

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 55/2019

IN THE MATTER OF:

JANHIT ABHIYAN

...PETITIONER

VS.

UNION OF INDIA

...RESPONDENT

**COUNTER AFFIDAVIT ON BEHALF OF UNION OF INDIA**

I, \_\_\_\_\_, S/o \_\_\_\_\_, age \_\_\_\_\_, resident of \_\_\_\_\_, currently working as \_\_\_\_\_, do hereby solemnly affirm and state on oath as under:

1. That I am working as \_\_\_\_\_ to the Ministry of Social Justice and Empowerment, Union of India and in my official capacity, I am conversant with the facts of the case based on knowledge derived from official records and as such I am competent and authorized to file this counter affidavit.
2. That the present Petition seeks to challenge the validity of the Constitution (103<sup>rd</sup> Amendment) Act, 2019 on the ground that it is contrary to the decision of this Hon'ble Court in ***Indra Sawhney vs. Union of India, 1992 Supp (3) SCC 217*** and violates the basic structure of the Constitution.

**I. BACKGROUND**

3. That the Constitution Amendment (103<sup>rd</sup>) Act' 2019 was necessitated to benefit the economically weaker sections of the society who were not covered within the existing schemes of reservation, which as per statistics, constituted a considerably large segment of the Indian population. In order to do justice across all the weaker sections of the society, it was therefore considered imperative that the

Constitution be appropriately amended to enable the State to extend various benefits, including reservations in educational institutions and public employment to the economically weaker sections of the society who are not covered by any of the existing schemes of reservation to enable them equal opportunity to get access to educational institutions and also in matters of employment.

4. That subsequent to the decision of this Hon'ble Court in *Indra Sawhney vs. Union of India, 1992 Supp (3) SCC 217*, the Government appointed an Expert Committee to recommend the criteria for exclusion of advanced sections of Socially and Educationally Backward classes (SEBCs), i.e. the creamy layer. The Committee in its report recommended that children of holders of constitutional posts, certain group of employees of Central Government, State Government, and Armed Forces, and agricultural land holders above a certain limit be excluded from the scheme of reservation. The Committee also recommended that persons having gross annual income of Rs. 1.00 Lakh and above or possessing wealth above the exemption limit as prescribed in the Wealth Tax Act for a period of 3 consecutive years shall be excluded from the benefit of reservation. The Government accepted the recommendation and accordingly issued an O.M. dated 08.09.1993 on the exclusion criteria. The income limit has been raised from time to time and at present is at Rs. 8.00 lakh per annum and the Wealth Tax Act is not in force at present.
  
5. That it is pertinent to state that a Commission for Economically Backward Classes was constituted, headed by Chairman Maj. Gen. (Retd.) S.R. Sinho, to suggest the criteria for identification for economically backward classes (EBC) as well as to recommend welfare measures and quantum of reservation in education and Government employment to the extent as appropriate.

6. That in its report dated 2.07.2010, the Commission recommended that all BPL (Below Poverty Line) families among general category as notified from time to time and also all families whose annual family income from all sources is below the taxable limit (as may be revised from time to time) should be identified as EBCs. Furthermore, keeping in view the differentiation adopted by this Hon'ble Court in *Indra Sawhney* between the “weaker sections of the people” and “backward classes of citizens”, resolved that indicators that were used for identification of socio-economic backward classes cannot be used for identification of economically backward classes, mainly because, at first place, classes are not homogenous, and secondly, they do not have a common criteria like that of castes, on the basis of which, economic backwardness can be evolved. In its Report, the Sinho Commission had, on the basis of NSSO (National Sample Survey Office) Estimates, concluded that BPL% was not just high among STs, SCs and OBCs but were also high amongst the General category, being 18.2%. The NSSO (2004-05) and NFHS (National Family Health Survey) (1998-99) data suggest that there is a need to make provisions similar to the backward classes for the economically weaker sections.
7. That further, the Sinho Commission in its Report had observed that given the existing legal premise that Backward Classes cannot be identified on the basis of economic criteria for the purpose of reservation in employment and admission in educational institutions, the States were unable to identify Economically Backward Classes for extending benefits of reservation till necessary Constitutional Amendment were made or the Supreme Court directs raising the ceiling for reservation beyond 50%. A copy of the Sinho Committee Report is attached herewith as **Annexure R-1**.
8. That in light of the aforestated background, it was deemed necessary that a constitutional amendment be brought in to promote social equality by providing

opportunities in higher education and employment to those who have been excluded by virtue of their economic status.

9. Article 46 of the Constitution provides for the welfare of the weaker sections and reservation for Backward classes. Article 46 reads as:

*“The State shall promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Castes and Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.”*

10. It is relevant to state that India has a population of about 135 crore people, of which a considerably large section comprises the lower middle class and those living below poverty line. The State has a duty as per the directive of Article 46 of the Constitution to promote the educational and economic interests of the weaker sections of the people.

11. Accordingly, in terms of the recommendations made, the Ministry of Social Justice and Empowerment introduced a bill, namely the Constitution (One Hundred and Twenty Fourth Amendment) Bill, 2019. The said Bill was passed by the Lok Sabha on 08.01.2019 and by the Rajya Sabha on 09.01.2019. The President gave his assent on 12.01.2019, whereafter it was notified by the Ministry of Law and Justice .

12. The Statement of objects and reasons appended to the Constitution (One Hundred and Twenty Fourth) Amendment Bill, 2019 is reproduced as under:

*“At present, the economically weaker sections of citizens have largely remained excluded from attending the higher educational institutions and public employment on account of their financial incapacity to compete with the persons who are economically more privileged. The benefits of existing reservations under clauses (4) and (5) of article*

*15 and clause (4) of article 16 are generally unavailable to them unless they meet the specific criteria of social and educational backwardness.*

*2. The directive principles of State policy contained in article 46 of the Constitution enjoins that the State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.*

*3. Vide the Constitution (Ninety-third Amendment) Act, 2005, clause (5) was inserted in article 15 of the Constitution which enables the State to make special provision for the advancement of any socially and educationally backward classes of citizens, or for the Scheduled Castes or the Scheduled Tribes, in relation to their admission in higher educational institutions. Similarly, clause (4) of article 16 of the Constitution enables the State to make special provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.*

*4. However, economically weaker sections of citizens were not eligible for the benefit of reservation. With a view to fulfil the mandate of article 46, and to ensure that economically weaker sections of citizens to get a fair chance of receiving higher education and participation in employment in the services of the State, it has been decided to amend the Constitution of India.*

*5. Accordingly, the Constitution (One Hundred and Twenty-fourth Amendment) Bill, 2019 provides for reservation for the economically weaker sections of society in higher educational institutions, including private institutions whether aided or unaided by the State*

*other than the minority educational institutions referred to in article 30 of the constitution and also provides for reservation for them in posts in initial appointment in services under the State.*

*6. The Bill seeks to achieve the above objects.*

## **II. CHALLENGE TO THE VALIDITY OF THE CONSTITUTION (103<sup>RD</sup> AMENDMENT ACT, 2019)**

13. That the present Petition seeks to challenge the validity of the Constitution (103<sup>rd</sup> Amendment) Act, 2019 on the ground that it is contrary to the decision of this Hon'ble Court in *Indra Sawhney* (supra) and violates the basic structure of the Constitution on the following grounds:

- i. Economic criteria cannot be the sole basis for reservation
- ii. Economic reservation cannot be limited to general categories
- iii. 50% ceiling limit cannot be breached
- iv. Imposing reservations on unaided institutions is manifestly arbitrary and violative of Article 19(1)(g)

14. *Ex facie*, notwithstanding anything stated by the Petitioner, in dealing with a constitutional amendment, none of the four aspects could be used to strike down the amendment as being violative of the basic structure of the constitution.

### **A. In Re: Violation of Basic Structure of the Constitution**

15. That 'basic structure' comprises many features like several pillars in a foundation, some of which were enumerated in the opinions rendered in *Kesavananda Bharati*, as cited below. The significance of these pillars is that if one of them is removed the entire edifice of the Constitution will fall. Hence, in judging a constitutional amendment, the question to be addressed is whether the said amendment would lead to a collapse of the edifice of the Constitution.

16. Merely affecting or impinging upon an article embodying a feature that is part of the basic structure is not sufficient to declare an amendment unconstitutional. To sustain a challenge against a constitutional amendment, it must be shown that the very identity of the constitution has been altered. In understanding what is to be avoided so as to preserve the basic structure, the words of Prof. Conrad as quoted by Khanna J. in ***Kesavananda Bharati*** are useful (at p. 769):

*"1431. The amending procedure is concerned with the statutory framework of which it forms part itself. It may effect changes in detail, remould the legal expression of underlying principles, adapt the system to the needs of changing conditions, be in the words of Calhoun 'the medicatrix (Sic) of the system', but should not touch its foundations."*

17. Thus, a mere amendment to an Article of the Constitution, even if embodying a basic feature, will not necessarily lead to a violation of the basic feature involved.

18. .

19. It is submitted that the newly inserted provisions of Article 15(6) and Article 16(6) are enabling provisions for advancement of the economically weaker sections and are in fact, in conformity with the principle of Reservation and Affirmative action, which are the touchstones of protection of equality of citizens and also the basis under Article 15(1), Article 15(2), Article 16(1) and 16(2). Therefore the impugned Amendment is in conformity with the constitutional principles and does not violate the basic structure doctrine.

**B. Economic Criteria ought to be a relevant criteria for Affirmative action under the Constitution:**

20. That, economic criteria has been held to be a relevant factor for determination of social and educational backwardness. Reference may be made to the decision of this Hon'ble Court in *Ashoka Kumar Thakur v. Union of India, (2008) 6 SCC I*, wherein it was held:

“4.7. Upon expiry of the time-limit, the criteria for identifying OBCs **should only be economic in nature because our ultimate aim is to establish a casteless and classless society.**

...

“24. ...

591. In *Vasanth Kumar [1985 Supp SCC 714]*,

*Chinnappa Reddy, J. departs from Desai, J.'s use of economic criteria as the sole means of identification.*

*Nevertheless, he recognises that “... **attainment of economic equality is the final and only solution to the besetting problems**”.*

...

597. *The National Commission for Backward Classes aside, I have set out to eventually install a system that*

*only takes cognizance of economic criteria. Using purely economic criteria would lighten the identification load, as ascertaining caste would no longer be required.... **If economic reservation were limited to a reasonable number, it could be upheld.***

598. *In addition to the problem of extending the benefit to too many, Reddy, J. cannot contemplate the idea of bestowing reservation on an economically poor Brahmin. “The idea that poor Brahmins may also be eligible for the benefits of Articles 15(4) and 16(4) is too*

*grotesque even to be considered.” He says that they are not “socially backward”, thus they should not receive the benefit. But can one call a Brahmin sweeper, poor by occupation, socially forward? To do so would be a stretch.*

**C. In Re: Economic backwardness cannot be used as the sole criteria for reservation and that 50% ceiling limit cannot be breached**

21. That at the outset, it is submitted that the conclusions drawn in *Indra Sawhney (supra)* are inapplicable to the present case as the said judgment was delivered while determining the constitutional validity of certain Office Memorandums issued by the Government of India in the year 1990, which provided for reservations for the backward classes of citizens in services under the State. The present challenge, however, is in relation to the validity of a constitutional amendment made wherein Article 15(6) and Article 16(6) have been inserted, which did not exist on the book when *Indra Sawhney* was delivered. *Indra Sawhney* and the findings therein can therefore have no application thereafter.

22. That in view of the above, this Hon’ble Court in *Indra Sawhney* did not have the opportunity to deliberate or hold in relation to the constitutional amendment, whereby the new criteria of ‘economically weaker sections of the society’ has been introduced. The decision was therefore purely on the anvil of the yardsticks available under Article 16 (4) and Article 16 (1), which are distinct from Article 15(6) and Article 16 (6) and will have to, therefore, be tested independently.

23. Furthermore, Article 16 (4) and Article 16 (6) are distinct as Article 16 (4) deals with backwardness whilst Article 16(6) deals with economically weaker sections of the society.

24. That in order to provide reservation to Economically Weaker Sections without disturbing the existing reservations for SCs, STs and OBCs, the constitutional

amendment has provided for a maximum of 10% reservation for Economically Weaker Sections in addition to the existing reservations. The limit of 50% is only applicable to reservation made under Article 15(4), 15(5) and 16(4) and does not apply to Article 15(6).

25. That, reference must be made to the decision of this Hon'ble Court in *S.V. Joshi vs. State of Karnataka*, (2012) 7 SCC 41, where the question that arose for deliberation 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, being over 50%, was valid or not. Holding for the bench, Kapadia J. ordered:

*“4. Subsequent to the filing of the above writ petitions, Articles 15 and 16 of the Constitution have been amended vide the Constitution (Ninety-third Amendment) Act, 2005, and the Constitution (Eighty-first Amendment) Act, 2000, respectively, which Amendment Acts have been the subject-matter of subsequent decisions of this Court in M. Nagaraj v. Union of India [(2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013] and Ashoka Kumar Thakur v. Union of India [(2008) 6 SCC 1] in which, inter alia, it has been laid down that if a State wants to exceed fifty per cent reservation, then it is required to base its decision on the quantifiable data. In the present case, this exercise has not been done.*

*5. Therefore, keeping in mind the said parameter, we direct the State to place the quantifiable data before the Tamil Nadu State Backward Classes Commission and, on the basis of such quantifiable data amongst other things, the Commission will decide the quantum of reservation. We are informed by the*

*learned Solicitor General that such data in the form of reports, which are subsequently prepared, is already available.”*

26. That, as has been stated hereinabove, several Committees have been set up wherein quantifiable data has been collected highlighting the need for having reservation for the economically weaker sections of the society. Accordingly, the Constitutional amendments were necessitated for providing opportunities in higher education and employment to those who have been excluded by virtue of their economic status.

**D. In Re: Imposing reservations on unaided institutions is manifestly arbitrary:**

27. That the present Petitioner, not being an unaided institution, does not have locus to file the present Petition or to challenge the constitutional validity of Article 15 (6) of the Constitution.

28. That without prejudice to the above, it is submitted that access to higher education, including professional education to students belonging to weaker segments of the society is a matter of major concern and the number of seats available in aided or Government maintained institutions, is limited in comparison to those in private unaided institutions. Furthermore, Article 46 of the Directive Principles of State Policy commands that the State should promote with special care the educational and economic interests of the weaker section of the population and protect them from social injustice.

29. That in the Country's higher educational system, the private unaided institutions play an important role providing education to over 1.34 Crore students in various programs. It is therefore essential that the socially and economically weaker section gets access to these facilities as mandated in the Constitution.

30. That the Constitutional (103<sup>rd</sup>) Amendment Act, 2019 does not violate Article 19(1)(g) of the Constitution read with Article 19(6) as the State is permitted to

make any law imposing reasonable restrictions on the exercise of the right in Article 19(1) (g) in the interest of the general public.

31. That in view of the above, it is submitted that the Constitution (103<sup>rd</sup> Amendment) Act, 2019 as notified in the Extraordinary Gazette of India is a valid legislation, is not contrary to *Indra Sawhney* and does not violate the basic structure of the Constitution.

32. That furthermore, the prayer of the Petitioner, seeking an Interim stay on the operation of the Constitution (103<sup>rd</sup> Amendment) Act, 2019 is contrary to the well settled principle that in matters pertaining to constitutional validity of any legislation, the Courts should be reluctant to pass interim orders to make the operation of that statute ineffective. Reference must be made to the decision of this Hon'ble Court in *Health for Millions v. Union of India, (2014) 14 SCC 496*, wherein it was held

*“13. We have considered the respective arguments and submissions and carefully perused the record. Since the matter is pending adjudication before the High Court, we do not want to express any opinion on the merits and demerits of the writ petitioner’s challenge to the constitutional validity of the 2003 Act and the 2004 Rules as amended in 2005 but have no hesitation in holding that the High Court was not at all justified in passing the impugned orders ignoring the well-settled proposition of law that in matters involving challenge to the constitutionality of any legislation enacted by the legislature [500] and the rules framed thereunder the courts should be extremely loath to pass an interim order. At the time of final adjudication, the court can strike down the statute if it is found to be ultra vires the Constitution. Likewise, the rules can be quashed if the same are found to be unconstitutional or ultra vires the provisions of the Act.*

*However, the operation of the statutory provisions cannot be stultified by granting an interim order except when the court is fully convinced that the particular enactment or the rules are ex facie unconstitutional and the factors, like balance of convenience, irreparable injury and public interest are in favour of passing an interim order.”*

33. That in view of the foregoing submissions, the Petition is without any merit, and must accordingly fail and be dismissed.

**DEPONENT**

**VERIFICATION:**