maximum age relaxation for OBC & Widow categories is 38 years. The applicant has relied upon the judgment of a Coordinate Bench dated 03.11.2012 in **Karmender Kumar vs. Union of India & Others** (OA No.2885/2011), in which one of us [Mr. Sudhir Kumar, Member (A)] was a Member, wherein it was held that the Naib Tehsildar in Haryana is competent to issue Non-Creamy Layer OBC Certificates. It was, therefore, prayed that the OA be allowed.

8. The respondents filed their counter reply on 12.10.2015, and submitted that the applicant herein has not approached this Tribunal with clean hands, and has suppressed certain material facts. It was admitted that the applicant had applied for the post of Senior Library and Information Assistant (Post Category No.IB-05) under age relaxation Code-22/Widow/Divorced Women/Women judicially separated who are not remarried (OBC) candidate. But, it was submitted that during the verification of her documents on 07.08.2015, it was found that she had produced two OBC certificates, and both of which were not considered by the respondents, because of the reasons given in the Counter Reply as follows:

(7)

"1st OBC Certificate No.78390 dated 26/04/2011 issued by Tehsildar-Rewari (Haryana):- This OBC Certificate is not valid due to the reason that the certificate on Creamy Layer status was not issued within the stipulated period of 3 years before the closing date of submission of application. Secondly, the rule of inclusion regarding limit of income for determining the creamy layer status will apply to Son(s) and daughter(s) of a person and not to wife of a person. The OBC certificate produced by the applicant was issued in favour of Neeta Kumari, w/o Dinesh Kumar.

2nd OBC Certificate No.MNT/OBC/20151161 dated 29/07/2015 issued by Naib Tehsildar-Maneth:- This OBC Certificate is also not valid due to the reason that the rule of inclusion regarding limit of income for determining the creamy layer status apply to Son(s) and daughter(s) of the person and not to wife of a person. Secondly, the authority competent to issue OBC Certificate is – Revenue Officer not below the rank of Tehsildar. The certificate issued by Naib Tehsildar is not valid."

9. It was further submitted by the Respondents that the applicant was not allowed to appear for the interview because her candidature did not fulfil the requisite criteria, as laid down with the instructions contained in Note I and Note-II below Para 6.5(x) of the advertisement, which stated as follows:

"Note-I: The closing date for receipt of application will be treated as the date of reckoning for OBC status of the candidate and also, for assuming that the candidate does not fall in the Creamy layer on the reckoning date. The candidate should furnish the relevant OBC certificate in the format prescribed for Central Govt. jobs as per Appendix-IV issued by competent authority on or before the Closing date stipulated in the Notice. Candidates claiming OBC

(8)

certificate may note that the certificate on Creamy Layer issued by the competent authority as prescribed by Deptt. of Personnel and Training should have been obtained within 3 years before the closing date. OBC certificate issued upto the last tier of examination i.e. Interview will also be accepted by the Commission. Candidates furnishing OBC certificate in proforma/format other than the prescribed format as given in Appendix-IV will be summarily rejected. **(The profoma/format of OBC certificate given in Appendix-IV is enclosed as Annexure R/1).**

Note-I:OBC certificate for the purpose of age relaxation will mean "PERSON OF OBC CATEGORY NOT BELONGING TO CREAMY LAYER" as defined in DoP&T OM 36012/22/93-Estt.(SCT) dated 08/09/93 and modified vide DoP&T OM No. 36033/3/2004 Estt.(Res.) dated 09/03/2004 and 14.10.2008 **(DOP&T OM No. 36033/3/2004 Estt.(Res.) dated 09/03/2004 and 14.10.2008 is enclosed as Annexure-R/II."**

(Emphasis supplied).

10. It was submitted that in all recruitments carried out by the Respondents No.2 & 3, the provisions of the Recruitment Notice are sacrosanct, and are binding on both the parties. They maintained that the applicant had failed to produce a valid OBC certificate, as prescribed in the Notice of the Recruitment. It was submitted that her application had been dealt with as per the conditions laid down in the advertisement, and, therefore, her candidature was rightly rejected, as she did not submit the valid OBC certificate, as per the provisions of the Notice.

(9)

11. It was further submitted that as per the DoP&T OM No.36033/3/2004-Estt. (Res.) dated 14.10.2008, under which the rule of inclusion regarding limit of income for determining the creamy layer status of backward class apply to son(s) and daughter(s) of the person, and not to wife of a person. It was further submitted that the authority competent to issue a Non-Creamy Layer OBC Certificate is a Revenue Officer not below the rank of Tehsildar. It was submitted that the respondents have acted strictly as per the Advertisement for the Recruitment, and the Government Instructions, and no fundamental or legal rights of the applicant have been violated and, therefore, it was prayed that the OA is liable to be dismissed, being devoid of any merit.

12. Heard. During the course of arguments, learned counsel for the applicant relied upon the judgment passed by a Coordinate Bench (including one of us) in OA No.2885/2011 (supra). The relevant portion of the said judgment reads thus:

"22. It is clear from Sub-Section (1) of Section 20 of the Cr.P.C., 1973, as reproduced above that the State Government may appoint as many persons as it thinks fit to be Executive Magistrates, and shall appoint one of them to be the District Magistrate. Section 21 of the Cr. P.C., 1973 further prescribes that the State Government may appoint, for such term as it may think fit, Executive Magistrates, to be known as Special Executive Magistrates, for particular areas, or for the performance of particular functions, and confer on such Special Executive Magistrates such of the powers as are conferrable under the Code on Executive Magistrates, as it may deem fit, which exercise of powers by them has been upheld by the

(10)

Hon'ble Apex Court in the case of **State of Maharashtra v. Mohammad Salim Khan (1991) 1 Crimes 120 (SC)**. Section 22 of the Cr.P.C., 1973, further lays down that subject to the control of the State Government, the District Magistrate may, from time to time, define the local limits of the areas within which the Executive Magistrates may exercise all or any of the powers with which they may be invested with under the Cr.P.C., 1973. Sub-Section(2) of Section 22 further provides that in the absence of any such provisions made under Sub-Section(1) of Section 22, the jurisdiction and powers of every such Magistrate shall extend throughout the district. Section 23 of the Cr. P.C., 1973 further prescribes that all Executive Magistrates, other than the Additional District Magistrate, shall be subordinate to the District Magistrate, and every Executive Magistrate (other than the Sub-divisional Magistrate) exercising powers in a subdivision shall also be subordinate to the Sub-divisional Magistrate, subject, however, to the general control of the District Magistrate and the District Magistrate may, from time to time, make rules or give special orders, consistent with the Cr. P.C., as to the distribution of business among the Executive Magistrates subordinate to him, and as to the allocation of business to an Additional District Magistrate.

23. From the letter of the Chief Secretary, Govt. of Haryana, dated 30.01.2004, as re-produced in para 17 above, and as cited by the applicant, it is apparent that in the State of Haryana all the Circle Revenue Officers, whether Tehsildars or the Naib Tehsildars, have been conferred with the powers of an Executive Magistrate, as per para-2 of the letter reproduced in para 17 above. On the other hand, Note-1 (b) of the Schedule Annexure VII of the Notification prescribes the authorities competent to issue the caste certificate, which are recognized by the SSC and the Union of India to be competent to issue such certificates.

24. Note-I (b) (i) reads as under:

“(i) **District Magistrate/Additional Magistrate/Collector/ Dy. Commissioner /Additional Deputy Commissioner/ Deputy Collector/ Ist Class Stipendary Magistrate/ Sub Divisional Magistrate / Taluka Magistrate/Executive Magistrate/Extra Assistant Commissioner** (not below the rank of Ist Class Stipendiary Magistrate).”

25. In his arguments, the learned counsel for the respondents relied mainly upon the Note I (b) (iii), which has prescribed the competent authority to be a Revenue Officer not below the rank of Tehsildar, but where the words 'Executive Magistrate' have not been mentioned.

(11)

26. From a comparison of the above stipulations of the Note I (b) (i) and I (b) (iii) below Annexure A-7 itself, it can be seen that **there are at least six categories of Magistrates which have been declared to be competent authorities under Note-I (b) (i), and three categories of Magistrates in the Presidency Areas have also been declared to be the competent authorities in Note I b (ii).**

27. Unfortunately, the State of Haryana's specific Notification which had declared the designations of the persons appointed as Executive Magistrates under Sub-Section (1) of Section 20 of Cr.P.C. is not available for our benefit. However, the use of the words "Tehsildar/ Naib Tehsildar-cum-Executive Magistrate" in the Chief Secretary's letter dated 30.01.2004, prompts us to believe that **the Naib Tehsildars have been declared to be Executive Magistrates by the State of Haryana under Sub Section (1) of Section 20 of the Cr.P.C., 1973. As a result, Naib Tehsildar would then fall within the 6 categories of Magistrates as designated by the SSC and the Union of India to be the competent authorities issue Caste Certificates in terms of Note I (b) (i) of Annexure A-7 to the Employment Notification.**

28. This empowerment of Naib Tehsildars as Executive Magistrates under Sub-Section (1) of Section 20 of Cr.P.C., 1973, has relevance only to his being a Circle Revenue Officer, though below the rank of the Tehsildar, and thus falling outside the purview of Note 1 (b) (iii), relied upon by the learned counsel for the respondents. **Therefore, it is clear that even under the provisions of the Employment Notice published on 30.01.2010, Annexure A-7 thereto, by virtue of his being an Executive Magistrate so declared under the Cr.P.C., a Naib Tehsildar of Kanina Mahender Garh, was competent to have issued OBC Creamy Layer Caste Certificate as produced by the applicant at Annexure A-2B (Page 20 of the Paper Book) on 15.10.2008, even without its being countersigned by the Tehsildar, Mehender Garh on 15.11.2010, or further validation by the SDM, Mahender Garh on 23.11.2010 Annexure A-3 (Page 21 of the Paper Book).**

29. **Therefore, since the OBC certificate issued by the Naib Tehsildar-cum- Executive Magistrate, Kanina, Mahender Garh on 15.10.2008 was available with the applicant, which had been issued before the cut-off date of 02.03.2010, the respondents were wrong in having denied the applicant an opportunity of employment, to which he was and is lawfully entitled.** The contention of the respondents that the Central Government alone can decide as to who is the competent authority to issue the certificate in respect of Employment

(12)

Notification for the Central Government is not tenable in this case, **since the Central Government's Notification itself has prescribed the six categories of Magistrates, along with the Revenue Officer designations, as authorities competent to issue a caste certificate, and the aspect of the declaration of any person as an Executive Magistrate lies within the competence of the State Government alone, under sub Section (1) of Section (20) of the Cr.P.C., 1973. The Union of India/Central Government in fact does not have any powers prescribed under the Cr.P.C., 1973, to either declare, or recognize, or de-recognize anybody, or any official functionaries, as Executive Magistrates for any purpose whatsoever, as maintenance of public order is a function of the State Governments, under Item No.I, List-II, State List, of Schedule VII of the Constitution of India, and the Union of India does not have any powers whatsoever under Section 20 of the Cr.P.C., 1973, or under any of the entries of List I of the Union List of Schedule VII of the Constitution of India to refuse to recognize the authority of an Executive Magistrate of a State, whom the State Government has declared to be an Executive Magistrate under the Cr.P.C.**

30. In the result, OA is allowed to the extent that the applicant is held to have been holding a valid OBC certificate issued by an Executive Magistrate of the State of Haryana prior to the cut off date prescribed in the advertisement, and the respondents are directed to treat his case as such, and allow him the consequential benefits. There shall be no order as to costs."

(Emphasis supplied).

13. Learned counsel for the applicant pointed out to the hand written notings on the Annexure A-1 dated 07.08.2015, in which some official of the Respondent-Commission had suggested for consideration of her certificate, but his opinion had been overruled by some other officer in the Office of the Regional Director (Northern Region), Respondent No.3, as has already been reproduced by us in the opening paragraph itself.

(13)

14. Learned counsel for the applicant had also relied upon Annexure A-3 (Colly), which was Non-Creamy Layer Certificate issued on 22.06.1994 in her name at her parental address District Alwar, Rajasthan, before her marriage on 05.02.1999. But this does not have any meaning whatsoever now, after her marriage, when she has become a "Sapinda" of her matrimonial home.

15. However, learned counsel for the respondents submitted that her candidature was rejected as she had not only produced the old parental home Non Creamy Layer OBC certificate as at Annexure A-3 issued by the Tehsildar of Alwar District, Rajasthan, but also another OBC Non-Creamy Layer Certificate dated 29.07.2015 issued by the Naib Tehsildar Manethi, District Rewari, Haryana, within whose jurisdiction her matrimonial home was located. He also relied upon the respondents' standard Non-Creamy Layer OBC Certificate Format, in which, according to the Government of India Instructions, first an undertaking has to be issued by the concerned OBC candidate, claiming to fall under Non-Creamy Layer of the OBCs, and thereafter a certificate has to be issued by the Competent Authority in the standard prescribed Non-Creamy Layer OBC Certificate Format, which is as follows,

(14)

and which does not provide for the husband (and the “karta” of the H.U.F., in case of a Hindu Undivided Family) to be placed on the pedestal of being the guardians of a married lady:-

“OBC Certificate Format FORM OF CERTIFICATE TO BE PRODUCED BY OTHER BACKWARD CLASSES APPLYING FOR APPOINTMENT TO POSTS / ADMISSION TO CENTRAL EDUCATIONAL INSTITUTES (CEIs), UNDER THE GOVERNMENT OF INDIA

“This certificate MUST have been issued on or after 1st April 2014.”
This is to certify that Shri/Smt./Kum.

_____	Son/Daughter	of	Shri/Smt.
_____			of Village/Town
_____			District/Division
_____			in the
_____		State	belongs to the
_____		Community which is recognized as a	
backward class under:			

- (i) Resolution No. 12011/68/93-BCC(C) dated 10/09/93 published in the Gazette of India Extraordinary Part I Section I No. 186 dated 13/09/93.
- (ii) Resolution No. 12011/9/94-BCC dated 19/10/94 published in the Gazette of India Extraordinary Part I Section I No. 163 dated 20/10/94.
- (iii) Resolution No. 12011/7/95-BCC dated 24/05/95 published in the Gazette of India Extraordinary Part I Section I No. 88 dated 25/05/95.
- (iv) Resolution No. 12011/96/94-BCC dated 9/03/96.
- (v) Resolution No. 12011/44/96-BCC dated 6/12/96 published in the Gazette of India Extraordinary Part I Section I No. 210 dated 11/12/96.
- (vi) Resolution No. 12011/13/97-BCC dated 03/12/97.
- (vii) Resolution No. 12011/99/94-BCC dated 11/12/97.
- (viii) Resolution No. 12011/68/98-BCC dated 27/10/99.

(15)

(ix) Resolution No. 12011/88/98-BCC dated 6/12/99 published in the Gazette of India Extraordinary Part I Section I No. 270 dated 06/12/99.

(x) Resolution No. 12011/36/99-BCC dated 04/04/2000 published in the Gazette of India Extraordinary Part I Section I No. 71 dated 04/04/2000.

(xi) Resolution No. 12011/44/99-BCC dated 21/09/2000 published in the Gazette of India Extraordinary Part I Section I No. 210 dated 21/09/2000.

(xii) Resolution No. 12015/9/2000-BCC dated 06/09/2001.

(xiii) Resolution No. 12011/1/2001-BCC dated 19/06/2003.

(xiv) Resolution No. 12011/4/2002-BCC dated 13/01/2004.

(xv) Resolution No. 12011/9/2004-BCC dated 16/01/2006 published in the Gazette of India Extraordinary Part I Section I No. 210 dated 16/01/2006.

Shri/Smt./Kum. _____ and/or
his family ordinarily reside(s) in the
_____ District/Division of
_____ State. This is also to certify that
he/she does not belong to the persons/sections (Creamy Layer)
mentioned in Column 3 of the Schedule to the Government of India,
Department of Personnel & Training O.M. No. 36012/22/93-
Estt.(SCT) dated 08/09/93 which is modified vide OM No.
36033/3/2004 Estt.(Res.) dated 09/03/2004.

Dated: _____ District Magistrate/ Deputy
Commissioner, etc.

Seal

NOTE:

(a) The term 'Ordinarily' used here will have the same meaning as in Section 20 of the Representation of the People Act, 1950.

(b) The authorities competent to issue Caste Certificates are indicated below:

(i) District Magistrate / Additional Magistrate / Collector / Deputy Commissioner / Additional Deputy Commissioner / Deputy Collector / Ist Class Stipendiary Magistrate / Sub-Divisional magistrate / Taluka Magistrate / Executive Magistrate / Extra Assistant

(16)

Commissioner (not below the rank of Ist Class Stipendiary Magistrate).

(ii) Chief Presidency Magistrate / Additional Chief Presidency Magistrate / Presidency Magistrate.

(iii) Revenue Officer not below the rank of Tehsildar and

(iv) Sub-Divisional Officer of the area where the candidate and / or his family resides.

Caste Certificate issued from Maharashtra State must be validated by social welfare Department of Maharashtra Government

OBC Undertaking

Declaration/undertaking - for OBC Candidates only

I, _____ **son/daughter of** Shri _____ resident
of village/town/city _____
district _____ State hereby declare
that I belong to the _____ community which is
recognised as a backward class by the Government of India for the
purpose of reservation in services as per orders contained in
Department of Personnel and Training Office Memorandum
No.36012/22/93- Estt. (SCT), dated 8/9/1993. It is also declared
that I do not belong to persons/sections (Creamy Layer) mentioned
in Column 3 of the Schedule to the above referred Office
Memorandum, dated 8/9/1993, which is modified vide Department
of Personnel and Training Office Memorandum No.36033/3/2004
Estt.(Res.) dated 9/3/2004. **I also declare that the condition of
status/annual income for creamy layer of my
parents/guardian is within prescribed limits as on financial
year ending on March 31, 2014.**

Signature of the Candidate

Place: _____

Date: _____

Declaration/undertaking not signed by Candidate will be rejected”

(Emphasis supplied).

(17)

16. Learned counsel for the respondents also relied upon the DoP&T OM dated 14.10.2008, by which it was pointed out that the DoP&T OM dated 08.09.1993 had provided for the income classification for OBC Creamy Layer Certification to be based only upon parental income, and that only the sons and daughters of persons having gross annual income of Rs.1 lakh, or above for a period of three consecutive years, would fall within the creamy layer, and would not be entitled to get the benefit of the reservation available to the Other Backward Classes. This O.M. never talked about the cases of married women. The limit of parental income for determining the creamy layer status was raised to Rs. 2.5 lakh vide OM of even number dated 9.3.2004, but once again this amendment also never talked about the cases of married women. That parental income limit has since been increased from Rs. 2.5 lakh to Rs. 4.5 lakh per annum or above, for a period of three consecutive years, for determining the creamy layer amongst the OBCs, but still without providing for the cases of married women. The said OM reads thus:

"NO.36033/3/2004-Estt. (Res.)
Government of India
Ministry of Personnel, Public Grievances & Pensions
Department of Personnel & Training

New Delhi, dated the 14th October, 2008

(18)

Subject:- Revision of income criteria to exclude socially advanced persons/sections (Creamy Layer) from the purview of reservation for Other Backward Classes (OBCs).

The undersigned is directed to invite attention to this Department's O.M No.36012/22/93-Estt.(SCT) dated 8 th September, 1993 which inter alia provided that **sons and daughters of persons having gross annual income of RS.1 lakh or above for a period of three consecutive years would fall within the creamy layer and would not be entitled to get the benefit of reservation available to the Other Backward Classes. The limit of income for determining the creamy layer status was raised to Rs. 2.5 lakh vide this Department's OM of even number dated 9.3.2004. It has now been decided to raise the income limit from Rs. 2.5 lakh to Rs. 4.5 lakh per annum for determining the creamy layer amongst the OBCs.** Accordingly the following entry is hereby substituted for the existing entry against Category VI in the Schedule to the above referred O.M.

Category	Description of Category	To whom the rule of exclusion will apply
		Son(s) and daughter(s) of
		(a) Persons having gross annual income of Rs. 4.5 lakh or above or: possessing wealth above the exemption limit as prescribed in the Wealth Tax Act for period of three consecutive years.
		(b)Persons in Categories I, II, III and V A who are not disentitled to the benefit of reservation but have income from other sources of wealth which will bring them within the income wealth criteria mentioned in (a) above.
		<u>Explanation:</u>
		Income from salaries or agricultural land shall not be clubbed.

2. The provisions of this Office Memorandum take effect from the 3rd October, 2008.

(19)

3. All the Ministries/Departments are requested to bring the contents of this Office Memorandum to the notice of all concerned.

(K.G Verma)
Director"

(Emphasis supplied).

17. Learned counsel for the respondents had, therefore, submitted that since the Income/Wealth Test, as to in respect of whom the rule of inclusion, or exclusion of the Creamy Layer of the OBCs, will apply only on the basis of parental incomes, to son(s) and daughter(s) of OBC families, through OM dated 14.10.2008, as above, the applicant widow could neither have claimed the OBC Non-Creamy Layer reservation under the very old certificate dated 22.06.1994 issued in respect of her parental home's income by the Naib Tehsildar, Alwar, Rajasthan, nor could she have claimed the benefit of Non-Creamy Layer reservation on the basis of the aggregate income of the family at her matrimonial home at Manethi, District Rewari, Haryana, through the certificate dated 29.07.2015, though it had been issued before the date of the interview and documents verification, and, therefore, the OA is liable to be rejected.

18. We have given our anxious consideration to the facts of the case, and the law relating to the case, apart from our

(20)

observations already recorded above. Out of the two objections taken by the respondents, one part of the second one, being regarding the certificate dated 29.07.2015 issued by the Naib Tehsildar, Manethi, District Rewari, Haryana, not having been issued by a competent authority, and, therefore, not being valid, is rejected, because the respondents have never laid a challenge to the order dated 03.11.2012 passed by this Tribunal in OA No.2885/2011 (supra), and that order has become final. A Naib-Tehsildar may not be competent to issue such a Certificate in his capacity as a Revenue Officer, but he is certainly empowered to issue such a certificate in his other capacity as an Executive Magistrate. Therefore, the respondents are bound to accept the Non-Creamy Layer OBC Certificate issued by any of the Naib Tehsildars of Haryana, who have been designated by the Haryana State Government as Executive Magistrates, and are, therefore, empowered to issue such Certificate, as has already been held in the order of the Tribunal dated 03.11.2012 in O.A. No. 2885/2011 **Karmender Kumar** (supra).

19. We, however, agree that the first objection of the Respondents was also quite valid, and a very old Certificate dated 22.06.1994, issued to the applicant prior to her marriage, at her

(21)

parental home, could not have been considered as valid as on 07.08.2015, in view of the law as laid down in this regard.

20. The issue now remains as to whether as a widow she would be eligible to derive the benefit of her Non-Creamy Layer OBC certificate dated 29.07.2015 produced by her from her matrimonial home, which was obtained by her after she became a widow, or that the respondents' standard format and procedure of accepting such Non-Creamy Layer Certificates only in respect of sons and daughters of OBC families, are valid and legal.

21. Though this case is related to the OBCs, and it is not a case of SCs and STs, however, we may borrow some principles laid down in the case of SCs and STs in a case of Christian having married into a SC family, and appreciation of the related Hindu law by the Apex Court in the case of **Mrs. Valsamma Paul vs. Cochin University and Others**, AIR 1996 SC 1011. The relevant portion of the judgment reads thus:

"30. It would thus be seen that the institution of marriage is one of the second social institutions to bring harmony and integration in social fabric. The Shastric law among Hindus has undergone sea change, in the rigidity of Shastric prescriptions. In relation to intestate succession of property, marriage, adoption and maintenance among Hindus, they are brought under statutory operation appropriately underpinning the rigid Shastric prohibitions restrictions to operate in harmony with Universal Declaration of Human Rights and Constitutional rights. The right to divorce which is unknown to Hindu law is made feasible and an irretrievable breakdown of the marriage is made

(22)

a ground so as to enable the couple to seek divorce by mutual consent. The Hindu Marriage Act, 1956 and Special Marriage Act, 1954 made the marriage between persons belonging to different castes and religions as valid marriage. Even local amendments in Section 7A to the Hindu Marriage Act, 1956 like is Tamil Nadu, removed the rigidity of celebrating the marriages in accordance with Shastric prescription like Kanyadan and Saptapadhi being not mandatory, recognised social marriage as valid. Right to maintenance from the divorced husband is provided under the Hindu Adoptions and Maintenance Act, 1956 and Section 125 of the Code of Criminal Procedure, 1973 so long as she remained unmarried. Under Hindu Minority and Maintenance Act, she is entitled to maintenance from father-in-law. Similar gender equality is available to other citizens consistent with Human Right and under Article 15(3) of the Constitution. The march of law lays emphasis on the rights of the individual for equality. The form of marriages is relegated to backdoor as unessential. These are matter of belief and practice and not core content. Tying Tali is a must and without it marriage is not complete is not complete in South India among all Hindus and in some parts among Harijan Christians, while exchange of ring would do in North India. Ritualistic celebration of marriage would be considered by some as valid, while most people on other sections think that factum of marriage is enough. When in Tamil Nadu such marriage is statutorily valid, would it become invalid in other parts of the country? The answer would, obviously and emphatically be, "No". Inter-caste marriage and adoption are two important social institutions through which secularism would find its fruitful and solid base for an egalitarian social order under the Constitution. Therefore, due recognition should be accorded for social mobility and integration and accordingly its recognition must be upheld as valid law.

31. It is well settled law from *Mussumat Bhoobun Moyee Debia v. Ramkishore Achari Chowdhary*, (1865 10) Moo Ind App 279, that judiciary recognised a century and half ago that a husband and wife are one under Hindu law and so long as the wife survives she is half of the husband. She is 'Sapinda' of her husband as held in *Lallu Bhoy v. Cassibai*, clear that be it either under the Canon law or the Hindu law, on marriage wife becomes an integral part of husband's marital home entitled to equal status of husband as a member of the family. Therefore, the lady, on marriage, becomes a member of the caste to which she moved. The caste rigidity breaks down and would stand no impediment to her becoming a member of the family to which the husband belongs and she gets herself transplanted.

32. The immediate question arises : Whether recognition of the community is a pre-condition ? Though it was consistently held that recognition is a circumstance to be taken into consideration, marriage being personal right of the spouses they are entitled to

(23)

live, after marriage, openly to the knowledge of all the members of the community or locality in which they live and by such living they acquire married status. In the light of the constitutional philosophy of social integrity and national unity, right to equality assured by the human rights and the Constitution of India on marriage by man and woman, they become members of the family and entitled to the social status as married couple, recognition per se is not a pre-condition but entitled to be considered, when evidence is available. It is common knowledge that with education or advance of economic status, young men and women marry against the wishes of parents and in many a case consent or recognition would scarcely be given by either or both of the parties or parents of both spouses. Recognition by family or community is not a pre-condition for married status.

33. However the question is : whether a lady marrying a Scheduled Caste, Scheduled Tribe or OBC citizen, or one transplanted by adoption or any other voluntary act, ipso facto, becomes entitled to claim reservation under Article 15(4) or 16(4), as the case may be? It is seen that Dalits and Tribes suffered social and economic disabilities recognised by Articles 17 and 15(2). Consequently, they became socially, culturally and educational backward; the OBC also suffered social and educational backwardness. The object of reservation is to remove these handicaps, disadvantages, sufferings and restrictions to which the members of the Dalits or Tribes or OBCs were subjected to and was sought to bring them in the mainstream of the nation's life by providing them opportunities and facilities.

34. In *Murlidhar Dayandeo Kesekar v. Vishwanath Pandu*, (1995) 3 JT (SC) 563 : (1995 AIR SCW 2224); and *R. Chandevappa v. State of Karnataka*, (1995) 7 JT (SC) 93, this Court had held that economic empowerment is a fundamental right to the poor and the State is enjoined under Articles 15(3), 46 and 39 to provide them opportunities. Thus, education, employment and economic empowerment are some of the programmes, the State has evolved and also provided reservation in admission into educational institution, or in case of other economic benefits under Articles 15(4) and 46 or in appointment to an office or a post under the State under Article 16(4). Therefore, when a member is transplanted into the Dalits, Tribes and OBCs he/she must of necessity also undergo same handicaps, be subject to the same disabilities, disadvantages, indignities or sufferings so as to entitle the candidate to avail the facility of reservation. A candidate who had the advantageous start in life being born in forward caste and had march of advantageous life but is transplanted in backward caste by adoption or marriage or conversion, does not become eligible to the benefit of reservation either under Article 15(4) status of Scheduled Caste etc. by voluntary mobility into these categories would play fraud on the Constitution, and would frustrate the benign constitutional policy under Articles 15(4) and 16(4) of the Constitution."

22. It is, therefore, obvious that after her marriage, the applicant could not have even applied for or claimed Non-Creamy Layer reservation based upon her father's income, at her parental home, either on the basis of the earlier certificate dated 22.06.1994 issued by the SDM, Alwar, Rajasthan, as the date of issuance of the Non-Creamy Layer OBC certificate is relevant for the purpose of determining the fact regarding a person coming within the Creamy Layer, or below the Creamy Layer, or could have even applied for a fresh Certificate as such at her parental home, even after her marriage, or widowhood, as per the judgment of a Nine Judges Bench of the Apex Court in **Indra Sawhney vs. Union of India**, 1992 Supp (3) SCC 210 (217). After her marriage a girl's link with her parental home, and dependence on the income of her parental home, gets severed substantially, and she gets cloaked, with the "Gothra" (if her matrimonial home is a Hindu family), and all legal rights and, particularly, right to the income, of the family of her matrimonial home. In fact the husband of the married girl, or, in the case of a Hindu Undivided Family (H.U.F.), the "Karta" of the H.U.F. also, apart from her husband, take the position of the protectors of the married girl, and, in that sense, become her **"guardians"**.

(25)

23. The standard format of the Non-Creamy Layer OBC Certificate, and the contention of the respondents that the Non-Creamy Layer reservation can only be admissible on the basis of the income of the parental home, to the son (s) or daughter(s) of persons, having gross annual income of Rs.4.5 lakh or above through DoP&T OM dated 14.10.2008, and such eligibility/ineligibility applies only to son(s) and daughter(s) of OBC persons, when only the parents' income criteria is considered, is illegal, and is out-rightly rejected.

24. As held by the Hon'ble Apex Court in **Mrs. Valsamma Paul vs. Cochin University and Others** (supra), when a lady enters her matrimonial home, she became a "Sapinda" of her matrimonial home. The concept of reservation for backward classes would therefore apply, and her being floating with the Creamy Layer of OBC, or being still below the OBC Creamy Layer, would be determined not on the basis of her being a daughter of her parents, whose income could be considered, whose home she has left, but only the basis of the income of her husband, and only her matrimonial home's income as a widow would matter.

25. This aspect had been considered in detail by this Tribunal in another case in **Ms. Jyoti vs. Govt. of NCT of Delhi & Others** in

(26)

OA No. 1875/2011 on 25.09.2013, in which also one of us [Mr. Sudhir Kumar, Member (A)] was a member, and which judgment has also become final. The relevant portion of that judgment was as follows:

"32. There is another aspect also, i.e., the possibility or likelihood, of the change of **"creamy layer"** status of a lady after her marriage. We have been perplexed as to why when in her previous O.A., as well as in her present O.A., and in all her submissions the applicant before us has given her Rohini, Delhi, address, which is her marital home, and address for correspondence, as to why the applicant chose to apply for the **"OBC non-creamy layer certificate"** from her village address, giving only the name of her father, and the village address, and obtaining an **"OBC non-creamy layer certificate"** from SDM Narela. We have not been able to lay our hands upon, and find any definitive case law, which lays down that a girl who may belong to **"non-creamy layer"** before her marriage can be considered to have crossed over and above her previous status, to the **"creamy layer"** after her marriage. But in the instant case, it appears to be one such case. In this case it appears that the monthly income and social standing of her marital home may have perhaps disintitiled her to a **"non-creamy layer certificate"**, and, therefore, only while choosing to apply for the job, within a period of 8 days, while she gave her marital home address, which is the same in the case of her address in her previous OA and the present OA, but while applying for her **"non-creamy layer OBC certificate"**, she chose to apply from her parents' address, which was her address prior to her marriage."

26. Therefore, the contention of the respondents that a certificate in respect of an OBC candidate before them floating in the Creamy Layer, or being still below the Creamy Layer, can only be decided on the basis of a Certificate issued in case of son(s) or daughter(s), is illegal, and is struck down, as Income/Wealth Test in respect of the parents, whose home a girl leaves after her

(27)

marriage, cannot be considered at all, as per the judgment of the Nine-Judges Bench of the Hon'ble Apex Court in **Indra Sawhney** (supra), read with the Apex Court judgment in **Mrs. Valasamma Paul** (supra), and this Tribunal's order in **Ms. Jyoti** (supra) dated 25.09.2013, in OA No.1875/2011.

27. As was held by this Tribunal in **Ms. Jyoti vs. Govt. of NCT of Delhi & Others** (supra), the status of a married (or even a widowed) lady being below the Creamy Layer of OBC, or her floating in the Creamy Layer of OBCs, in respect of a wife, who is not already an earning member, will have to be decided by the income criteria of only her husband (or her deceased husband), or of the family, of which she is a "Sapinda", with the husband being her guardian while he is alive, and the "karta" of the H.U.F., or the head of the matrimonial home family in respect of all others, being her guardian after her widowhood.

28. However, it would be a different matter that in case an OBC lady's husband is alive, and the family is below the OBC Creamy Layer, and she is provided the benefit of OBC Non-Creamy Layer reservation, because of the poverty and backward status of her husband's family, and her matrimonial home being such that they are below the Creamy Layer of OBCs, it is well-nigh possible that

once such a married lady is allowed to avail of such OBC Non-Creamy Layer reservation status, because of her income being added to the income of her matrimonial home, including the income of the husband (being below the prescription in respect of Creamy Layer), after she acquires such a job on the basis of such certification, because of the addition of her salary income also, her matrimonial home may then start floating in the Creamy Layer of OBCs, which would then have to be taken into account, and her own income also would have to be added to the income of her matrimonial home, including that of her husband, or of her late husband's family, which addition may then deprive her son(s) and daughter(s) from the status of being below the Creamy Layer, because their mother has claimed such Non-Creamy Layer OBC reservation.

29. The Income/Wealth Test has to be applied to the household as a whole, in order to determine the household itself being below the OBC Creamy Layer, or floating in the Creamy Layer of the OBC category concerned. Therefore, availing of the Non-Creamy Layer reservation by a daughter-in-law of a family may, perhaps, later deprive her children from availing of such Non-Creamy Layer certification, as per the law as laid down in **Indra Sawhney vs. Union of India** (supra).

30. Since the DoP&T OMs dated 08.09.1993, dated 09.03.2004, and dated 14.10.2008, have not taken these scenarios into account at all, all those three O.Ms are, therefore, set aside to the extent that they do not provide for all the above eventualities flowing from the Hon'ble Apex Court's judgment in **Indra Sawhney** (supra). The standard format and OBC Undertaking as had been reproduced in para 15/above are also, therefore, set aside as being un-Constitutional, and not being in consonance with the Hon'ble Apex Court's judgment in **Indra Sawhney** (supra).

31. Therefore, in view of the above discussions, since we do not find any merit in the submission of the respondents that the OBC Non- Creamy Layer certificate dated 29.07.2015 issued by the Naib Tehsildar, Manethi, District Rewari, Haryana, produced by the applicant, was invalid or illegal, in any manner whatsoever, the OA is allowed in the above terms, and the respondents are directed to consider the applicant's candidature against the post to which she had applied for, for which they had wrongly rejected her candidature, by not applying the judgment dated 03.11.2012 passed by this Tribunal in OA No.2885/2011 (supra), and mis-appreciating the concept of OBC reservation to be available only

(30)

to son(s) and daughter(s) of a family through OM dated 14.10.2008 (supra). As already held above in para 30, the relevant DoP&T OMs dated 08.09.1993, dated 09.03.2004, and dated 14.10.2008 are held as un-Constitutional and set aside to the extent indicated above, and the standard format for the Non-Creamy Layer OBC Certificate, and the OBC Undertaking attached to that are also held as un-Constitutional and set aside to the extent indicated, i.e., to the extent that they do not provide for the consideration of the cases of married/widowed women, as per their proper legal status away from their parental home. But there shall be no order as to costs.

(Raj Vir Sharma)
Member (J)

(Sudhir Kumar)
Member (A)

/kdr/