

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
WRIT PETITION (CIVIL) NO. 961/2021

IN THE MATTER OF:

NEIL AURELIO NUNES AND ORS. ...PETITIONERS

VERSUS

UNION OF INDIA AND ORS. ...RESPONDENTS

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Date: 26.10.2021

FILED BY:

AMRISH KUMAR

AOR FOR RESPONDENT NO.5

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
WRIT PETITION (CIVIL) NO. 961/2021

IN THE MATTER OF:

NEIL AURELIO NUNES AND ORS. ...PETITIONERS

VERSUS

UNION OF INDIA AND ORS. ...RESPONDENTS

COUNTER AFFIDAVIT ON BEHALF OF RESPONDENT

NO. 5 IN TERMS OF ORDER DATED 21.10.2021

I, N.S. Venkateshwaran, S/o N.V. Sivaramakrishnan, aged about 47 years, working as the Under Secretary, Ministry of Social Justice and Empowerment, do hereby solemnly affirm and state on oath as under:



N.S. Venkateshwaran
26/10/2021

श्री एन. वेण्कटेश्वरन, N. Venkateshwaran
अधीनस्थ सचिव, Ministry
सोशल जस्टिस और एम्पवोरमेंट
Min. Social Justice & Empowerment
सरकार, भारत, नई दिल्ली
Govt. of India, New Delhi

1. That I am presently working as stated above and as such I am conversant with the relevant facts and circumstances of the present case. I am therefore competent to sign, swear and verify the present counter affidavit on behalf of Respondent No. 5 (hereinafter referred to as the 'Answering Respondent').

2. I state that the Respondent No. 1 has, by the impugned notification dated 29.07.2021, issued a notice that for the NEET-UG and NEET-PG, 27% OBC reservation (Non-Creamy layer) and 10% EWS reservation in 15% UG and

50% PG AIQ seats would be provided with effect from the academic session of 2021-22.

The classification and categorisation of what would constitute EWS is provided for in the Office Memorandum dated 17.01.2019 issued by the Ministry of Social Justice and Empowerment, Government of India [Annexure A-1 to the Written Submission on behalf of the Petitioners in W.P. (C) No. 961/2021]. It provides that a person would fall under economically weaker section if he or she satisfies the following conditions:

- i. He/she should not already be covered under the existing scheme of reservations for SC/ST/SCBC; and
- ii. His/her family has gross annual income of below Rs. 8 lakh; and
- iii. He/she along with his/her family must not own or possess any of the following assets:
 - a. 5 acres of agricultural land and above,
 - b. Residential flat of 1000 sq. ft. or above,
 - c. Residential plot of 100 sq. yards and above in notified municipalities;

N. S. Vembatesh
26/10/2021

एन एस वेंबतेश्वरन N. Vembateshwaran
असिस्टेंट सचिव Assistant Secretary
सामाजिक न्याय और अधिकार मंत्रालय
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नए नगर, नई दिल्ली
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d. Residential plot of 200 sq. yards and above in areas other than the notified municipalities.

3. I state that, by its order dated 07.10.2021 and 21.10.2021, this Hon'ble Court had directed the Union of India to file an affidavit on certain specified aspects and in compliance with the orders of this Hon'ble Court, the present affidavit is being filed.

4. I state that in response to the specific issues raised by this Hon'ble Court in its order dated 21.10.2021, the Answering Respondent submits as follows:

A. Exercise undertaken by the Union Government for the determination of the EWS category with reference to Major General Sinho's report [with reference to issue nos. i and ii framed in terms of the Hon'ble Court's order dated 21.10.2021]

i. It is submitted that the criteria for determination of EWS category, as detailed in the Office Memorandum dated 17.01.2019, was arrived at after due deliberation within the Ministry of Social Justice and Empowerment and all concerned stakeholders.



N. S. Venkateshwar
26/10/20

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ii. It is pertinent to submit that, even before the Office Memorandum dated 17.01.2019 was in existence, in the context of identification of Economically Backward Classes, the Government had set up the Major General Sinho Commission in the year 2005. This Commission had, by its report of July, 2010, arrived at various conclusions [at internal pages 97, 98 of the Report] including that the criteria to identify 'Creamy Layer' amongst OBCs could well serve as a basis to decide the upper limit or as a criterion for identifying EBC families amongst the General category as well. Alternatively, the Commission recommended that BPL families from the General category, whose annual family income from all sources is below the taxable limit (as may be revised from time to time), may be identified as EBCs.



iii. It is submitted that in the context of determining the 'Creamy Layer' in terms of this Hon'ble Court's judgement in Indra Sawhney's case, the Government of India had, by an Office

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एन एन वेल्मुरी N. S. Velamuri
 Under Secretary
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Memorandum dated 08.09.1993, fixed an income limit of Rs. 1 lakh. This limit of Rs. 1 lakh has been raised from time to time on the basis of cost of living and at present, the same stands at Rs. 8 lakhs per annum. In the year 2016, the upper income limit for determination of Creamy Layer in respect of OBCs was Rs. 6 lakhs per annum. In order to maintain the same living standard in 2017, the same was adjusted to Rs 8 lakhs on the basis of the Consumer Price Index [hereinafter referred to as "CPI"]. As the CPI had increased from 197 (December, 2011) to 268 (March, 2016), the multiplier was 1.36. Therefore, in order to maintain the same standard of living, the income limit of Rs. 6 lakhs was multiplied with 1.36 to arrive at Rs. 8.16 lakhs which was rounded off to Rs. 8 lakhs.



- iv. The income limit for determining EWS also largely follows the economic criteria used for the determination of those persons who would be entitled to the benefit of OBC reservation [as suggested by the Major General

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24/6/2024
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B. The determination of EWS category does not suffer from over-inclusiveness [with reference to issue no. iii framed in terms of the Hon'ble Court's order dated 21.10.2021]

- i. It is, at the outset, submitted that any criteria based on a cut-off is likely to have some degree of assumption. The fixation of Rs. 8 lakhs as the income criteria is on the basis of the criteria already detailed above in this affidavit after taking into consideration the criteria for determining the Creamy Layer for OBCs. Further, as detailed above, even the Major General Sinho Commission had recognised that the very same test can also be applied for determining EWS. To provide further checks so as to ensure that only the needy get the benefit of Article 15(6) and Article 16(6) reservations, the Office Memorandum dated 17.01.2019 provides further exclusions as detailed above [which are not otherwise applicable for determination of Creamy Layer for OBCs].



N.S. Vardheshwar
26/10/2021

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श्री एन. वार्धेश्वरन
असिस्टेंट सॉसल अंड एम्पॉवरमेंट सचिव
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सरकार भारत, नई दिल्ली
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- ii. Under such circumstances, it is submitted that the determination of EWS category, in terms of the Office Memorandum dated 17.01.2019, is not over-inclusive and ought not to be interfered with.

C. The fixation of the same income limit for OBC and EWS category is not arbitrary [with reference to issue no. iv framed in terms of the Hon'ble Court's order dated 21.10.2021].

- i. It is submitted that the principle of fixation of Rs. 8 lakhs as a criteria for determination of EWS as also for determination of Creamy Layer in the OBC category is rational and in keeping with Articles 14, 15 and 16 of the Constitution.
- ii. The exercise conducted to determine the Creamy Layer for the purpose of OBC reservation would be equally applicable for determination of EWS category since the fundamental premise is that that if a person/his family have a substantial economic standing, he/she may not require the benefits of reservation at the cost of others. It is reiterated that even the Major General



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सामाजिक न्याय और अधिकारिता विभाग
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Govt. of India, New Delhi

Sinhu Commission had suggested that "extending the existing criteria to identify 'Creamy Layer' among OBCs could well serve as to decide the upper limit or as a criterion for identifying EBC families among GC too". In any event, the Office Memorandum dated 17.01.2019 provides further exclusionary criteria such as the following:

- a. He/she should not already be covered under the existing scheme of reservations for SC/ST/SCBC; and
- b. His/her family has gross annual income of below Rs. 8 lakh; and
- c. He/she along with his/her family must not own or possess any of the following assets:
 - (i) 5 acres of agricultural land and above, (ii) Residential flat of 1000 sq. ft. or above, (iii) Residential plot of 100 sq. yards and above in notified municipalities; and (iv) Residential plot of 200 sq. yards and above in areas other than the notified municipalities.



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26/10/2021

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New Delhi

iii. It is submitted that once the criteria as detailed above (for the purpose of determining EWS Category) does exist and the decision is taken on the basis of some material, including the suggestions of the Major General Sinho Commission, as to what cut-off criteria is to be provided is largely within the realm of the governmental policy.

D. The determination of Rs. 8 lakhs income limit is arrived at after taking into consideration the diverse economic factors in different states as also the diverse economic status between rural and urban areas. However, on account of the criteria being of a national character, Rs. 8 lakhs was fixed after taking into consideration the test for determination of 'Creamy Layer' [with reference to issue nos. v and vi framed in terms of the Hon'ble Court's order dated 21.10.2021].

i. It is submitted that while there would be diversity in economic factors between rural and urban areas as also between one state and another and between each region/district within one state and another region/district within the very same state, an approximation is necessarily required to



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be made in matters such as reservation. Further, even after the provision of reservation, with the efflux of time, economic situations of a district, region, state, may keep changing and, therefore, as long as the classification is based on some material, the same falls within the realm of policy and ought not to be interfered with. It is reiterated that in the present case, the basis for arriving at Rs. 8 lakhs is the fact that this is the criteria for determining the Creamy Layer for OBCs.

- ii. It is further submitted that, while there is a difference in purchasing power between rural and urban areas, in the sections which are intended to be under EWS reservation – namely students in higher educational institutions and for employment, there is constant migration from rural to urban areas. This factor of migration, especially for studies, would obviate the need for separate income criteria for rural and urban areas. Therefore, in view of the above, no



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26/10/2021

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separate criterion has been fixed for the rural and urban areas.

- iii. The determination has to be made on broad probabilities and it is impossible to achieve perfection/mathematical precision. Even if we take a city, the cost of living within the city varies and if we take a state, the cost of living within the state varies in different parts. In such circumstances, the broad criteria as applicable to the country alone has to be taken into consideration.

E. On the issue of asset exception in terms of the Office Memorandum dated 17.01.2019 [with reference to issue no. vii framed in terms of the Hon'ble Court's order dated 21.10.2021] it is submitted as follows:

- i. The basis for the asset exception contained in the Office Memorandum dated 17.01.2019 was the intention to ensure that the benefits of EWS reservation reaches only the needy. The same was initiated after due discussion which was



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24/10/2021
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approved by the Cabinet initially on 07.01.2019 and finally on 06.02.2019.

- ii. The reference to 'notified' municipalities in the Office Memorandum dated 17.01.2019 refers to all municipalities duly and legally constituted.
- iii. The distinction between metropolitan and non-metropolitan areas is taken into consideration as is evident from the reference to 'agricultural lands', 'municipalities' and 'residential flats'.

5. Without prejudice to the submissions made above, it is submitted that the writ petitions in question deserve to be dismissed at the outset. The Petitioners do not have the locus to raise the question with regard to the cut-off criteria of Rs. 8 lakhs or the eligibility criteria prescribed. It is not forthcoming anywhere in the petition as to whether the Petitioners fall within the criteria prescribed or as to where they stand in respect of the criteria prescribed in the Office Memorandum dated 17.01.2019 and how they are affected by it.

6. It is submitted that the entire attempt of the Petitioners is to deprive the eligible EWS candidates and to corner



N.S. Venkateshwar
 27/01/2021
 श्री एन. वेण्कटेश्वरन
 ज्येष्ठ अधिवक्ता
 न्यायिक मामलों और अधिवक्ता सचिवालय
 Ministry of Social Justice & Empowerment
 भारत सरकार, नई दिल्ली
 Govt. of India, New Delhi

the entire seats contrary to the Constitutional mandate and obligations.

7. It is submitted that the entire process of issuing the impugned notice is with a view to provide reservation to Economically Weaker Sections of the society. In order to ensure that the provision of reservation in terms of the 103rd Constitutional Amendment would not prove to the detriment of other General category students, the total number of seats available has been drastically increased by 56% in the last 6 years in respect of MBBS seats and 80% in the last 6 years in respect of PG seats. In the absence of the reservation as envisaged in the impugned notice, the EWS students are not getting the benefit of the reservation in spite of the increase in the number of seats.

8. It is further submitted that the question as to whether the reservation for EWS would violate the law laid down by this Hon'ble Court in *Indra Sawhney's* case on account of total reservation exceeding 50% is the subject matter of the reference to a Constitution Bench of this Hon'ble Court in the case of *Janhit Abhiyan v. Union of*

N. S. Venkatesh
Secretary *India and ors. [W.P. (C) No. 55/2019].* In any event, it is

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 Ute. Social Justice & Empowerment
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 Govt. of India, New Delhi



submitted that the judgement in cases *Indra Sawhney*, *M.R. Balaji v. State of Mysore*, etc. is in the context of Articles 15(4), 15(5) and 16(4).

9. I state that since 2019, the office memorandum fixing Rs. 8 lakhs has been applied and effectively implemented throughout the country in the matters of public employment and admissions in educational institutions. The Petitioner's vague assertions will have far reaching and serious consequences on several employment and admissions already done and in the pipeline. The Petitioner's grievance is imaginary and the apprehensions of arbitrariness is subjective and does not lay foundation for judicial review.

WHEREFORE, for the reasons stated above, this Hon'ble Court maybe pleased to dismiss the present Writ Petition and also reject any prayer for interim relief.



N.S. Varhatesh
26/10/2021
एन एस वैश्वदेवराव N. Venkateshwaran
अवर सचिव/Under Secretary
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भारत सरकार, नई दिल्ली
Govt. of India, New Delhi

VERIFICATION

Verified at New Delhi on this 26th day of October, 2021 that the contents of the above counter affidavit from paragraphs 1 to

are true and correct to the best of my knowledge, information and belief as derived from the records and nothing material is concealed therefore.

N.S. Verma
26/10/2021

I identify the Deponent who has Signed/Put T.I. in my presence

DEPONENT
एन.एस. वर्मा
अवर सचिव/Under Secretary
सामाजिक न्याय और अधिकाधिक भागीदारी
Mo. Social Justice & Empowerment
भारत सरकार, नई दिल्ली
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Certified that the above Named Deponent
identity by Shri/Smt. Self
Solemnly affirmed before me at Delhi
S. No. 2403
The contents of the affidavit which have
been read & explained to me are true and
correct [Signature] Notary

26 OCT 2021

ATTESTED
[Signature]
A.N. Singh, Adv.
Notary Public
Govt. of India, Delhi
Mob.: 9718139591, 7982539115

26 OCT 2021