

IN THE SUPREME COURT OF INDIA
[CIVIL ORIGINAL WRIT JURISDICTION]

IA No. _____/2007 in
WRIT PETITION (CIVIL) NO.29 OF 2007

IN THE MATTER OF:

Youth for Equality

AIIMS Delhi Chapter, New Delhi

...PETITIONERS

VERSUS

Union of India

...RESPONDENTS

COUNTER AFFIDAVIT TO THE APPLICATION FOR STAY

I, Sunil Kumar S/o Dr. A.M. Kurup, Age 52 years, working as Joint Secretary and being the Authorized Signatory on behalf of the Union of India do hereby solemnly affirm and say as follows:

- (1) That I am the Authorized Signatory of the above named Respondent, and I am duly authorized and competent to make and affirm the instant Affidavit for and on behalf of the said Respondent.
- (2) That I have read the application of stay filed by the Petitioner herein and have understood the contents thereof. A detailed Counter-Affidavit in reply to the main petition in the Writ Petition No.29 of 2007 is being shortly filed by the Govt. of India. In addition, detailed Counter-Affidavits on the same subject have been filed in respect of the following two Writ Petitions:
 - (i) Writ Petition (Civil) No.269 of 2006
Mr. Shiv Khera Vs. Union of India
 - (ii) Writ Petition (Civil) No.265 of 2006
Mr. Ashok Kumar Thakur Vs. Union of India

The Government is filing its detailed reply in the following matter on February 19, 2007:

(iii) Writ Petition (Civil) No.598 of 2006

Resident Doctors Association Vs. Union of India

It is respectfully submitted that all the above three Writ Petitions pertain to the same subject and issues raised therein are the same/ similar. Each and every contention raised by the present petitioner stands negated by this Hon'ble Court while dealing with similar contentions in *Indra Sawhney vs. Union of India*, 1992 Supp (3) SCC 217 and in various other judgements of this Hon'ble Court referred to in the Counter-Affidavits in the WPs mentioned in para (2) above. These contentions include –

- a) the argument that reservation, whether in employment or education violates the basic structure of the Constitution and the basic feature of equality;
- b) the choice of reservation policy to bring about equality is not appropriate;
- c) the use of caste for identification of Socially and Educationally Backward Classes or Other Backward Classes (SEdBC/OBC) is unconstitutional;
- d) reservation is anti-merit;
- e) estimation of the population proportion of SEdBC/OBC is flawed by the choice of data derived from the Census of 1931 for making projections and thus there is inadequacy of data for SEdBC/OBC;
- f) determination/ classification as to who belongs to SEdBC/OBC has not been done properly
- g) reservation policy is disintegrative and against the unity and integrity of the nation.

All these contentions have been considered in detail by this Hon'ble Court in its various judgments from the case of *Minor P. Rajendran* (1968) onwards and finally in the *Indra Sawhney* case and they have been rejected by this Hon'ble Court, establishing that -

- (a) Reservation, whether in employment or in education, is not violative of the basic structure or Equality code;
- (b) Choice of reservation is not inappropriate and is justified;
- (c) There is nothing wrong or unconstitutional in specifying, in terms of units of castes, those who have been identified as Socially and Educationally Backward Classes on the basis of criteria of social and educational backwardness;
- (d) Reservation is not anti-merit;
- (e) In the absence of caste data after 1931, there was no alternative but to project the population proportion of SEdBC/OBC from the next best source, i.e. latest available Census 1931; fault-finding in the data-base is an exercise of taking pot-shots and the methodology followed for identifying the various castes listed as SEdBC/OBC by the Govt. of India is valid;
- (f) Determination/classification as to who belongs to SEdBC/OBC as made by Government of India is valid and, in any case if anyone is of the opinion that any caste included in the list is not really socially and educationally backward, the Supreme Court laid down a mechanism, which has been given statutory shape consisting of the National and State Backward Classes Commissions to which complaints of over-inclusion can be made by anyone and whose statutory advice is ordinarily binding on the respective governments, with appeal to the Supreme Court in case of dissatisfaction with the Commission's advice or Government Order;
- (g) Reservation Policy is not disintegrative and is not against the unity and integrity of the nation; on the contrary, reservation policy is a means of integrating the society disintegrated over the centuries by the age-old caste system, and that policy thus strengthens the unity and integrity of the nation.

In the Respondent's Counter-Affidavits in the WPs referred to in para (2) above, the Respondent has brought out the various judgments in which the Supreme Court has rejected the various contentions, made in those writ petitions in various cases including the Indra Sawhney case, which contentions have again been raised in the present petition, stay petition and the writ petitions referred to in para (2) above, and has submitted quotations from many of those judgments, and particularly from the judgement in the Indra Sawhney case. The Respondent prays that these Counter-Affidavits may kindly be read in connection with and as a part of the rely to the present Stay application and the contents thereof are not being repeated for the sake of brevity.

- (3) The contents of the application are set traversed in seriatim. Nothing contained therein may be deemed to be admitted, save where specifically stated to be so admitted:

Para 1: That the stay application filed by the Petitioner praying for the stay on the operation of Constitution (Ninety Third Amendment) Act, 2005 and Central Educational Institutions (Reservation in Admissions) Act, 2006 is not maintainable in law. It is denied that the said Constitutional Amendment and Act in any way alter the basic structure of the Constitution or that the Parliament has overreached its powers under Article 368 of the Constitution in the said case. As submitted in the earlier Counter-Affidavits in the Writ Petitions referred to in para (2) above, the Amendment is not only a valid and justified exercise of the amending power of Parliament, but also does not, in any manner, violate the basic structure of the Constitution. In fact, the insertion of sub clause (5) in Article 15 lends strength to the basic structure of the Constitution by giving further content and strength to the rights conferred by Articles 14, 15, 16, 17, 19, 21 of the Constitution and to the mandate contained in the Directive Principles of State

Policy, in particular, in Articles 38, 39, 41 and 46. The Amendment Act maintains the structure of Article 15 intact. As has been elaborately submitted and in the three Counter-Affidavits referred to in para (2) above, the said Amendment and the legislation thereunder are in fact intended to strengthen the basic structure of the Constitution by providing meaningful equality of educational opportunity by eliminating the existing inequality. It has been submitted in the Counter-Affidavits in the WPs referred to in para (2) above that the present batch of petitions is founded on a premise that by the Amendment Act, Parliament has violated one of the features forming part of the basic structure of the constitution, viz., the right to equality. Underlying this assertion is an attack by the petitioner on the very policy of reservation. On both counts, the petition is misconceived and baseless. The petition proceeds on a premise of formal equality being the content of Article 14, a premise which has been rejected by this Hon'ble Court on several occasions. This Hon'ble Court has emphasized that Equality is a positive right and requires the State to minimize the existing inequalities and to treat unequals or the underprivileged with special care as envisaged in the Constitution. (Please see *Indra Sawhney vs. Union of India*, 1992 Supp (3) SCC 217; *St. Stephens College vs. University of Delhi*, (1992) 1 SCC 558). The petition turns a blind eye to widespread discrimination against and lack of access to education and employment to the weaker sections which form the major part of the population of the country. Given the inequities and inequality of status and opportunity marring Indian society and the ground reality of widespread disparity in access to education and employment for the SCs and STs and for SE/BC/OBCs, the scheme envisaged under Articles 15(4), 15(5), 16(4), 16(4A) and 16(4B) and Article 46 and Part XVI of the

Constitution is designed to reduce and eliminate inequality including Social inequality and promote Equality including Social Equality which clearly and incontrovertibly forms part of the basic structure of the Constitution and is part and parcel of the Equality Code. Accordingly, not providing for reservation for SC and ST and for SE_{BC}/OBC will be a violation of the Basic Structure of the Constitution. It is therefore a mandate and not something merely permissible at the option of the State. Reservation under these circumstances being mandatory on the State, as part of the Basic Structure of the Constitution, Clause (5) of Article 15 was inserted through the 93rd Amendment to enable and equip the State to implement the said Mandate. That the non-implementation and delay in implementation of Reservation for SE_{BC}/OBC is unconscionable comes out in the following observations of the Supreme Court in the Mandal Judgement:-

"More than forty years have passed by. So far, no reservation could be made in favour of O.B.Cs for one or the other reason in Central Services though in many States, such reservations are in force".

More than forty years then has now become more than fifty five years in the context of Reservation in Education. The collateral attack by the petitioner on the policy of reservations, which as mentioned above is part of the Basic structure of the Constitution, is entirely mis-conceived. This Hon'ble Court has upheld the policy of reservation in a series of judgments, for well over 50 years, and indeed, Articles 15(4), 16(4), 16(4A) and 16 (4B), have all passed scrutiny by this Hon'ble Court on the touchstone of the principle of basic structure and the amending power of the Parliament. The Amendment and legislation thereunder have been enacted in order to open avenues of education including higher, professional and technical education to SCs and STs who

have been denied their right in this regard, alleviated partly by Executive Orders already existing, which provide them reservation in Government institutions and which are now brought within the ambit of statute. They are enacted also to open avenues of education similarly for SEdBCs/OBCs who have been denied till now their Constitutional right for such opportunity in education including Central Educational Institutions though provided in a number of States in State institutions. Without such reservation, the SC, ST and SEdBC/OBC will not be able to secure a fair share of this opportunity. While reservation for SC and ST has not been seriously contested with reference to the basic structure, reservation for SEdBC/OBC also does not abrogate or abridge the basic structure of the Constitution as has been settled in a number of judgments of this Hon'ble Court including that in *Indra Sawhney*.

Para 2: The petitioners allege that the impugned 93rd Amendment is in the "teeth" of the *Indra Sawhney* judgement, in as much as "Creamy Layer" has not been excluded, while making provision for reservation for the OBC. This criticism is misplaced since clause (5) of Article 15 does not speak of reservation as such, but provides for any special provision by law related to their admission to educational institutions. The apparent intention of the petitioner, seems to be related to the non-exclusion of "Creamy Layer" from reservation for OBC in the Central Educational Institutions (Reservation in Admission) Act, 2006. Regarding this, Respondent's Counter Affidavit in W.P. No.265 of 2006 has clearly brought out how the Hon'ble Supreme Court's direction in *Indra Sawhney* in 1992 regarding Socially Advanced Persons/ Sections (SAP/S) referred to as "Creamy Layer" among SEdBC/OBC, has been fully implemented by the Government of India in 1993 while implementing reservation for SEdBCs in

Central employment. It is respectfully submitted that the issue of SAP/S referred to as 'creamy layer' in the context of reservation in educational institutions is different from the application of this concept in the matter of employment. In this Respondent's Counter Affidavit in W.P. No.265 of 2006, it has been pointed out that the application of this concept in the context of reservation in educational institutions may deprive the SEdBC/OBC of the full benefit of 27% reservation. As also submitted in this Respondent's Counter-Affidavit in Writ Petition No.598 of 2006, there are certain conceptual issues that need to be considered with regard to this concept in the educational context. For example, the first entrants in the field of modern higher education are pioneers who become role models and reference points for other members of the family, community, etc. They become leaders of progress for the community/ castes/ constellation of similarly placed castes. If they are nipped away, this advantage is lost for the entire caste/ community/ constellation of similarly placed castes which are in the process of educational advancement. This advantage was available without any obstruction to those who for long had what *Indra Sawhney* (per Justice Sawant) refers to as "cent per cent reservation in practice in all fields, in favour of the high caste(s), to the total exclusion of others" which "was a purely caste-based and class-based reservation" during their period of avilment of and advancement through modern education introduced and provided by the British Rulers in the 19th century. This facilitated their progress to their present level of advancement and eminence in various fields. It will be deleterious to the educational advancement of the castes/communities which are backward at present, if they are denied this natural advantage by excluding any section of them as "Creamy Layer" in education.

This reservation does not enable a member belonging to SEBCs/OBCs to the benefit of reservation without having qualified with reference to the criteria stipulated, which in no event can be less than that prescribed for SCs/STs. In fact, the degree of latitude available and possible for prescribing qualifications for public employment is much wider, and hence, incomparable to the differential between qualifying marks for general category and that of SCs/STs/OBCs. After admission, the candidate, to whatever stream he or she may belong, has to perform rigorously in competition with all others to complete the course of advanced education. Once admitted, there is no scope for any further relaxation. What is stated in this paragraph of the Petition does not provide any justified grounds to support its plea to deny reservation to the SEBC/OBC or to stay the 93rd Amendment or the operation of Central Educational Institutions (Reservation in Admission) Act, 2006, which has been notified. The petitioner has referred vaguely to "the specific direction of this Hon'ble Court to adhere to the provisions of Article 340" and Section 11 of the NCBC Act, 1993. The Government of India set up the Second Backward Classes Commission commonly known as the Mandal Commission under Article 340. This has been taken note of by this Hon'ble Court in *Indra Sawhney*, in which the contents of the Report of the Commission have been analysed chapter-wise and discussed in detail. It has upheld the criteria evolved by Mandal Commission for defining/ identifying the OBC and the decision of Government of India taken thereafter in 1990. As submitted in the Counter-Affidavit in W.P. No.265 of 2006, *Indira Sawhney* upheld specifically the principle laid down by the above O.M. of Government of India on the basis of which the first phase listing of castes and communities comprising SEBC/OBC was done. It has been explained in that Counter-Affidavit how

subsequent additions were made on the basis of the principles upheld by the Hon'ble Supreme Court and on the basis of the statutory advices of the National Commission for Backward Classes (NCBC) set up by the Government of India in accordance with the Supreme Court's direction. It has further been submitted in that Counter-Affidavit that NCBC's procedure, of which particulars are given therein, was in accordance with the principles of natural justice and transparency. There is absolutely no basis to allege that any specific directions of the Supreme Court have not been followed. Whatever has been done to promote the legitimate interest of the SEdBC/OBC including the impugned Amendment and legislation notified thereunder are entirely in keeping with Article 340 as well as other relevant Articles of the Constitution. It is not correct to allege that Section 11 of the NCBC Act has not been followed. The Act, including Section 11 and other material provisions, was enacted in order to create a statutory and independent machinery to implement the specific directions of this Hon'ble Court in *Indira Sawhney*. In accordance with Section 11 of the NCBC Act, the National Commission for Backward Classes (NCBC) was entrusted with the task of revising the Lists of OBCs. The Commission undertook the exercise in 2003 and advised the Government not to delete any of the castes/communities notified in the Central List. The Government accepted the advice given by NCBC. The limitations on the scope for revision at this stage when reservation for SEdBC/OBC at the Central level in employment is of very recent origin and reservation for them in education is yet to commence, require to be appreciated. However, as submitted in the Counter-Affidavits in the WPs referred to above, there is no need for anyone to wait for any revision or review if such person has grounds to believe that the

inclusion of any caste in the List of Backward Classes is not justified on the basis of criteria of social and educational backwardness. As submitted in those Counter-Affidavits, the Hon'ble Supreme Court has discussed this aspect in detail and issued directions for creation of a permanent machinery for this and similar purposes; this machinery has been promptly created by Statute by the Parliament and Government of India in the shape of NCBC and similar Commissions, some by Statute and some by Executive Orders, have been created in the States. The Supreme Court's direction in this regard is reproduced in extenso in the Counter-Affidavit in W.P. 265 of 2006 which brings out the precise remedy available for such complaints. All that such persons have to do is to move the NCBC in the case of complaints of wrong inclusion or, as termed by this Hon'ble Court in Indra Sawhney, 'over-inclusion' in the Central Lists, and the appropriate SCBC in respect of complaints of wrong inclusion or over inclusion in any State List. It is obvious from this and from the detailed submissions in the Counter-Affidavits in the WPs referred to in para 2 above, that the allegation that the identification and listing of SEdBC/OBC is without adequately ascertaining the existence of backwardness and inadequacy of opportunity/ representation is baseless. It is not correct to allege that the Respondent has come up with the 93rd Amendment which was enacted by the Parliament inserting Clause (5) in Article 15 "for inexplicable reasons". The Statement of Objects and Reasons of the Amendment has been brought out in full in the aforesaid Counter-Affidavits clearly explaining the Constitutional justification and Constitutional imperative of that Amendment. It can neither be called illegal nor invalid. The constitutionality of this has been fully set out in the submissions in the aforesaid Counter-Affidavits in terms of the Constitutional

provisions and the various judgements of this Hon'ble Court including, particularly Indra Sawhney. The petitioner has cited certain reports in this para in support of WP's contentions. There have been efforts on the part of both the National Commissions and some State Commissions and other bodies and individuals working for the rights of SEdBC/OBC to get such data included in post-Independence Censuses. This Hon'ble Court was apprised of the position and upheld the various State Government Orders and the Union Government's Orders listing and providing reservation for SEdBC/OBC, pursuant to the respective State Commissions/ Committees' Reports and the Mandal Commission's Report. Please see Minor P Rajendran v. State of Madras ((1968) 2 SCR 786); State of AP vs. USV Balaram ((1972) 1 SCC 660; and Indra Sawhney vs. Union of India (1992 Supp (3) SCC 217). The allegations made in this Para provide no justifiable ground for staying the operation of the impugned Act notified in January, 2007 or to pass other orders as prayed in this Stay Petition.

Para3 : It is denied that this significant national issue is "controversial", as alleged. All controversies in this regard on various issues raised in various writ petitions have all been settled in favour of the Constitutional validity of identification of SEdBC/OBC, identified on the basis of criteria of social and educational backwardness, and their listing in terms of castes/ units, and the provision of reservation for them by this Hon'ble Court in various judgments including finally Indra Sawhney as mentioned in Para (2) above and as detailed in the Counter-Affidavits in WPs referred to in that para.

Paras 4 & 5 : It is misleading and incorrect on the part of the petitioner to say that it was agreed and understood that the Respondent would not take any steps towards implementing reservation for the

SEdBC/OBC without the leave of this Hon'ble Court. It is denied that any directions of the Hon'ble Court in its order dated 31.5.2006, which is apparently referred to by the petitioner as the directions of 29.5.2006, has been flouted. The direction issued on the said date contained the observation that any action taken by the Government in respect of the impugned policy will be subject to the outcome of the present proceedings/ or any proceeding which will be filed relating to the issue. This normal process of judicial scrutiny of any Act or Order of the Government has been misrepresented by the petitioner as a direction or agreement not to proceed further. The actions of the Executive and Legislature in this regard are within their respective jurisdictions and competence. Therefore, to say that the Respondent has taken steps "to over-reach this Hon'ble Court" is, it is submitted, mischievous and, as explained above, false. It is not correct to say that the required information as directed has not been filed. All the information relevant to the matter and those specifically asked for by this Hon'ble Court have already been filed in the Counter-Affidavits in the three WPs referred to in para (2) above.

Para 6: It is incorrect to describe the present action of the Parliament and Government of India "as motivated by the political agenda in view of the forthcoming election in the State of Uttar Pradesh", as alleged in this Para. As submitted in the Counter-Affidavits in the WPs referred to in para (2) above, the policy of reservation is based on the historical factum and social factum of the deprivation of SC, ST and SEdBC/OBC, which the Mandal judgment and other judgments of this Hon'ble Court have taken note of, in the interests of equity and justice. It is not possible to allow a situation in which the bulk of the seats are out of bounds for the vast majority of India who belong to the weaker sections of our society. Such a situation goes against the basic constitutional

feature of equality and, by denying the nation the benefit of the full contribution of this vast majority, it is also seriously injurious to the optimal progress of the nation as a whole. If the legitimate aspirations of these three classes for due share in the avenues for advancement are not satisfactorily addressed, it would affect rule of law, law and order and the realization of country's full potential. It is within the competence and jurisdiction of the Parliament to take note of this and take remedial measures. This is what it has done and such response is indeed a feature of a vibrant democracy, which the Petitioner has chosen to ignore and caricature as motivated by the forthcoming elections in U.P., to give a mischievous twist of misinterpretation of the action taken in the light of Constitutional mandate. In the Counter-Affidavit in W.P. No.598 of 2006 referred to in para (2) above, the Respondent has brought out the beginnings of reservation long before Independence. This history has also been well described by this Hon'ble Court in *Indra Sawhney*. What the Legislature and Executive have done, is neither pre-emptive nor in haste. What has been done by them is only what the Constitution mandate requires them to do. As emerges from this Hon'ble Court's observation in *Indra Sawhney* the time lag which has already occurred is unconscionable, and therefore, it is none too early.

Para 7: The Act protects the number of non-reserved category seats from any diminution while introducing reservation for SE/BC/OBC – reservation for SC and ST being already in existence under Executive Orders and now only being given Statutory shape. In view of this, there is no justification for the writ petitioners' prayer for a stay either on the impugned amendment or the impugned Act recently notified. The writ petitioners, while pleading for stay to protect the rights of the

non-reserved categories, which are not touched by the legislation that has been passed, are losing sight of the rights of SC, ST, SEdBC/OBC, who form the bulk of the population of India and whose rights have suffered by operation of the caste system. Of these three, reservation already exists in Central Educational Institutions for SCs and STs under Executive Orders. These existing rights will be hampered by any stay on this Act. It is a well-recognized fact that SCs are the victims of the grossest form of discrimination, namely "untouchability" and all its attendant consequences in all fields as part of the age-old caste system. It is also well known that STs are the sufferers of tribal remoteness and isolation and its attendant consequences including severe discrimination. Yet the writ petitioners want a stay of an Act which, so far as SC and ST are concerned, only gives statutory shape and continuance to the reservation already in existence for them in Central Educational Institutions. Coming to the SEdBCs/OBCs, it has been established by the reports of the numerous Commissions in different States and the Mandal Commission that they are also the victims of the caste system and its attendant discriminations in different fields including education. This correct view and assessment has been upheld by this Hon'ble Court in numerous judgments including its judgment in Indra Sawhney case. The SEdBC/OBC have not had till now reservation in admission to Central Educational Institutions. This state of affairs requires to be remedied. It is reiterated that the non-reserved category will not have any loss on this account since the Act ensures that the number of unreserved seats are not reduced while providing reservation for SEdBCs/OBCs. As explained in the foregoing paras and para-wise remarks, and as submitted in the Counter-Affidavits in the earlier three writ petitions referred to in para (2) above, the Respondent

and the SC, ST and the SE_{ED}BC/OBC, whose legitimate rights the Respondent has sought to promote in accordance with the Constitution, at the same time without diminishing the number of unreserved seats, have a very strong prima facie case in the light of the Constitutional mandate and the Constitutional scheme and the various judgements of the Hon'ble Supreme Court including its judgement in Indra Sawhney case. As submitted in the foregoing para-wise remarks, no prejudice will be caused to the applicants or to the unreserved category by the denial of stay, while irreparable and irreversible loss will be caused to the SC, ST and the SE_{ED}BC/OBC if the process is delayed which will be over and above the delay which has been deplored by this Hon'ble Court in the Indra Sawhney judgement, of which extracts have been submitted above. It is further submitted that the admission process has got a long time schedule and many institutions have already started taking preparatory action like invitation of applications in accordance with the time schedule and any interruption in this may cause loss of another year which will be the 57th year of denial after the Constitution in respect of SE_{ED}BC/OBC and interruption of what the SC and ST are already having under Executive Orders. Any stay on the operation of Central Educational Institutions (Reservations in Admission) Act, 2006 will result in irreparable loss as the admission process in various central institutions/ institutions have already started and another one academic year will be lost, in case a stay is granted. It is denied that the implementation of the legislation will any way affect the rights of the students belonging to non reserved categories as the seats for OBCs being provided in the central institutions are in addition and not by way of reduction in the available non-reserved seats. It is submitted that the balance of convenience is in allowing the process of implementation of the

Central Educational Institutions (Reservation in Admission) Act, 2006 to proceed without interruption, and irreparable and irreversible loss will be caused to SEdBC/OBC and also to the SC and ST in case operation of the Act is stayed.

- (4) It is, therefore, respectfully prayed that both the prayers for staying the operation of notification, referred to in the petition, of the Central Educational Institutions (Reservations in Admission) Act, 2006 and for other/further orders may be rejected.

DEPONENT

VERIFICATION:

Verified that the contents of the counter affidavit as contained in paragraph 1 are true to my knowledge and in paragraphs 2 - 4 are based on the records of the case maintained by the Ministry in the ordinary course of its activities, and believed by me to be correct. No part of the affidavit is false and nothing has been concealed or mis-stated therein.

DEPONENT

Place: NEW DELHI

DATED: February 19, 2007

IN THE SUPREME COURT OF INDIA
[CIVIL ORIGINAL WRIT JURISDICTION]

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NEW DELHI

DATED: Feb 19, 2007

Through Smt. Sushma Suri

Advocate on Record

Union of India

In fact the differential, that is possible, between qualifying marks for general category and that of SCs and STs or SEdBCs/OBCs is much narrower than and hence incomparable to the degree of latitude available and possible in prescribing qualifications for public employment.