HON'BLE THE CHIEF JUSTICE SRI MADAN B. LOKUR

AND

THE HON'BLE SRI JUSTICE SANJAY KUMAR

PIL Nos.1, 22 and 56 of 2012

28-05-2012

Between

R. Krishnaiah

And

Union of India, Represented by its Secretary,

General Administration

Department, New Delhi & others. ….Respondents

Cases referred

1. 2004 (5) ALT 634

2. (2008) 6 SCC 1

3. AIR 1969 SC 1

4. 1994 Supp (1) SCC 324

5. AIR 1976 SC 490

6. AIR 2005 SC 162

7. (1974) 1 SCC 19

8. 2010 (2) ALT 357

9. AIR 1966 SC 1942

10. AIR 1991 SC 1933

11. AIR 1958 Kerala 290

12. AIR 1955 SC 549

13. 1995 (2) ALT 1

14. AIR 1993 SC 477

15. See State of Assam v. Basanta Kumar Das, (1973) 1 SCC 461 and D.P. Das v.

Union of India, (2011) 8 SCC 115

ORDER: (Per Hon'ble the Chief Justice Sri Madan B. Lokur)

The challenge in this batch of writ petitions is to two Office Memoranda, both dated 22.12.2011. There is also challenge to a Resolution dated 22.12.2011 which relates to one of the Office Memoranda.

2. The first Office Memorandum (for short the first OM) and the accompanying Resolution concern the Central Educational Institutions (Reservation in Admission) Act, 2006 (hereinafter referred to as 'the CEI Act'). The first OM and the Resolution carve out, with effect from 1.1.2012, a sub-quota of 4.5% for socially and educationally backward class of citizens belonging to minorities, for reservation in admission in some central educational institutions. The carving out is from the 27% reservation for Other Backward Classes (OBCs) who are entitled to reservation in admission to central educational institutions. In other words, OBCs having 27% reservation have been broken up into two segments: one segment of 22.5% reservation for OBCs and the second or balance segment of 4.5% reservation for socially and educationally backward class citizens belonging to minorities.

3. The grievance of the petitioners relates to the following paragraph of the first OM and the Resolution:

From the first OM:

"The Central Government has decided to carve out, with effect from the 1st January, 2012 a sub-quota of 4.5 per cent (four point five) for socially and educationally backward classes of citizens belonging to minorities, as defined in clause (c) of Section 2 of the National Commission for Minorities Act, 1992 from within the 27 per cent reservation for Other Backward Classes as notified by the Government in accordance with O.M.No.36012/22/93-Estt. (SCT), dated 8.9.1993 from time to time, referred in the preceding paragraph subject to the same conditions and restrictions mentioned therein."

From the Resolution:

"Now therefore, the Government of India in the Ministry of Human Resource Development hereby clarifies that reservations in admission to the educational institutions as elucidated in its earlier Resolution would continue to apply subject to a sub-quota of 4.5 per cent (four point five) for minorities, as defined in clause (c) of Section 2 of the National Commission for Minorities Act, 1992 out of the 27 per cent reservation for Other Backward Classes, in accordance with the Office Memorandum as modified by those Ministries referred to in the third paragraph from time to time, as applicable for the purposes of implementing reservation in admission to Central Educational Institutions as defined in the CEI Act, 2006."

4. The second Office Memorandum (for short the second OM) carves out a similar sub-quota of 4.5% reservation for minorities in appointments and posts under the Government of India. The paragraph objected to by the petitioners reads as follows:

"The Government of India had set up the National Commission for Religious and Linguistic Minorities to suggest criteria for the identification of the socially and economically backward sections amongst Religious and Linguistic Minorities and to recommend measures for their welfare, including reservation in Government employment. The Commission submitted its report to the Government on 10th May, 2007, wherein it had, inter alia, recommended creation of a sub-quota for minorities from within the reservation of 27% available to OBCs, in Government employment.

The Government have carefully considered the above recommendation and it has been decided to carve out a sub-quota of 4.5% for minorities, as defined under Section 2(c) of the

National Commission for Minorities Act, 1992, from within the 27% reservation for OBCs as notified by the aforesaid O.M. The castes/communities of the said minorities which are included in the Central list of OBCs, notified State-wise from time to time by the Ministry of Social Justice and Empowerment, shall be covered by the said sub-quota."

5. The principal contention of the petitioners is that the sub-quota reservation is minority religion-based and therefore it is in violation of Article 15(1) of the Constitution with regard to the first OM and Article 16(2) of the Constitution with regard to the second OM. It is contended that the sub-quota reservation is not saved by Article 15(5) of the Constitution with regard to the first OM nor is it saved by Article 16(4) of the Constitution with regard to the second OM. We agree with learned counsel for the petitioners.

Statutory Provisions:

6. The CEI Act provides for reservation in admission of students belonging to the Scheduled Castes, the Scheduled Tribes and Other Backward Classes of citizens in certain central educational institutions.

7. Section 3 of the CEI Act provides that out of the annual permitted strength in each branch of study or faculty, 15% of the seats shall be reserved for the Scheduled Castes, 7.5% of the seats shall be reserved for the Scheduled Tribes and 27% of the seats shall be reserved for the OBCs.

Section 3 of the CEI Act reads as follows:

"3. Reservation of seats in Central Educational Institutions The reservation of seats in admission and its extent in a Central Educational Institution shall be provided in the following manner, namely:

(i) out of the annual permitted strength in each branch of study or faculty, fifteen per cent seats shall be reserved for the Scheduled Castes;

(ii) out of the annual permitted strength in each branch of study or faculty, seven and one-half per cent seats shall be reserved for the Scheduled Tribes;

(iii) out of the annual permitted strength in each branch of study or faculty, twenty-seven per cent seats shall be reserved for the Other Backward Classes."

8. The expression "Other Backward Classes" is defined in Section 2(g) of the CEI Act as meaning a class or classes of citizens who are socially and educationally backward and are so determined by the Central Government. Section

2(g) of the CEI Act reads as follows:

"2. Definitions

(g) "Other Backward Classes" means the class or classes of citizens who are socially and educationally backward, and are so determined by the Central Government;"

9. The CEI Act does not provide the procedure for determining the "Other Backward Classes" who are socially and educationally backward. A separate statute called the National Commission for Backward Classes Act, 1993 (for short 'the NCBC Act') provides for the functions and powers of the National Commission for Backward Classes (NCBC) in Chapter 3 thereof. Section 9 of the NCBC Act requires the NCBC to examine requests for inclusion of any class of citizens as a backward class and to hear complaints of over-inclusion or under-inclusion of any backward class in the lists prepared by the Central Government.

10. Section 9 of the NCBC Act reads as follows:

"9. Functions of the Commission

(1) The Commission shall examine requests for inclusion of any class of citizens as a backward class in the lists and hear complaints of over-inclusion or under-inclusion of any backward class in such lists and tender such advice to the Central Government as it deems appropriate.

(2) The advice of the Commission shall ordinarily be binding upon the Central Government."

11. The word "lists" is defined in Section 2(c) of the NCBC Act and this reads as follows:

"2. Definitions

(c) "lists" means lists prepared by the Government of India from time to time for purposes of making provision for the reservation of appointments or posts in favour of backward classes of citizens which, in the opinion of that Government, are not adequately represented in the services under the Government of India and any local or other authority within the territory of India or under the control of the Government of India;"

12. Section 11 of the NCBC Act provides for a periodic revision of the lists by the Central Government and this reads as follows:

"11. Periodic revision of lists by the Central Government

(1) The Central Government may at any time, and shall, at the expiration of ten years from the coming into force of this Act and every succeeding period of ten years thereafter, undertake revision of the lists with a view to excluding from such lists those classes who have ceased to be backward classes or for including in such lists new backward classes.

(2) The Central Government shall, while undertaking any revision referred to in sub-section (1), consult the Commission."

13. We have been informed by learned counsel for the petitioners that no definitive revision has been undertaken of the lists prepared by the Central Government nor has the NCBC been consulted in this regard. This may or may not be correct, but we are not concerned with the revision of lists for the purposes of these cases.

14. The sum and substance of the above statutory provisions is that the Central Government prepares lists of "Other Backward Classes" or OBCs after consultation with the NCBC, which is mandatorily required. That the requirement is mandatory has been so held by a Full Bench of this Court in T. Muralidhar v. State of Andhra Pradesh1 in relation to the Andhra Pradesh Commission for Backward Classes Act, 1993 which is in pari materia with the NCBC Act. The lists so prepared are important for two purposes, namely, for making reservations of appointments or posts in favour of OBCs which are not adequately represented in the services, inter alia, under the Government of India and secondly for reservation of seats in admission to central educational institutions under the CEI Act.

15. The minorities, mentioned in both the OMs and in the Resolution that we are concerned with are those notified by the Central Government as required by Section 2(c) of

the National Commission for Minorities Act, 1992 (hereinafter referred to as 'the NCM Act'). The minorities so notified through a notification dated 23.10.1993 are:

(1) Muslims,

(2) Christians,

(3) Sikhs,

(4) Buddhists, and

(5) Zoroastrians (Parsis)

16. Therefore, the effect of the first OM is that a sub-quota of 4.5% has been carved out from the 27% reservation for the OBCs for admission to some central educational institutions covered by the CEI Act. That 4.5% quota consists of socially and educationally backward class citizens who are either Muslims, Christians, Sikhs, Buddhists or Zoroastrians (Parsis) as per the notification issued under the NCM Act.

17. The second OM, as mentioned above, proceeds on the same lines as the first OM. The only difference being that the 4.5% sub-quota is for the same minorities who are socially and economically backward and is for appointments or posts under the Central Government. The sub-quota is based on the recommendations of the National Commission for Religious and Linguistic Minorities (NCRLM), which submitted its report on 10.5.2007. The sub-quota has not been determined under the NCBC Act.

18. At this stage, it may be mentioned that the Supreme Court in Ashoka Kumar Thakur v. Union of India2 upheld the constitutional validity of the CEI Act. By the same judgment, the Supreme Court also upheld the constitutional validity of Article 15(5) of the Constitution inserted by the 93rd Amendment to the Constitution to the extent that it permits reservation for socially and educationally backward classes in central educational institutions subject to the exclusion of the creamy layer of OBCs. In this view of the matter, the scope of our enquiry becomes somewhat limited and we are confined only to determining whether the sub-quota of 4.5% for the minorities in both the OMs is constitutionally permissible or not.

Principal submission:

19. The principal contention of learned counsel for the petitioners is that by providing a sub-quota for minorities, the Central Government has clearly violated the provisions of Article 15(1) and Article 16(2) of the Constitution. Article 15(5) and Article 16(4) of the Constitution do not save the actions of the Central Government.

For convenience, Articles 15(1) and 15(5) of the Constitution are reproduced hereinbelow:

"15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

Xxxxxxx

(5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or Scheduled Tribes insofar as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.

Article 16(2) and Article 16(4) of the Constitution are reproduced hereinbelow:

"16. Equality of opportunity in matters of public employment

(1) xxxxxx.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) xxxxxx

(4) Nothing in this article shall prevent the State from making any 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."

20. Generally arguing in support of the OMs, learned Assistant Solicitor General submits that since they have been issued for the benefit of socially and educationally backward classes of citizens, or for socially and economically backward classes of citizens, they should not be struck down. He has drawn our attention to the contents of the counter affidavit filed on behalf of the respondents wherein it is stated that both the OMs were issued as per the extant procedure of the Government of India and, therefore, it would not be correct to say that they have been issued contrary to law.

21. While specifically dealing with the second OM, learned Assistant Solicitor General refers to the observations of the NCRLM in its report dated 10.5.2007. It is stated in Chapter X thereof to the following effect:-

".....The Commission was of the view that ideally the criteria for reservation should be socio-economic backwardness and not religion or caste. Further, Article 16(4) should be the basis for providing reservation benefits to minority groups who are socially and economically backward. Reservation should be provided only as a short term, time-bound measure for enabling greater participation, both in education and employment. As we have mentioned earlier, the lists of SC/ST and OBC have not been scientifically prepared either on the basis of a proper survey or reliable data on socio-economic status of a particular caste or class. Therefore, the entire system of reservation, including that for SCs/STs and OBCs needs to be overhauled. Reservation as available to SCs and STs is open-ended as it is available to all belonging to the category irrespective of income, educational and economic status. OBCs enjoy 27 percent reservation in employment, though creamy layer is excluded. The norms and methodology adopted, as pointed out in Chapter-VIII is full of anomalies and hence amenable to large-scale abuse. For this reason, the better off among the groups take advantage of reservation at the cost of socially and economically backward and deprived. It is, therefore, necessary to limit benefits of reservation to the socially and economically backward only. Since BPL lists are prepared on the basis of social/educational and economic criteria, they are more scientific. They are also revised periodically. BPL lists should, therefore, be made eligible for grant of reservation without distinction on caste, class, group or religion basis."

Findings on the principal challenge:

22. The Constitution Bench held, in no uncertain terms, in Triloknath Tiku v. State of Jammu & Kashmir3 with reference to Article 16(2) of the Constitution as follows:

"Article 16 in the first instance by clause (2) prohibits discrimination on the ground, inter alia, of religion, race, caste, place of birth, residence and permits an exception to be made in the matter of reservation in favour of backward classes of citizens. The expression "backward class" is not used as synonymous with "backward caste" or "backward community". The members of an entire caste or community may in the social, economic and educational scale of values at a given time be backward and may on that account be treated as a backward class, but that is not because they are members of a caste or community, but because they form a class. In its ordinary connotation the expression "class" means a homogenous section of the people grouped together because of certain likenesses or common traits, and who are identifiable by some common attributes such as status, rank, occupation, residence in a locality, race, religion and the like. But for the purpose of Art 16 (4) in determining whether a section forms a class, a test solely based on caste, community, race, religion, sex, descent, place of birth or residence cannot be adopted, because it would directly offend the Constitution."

In our opinion, this statement of the law would equally apply to Article 15(1) of the Constitution.

23. In fact, in R. C. Poudyal v. Union of India4 Justice S.C. Agrawal held (in paragraph 191 of the Report) in a partly dissenting opinion (with no learned Judge disagreeing on this issue) that, "Clause (1) of Article 15 prohibits discrimination by the State against any citizen on the ground only of religion, race, caste, sex or any of them. Clause (3), however, permits the State to make special provision for women and children. Similarly, clause (4) permits the State to make special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes. Clauses (3) and (4) do not, however, permit making of special provisions in derogation of the prohibition against discrimination on the ground of religion."

24. Looked at in this light, the nub of the controversy lies in the creation of a sub-quota for minorities alone - does this offend Article 15(1) or Article 16(2) of the Constitution? According to the petitioners, the sub- quota is based entirely on religion and therefore, it should be struck down. This appears to be so on a plain reading of both the OMs and the

Resolution. The First OM states that the 4.5% sub-quota is carved out of socially and educationally backward classes of citizens "belonging to minorities" as defined in Section 2(c) of the NCM Act. The Resolution and the second OM carve out a sub-quota "for minorities". The very use of the words "belonging to minorities" or "for minorities" indicates to us that the sub-quota has been carved out only on religious lines and not on any other intelligible basis. The identified minorities are Muslims, Christians, Sikhs, Buddhists and Zoroastrians (Parsis) as per the notification issued under the provisions of the NCM Act. Absolutely no empirical evidence is placed before us to enable us to conclude or to support the requirement of carving out a special class of beneficiaries from the existing backward classes. Absolutely no material is placed before us to demonstrate that persons belonging to the religious groups mentioned above are more backward than any other category of backward classes or that they need any preferential treatment as compared to other OBCs.

25. In the absence of any material before us (and we must emphasize this), and on the plain language of the OMs, it seems to us quite clear that the sub-quota has been created only on grounds of religion and nothing else. This is clearly impermissible in view of the specific language of Article 15(1) of the Constitution as well as Article 16(2) of the Constitution. In the absence of any factual basis, it seems to us that by making a special provision for religious minorities with regard to admission in some central educational institutions and with regard to employment in appointments and posts under it, the Central Government has exceeded the constitutional boundaries. Ex facie, the petitioners must succeed on this basic ground of challenge.

26. The next question is whether the sub-quota can be saved by resorting to Article 15(5) and Article 16(4) of the Constitution.

Absence of any rational classification:

27. Assuming it is permissible to identify different categories only on the ground of religion, for such a classification to be constitutionally permissible, it must rest upon a distinction that is substantial and not illusory (State of Kerala v. N.M. Thomas)5.

28. In E.V. Chinnaiah v. State of A.P.6 the Supreme Court approved the above principle and quoted the following passage from State of Jammu and Kashmir v. Triloki Nath Khosa7 :- "Classification, however, is fraught with the danger that it may produce artificial

inequalities and therefore, the right to classify is hedged in with salient restraints; or else, the guarantee of equality will be submerged in class legislation masquerading as laws meant to govern well marked classes characterized by different and distinct attainments. Classification, therefore, must be truly founded on substantial differences which distinguish persons grouped together from those left out of the group and such differential attributes must bear a just and rational relation to the object sought to be achieved."

29. The question that arises in this context is whether the groups clubbed together by the OMs are homogenous or not. Clubbing certain minorities such as Muslims, Christians, Sikhs, Buddhists and Zoroastrians (Parsis) into one group does not per se lead to any conclusion of homogeneity among them - on the contrary, the presumption is of diversity. The presumption is confirmed by the report of the NCRLM which brings out the heterogeneity among the various minorities. For example, the literacy rate amongst these religious communities shows a variation between 59.1% and 80.3% (other than Zoroastrians). Similarly, the educational levels of these religious communities shows a wide variation at all levels, starting from the primary level going up to the graduation level. Finally, economic indicators such as housing, lighting, availability of drinking water, availability of toilet facilities and occupation figures also show a wide variation in the economic field among these religious minorities.

30. In T. Muralidhar Rao v. State of Andhra Pradesh8 a Bench of seven learned Judges of this Court concluded in paragraph 204(c) of the Report as follows: "Where the petitioner presents a prima facie case of hostile or invidious discrimination in a factual matrix where the monopoly of information/material is with the State, the burden of justifying the apparent discriminatory State action as falling within the constitutionally permitted area of classification {in this case, for affirmative action under Articles 14, 15 (4) and 16 (4)} shifts to the State."

31. During the course of his submissions, the learned Assistant Solicitor General did not advert to this aspect of the matter and even the counter affidavit filed by the respondents does not enlighten us on this issue at all. In fact, we must express our anguish at the rather casual manner in which the entire issue is taken by the Central Government. No evidence has been shown to us by the learned Assistant Solicitor General to justify the classification of these religious minorities as a homogenous group or as more backward classes deserving of some special treatment. We must, therefore, hold that Muslims, Christians, Sikhs, Buddhists and Zoroastrians (Parsis) do not form a homogenous group but a heterogeneous group.

32. We may add that the report of the NCRLM, on which the learned Assistant Solicitor General places reliance completely defeats his argument. The NCRLM has stated in the passage quoted above that "the lists of SC/ST and OBC have not been scientifically prepared either on the basis of a proper survey or reliable data on socio-economic status of a particular caste or class. Therefore, the entire system of reservation, including that for SC/STs and OBCs needs to be overhauled." This being the position, we find it difficult to appreciate any rational basis for the Central Government in making the classification for preferential treatment between non-minorities and minorities.

33. On the basic principles of reasonable or rational classification, the OMs and the Resolution cannot be sustained. Disparate groups are sought to be clubbed together on religious lines and without any homogeneity amongst them.

Other challenges to the first OM:

34. The first contention of learned counsel for the petitioners under this sub-heading is that the Government of India has not followed the mandatory procedure prescribed by the NCBC Act for identifying a backward class of persons for preferential treatment.

35. In B.N. Nagarajan v. State of Mysore9, the Supreme Court observed as follows:

".....It is hardly necessary to mention that if there is a statutory rule or an act on the matter, the executive must abide by that act or rule and it cannot in exercise of the executive power under Art. 162 of the Constitution ignore or act contrary to that rule or act."

36. Similarly, in State of Sikkim v. Dorjee Tshering Bhutia10, the Supreme Court held in paragraph 15 of the Report: "The executive power of the State cannot be exercised in the field which is already occupied by the laws made by the legislature. It is settled law that any order, instruction, direction or notification issued in exercise of the executive power of the State which is contrary to any statutory provisions, is without jurisdiction and is a nullity....."

37. Reference may also be made to Rev. Fr. Joseph Valamangalam v. State of Kerala11 in which the High Court relied upon Ram Jawaya v. State of Punjab12 to the effect that:-

".....ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away and the executive powers of a State upon which the State Legislature is competent to legislate and are not confined to matters over which legislation has already been passed. ...."

38. The aforesaid decisions, and others, were considered by a Full Bench of this Court in A.P. State Backward Class Welfare Association v. A.P. State. Backward Classes Welfare Department13 and it was held with reference to the A.P. Commission for Backward Classes Act, 1993 that backward classes can only be identified in accordance with the procedure prescribed under the A.P. Commission for Backward Classes Act, 1993 and not otherwise. This was affirmed in T. Muralidhar. The principle laid down by these decisions is equally applicable to NCBC Act, which is pari materia with the A.P. Commission for Backward Classes Act, 1993.

39. It is true that the Supreme Court has permitted the sub-classification of backward classes into more backward classes. Indeed, in Indra Sawhney v. Union of India14 it is held that there is no constitutional bar to the classification of backward classes into backward classes and more backward classes for the purposes of Article 16(4) of the Constitution. But the fact remains that there is a statutorily prescribed mode for identifying backward classes, namely through the NCBC Act, and therefore that procedure must mandatorily be followed. The Central Government cannot unilaterally add to the list of backward classes nor can it cull out a more backward class from the list, without reference to the NCBC.

40. In the case at hand, what the Central Government has essentially done is to cull out religious minorities - Muslims, Christians, Sikhs, Buddhists and Zoroastrians (Parsis) and "designate" them as more backward amongst the Other Backward Classes. In view of the law laid down, in our opinion, one of the reasons why the OMs should be struck down is that while issuing them, the NCBC has been totally ignored and by-passed by the Central Government in culling out some categories of citizens from the generic class of OBCs. This is impermissible. The statutory function of the NCBC (under Section 9(1) of the NCBC Act) is to examine requests for inclusion of any class of citizens as a backward class, formulate a list of backward classes and advise the Central Government in this regard. This statutory function cannot be given a go-bye -the NCBC Act does not provide for it. On the contrary, in terms of Section 9(2) of the NCBC Act, the advice of the NCBC shall ordinarily be binding upon the Central Government. It is only thereafter that the Central Government may

prepare lists for the Scheduled Castes, the Scheduled Tribes and Other Backward Classes for making provision for reservations.

41. Section 11 of the NCBC Act provides for the periodic revision of lists by the Central Government. In essence, therefore, a reading of Section 9 and Section 11 of the NCBC Act indicates that the statute occupies the legislative field and the Central Government cannot, unilaterally, issue an OM identifying a backward class of citizens for inclusion in the lists to be prepared by it or to identify a backward class of citizens already included in the list for any preferential treatment. As mentioned above, the advice of the NCBC is mandatorily required to be taken and since that has not been taken, the procedure adopted by the Central Government while issuing the first OM is clearly faulty. For this reason and applying the law laid down by the Supreme Court, the portion of the first OM objected to by the petitioners ought to be struck down.

42. The second contention of learned counsel for the petitioners is that the OMs ought to be struck down because there is absolutely no indication whatsoever of the basis on which a sub-quota of 4.5% has been carved out from the 27% reservation for OBCs. In response, the only basis indicated in the counter affidavit is that as per the report of the Mandal Commission, 52% of the total population consists of OBCs as per the caste census held in 1931. It is stated that out of 52% of the OBCs, the non-Hindu population constitutes 8.4% thereof and that can be taken to be the minority communities. Therefore, from the 27% reservation for OBCs, the pro-rata minority communities work out to approximately 4.5%. Unfortunately, it seems to us that the huge demographic changes that have taken place have not been considered by the Central Government.

43. According to the petitioners, if the classification is made on the basis of the castes/communities identified by the Mandal Commission (and not on the basis of the population), then as per the report of the NCRLM dated 10.5.2007, the OBC lists contain a total of 2,150 castes and communities, out of which 76 are minority communities. On the basis of community representation the minority OBCs would be entitled to a sub-quota of 0.95% and not 4.5%.

44. Therefore, we have two different methods for determination of a sub-quota for minorities within the 27% reservation for OBCs. Out of the two, we may have to accept the method adopted by the Central Government, but the NCBC ought to have been consulted in

this regard in terms of Section 9 and Section 11 of the NCBC Act, and it has not been so consulted. There is no explanation for this, nor is there any explanation why more recent census figures have been ignored.

45. The third contention of learned counsel for the petitioners (with reference to the first OM) is that Article 15(5) of the Constitution requires that a special provision for the advancement of any socially and educationally backward class of citizens shall be made "by law". Such a law has not been enacted. It is not the contention of the learned Assistant Solicitor General that the first OM is "law" within the meaning of Article 15(5) of the Constitution. We are of the view that the OM is nothing more than an executive instruction and that an executive instruction15 cannot be a substitute for the "law" postulated by Article 15(5) of the Constitution. That being so, there is no law to sustain the creation of a sub-quota of 4.5% out of the 27% reservation for OBCs. The third contention must also be accepted.

Other challenges to the second OM:

46. The second OM has purportedly been issued consequent to the report submitted by the NCRLM. By itself, this does not sanctify the second OM. The NCRLM is not a statutory body and consultation with it is as efficacious or non- efficacious a consultation as with any third party and has no relevance to the provisions of the NCBC Act. The report may be useful per se but it has no relevance to Article 16(4) of the Constitution.

47. This is clear from the terms of reference of the NCRLM which are quite different from what Article 16(4) of the Constitution requires. The terms of reference of the NCRLM read as follows:-

"(a) to suggest criteria for identification of socially and economically backward sections among religious and linguistic minorities;

(b) to recommend measures for welfare of socially and economically backward sections among religious and linguistic minorities, including reservation in education and government employment;

(c) to suggest the necessary constitutional, legal and administrative modalities, as required for the implementation of their recommendations; and to present a Report of their deliberations and recommendations."

48. In its report, the NCRLM has considered the criteria for social and economic backwardness amongst religious and linguistic minorities while Article 16(4) of the Constitution requires consideration of inadequate representation in the services of the State. The application of mind by the NCRLM is to a completely different issue altogether and, therefore, by relying solely on the report of the NCRLM, the Central Government has failed to apply its mind to the constitutional requirements. This makes it difficult to accept the contention of the learned Assistant Solicitor General that the carving out of a sub-quota is procedurally correct or with due authority of law. In our opinion, reliance on the report of the NCRLM is misplaced and inappropriate.

49. Additionally, on facts, the learned Assistant Solicitor General has not shown us any material in the report of the NCRLM to the effect that there is inadequate representation of a section of backward classes in employment under the State as per the requirement of Article 16(4) of the Constitution. Indeed, the terms of reference of the NCRLM does not postulate such a discussion. In the absence of any empirical evidence, it is not possible to accept the view that some minority communities are inadequately represented in appointments and posts under the Central Government.

Conclusion:

50. We have, therefore, no option but to set aside the carving out of a sub-quota of 4.5% in favour of backward classes belonging to minorities out of the 27% reservation for OBCs in both the OMs dated 22.12.2011 and the Resolution dated 22.12.2011. We do so accordingly.

51. The writ petitions are allowed. No costs.

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MADAN B. LOKUR, C.J.

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SANJAY KUMAR, J.

28th May, 2012.