
(2009) 10 MP CK 0014
In the Madhya Pradesh High Court
Case No : Writ Petition No. 8122/09

Ashok Kumar Malpani and Another

APPELLANT

Vs

State of M.P. and Others

RESPONDENT

Date of Decision : 22-10-2009

Acts Referred:

Constitution of India, 1950 — Article 14, 15, 15(1), 15(3), 15(4)
Madhya Pradesh Municipal Corporation Act, 1956 — Section 11, 11(2), 11(3)(431, 11A, 9
Madhya Pradesh Municipalities (Reservation of Wards of Scheduled Castes and Scheduled Tribes, Other Backward Classes and Women) Rules, 1994 — Rule 22A(2), 3(3), 3(4), 3(5), 3(6)
Madhya Pradesh Municipalities Act, 1961 — Section 29A(2), 29B

Citation : (2009) 4 MPJR 179

Hon'ble Judges : R.K. Gupta, J;Dipak Misra, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Dipak Misra, J.

In this batch of writ petitions, the centroidal issue that has been sought to be assiduously pyramided with immense gloss is that the amendments brought into force in the M.P. Municipal Corporation Act, 1956 (in short the 1956 Act') and the M.P. Municipalities Act, 1961 by the M.P. Nagar Palika Vidhi (Sanshodhan) Adhiniyam, 2007 as a consequence of which the reservation in favour of women has increased from 33% to 50% in Municipal Corporation and Municipalities in the State of M.P. is unsustainable being violative of Articles 14 and 15(1) of the Constitution and as a sequitur thereof, Rule 3 of the Madhya Pradesh Municipalities (Reservation of Words for Scheduled Castes, Scheduled Tribes, Other Backward Classes and Women) Rules, 1994 (for brevity "the 1994 Rules") as amended vide notification dated 3.9.2007 is also unconstitutional. The aforesaid structure of the edifice has led to the prayer declaring the statutory provisions as ultra vires and quashment of the consequent notifications and

orders. In spite of various range of asseverations of facts in the writ petitions, the learned counsel for the petitioners restricted the relief to the constitutional validity of the provisions pertaining to reservation for women and, therefore, the factual matrix as regards the said spectrum shall only be exposited. For the sake of clarity and convenience, the facts in WP No.8122/2009 are uncurtained and unfurled herein.

In the petition, the contents of Section 11 of the 1956 Act have been narrated and special reference has been made to sub-sections (3) and (4) indicating that prior to the amendment Act No. 16 of 2007, the said sub-sections provided reservation of one-third of total number of seats for women belonging to each category. It is set forth that Section 11 provides compartmentalised reservation for Scheduled Castes, Scheduled Tribes, Other Backward Classes and Women. The reservation made in favour of the women candidates is vertical inasmuch as the same is dependent on the final number of elected candidates in the election. In order to make special provisions of women, the Legislature had earlier provided reservation of one-third seats for candidates belonging to women category which was sufficient and adequate. Apart from the seats reserved for women, women also contest election from unreserved seats and succeed. There are instances where in the elections of local bodies, women candidates contested in unreserved seats and got elected against male candidates which goes a long way to show that reservation made prior to the amendment ensured proper and adequate representation of women in the municipal corporation. It is pleaded that in spite of the aforesaid, in sub-sections (3) and (4), in place of the word "not less than 1/3rd", the words "as nearly as possible 50% " have been substituted. In view of the amendments carried out by the notification dated 3.9.2007, the Rules have been amended.

It is contended that the amendment in sub-sections 11 (3) and (4) and the corresponding amendment carried out in the rules created a discrimination on the ground of sex which is impermissible under Articles 14 and 15(1) of the Constitution of India. Though Article 15(3) empowers the State to make special provisions for women, yet the said provision cannot be stretched to such an extent that it discriminates other classes in an arbitrary manner. It is put forth that the increase of reservation from one-third to 50% operates as discrimination as such a reservation is vertical and when counted along with the reservation meant for other classes, the total percentage of reservation would come to 75% which is contrary to the law laid down in *Indra Sawhney v. Union of India*, (1992) 6 SCR 321 . It is urged that the success of women candidates in elections reflects in a crystallized manner that the women candidates do not suffer any disparity which requires the further crutches of reservation. The increase of reservation from 1/3rd to half is not founded on any scientific or systematic study and there is no material to show that women need reservation to that extent for ensuring adequate representation in local self government. Such a reservation, it is contended, is irrational, arbitrary and smacks of total discrimination violating the basic facet of Article 14 of the Constitution.

It is averred that the concept of reservation is only to make provisions for upliftment of those classes who suffered disadvantage over centuries. Reference has been made to Article 334 of the Constitution which mandates reservation to continue only till such categories or classes attain the status of equality with other citizens. It is put forth that though there has been prescription of period for reservations for other classes, yet no period has been provided for reservation for women and, therefore, such a reservation would continue in perpetuity. It is set forth that women in India have already achieved the status of equality and, consequently, there is no necessity for further reservation. The reservation is exclusively based on sex which is prohibited under Article 14 and 15(1) of the Constitution of India but the State Legislature has provided such a reservation in absolute transgression of the said constitutional mandate. It is urged that the impugned amendment has no nexus with the object sought to be achieved and also does not get any support from Article 334 of the Constitution and, therefore, the said provision deserves to be declared as unconstitutional.

A counter affidavit has been filed by the respondents contending, inter alia, that Article 243T(2) of the Constitution provides for reservation for women candidates which should not be less than one-third of the total number of seats. The maximum number relating to reservation fixed as 50% as has been laid down in *Indra Sawhney (supra)* is not applicable to election matters as has been held by this Court in *Tulsiram Jatav v. Union of India and Others*, 2001 (4) MPLJ 132. It is pleaded that the process of election has already commenced and the preparation of the electoral roll is being done as per the order dated 7.7.2009 and the final publication of the electoral rolls would be done by 11.11.2009. It is put forth that as per Article 243ZG of the Constitution, there is bar to interfere in the electoral matters. It is the stand in the return that the plea of excessive reservation and that it is beyond the permissible limit of 50% is unsustainable inasmuch as the provisions, if appositely read, would show that the reservation is up to the extent of 50% and not beyond the said percentage. It is urged that under Article 243T of the Constitution, there is a mandate for reserving seats for Scheduled Castes and Scheduled Tribes in every municipality in the proportion to the total number of seats and the total population. As per sub-clause (2) of Article 243T, there is clear warrant to reserve not less than one-third seats for women belonging to the Scheduled Castes and Schedule Tribes. It is also set forth that the reservation for women can be more than 1/3rd of the total seats and the same would be well within the permissible limit of 50%. The State Legislature, keeping in view the above aspects, has amended sub-sections (3) and (4) of Section 11 of the 1956 Act which provide as nearly as possible 50% reservation of the total number of seats. The intention of the Legislature is to provide reservation upto 50% but there is remotely no intention to create any contingencies for providing reservation beyond 50%. The Rules are in consonance with the Act and in accord with the Constitution and cannot be found to be playing foul with any constitutional provision. It is contended that under Article 15(3), the State is empowered to make special provisions for women and

children and hence, the action taken by the State Legislature is well within the constitutional frame. The methodology adopted by the respondents is quite clear and there is an erroneous assumption by the petitioners that the reservation is vertical. The respondents have prescribed reservation for each category separately and thereafter, equal horizontal reservation is provided for women. As regards the unreserved seats, the same methodology has been adopted so as to ensure total reservation as nearly as possible 50% for women candidates and further unreserved seats are open for all categories of women candidates, i.e., Scheduled Castes, Scheduled Tribes and Other Backward Classes. Thus, the methodology adopted by the answering respondents clearly reveals that horizontal reservation has been provided for women candidates. A comparative chart has been produced pertaining to the Bhopal Municipal Corporation in respect of the year 2004 and the year 2009 to highlight that the reservation granted to women is well within the permissible limit of 50%. The allegation that there is reservation of 75% is absolutely misconceived and the same has been put forth in a fallacious manner.

It is asseverated in the return that there are 14 municipal corporations and 96 municipalities in the State of M.P. In addition to that, there are 248 Nagar Panchayats (transitional areas) spread in 50 districts of the State of M.P. The petitioners have not submitted in the writ petitions that the process of reservations in respect of almost 50 districts has been completed. It is submitted that in respect of 43 districts, notification has already been published as contemplated under Rule 7 of the 1994 Rules. In essence, the stand is that the election process has commenced to a concrete extent and the petitioners have challenged the validity at a belated stage. It is put forth that the State Legislature has provided horizontal reservation for the women within the permissible limit and hence, no fault can be found with it. It is worth noting that a stand has been taken in some of the writ petitions that reservation of 50% seats for women would result in total lack of control over the officers and administration of the corporations and municipalities. The said stand has been strongly refuted in the return. An explanation has been preferred how the reservation does exceed 50% in entirety. It is contended that the provisions neither play foul with Articles 14 and 15(1) of the Constitution of India nor do they run counter to any decision rendered by the Apex Court.

A rejoinder affidavit has been filed to the return filed by the respondents No. 1 and 3 contending, inter alia, that the reliance placed by the respondents on 243T of the Constitution of India as a source of power is absolutely untenable as the constitutional benchmark prescribed for reservation of seats for women is only 1/3rd and, therefore, the State Legislature even though has the power to make provision for reservation of seats for women candidates in excess of the constitutional benchmark of 1/3rd, yet such provision has to be based on sound and cogent reasons. It is put forth that respondents have not given any justification for providing reservation for women in excess of 1/3rd. No scientific or systematic study was conducted before enhancing the percentage for women

for 1/3rd to 50%. No material has been brought on record to demonstrate that women in the State of M.P. need reservation in excess of the prescribed constitutional benchmark of 1/3rd. The Constitution does not contemplate proportionate reservation for women and, therefore, there has to be a scientific base for providing 50% reservation for women. A classification has been made but in the absence of any cogent and germane reasons. Solely on the base of sex, such classification is impermissible as that ex facie invites the frown of Article 14 of the Constitution of India. In the past election, women have got adequate representation in the local bodies and large numbers of women candidates were elected from unreserved ward and hence, there is no warrant or justification for providing further reservation. The reservation of 50% for women is in excess of their proportion to the total population in the State if the sex ratio of the 2001 census is taken note of. The sex ratio in the State of Madhya Pradesh was 919 females against 1000 males. The total percentage of women population in the State of M.P. is slightly over 45%. Thus, the reservation is in excess of the percentage of population. The women residing within the Municipal Corporation area are highly educated and they are well aware of their rights and, consequently, they need no protection in the form of reservation. In the city of Bhopal, as per the 2001 census, there were 898 women against 1000 men. Likewise, in Gwalior the ratio is 848, in Indore 912 and in Jablapur, it is 908. Hence, the concept of proportionality has been thrown to the winds while determining the factum of reservation. The women candidates being educated can contest the election of ward members on the basis of their own merit. It is urged that during the pendency of the writ petition, the rule has been amended stipulating, inter alia, that reservation for women is horizontal and not vertical which means that the respondents are not at all aware about the concept of horizontal reservation. In horizontal reservation, the provision for reservation contemplates adjustment of seats/ posts for reserved category candidates as against such candidates selected/ elected on the basis of their own merit. The Municipal Corporation Act does not contain any such provision for the adjustment of seats. The total number of women candidates would exceed 50% as women form any category can also be elected from any unreserved ward. Thus, the impugned provision, in fact, seeks to provide vertical reservation for women, which, when added with the reservation provided for the Scheduled castes, Scheduled tribes and Other Backward classes candidates, would amount to 75%.

Be it noted, on 25th September, 2009, in rule 5, sub-rule (6) was inserted in the Madhya Pradesh Municipalities (Reservation of Office of Mayor and President) Rules, 1999. The said amendment reads as follows"-

(6) In the context of Section 11A of the Madhya Pradesh Municipal Corporation Act, 1956 (No.23 of 1956) and Section 29B of the Madhya Pradesh Municipalities Act, 1961 (No. 37 of 1961), it is further clarified that the Provision of fifty percent reservation for women shall be done horizontally in all Categories, so that the overall reservation shall not exceed fifty percent.

In Rule 3, after sub-rule (6) of the Madhya Pradesh Municipalities (Reservation of Wards for Scheduled Castes, Scheduled Tribes, Other Backward Classes and Women) Rules, 1994, the following sub-rule was added:

(7) In the context of section 11 of the Madhya Pradesh Municipal Corporation Act, 1956 (No.25 of 1956) and Section 29-A of the Madhya Pradesh Municipalities Act, 1961 (No. 37 of 1961), it is further clarified that the Provision of fifty percent reservation for women shall be done horizontally in all categories, so that the overall reservation shall not exceed fifty percent.

At this juncture, it is apposite to note that on behalf of the respondents-State an affidavit has been filed in the course of hearing. We think it apt to produce paragraphs 1 to 3 of the affidavit. They read as follows:

1. That, on the basis of information collected from various local bodies accompanying chart relating to the results 60 local bodies in which besides the reserved seats only 1.53% of women could win the election in the last elections of Local Bodies held in the year 2004. It would be proper to state that extraordinary Gazette Notification on 20 December, 2004 was issued in respect of candidates who won the said elections of local bodies. Copy of chart is enclosed herewith as Annexure-A

That, in the last election of Parliament There were 29 seats out of which only 6 won the election and percentage of women category MLA who could win the election was 20.69% Copy of the list of Members of Parliament, who won the election is Annexure-B

That, in the last election, out of 230 Members of Legislative Assembly only 25 women could win the election. Copy of the total candidates who won the election is filed as Annexure-C in which 25 women members were elected which comes to 10.87%

The said affidavit has been filed to emphasise how the participation of women in the governance of the body polity is really marginal and is of no signification.

We have heard Mr. Sanjay Agrawal, Mr. Sanjay K. Agrawal, Mr. Pankaj Dixit and Mr. A.P. Shroti. Learned counsel for the petitioners: Mr. R.D. Jain, learned Advocate General and Mr. Prashant Singh, Learned Additional Advocate General for the respondents/State; and Mr. A.K. Mishra, learned Senior Counsel along with Mrs. Divyakeerti Bohre, learned counsel for the respondent/Municipal Corporation.

Mr. Sanjay K. Agrawal, learned counsel for the petitioners, has raised the following submissions:

(a) The impugned amendment by increasing the reservation for women from 1/3rd to 50% ex-facie violates the equality clause enshrined under Article 14 of the Constitution and seeks to discriminate on the ground of sex which is violative of Article 15(1) of the Constitution of India.

(b) Prior to coming into force of the amended provision, 1/3rd of the seats were already reserved for women and thus, adequate representation was already provided to women in the local self government and there was absolutely no justification or warrant for increasing the percentage of reservation to 50% and further there is no nexus with the object sought to be achieved.

(c) The increase of percentage for women would result in reverse discrimination against the rest of the citizens.

(d) No systematic and scientific study has been undertaken before increasing the percentage of reservation for women and no identifiable, quantitative and qualitative data has been placed on record to demonstrate that the reservation of 50% wards for women is necessitous in the public interest or in the interest of the society at large.

(e) The total percentage of women in the State of M.P. is about 47.9% and, therefore the reservation of 50% wards for women is disproportionate to their population in the State. That apart, women have been contesting in elections at various level and they do not need the crutches of reservation.

(f) The presence of majority of women councilors in the Corporation would weaken the unit of local self governance and would only strengthen the bureaucracy which would be counter to the constitutional mandate incorporate in Chapter IX-A. Quite apart from the above, the duties and functions of the councilors are extremely onerous which cannot be effectively discharged by women and thereby it would retard the development at the level of local self government.

(g) The legislature has not kept in view the effect and impact of such increase on the society and while scrutinizing the constitutional validity of the law, it is the duty of the Court to see the direct and inevitable impact of the same, regard being had to the realistic background.

(h) The legislation is contrary to the decision rendered by the Apex Court in Indra Sawhney (Supra) and other decisions and is, therefore, liable to be struck down as ultravires.

The learned counsel has placed reliance on the decisions rendered in Indra Sawhney (supra). He has commended us to paragraphs 250 to 258, 261, 291, 804 to 812 and 842 of the said decision. Reliance has also been placed on the decisions rendered in Dr Preeti Srivastava and Another Vs. State of M.P. and Others, and Than Singh and Others Vs. The State of Madhya Pradesh, From the decision in M. Nagaraj and Others Vs. Union of India (UOI) and Others, , emphasis has been laid on paragraphs 46 to 49, 102, 106 and 117. Inspiration has been drawn from the decisions in Anuj Garg and Others Vs. Hotel Association of India and Others, and DCM Financial Services Ltd. Vs. J.N. Sareen and Another, .

Mr. Sanjay Agrawal, learned counsel for the petitioner in W.P. No. 8942/2009, has

raised the following contentions:

(a) Articles 330 and 332 of the Constitution provide for reservation of seats for Scheduled Castes and Scheduled Tribes in the House of the People and the Legislative Assembly of the State respectively in proportion to their population in the State and the Union Territory but there is no provision in the Constitution providing for proportionate reservation for women except the provision made under Article 243T and, therefore, the reservation as engrafted under Sections 11 (3) and (4) of the Act runs counter to the constitutional philosophy.

(b) The terms used "not less than one-third" in Article 243T should be understood as "not more than one-third" in the context in which the language is employed. No discretion has been provided to the State Legislature than what has been stated in the said Article and the Parliament did not want to leave anything to the discretion of the State Legislature and fixed the percentage of reservation for women at one-third by using the phraseology "not less than one-third".

(c) Providing proportionate reservation for women would amount to adding another class or category in addition to Scheduled Castes and Scheduled Tribes and Other Backward Classes. Such reservation has no constitutional sanction and the State Legislature cannot provide 50% reservation to women in each and every category as that squarely offends the rule of equality provided under Articles 14 and 15(1) of the Constitution.

(d) The provision made by the State Legislature providing reservation is sans relevant consideration and when no data is provided, the concept of judicial review to examine the issue on the anvil of power under Article 15(3) of the Constitution is attracted.

(e) By virtue of reservation for women in respect of seats in the Municipal Council, classes have been created but there is no intelligible data to sustain such classification and, therefore, it plays foul with the concept of equality which is the corner stone of Article 14 of the Constitution.

(f) The Constitution envisages only to provide adequate representation to women as is evident from the object and reasons of Constitution (Seventy Fourth Amendment) Act, 1992 and adequate representation cannot be understood to mean to provide proportionate reservation for women. There is a vast difference between "adequate representation" and "proportionate reservation" and by no stretch of imagination the logic of "adequate representation" can be equated with "proportionate reservation".

(g) The representation of one third in the total number of seats in every Municipal Corporation and Municipality which was prevalent can be said to be adequate representation. Nothing has been brought on record to show that the same was not adequate. The objects and reasons of the Amendment Act also does not so spell out. The representation which has been provided for women is

more than the population ratio and the benefit of reservation has been further given by the 1994 Rules. Further, by application of the rules, i.e., sub-rule (4) of Rule 3 of the Madhya Pradesh Municipalities (Reservation of Wards for Scheduled Castes, Scheduled Tribes, Other Backward Classes and Women) Rules, 1994, the fraction of less than half shall be ignored and fraction of equal to half or more shall be counted as one. The benefit of reservation has further been given in favour of women.

(h) It is permissible in law for women to contest election from unreserved wards and, thus, in the ultimate eventuate; the total number of women representation would exceed the maximum limit of the population ratio.

(i) The maximum limit of reservation which has been provided in *Indra Sawhney's* case (supra) is 50% except in very extraordinary situation but in the case at hand, the over all reservation comes upto 75% which is totally impermissible.

(j) The law relating to vertical and horizontal reservation is not possible in respect of reservation for seats in Municipal Corporation or Municipalities and, therefore, the amendment of the Rules putting forth 50% reservation is horizontal and does not save the enactment.

(k) Article 15(3) is an enabling provision and is to be exercised in the manner so that the rules of equality provided under Article 15(1) is not destroyed but in the case at hand the direct, real and inevitable effect of the impugned legislation is the destruction of Article 15(1) which is an anathema to the Constitutional philosophy.

(l) The doctrine of direct, real and inevitable effect has to be applied to the case at hand and on applicability of the said principle, it would be clear that the impugned legislation provides for more than 75% reservation which the law does not countenance and, thus, the said provisions are to be declared as ultra vires.

To bolster the said submissions, the learned counsel has placed reliance on the decisions rendered in *Indra Sawhney* (supra), *Miss Arti Sapru and Others Vs. State of Jammu & Kashmir and Others*, , *Ms. Swati Gupta Vs. State of U.P. and Others*, , *Anil Kumar Gupta and Others Vs. State of U.P. and Others*, , *M. Nagraj* (supra) and *Dr. Preeti Shrivastava* (supra); *Rajesh Kumar Gupta and Others Vs. State of U.P. and Others*, , *Dattatraya Motiram More Vs. State of Bombay*, and *Mrs. Maneka Gandhi Vs. Union of India (UOI)* and Another, .

Mr. A.P. Shrotri, learned counsel for the petitioner in Writ Petition No.9595/2009 which pertains to the assail of the provisions contained in the Municipalities Act and the rules framed thereunder, has advanced the following proponentments:

(i) Sections 29-A (3) and (4) as amended by the Act No. 16/2007 in effect prescribes for 75% reservation for women in election which exceeds the 50% limit contrary to the law laid down in *Indra Sawhney* (supra) and infringes the equality clause contained in Articles 14 and 15(1) of the Constitution.

(ii) The ceiling limit of 50% as prescribed cannot be confined to Article 16(4) only but is applicable to reservation made under Article 15(4) and in effect to Article 15(3) as well.

(iii) The reservation provided u/s 29-A and Article 243 is for women category and not to ward to which such woman belongs and, therefore, the reservation is category-wise and such prescription for reservation of wards is contrary to Article 243 of the Constitution.

(iv) Rules 3 (3) and 3 (5) of the 1994 Rules speak about the reservation of wards for women whereas such terminology does not occur in Section 29-A or in any other provisions of the Municipalities Act nor does it occur in Article 243 of the Constitution and, therefore, the said rule transgresses the scheme of the statute as well as the constitutional provision.

Mr. R.D. Jain, learned Advocate General and Mr. Prashant Singh, learned Additional Advocate General for the State, combating the aforesaid submissions, have advanced the following proponements:

(a) The principle of reservation as laid down in Indra Sawhney (supra) and in other decisions in that time is not applicable to the present factual matrix as the said decisions were rendered in the context of service matters pertaining to appointment and promotion, and in respect of admission to educational institution.

(b) The averments made in the petitions do not satisfy the requirement of the pleadings which are imperative when the constitutional validity of an enactment is called in question.

(c) The, percentage fixed for women in respect of wards is an affirmative and protective action, a special provision, under Article 15(3) of the Constitution and its equally distributed amongst all categories and hence, does not exceed the ceiling limit.

(d) An affirmative action of the State provides level playing field and it has equalizing results. (e) Article 243T is an enabling provision for the purpose of taking affirmative measure and the science of interpretation does not give allowance to the interpretation by the learned counsel for the petitioners.

(f) The aim of the Constitution is to establish an egalitarian piece of legislation to reinforce the same in its conceptual eventuality.

(g) The stand that women in the State of Madhya Pradesh are highly educated and adequately represented in the Municipal Corporation and Municipalities is far from the reality and the Legislature in its wisdom has prescribed the present affirmation which is constitutionally permissible.

(h) The purpose of the amendment is to give greater participation to female population in the administration of local bodies and such a step being a progressive one does not deserve to be struck down. (i) The reservation of wards

for women has not been made solely on the basis of sex but other factors such as upliftment of the conditions of women and their preparation at the grassroot level of democracy are also kept in view.

To buttress the aforesaid submissions, the learned counsel for the State have commended us to various passages from *Indra Sawhney (supra)*, *Toguru Sudhakar Reddy and another Vs. The Govt. of Andhra Pradesh and others*, , *M. Nagraj (supra)* and placed reliance on the decisions rendered in *Govt. of Andhra Pradesh Vs. P.B. Vijaykumar and another*, , *Tulsiram Jatav v. Union of India and others*, 2001 (4) E.V. *Chinnaiah Vs. State of Andhra Pradesh and Others*, , *Dr. Satish Menon Vs. State of Madhya Pradesh and Others*, and *Rajesh Kumar Gupta and Others Vs. State of U.P. and Others*, .

Before we proceed to address with regard to the constitutional validity of the provisions under assail of 1956 Act and 1961 Act we think it apt to refer to certain citations in the field as regards the role of Court while exercising power of judicial review in this arena.

In *R.S. Joshi, Sales Tax Officer, Gujarat and others v. Ajit Mills Ltd. and another*, (1997) 4 SCC 98, *Krishna Iyer, J.*, in his inimitable style, expressed thus:

2. A prefator caveat - When examining a legislation from the angle of its vires, the Court has to be resilient, not rigid forward looking, not static, liberal, not verbal - in interpreting the organic law of the nation. We must also remember the constitutional proposition enunciated by the U.S. Supreme Court in *Munn v. Illinois* viz., "that Courts do not substitute their social and economic beliefs for the judgment of legislative bodies". Moreover, while trespasses will not be forgiven, a presumption of constitutionality must colour judicial construction. These factors, recognised by our Court, are essential to the modus vivendi between the judicial and legislative branches of the State, both working beneath the canopy of the Constitution.

In *State of Andhra Pradesh and others, etc. Vs. McDowell and Co. and others*, etc., , their Lordships of the Apex Court have expressed the view as under:

A law made by the Parliament or the Legislature can be struck down by Courts on two grounds and two grounds alone, viz. (1) lack of legislative competence and (2) violation of any of the fundamental rights guaranteed in Part-III of the Constitution or of any other constitutional provision. There is no third ground. If an enactment is challenged as violative of Article 14, it can be struck down only if it is found that it is violative of the equality clause/ equal protection clause enshrined therein. Similarly, if an enactment is challenged as violative of any of the fundamental rights guaranteed by Clauses (a) to (g) of Article 19(1), it can be struck down only if it is found not saved by any of the Clauses (2) to (6) of Article 19 and so on. No enactment can be struck down by just saying that it is arbitrary or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act. An enactment cannot be struck down on the ground that Court thinks it unjustified. The Parliament and the Legislatures, composed

as they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them. The Court cannot sit in judgment over their wisdom. An enactment cannot be struck down by applying the principle of proportionality when its applicability even in administrative law sphere is not fully and finally settled. It is one thing to say that a restriction imposed upon a fundamental right can be struck down if it is disproportionate, excessive or unreasonable and quite another thing to say that the Court can strike down enactment if it thinks it unreasonable, unnecessary or unwarranted. The two rules stated above for striking down of enactments are however confined to an Act made by the Legislature.

It is settled law that the allegations regarding the violation of constitutional provision should be specific, clear and unambiguous and the burden is on the person who impeaches the law as violative of the constitutional guarantee to give relevant particulars and show that the particular provision is infirm for all or any of the reasons stated by him. In *Gauri Shanker and others Vs. Union of India and others*, , it has been reiterated as under-

(b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;

(c) that it must be presumed that the Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds:

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(e) that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation.

In *State of West Bengal and Another Vs. E.I.T.A. India Ltd. and Others*, it has been expressed thus:-

4. In examining the constitutional validity of the impugned provisions of a statute, it will be useful to bear in mind the following well-settled propositions. If a legislation is found to lack in legislative competence or is found to be in contravention of any provision of Part III or any other provision of the Constitution, the impugned legislation cannot escape the vice of unconstitutionality.....

As an issue has been raised with regard to the real, direct and inevitable impact of the law and the duty of the Court, we may refer with profit to the decision rendered in *Menaka Gandhi (supra)* wherein it has been held as under:

67.....Here we find the germ of the doctrine of direct and inevitable effect, which

necessarily must be effect intended by the legislature, or in other words, what may conveniently and appropriately be described as the doctrine of intended and real effect. So also in *Sakal Papers (P) Ltd. and Others Vs. The Union of India (UOI)*, while considering the constitutional validity of the Newspaper (Price and Page) Act, 1956 and Daily Newspaper (Price and Page) Order, 1960, this Court applied the test of direct and immediate effect. This Court, relying upon the decision in *Dwarkanadas Shrinivas of Bombay Vs. The Sholapur Spinning and Weaving Co. Ltd. and Others*, pointed out that "it is the substance and the practical result of the act of the State that should be considered rather than its purely legal aspect" and "the correct approach in such cases should be to enquire as to what in substance is the loss or injury caused to the citizen and not merely what manner and method has been adopted by the State in placing the restrictions". Since "the direct and immediate effect of the order" would be to restrain a newspaper from publishing any number of pages for carrying its news and views, which it has a fundamental right under Article 19(1)(a) to do, unless it raises the selling price as provided in the Schedule to the Order, it was held by this Court that the order was violative of the right of the newspapers guaranteed by Article 19(1)(a). Here again the emphasis was on the direct and inevitable effect of the impugned action of the State rather than on its object and form or subject-matter.

In *Daya Ram and Another Vs. State of M.P. and Others*, it has been stated thus:-

3.....The modus vivendi which requires a purposive and constructive ratiocination while engaged in viceration of the provision also warrants that a policy decision, a facet of the Legislature or at times a spectrum of the executive though may draw strength and stimulus in all its variation from the greatest instrument, i.e., the Constitution in a given case and in a particular fact situation if the provisions trespass the quintessential characteristic of Organic Law or Judge made law should not be allowed to stand.

Keeping in view the aforesaid guidance, we shall presently dwell upon the controversy that has emerged. The Parliament with the intention to organise the local bodies, inserted specific provisions in the Constitution and, ultimately, it culminated in the passing of the Constitution (Seventy-four Amendment) Act, 1992. Thus, in essentiality, the local governance has been ascribed a role under the Constitution. In this context, it is apt to refer to the Statement of Objects and Reasons behind the Amendment Act.

In many States local bodies have become weak and ineffective on account of a variety of reasons, including the failure to hold regular elections, prolonged supersessions and inadequate devolution of powers and functions. As a result, Urban Local Bodies are not able to perform effectively as vibrant democratic units of self-government.

Having regard to these inadequacies, it is considered necessary that provisions relating to Urban Local Bodies are incorporated in the Constitution particularly

for-

(i) putting on a firmer footing the relationship between the State Government and the Urban Local Bodies with respect to-

(a) the functions and taxation powers; and

(b) arrangements for revenue sharing;

(ii) Ensuring regular conduct of elections;

(iii) ensuring timely election in the case of supersession; and

(iv) providing adequate representation for the weaker sections like Scheduled Castes, Scheduled Tribes and women.

Accordingly, it is proposed to add a new part relating to the Urban Local Bodies in the Constitution to provide for-

xxxxxx xxxxxxxx xxxxxxxx

(e) reservation of seats in every Municipality-

(i) for Scheduled Castes and Scheduled Tribes in proportion to their population of which not less than one-third shall be for less than one third of the total number of seats:

(ii) for women which shall not be less than one third of the total number of seats;

(iii) in favour of backward class of citizens if so provided by the Legislature of the State;

(iv) for Scheduled Castes, Scheduled Tribes and women in the office of Chairpersons as may be specified in the State law;

Article 243T which is a consequence of the amendment is as follows:-

243T. Reservation of seats,

(1) Seats shall be reserved for the Scheduled Castes and the Scheduled Tribes in every Municipality and the number of seats so reserved shall bear, as nearly as may be, the same proportion to the total number of seats to be filled by direct election in that municipality as the population of the Scheduled Castes in the municipal area or of the Scheduled Tribes in the Municipal area bears to the total population of that area and such seats may be allotted by rotation to different constituencies in a Municipality.

(2) Not less than one-third of the total number of seats reserved under clause (1) shall be reserved for women belonging to the Scheduled Castes or, as the case may be, the Scheduled Tribes.

(3) Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes of the total number

of seats to be filled by direct election in every Municipality shall be reserved for women and such seats may be allotted by rotation to different constituencies in a Municipality.

(4) The offices of Chairpersons in the Municipalities shall be reserved for the Scheduled Castes, the Scheduled Tribes and women in such manner as the Legislature of a State may, by law, provide.

(5) The reservation of seats under clauses (1) and (2) and the reservation of offices of Chairpersons (other than the reservation for women) under clause (4) shall cease to have effect on the expiration of the period specified in Article 334.

(6) Nothing in this Part shall prevent the Legislature of a State from making any provision for reservation of seats in any Municipality or offices of Chairpersons in the Municipalities in favour of ward class of citizens.

In pursuance of the same, the State Legislature amended the Municipal Corporation Act, 1956 and the Municipalities Act, 1961. Initially, there was prescription that as nearly as possible 1/3rd seats shall be reserved for women. Thereafter, it has been enhanced to 50% by the impugned legislation. Presently, Section 11 of the 1956 Act reads as follows:

11. Reservation of seats. - (1) Out of the total number of wards determined under sub-section (1) of Section 10, such number of seats shall be reserved for Scheduled Castes and Scheduled Tribes in every Municipal Corporation as bears, as nearly as may be, the same proportion to the total number of seats to be filled by direct election in the Municipal Corporation as the population of the Scheduled Castes or of the Scheduled Tribes in the Municipal area bears to the total population of that area and such wards shall be those in which the population of the Scheduled Castes or the Scheduled Tribes as the case may be, is most concentrated.

(2) As nearly as possible twenty five percent of the total number of wards shall be reserved for other backward classes in such Municipal Corporations, where fifty percent or less seats are reserved for Scheduled Castes and Scheduled Tribes and such seats shall be allotted by rotation to different wards in such manner as may be prescribed:

Provided that if from any ward so reserved no nomination paper is filed for election, as a councillor, by any member of the backward classes, then the Collector shall be competent to declare it as unreserved.

(3) As nearly as possible fifty percent of the total number of seats reserved under sub-sections (1) and (2) shall be reserved for women belonging to the Scheduled Castes or the Scheduled Tribes or other backward classes, as the case may be.

(4) As nearly as possible fifty percent (including the number of seats reserved for women belonging to the Scheduled Castes, Scheduled Tribes and other backward

classes), of the total number of seats to be filled by direct election in every Municipal Corporation shall be reserved for women and such seats shall be allotted by rotation to different wards in a Municipal Corporation in such manner as may be prescribed.

(5) The reservation of seats under sub-sections (1), (2) and (3) shall cease to have effect on the expiration of the period specified in Article 334 of the Constitution of India.

Explanation. - In this section other backward classes means category of persons belonging to backward classes as notified by the State Government.

Section 29-A of the Municipalities Act, 1961 at present reads as follows:-

29-A. Reservation of Seats. - (1) Out of the total number of wards determined under sub-section (1) of Section 29, such number of seats shall be reserved for Scheduled Castes and Scheduled Tribes in every Municipality as bears as may be, the same proportion to the total number of seats to be filled by direct election in the Municipality as the population of the Scheduled Castes or of the Scheduled Tribes in the Municipal area bears to the total population of that area and such wards shall be those in which the population of the Scheduled Castes or the Scheduled Tribes, as the case may be, is most concentrated.

(2) As nearly as possible twenty-five percent of the total number of wards shall be reserved for Other Backward Classes in such Municipalities where fifty per cent or less seats are reserved for Scheduled Castes and Scheduled Tribes, and such seats shall be allotted by rotation to different wards in such manner as may be prescribed:

Provided that if from any ward so reserved, no nomination paper is filed for election, as a Councilor by any member of the Other Backward Classes then the Collector shall be competent to declare it as unreserved.

(3) As nearly as possible fifty percent of the total number of seats reserved under sub-sections (1) and (2), shall be reserved for women belonging to the Scheduled Castes or the Scheduled Tribes or Other Backward Classes, as the case may be.

(4) As nearly as possible fifty percent (including the number of seats reserved for women belonging to the Scheduled Castes, Scheduled Tribes and Other Backward Classes), of the total number of seats to be filled by direct election in every Municipality shall be reserved for women and such seats shall be allotted by rotation to different wards in a Municipality in such manner as may be prescribed.

(5) The reservation of seats under sub-sections (1), (2) and (3) shall cease to have effect on the expiration of the period specified in Article 334 of the Constitution of India.

Explanation. - In this section "Other Backward Classes" means category of

persons belonging to Backward Classes are notified by the State Government.

The Statement of Objects and Reasons behind the said amendment is profitably reproduced below:-

The Municipal Acts provided for reservation of one-third of the total number of seats of the Mayors of Municipal Corporations, Presidents of Municipalities and Councilors of these bodies for women. With a view to involve more women in the decision making process of the urban local bodies, it is proposed to enhance the existing ratio of reservation to as nearly as possible fifty percent.

As Articles 15 and 16 of the Constitution are of paramount signification in the present context, they are reproduced hereunder:-

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.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to-

(a) Access to shops, public restaurants, hotels and places of public entertainment; or

(b) The use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

[(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.]

[(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 the Scheduled Tribes in so far 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]. Equality of opportunities in matters of public employment.

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(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) Nothing in this article shall prevent Parliament from making any law prescribing in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.

(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 citizen which, in the opinion of the State, is not adequately represented in the services under the State.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

At this juncture, it is apposite to reproduce Articles 332 and 334:-

332. Reservation of seats for Scheduled Castes and Scheduled Tribes in the Legislative Assemblies of the States. - (1) Seats shall be reserved for the Scheduled Castes and the Scheduled Tribes, except the Scheduled Tribes in the autonomous districts of Assam in the Legislative Assembly of every State.

(2) Seats shall be reserved also for the autonomous districts in the Legislative Assembly of the State of Assam.

(3) The number of seats reserved for the Scheduled Castes or the Scheduled Tribes in the Legislative Assembly of any State under clause (1) shall bear, as nearly as may be, the same proportion to the total number of seats in the Assembly as the population of the Scheduled Castes in the State or of the Scheduled Tribes in the State or part of the State, as the case may be, in respect of which seats are so reserved bears to the total population of the State.

(3A) Notwithstanding anything contained in clause (3), until the taking effect, under article 170, of the re-adjustment, on the basis of the first census after the year 2026, of the number of seats in the Legislative Assemblies of the State of Arunachal Pradesh, Meghalaya, Mizoram and Nagaland, the seats which shall be reserved for the Scheduled Tribes in the Legislative Assembly of any such State shall be -

(a) if all the seats in the Legislative Assembly of such State in existence on the date of coming into force of the Constitution (Fifty-seventh Amendment) Act, 1987 (hereafter in this clause referred to as the existing Assembly) are held by members of the Scheduled Tribes, all the seats except one;

(b) in any other case, such number of seats as bears to the total number of seats, a proportion not less than the number (as on the said date) of members belonging to the Scheduled Tribes in the existing Assembly bears to the total number of seats in existing Assembly.

(3B) Notwithstanding anything contained in clause (3), until the readjustment under article 170, takes effect on the basis of the first census after the year 2026, of the number of seats in the Legislative Assembly of the State of Tripura, the seats which shall be such number of seats as bears to the total number of seats, a proportion not less than the number, as on the date of coming into force of the Constitution (Seventy-second Amendment) Act. 1992, of members belonging to the Scheduled Tribes in the Legislative Assembly in existence on the said date bears to the total number of seats in that Assembly.

(4) The number of seats reserved for an autonomous district in the Legislative Assembly of the State of Assam shall bear to the total number of seats in that Assembly a proportion not less than the population of the district bears to the total population of the State.

(5) The constituencies for the seats reserved for any autonomous district of Assam shall not comprise any area outside that district.

(6) No person who is not a member of a Scheduled Tribe of any autonomous district of the State of Assam shall be eligible for election to the Legislative Assembly of the State from any constituency of that district.

Provided that for elections to the Legislative Assembly of the State of Assam, the representation of the Scheduled Tribes and non-Scheduled Tribes in the constituencies included in the Bodoland Territorial Areas District, so notified, and existing prior to the constitution of the Bodoland Territorial Areas District, shall be maintained.

Reservation of seats and special representation to cease after sixty years.- Notwithstanding anything in the foregoing provisions of this Part, the provisions of this Constitution relating to -

(a) the reservation of seats for the Scheduled Castes and the Scheduled Tribes in the House of the People and in the Legislative Assemblies of the States; and

(b) the representation of the Anglo-Indian community in the House of the People and in the Legislative Assemblies of the States by nomination,

shall cease to have effect on the expiration of a period of sixty years from the commencement of this Constitution:

Provided that nothing in this article shall affect any representation in the House of the People or in the Legislative Assembly of a State until the dissolution of the then existing House or Assembly, as the case may be.

Be it noted, these Articles have been referred to by the learned counsel for the

petitioners to show that as far as Scheduled Castes and Scheduled Tribes are concerned, it has a concept of proportionate reservation and time limit but there is no provision of proportionate reservation for women. It is urged that though the said principle has to be followed yet unfortunately the same has been given a go-by: the State Legislature and nothing has been put-forth to satisfy the concept of proportionality.

In the obtaining factual matrix, it is to be seen whether the present special protective discrimination and affirmative acts fall in the compartment of excessive reservation and further obliterates, the equality facet or not. The submission of the learned counsel for the petitioners is that it offends Article 14 of the Constitution as the reservation in excess has denied equal opportunities to all citizens to contest the election. To elaborate; a male is debarred to contest from the constituencies where he should have contested because of the reservation made for a female. It is urged with vehemence from various spectrums that such reservation is beyond constitutional tolerance.

Regard being had to the said facet, the citations commended to us which reflect on reservation from many a sphere are to be referred to. First, we may refer with profit to the decision rendered in *Indra Sawhney* (supra) and the paragraphs which have been laid emphasis upon by the learned counsel for the petitioner to highlight the concept of reservation, adequate representation and proportionate reservation.

In paragraph 807 it has been stated thus:-

807. We must, however, point out that clause (4) speaks of adequate representation and not proportionate representation. Adequate representation cannot be read as proportionate representation. Principle of proportionate representation is accepted only in Articles 330 and 332 of the Constitution and that too for a limited period. These articles speak of reservation of seats in Lok Sabha and the State legislatures in favour of Scheduled Tribes and Scheduled Castes proportionate to their population, but they are only temporary and special provisions. It is therefore not possible to accept the theory of proportionate representation though the proportion of population of backward classes to the total population would certainly be relevant. Just as every power must be exercised reasonably and fairly, the power conferred by clause (4) of Article 16 should also be exercised in a fair manner and within reasonable limits- and what is more reasonable than to say that reservation under clause (4) shall not exceed 50% of the appointments or posts, barring certain extraordinary situations as explained hereinafter. From this point of view, the 21% reservation provided by the impugned Memorandums in favour of backward classes is well within the reasonable limits. Together with reservation in favour of Scheduled Castes and Scheduled Tribes, it comes to a total of 49.5%.

In paragraph 809, the majority has expressed the view in the following terms:

809. From the above discussion, the irresistible conclusion that follows is that the

reservations contemplated in clause (4) of Article 16 should not exceed 50%.

In paragraphs 810 to 812, it has been held thus:

810. While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in farflung and remote areas the population inhabiting those areas might, on account of their being out of the mainstream of national life and in view of conditions peculiar to and characteristic to them, need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out.

In this connection it is well to remember that the reservation under Article 16(4) do not operate like a communal reservation. It may well happen that some members belonging to, say, Scheduled Castes get selected in the open competition field on the basis of their own merit: they will not be counted against the quota reserved for Scheduled Castes; they will be treated as open competition candidates.

We are also of the opinion that this rule of 50% applies only to reservations in favour of backward classes made under Article 16(4). A little clarification is in order at this juncture: all reservations are not of the same nature. There are two types of reservations, which may, for the sake of convenience, be referred to as "vertical reservations" and "horizontal reservations". The reservations in favour of Scheduled Castes, Scheduled Tribes and other backward classes [under Article 16(4)] may be called vertical reservations whereas reservations in favour of physically handicapped [under clause (1) of Article 16] can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations - what is called interlocking reservations. To be more precise, suppose 3% of the vacancies are reserved in favour of physically handicapped persons: this would be a reservation relating to clause (1) of Article 16. The persons selected against this quota will be placed in the appropriate category; if he belongs to SC category he will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (OC) category, he will be placed in that category by making necessary adjustments. Even after providing for these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains - and should remain - the same. This is how these reservations are worked out in several States and there is no reason not to continue that procedure.

In paragraph 859(6), it has been stated thus:

859 (6) (a) and (b) The reservations contemplated in clause (4) of Article 16 should not exceed 50%. While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in far-flung and remote areas the population inhabiting those areas might, on account of their

being out of the mainstream of national life and in view of the conditions peculiar to and characteristic of them, need to be treated in a different way some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out."

Mr. Sanjay K. Agrawal has commended us to paragraph 258 to highlight the concept of reservation. It is worth noting that the said paragraph occurred in the decision rendered by Thommen, J. which was a dissenting view. The said paragraph reads as follows:

258. Reservation must one day become unnecessary and relic of an unfortunate past. Every such action must be a transient self-liquidating programme. That is the hope and dream cherished by the Constitution Makers and that is the end to which the State has to address itself in making special provisions for the chosen classes of people for special constitutional protection, so that "persons will be regarded as persons, and discrimination of the type we address today will be an ugly feature of history that is instructive by that is behind us" "Per Kistoce T. Marshall, Regents of the University of California v. Allan Bakke. See also H. Earl Fullilove v. Philip M. Klutznick; Metro Broadcasting Inc. v. Federal Communications Commission; Oliver Brown v. Board of Education of Tepeka; City of Richmond v. J.A. Croson Co; Wendy Wygant v. Jackson Board of Education.

In this regard, we may fruitfully refer to the concurring opinion of Sawant, J. His Lordship while dealing with the philosophy and objectives of reservation, has stated thus:

411. The aim of any civilised society should be to secure dignity to every individual. There cannot be dignity without equality of status and opportunity. The absence of equal opportunities in any walk of social life is a denial of equal status and equal participation in the affairs of the society and, therefore, of its equal membership. The dignity of the individual is dented in direct proportion to his deprivation of the equal access to social means. The democratic foundations are missing when equal opportunity to grow, govern, and give one's best to the society is denied to a sizeable section of the society. The deprivation of the opportunities may be direct or indirect as when the wherewithals to avail of them are denied. Nevertheless, the consequences are as potent.

Inequality ill-favours fraternity, and unity remains a dream without fraternity. The goal enumerated in the Preamble of the Constitution, of fraternity assuring the dignity of the individual and the unity and integrity of the nation must, therefore, remain unattainable so long as the equality of opportunity is not ensured to all.

XXX

The trinity of the goals of the Constitution, viz., socialism, secularism and democracy cannot be realised unless all sections of the society participate in the State power equally, irrespective of their caste, Community, race, religion and

sex and all discriminations in the sharing of the State power made on those grounds are eliminated by positive measures.

The learned counsel has also drawn our attention to paragraph 682 (9) to highlight that when the percentage of reservations is made for such classes to a demonstrably perverse identification or a demonstrably unreasonable percentage, judicial review is permissible. The learned counsels have also referred to paragraphs 741 and 742. We think it seemly to reproduce them:

741. In *Balaji* it was held - "there is no doubt that Article 15(4) has to be read as a proviso or an exception to Articles 15(1) and 29(2)". It was observed that Article 15(4) was inserted by the First Amendment in the light of the decision in *Champakam*, with a view to remove the defect pointed out by this Court namely, the absence of a provision in Article 15 corresponding to clause (4) of Article 16. Following *Balaji* it was held by another Constitution Bench (by majority) in *Devadasan* - "further this Court has already held that clause (4) of Article 16 is by way of a proviso or an exception to clause (1)". Subba Rao, J., however, opined in his dissenting opinion that Article 16(4) is not an exception to Article 16(1) but that it is only an emphatic way of stating the principle inherent in the main provision itself. Be that as it may, since the decision in *Devadasan*, it was assumed by this court that Article 16(4) is an exception to Article 16(1). This view, however, received a severe setback from the majority decision in *State of Kerala v. N.M. Thomas*. Though the minority (H.R. Khanna and A.C. Gupta JJ) stuck to the view that Article 16(4) is an exception, the majority (Ray, CJ, Mathew, Krishna Iyer and Fazal Ali, JJ) held that Article 16 (4) is not an exception to Article 16(1) but that it was merely an emphatic way of stating a principle implicit in Article 16(1). (Beg, J. took a slightly different view which it is not necessary to mention here). The said four learned Judges - whose view have been referred to in para 713 - held that Article 16(1) being a facet of the doctrine of equality enshrined in Article 14 permits reasonable classification just as Article 14 does. In our respectful opinion, the view taken by the majority in *Thomas* is the correct one. We too believe that Article 16(1) does permit reasonable classification for ensuring attainment of the equality of opportunity assured by it. For assuring equality of opportunity, it may well be necessary in certain situations to treat unequally situated person unequally. Not doing so would perpetuate and accentuate inequality. Article 16(4) is an instance of such classification, put in to place the matter beyond controversy.

The "backward class of citizens" are classified as a separate category deserving a special treatment in the nature of reservation of appointments/sports in the services of the State. Accordingly, we hold that clause (4) of Article 16 is not exception to clause (1) of Article 16. It is an instance of classification implicit in and permitted by clause (1). The speech of Dr. Ambedkar during the debate on draft Article 10(3) corresponding to Article 165(4) in the Constituent Assembly - referred to in para 693 - shows that a substantial number of members of the Constituent Assembly insisted upon a "provision (being) made for the entry of

certain communities which have so far been outside the administration", and that draft clause (3) was put in inrecognition and acceptance of the said demand. It is a provision which must be read along with and in harmony with clause (1). Indeed, even without clause (4), it would have been permissible for the State to have evolved such a classification and made a provision for reservation of appointment/sports in their favour. Clause (4) merely puts the matter beyond any doubt in specific terms.

Regarding the view expressed in Balaji and Devadasan, it must be remembered that at that time it was not yet recognized by this Court that Article 16(1) being a facet of Article 14 does implicitly permit classification. Once this feature was recognized the theory of clause (4) being an exception to clause (1) become untenable. It had to be accepted that clause (4) is and instance of classification inherent in clause (1). Now, just as Article 16(1) is a facet or an elaboration of the principle underlying Article 14, clause (2) of Article 16 is also an elaboration of a facet of clause (1). If clause (4) is an exception to clause (1) then it is equally an exception to clause (2). Question then arises, in what respect if clause (4) an exception to clause (2), if "class" does not means "caste". Neither clause (1) nor clause (2) speaks of class. Does the contention mean clause (1) does not permit classification and therefore clause (4) is an exceptions to it. Thus, from any point of view. The contention of the petitioners has no merit.

In paragraph 842 of the said decision, it has been opined as follows:-

842. It is enough to say on this question that there is no particular or special standard of judicial scrutiny in matter arising under Article 16(4) or for that matter, under Article 15(4). The extent and scope of judicial scrutiny depends upon the nature of the subject-matter, the nature of the right affected, the character of the legal and constitutional provisions applicable and so on. The acts and orders of the State made under Article 16(4) do not enjoy any particular kind of immunity. At the same time, we must say that court would normally extend due deference to the judgment and discretion of the executive - a co-equal wing-in these matters. The political executive, drawn as it is from the people and represent as it does the majority will of the people is presumed to know the conditions and the needs of the people and hence its judgment in matters within its judgment and discretion will be entitled to due weight. More than this, it is not neither possible nor desirable to say. It is not necessary to answer the question as framed.

In paragraph 518, his Lordship has expressed thus:

518. To summarise, the question may be answered thus. There is no legal infirmity in keeping the reservation under clause (4) alone or under clause (4) and clause (1) of Article 16 together, exceeding 50%. However, validity of the extent of excess of reservations over 50% would depend upon the facts and circumstances of each case including the field in which and the grade or level of administration for which the reservation is kept. Although, further, legally and

theoretically the excess of reservation over 50% may be justified, it would ordinarily be wise and nothing much would be lost, if the intentions of the Framers of the Constitution and the observations of Dr. Ambedkar, on the subject in particular are kept in mind. The reservations should further be kept category and gradewise at appropriate percentages and for practical purposes the extent of reservations should be calculated category and gradewise.

In this contest, we may also reproduce paragraph 514 of the said decision:-

514. It is necessary to add here a word about reservations for women. Clause (2) of Article 16 bars reservation in services on the ground of sex. Article 15(3) cannot save the situation since all reservations in the services under the State can only be made under Article 16. Further, women come from both backward and forward classes. If reservations are kept for women as a class under Article 16(1), the same inequitous phenomenon will emerge. The women from the advanced classes will secure all the post, leaving those from the backward classes without any. It will amount to indirectly provide statutory reservations for the advanced classes as such, which is impermissible under any of the provisions of Article 16. However, there is no doubt that women are a vulnerable section of the society, whatever the strata to which they belong. They are more disadvantaged than men in their own social class. Hence reservations for them on that ground would be fully justified, if they are kept in the quota of the respective class, as for other categories of persons, as explained above.

In *S. Sathyapriya and Others Vs. State of A.P. and Others*, the Apex Court was dealing with reservation for special categories under Art. 15(1) and in that context opined that the said reservation can be described as horizontal reservation. Their Lordships expressed that the said reservation cannot be in addition to the reservation made under Art. 15(4) of the Constitution which can be described as vertical reservation. Students who were admitted against horizontal reservation must be given adjustment against vertical social reservation quota under Art. 15(4) of the Constitution. After analyzing the facts, their Lordships proceeded to state as follows:

6. As stated above, the 161 seats meant for all-India merit quota are not yet filled up. We do not know whether all the seats will be filled up by the students allotted by the appropriate authority against that quota or any seats will be left vacant and surrendered to the State Government. Secondly, the 54 seats earmarked to be filled up from among the members of the special categories are deducted from the total number of seats. (These 54 seats are in lieu of 5% reservation in favour of certain special categories in Tamil Nadu). In our opinion, this is wrong. This 5% reservation for the said special categories cannot be in addition to 69% reservation. Whereas 69% reservation is under Article 15(4) of the Constitution, the 5% reservation for special categories is under Article 15(1). As held in *Indra Sawhney v. Union of India*- the seats reserved under Article 15(1) [corresponding to Article 16(1)] should have to be spread across the social reservation categories. In other words, while the reservations made under Article

15(4) can be broadly described as vertical reservations, the reservations provided under Article 15(1) can be described as horizontal reservations. The students admitted against horizontal reservation (5% quota in this case) will necessarily belong either to open competition category or to the BC/MBC/SC/ST category. Once selected they have to be adjusted against their respective quotas prescribed under Article 15(4). Thus, in law, these 54 seats must also be deemed to be now available. The students who will be admitted against these 54 seats will have to be spread across the appropriate categories as mentioned above, which would necessarily mean elimination of some students at the bottom of the respective OC/BC/MBC/SC/ST list to the extent necessary. At this stage, however, we are not inclined to cancel any of the admissions (sic) provide for the 62 merit students who have been deprived of admission because of the 69% reservation provided by the said Tamil Nadu Act without disturbing the admissions already made."

The learned counsel for the petitioners submitted that though the State has made an effort to propound that there is distinction between Article 15 and Article 16 as regards the reservation yet the same is not correct in view of the decision rendered in *Dr. Preeti Srivastava* (supra) wherein it has been emphasized that the constitutional perception of Art. 16(1) and Art. 16(4) is akin to Arts. 15(1) and 15(3) of the Constitution. The inspiration has been drawn from paragraphs 11 and 12 of the decision. The relevant portion of para 11 of the decision is as follows:-

The constitutional protection of equality before the law under Article 14 of the Constitution is one of the basic tenets of the Constitution. It is a cardinal value which will govern our policies and actions, particularly policies for employment and education. Article 15(1) prohibits State discrimination on the ground (among others) of religion, race or caste. Article 16(1) prescribes equality of opportunity for all in matters relating to employment or appointment to any office under the State. Article 16(2) prohibits discrimination on the ground (among others) of religion, race, caste or descent. At the same time, the Constitution permits preferential treatment for historically disadvantaged groups in the context of entrenched and clearly perceived social inequalities. That is why Article 16(4) permits reservation of appointments or posts in favour of any backward class which is not adequately represented in the services under the State. Reservation is linked with adequate representation in the services. Reservation is thus a dynamic and flexible concept. The departure from the principle of equality of opportunity has to be constantly watched. So long as the backward group is not adequately represented in the services under the State, reservations should be made....

In para 12, which has been emphasized upon, the Constitution Bench has expressed thus:

Article 15(4), which was added by the Constitution. First Amendment of 1951, enables the State to make special provisions for the advancement, inter alia of

Scheduled Castes and Scheduled Tribes, notwithstanding Articles 15(1) and 29(2). The wording of Article 15(4) is similar to that of Article 15(3). Article 15(3) was therefrom inception. It enables special provisions being made for women and Children notwithstanding Article 15(1) which imposes the mandate of non-discrimination on the ground (among others) of sex. This was envisaged as a method of protective discrimination. This same protective discrimination was extended by Article 15(4) to (among others) Scheduled Castes and Scheduled Tribes. As a result of the combined operation of these Articles, an array of programmes of compensatory or protective discrimination have been pursued by the various States and the Union Government."

In the said decision, their Lordships, after referring to a passage from Marc Halanter in his book "Competing Equities", have expressed thus:

Since every such policy makes a departure from the equality norm, though in a permissible manner, for the benefit of the backward, it has to be designed and worked in a manner conducive to the ultimate building up of an egalitarian non-discriminating society. That is its final constitutional justification. Therefore, programmes and policies of compensatory discrimination under Article 15(4) have to be designed and pursued to achieve this ultimate national interest. At the same time, the programmes and policies cannot be unreasonable or arbitrary, nor can they be executed in a manner which undermines to the vital public interests or the general good of all. All public policies, therefore, in this area have to be tested on the anvil of reasonableness and ultimate public good. In the case of Article 16(4) the Constitution makers explicitly spelt out in Article 335 one such public good which cannot be sacrificed, namely, the necessity of maintaining efficiency in administration. Article 15(4) also must be used, and policies under it framed, in a reasonable manner consistently with the ultimate public interests.

We have referred to the said decision as the learned counsel for the petitioners submitted that the policy behind the reservation for women neither spells out the public interest nor does it indicate in any manner how it would build up an egalitarian non- discriminating society.

The learned counsel for the petitioners have also invited our attention to the decision rendered in *M. Nagaraj (supra)* wherein their Lordships, while dealing with the constitutional validity of Article 16(4-A) which was inserted into the constitution retrospectively from 17-6-95 by the Constitution (Eighty-Fifth Amendment) Act, 2001 providing reservation in promotion with consequential seniority, dealt with the facet of concept or reservation thus:

39. Reservation as a concept is very wide. Different people understand reservation to mean different things. One view of reservation as a generic concept is that reservation is anti-poverty measure. There is a different view which says that reservation is merely providing a right of access and that it is not a right to redressal. Similarly, affirmative action as a generic concept has a

different connotation. Some say that reservation is not a part of affirmative action whereas others say that it is apart of affirmative action.

Our Constitution has, however, incorporated the word "reservation" in Article 16(4) which word is not there in Article 15(4). Therefore, the word "reservation" as a subject of Article 16(4) is different from the word "reservation" as a general concept

Applying the above test, we have to consider the word "reservation" in the context of Article 16(4) and it is in that context that Article 335 of the Constitution which provides for relaxation of the standards of evaluation has to be seen. We have to go by what the Constitution framers intended originally and not by general concepts or principles. Therefore, schematic interpretation of the Constitution has to be applied and this is the basis of the working test evolved by Chandrachud. J. in the Election Case 14.

In this context, it is apt to refer to the decision rendered by the Apex Court in *Toguru Sudhakar Reddy* (supra) wherein the Apex Court, while dealing with the provisions contained in the A.P. Cooperative Societies Act, 1964 wherein a proviso was added to Section 31(1)(f) of the Act in the year 1991, addressing the issue with regard to total reservation beyond 50%, expressed the view as follows:

The High Court rejected the main contention of the appellants- petitioners on the reasoning that Article 15(3) of the Constitution of India permits the making of special provisions for women. The High Court went into the scheme of the Andhra Pradesh Co-operative Societies Act, 1964 in detail and came to the conclusion that impugned provisions were not arbitrary. The High Court further rejected the contention that reservation beyond 50% was not permissible. The High Court rightly held that the ratio in *M.R. Balaji and Others Vs. State of Mysore*, was only confined to the reservations under Articles 15(4) and 16(4) of the Constitution of India.

In *Tulsiram Jatav* (supra) the petitioner therein challenged the constitutional validity of the provisions of the M.P. Municipal Corporation Act, 1956 and the M.P. Municipalities Act, 1961 wherein the provisions were made for reservation of seats in different wards in favour of Scheduled Castes and Scheduled Tribes, Other Backward Classes and women. The Bench referred to Article 243T in entirety, referred to Sections 11 and 11-A of the Corporation Act and also referred to the M.P. Nagar Palika (Anusuchit Jati, Anusuchit Jan Jati, Pichhada Varg Avam Mahilaon Ke Liye Wardon Ka Arakshan) Niyam, 1994, the M.P. Lok Seva (Anusuchit Jati, Anusuchit Jan Jati, Anya Pichhada Vargon Ke liye Arakshan) Adhiniyam, 1994, the M.P. Municipalities (Reservation of Office of Mayor and President) Rules, 1999 and the report of the M.P. State Backward Classes Commission popularly known as the Mahajan Commission report and after referring to the decision rendered in *Anugrah Narain Singh and Another Vs. State of U.P. and Others*, and the data contained in the aforesaid commission came to

hold as under:

From the language used in sub-section (2) of Section 11 of the Corporation Act analogous to sub-section (2) of Section 29A of Municipalities Act, analogous to sub-section (2) of Section 29A of Municipalities Act, 25% reservation for Other Backward Classes is not at flat rate, The expression used in those section is "as nearly as possible" 25% of the total number of seats shall be reserved for Other Backward Classes. The expression "as nearly as possible" makes 25% as the outer limit and not a fixed uniform flat rate. It is also not correct to suggest that fixation of this outer limit of 25% for Other Backward Classes for reservation of seats has no nexus or relation with their population in municipal areas. The Mahajan Commission report is a relevant document with the State to form a bona fide opinion that throughout the State the population of the Municipal Areas concerned. It is also wrong to suggest that the population of Other Backward Classes in Rural Areas for their representation on reserved seats in Urban area to Municipal Bodies is totally irrelevant. There is always inter-connection and mutual co-operation needed in the local bodies in Rural areas and in Urban areas as means of communication, transport, occupation, business, taxation as also civil amenities are interconnected between Rural and Urban population of a district, in the State. We are, therefore, unable to accept the argument advanced on behalf of the petitioners that fixation 25% reservation as outer limit for Other Backward Classes is regardless of their population in the Urban areas. The challenge, made to 25% reservation in favour of Other Backward Classes, therefore, fails.

After so holding, the Division Bench addressed to the challenge to the reservation to various categories exceeding 50% of the total seats. It was contended that in many of the municipal areas, municipalities and nagar panchayats, the reservation inclusive of all the categories, i.e., Scheduled Castes and Scheduled Tribes, Other Backward Classes including women from general and reserved categories, exceeded 50% which is contrary to the Constitution Bench judgment in Indra Sawhney (supra) in which the 50% limit has been laid down in respect of different classes for recruitment in public service. The petitioner therein, placed reliance on the decision in Anand Manohar Tambe v. State of M.P. (Writ Petition No. 1013/90) decided on 1212.1996) which pertained to reservation of seats for election to Cooperative Societies. On behalf of the State, it was contended that barring few municipalities, the reservation did not exceed 50%. In that context, the Division Bench in paragraph 37 held as follows:

In our considered opinion, if reservation in favour of reserved categories or classes of citizens for election to local bodies based on proportionate population is permitted by the constitutional provisions contained in Part IX of the Constitution, challenge to reservation on the ground that it exceeds 50% is unacceptable. It may be mentioned that the petitioners have challenged the constitutional validity of the State Legislation contained in the two Acts and Rules framed thereunder but there is no challenge made to the validity of the Constitutional provisions permitting reservations based on principle of

proportionate population contained in Part IX of the Constitution of India. Reservation of seats for special classes of citizens such as Scheduled Castes, Scheduled Tribes and socially and educationally backward classes cannot strictly be limited to the ceiling of 50% as was the ceiling put in the case of *Indra Sawhney* (supra) in recruitment to public services where efficiency of administration is one of the important considerations to be kept in view while judging the reasonableness of a reservation policy. We have dealt with this aspect of the challenge in greater detail in our Judgment delivered today in a batch of petitions challenging similar provisions of reservations in excess of 50% to Panchayats in W. P. No.2262/99 (Since reported in 2001 (4) MPLJ 206) (*Ashok Kumar Tripathi v. Union of India*).

Eventually, while dealing with the issue that the non-rotation of reserved seats amounts to reservation in perpetuity, in paragraph 40, D. M. Dharmadhikari, J. (as his Lordship then was) in the leading judgment held thus:

40. The learned Advocate General is right in pointing out that if rotation system is applied also to the Scheduled Castes and Scheduled Tribes seats reserved in descending order after ascertaining their population in various Municipal areas, even the wards in areas where their concentration of population may not be there or is less, would get reserved for them on rotation basis. That would be a result contrary to the intention for which the seats are reserved on the basis of population of Scheduled Castes and Scheduled Tribes. We are, therefore, unable to accept the submission made on behalf of the petitioners that rotation system should also be applied to seats reserved in preceding election for Scheduled Tribes and Scheduled Castes. The State Legislature was fully competent to make a law in the two Acts and the Rules that only the seats reserved in preceding election for Other Backward Classes and women which are categories of citizens in all the wards of a Municipal Area shall be rotated by lots but not the seats of Scheduled Castes and Scheduled Tribes. It is for the aforesaid reason that the seats which were reserved in the preceding election by rotation and on lots alone are required to be rotated again in the subsequent election or the ensuring election and no contravention of the Act or the Rules can be held to have been committed by the State.

In *Ashok Kumar Tripathi Vs. Union of India (UOI) and Others*, , the decisions rendered in *Amarendra Nath Dutta and Others Vs. State of Bihar and Others*, . *Janardan Paswan and Others Vs. State of Bihar and Others*, and *Krishna Kumar Mishra and Another Vs. State of Bihar and Others* etc. etc., and *Anirudh P. Shashtri* (supra) were pressed into service by the petitioners. It was urged that reservation above 50% both in Scheduled and non-Scheduled areas is far in excess of the proportionate population of the reserved categories resulting in creation of a rule of minority in local self government institutions over majority which is not countenanced by the Rule of Equality under Article 14 of the Constitution of India which is fundamental to the governance of the country. It was also canvassed that though the right of franchise may not be a fundamental

right yet it is a legal right and has to be protected on the anvil of the fundamental right of equality contained in Article 14 of the, Constitution. The aforesaid stand of the petitioner therein was combatted by the State stating that the concept of proportionality based on population is attracted and reservation in favour of the reserved categories may exceed 50%. It was pointed out that according to the Mahajan Commission, in the State of M.P., the population of OBC's was about 48% and looking to the fact that the percentage of population of OBC's in the State of M.P. is nearly 50%, a flat rate of 25% reservation has been made for OBC's under the 1993 Act. After stating the stand and counter stand, the Bench proceeded to hold as follows:

36.....Article 14 no doubt forbids denial of equality before law and equal protection of laws to the Citizens. Article 14, however does not envisage equal treatment of unequals. The Constitution itself has recognised necessity of special treatment and protection to the socially and the educationally backward classes or citizens, like Scheduled Tribes, Scheduled Castes and Socially Economically Backward citizens. Article 14 of the Constitution permits, therefore, protective treatment to deprived classes of citizens vis-a-vis the forward and advanced classes of the society. To safeguard interest of Scheduled Tribes living in remote or hill areas or forest with primitive culture of their own, the Constitution envisages formation of Scheduled Area for them, and application of laws to them with "exceptions and modifications", so that they are able to preserve their culture and occupation and are not exposed to exploitation by forward classes of Urban Population. The protective discrimination in favour of such deprived section of the society can go to the extent of complete exclusion, if the circumstances so justify of advanced classes in Local Self Governance of Scheduled areas. The main object and purpose behind such reservations based on population, even in excess of 50% is with a view that the exclusive participation of deprived and oppressed sections of the society in Local Self Government bodies in their areas is ensured because in open competition with the advanced sections of the society they can never have any share to participate in Self Governance. A close and careful examination of the provisions of the Central and State Act, in the light of Constitutional provisions, shows that principle of proportionate representation based on the population of the reserved categories has been adhered to but only departure has been made from it in giving them larger share of self governance by reserving seats for them as member and in the Scheduled Areas a monopoly on seats, of Chairpersons has been created for them so that they conserve their culture and way of living. The case of Indra Sawhney (supra) of the Supreme Court was concerning proportion of reservation for reserved categories including OBC's in public services where "-Maintenance of efficiency of administration" as laid down in Article 335 of the Constitution is held to be an important factor inputting a ceiling to reservation of 50%. The said decision was relied by the division bench of this Court in invalidating reservation in judgment in the case of Anand Manohar Tambe (supra) without dissenting from the view taken by the division bench in the

Cooperative election case, we find the Panchayat election matter completely distinguishable. Here elections are to be held under a prescribed, method for which there is constitutional sanction in Chapter IX and IXA of the Constitution. In the case of Anand Manohar Tambe (supra) pertaining to Cooperative elections no constitutional provision was involved and that makes the said case totally distinguishable in application of its ratio to these batch of petitions concerning Panchayat election and challenge to the extent of reservation therein. We find that the challenge to the alleged reservation being far in excess of 50% for membership to the Panchayats is not properly founded on any facts and figures ascertainable from 1991 census, which are published. There is therefore, a fallacy in the argument advanced. The petition, is founded on few stray examples of alleged excess reservation of seats in one or the other block in Panchayats. As has been pointed out on behalf of the State the basis of reservation has been "the population" figures ascertained from 1991 census and may be that in a given block or Panchayat area the reservation of seats is more than 50% but the over all extent of reservations in whole of the State in reserved categories does not exceed 50%. For taking a decision on the policy of reservation as to whether it is reasonable or unreasonable, the Court has to examine the over all Scheme of the Constitution as envisaged in Part IX and IXA and the corresponding Central and State Legislation brought to implement it. The aim and object of the reservation policy contained in Part IX and IXA is that the Backward and oppressed sections of the Society have to be encouraged in the democratic process by giving them a share of governance which hither-to was denied to them since the times of British India and after independence. The other object at the same time is to protect them from urban influences so that they may be able to conserve their culture and way of life and are not exposed to exploitation by the advanced or socially and economically powerful sections of the society.

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38. When the policy of reservation is based on proportionate population of the reserved classes at various levels of the State, merely on star instances in one or the other block, it cannot be held that the whole policy of reservation is bad and the reservation is in excess of 50%. The ceiling of 50% made applicable to public services to maintain a level of efficiency of administration cannot be made applicable when the constitution permits reservation on the basis of proportionate population of reserved categories. The policy has a benevolent aim of giving them training and chance of participating in Local Self Government being the lowest units of democratic institutions. The challenge, therefore, on the ground that the reservation in favour of categories in excess of 50% is bad, therefore fails.

(Empashsis supplied)

As is perceptible, in Tulsiram Jatav (supra), this Court upheld the constitutional validity of Sections 11 and 11-A of the Municipal Corporation Act and in Ashok Kumar Tripathi (supra), the Bench upheld the similar provisions of the M.P.

Panchayat Raj Adhiniyam.

If the law laid down in *Indra Sawhney* (supra), *Dr. Preeti Shrivastava* (supra) and *M. Nagraj* (supra) are properly understood, the principle laid down therein for the purposes of reservation is not applicable in respect of the seats meant for Municipal Corporations or Municipalities. In *Tulsiram Jatav* (supra) and *Ashok Kumar Tripathi* (supra), the Division Bench has dealt with the concept of population of other backward classes which was reflected in the Mahajan Commission report and opined that the reservation of seats for special classes of citizens such as Scheduled Tribes, Scheduled Castes and socially educationally backward classes cannot be strictly limited to the ceiling of 50% as the ceiling imposed in the case of *Indra Sawhney* (supra) is in respect of recruitment to public services. We are in respectful agreement with the view expressed therein. Thus, the reliance placed on various paragraphs by the learned counsel for the petitioners really do not render much assistance to them. The said decisions, be it noted, were rendered in the context of Articles 16(1) and 16(4) and in the matrix of Articles 15(1) and 15(4) of the Constitution.

The next submission of the learned counsel for the petitioners is that the reservation for women was not dealt with in *Tulsiram Jatav* (supra) and *Ashok Kumar Tripathi* (supra) and, therefore, it has to be dwelled upon whether such reservation is absolutely excessive and guillotines the basic equality clause. In quintessentiality, the proponement is that the reservation for women has to be proportionate to the population ratio and in the name of affirmative action, the State legislature cannot be allowed to stretch the facet of protective discrimination as a consequence of which the collective at large suffer immensely. It is urged by them that the plea advanced by the State that the reservation is horizontal and therefore the limit remains within 50% is absolutely misconceived. In election law, the conception of adjustment does not arise as the wards are reserved for Scheduled Castes, Scheduled Tribes, OBC's and unreserved category from the very inception and there is reservation of wards in each category for women. Thus, in the ultimate eventuality, there is no room for any adjustment and the ceiling does increase.

In this context, we may refer with profit to the decision rendered in *Anil Kumar Gupta* (supra) wherein a two-judge Bench of the Apex Court, while dealing with the controversy relating to the manner of vertical and horizontal reservation in the matter relating to the admission in medical courses, made a distinction between overall reservation and compartmentalised reservation in relation to special categories (special reservation) and expressed the view as follows:

15. On a careful consideration of the revised notification of 17/ 12/1994 and the aforementioned corrigendum issued by the Lucknow University, we are of the opinion that in view of the ambiguous language employed therein, it is not possible to give a definite answer to the question whether the horizontal reservations are overall reservations or compartmentalised reservations. We may explain these two expressions. Where the seats reserved for horizontal

reservations are proportionately divided among the vertical (social) reservations and are not intertransferable, it would be a case of compartmentalised reservations. We may illustrate what we say: Take this very case; out of the total 746 seats, 112 seats (representing fifteen per cent) should be filled by special reservation candidates, at the same time, the social reservation in favour of Other Backward Classes is 27% which means 201 seats for OBCs," if the 112 special reservation seats are also divided proportionately as between OC, OBC, SC and ST 30 seats would be allocated to the OBC category; in other words, thirty special category students can be accommodated in the OBC category; but say only ten special reservation candidates belonging to OBC are available, then these ten candidates will, of course, be allocated among OBC quota but the remaining twenty seats cannot be transferred to OC category (they will be available for OBC candidates only) or for that matter, to any other category; this would be so whether requisite number of special reservation candidates (56 out of 373 are available in OC category or not; the special reservation would be a watertight compartment in each of the vertical reservation classes (OC, OBC, SC and ST). As against this, what happens in the overall reservation is that while allocating the special reservation students to their respective social reservation category, the overall reservation in favour of special reservation categories has yet to be honoured. This means that in the above illustration, the twenty remaining seats would be transferred to OC category which means that the number of special reservation candidates in OC category would be $56 + 20 = 76$. Further, if no special reservation candidate belonging to SC and ST is available then the proportionate number of seats meant for special reservation candidates in SC and ST also get transferred to OC category. The result would be that 102 special reservation candidates have to be accommodated in the OC category to complete their quota of 112. The converse may also happen, which will prejudice the candidates in the reserved categories. It is, of course, obvious that the inter se quota between OC, OBC, SC and ST will not be altered.

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Now coming to the correctness of the procedure prescribed by the revised notification for filling up the seats, it was wrong to direct the fifteen per cent special reservation seats to be filled up first and then take up the OC (merit) quota (followed by filling of OBC, SC and ST quotas). The proper and correct course is to first fill up the OC quota (50%) on the basis of merit; then fill up each of the social reservation quotas, i.e., SC, ST and BC; the third step would be to find out how many candidates belonging to special reservations have been selected on the above basis. If the quota fixed for horizontal reservations is already satisfied in case it is an overall horizontal reservation no further question arises. But if it is not so satisfied, the requisite number of special reservation candidates shall have to be taken and adjusted/accommodated against their respective social reservation categories by deleting the corresponding number of candidates therefrom. (If, however, it is a case of compartmentalised horizontal reservation, then the process of verification and adjustment/accommodation as

stated above should be applied separately to each of the vertical reservations. In such a case, the reservation of fifteen per cent in favour of special categories, overall, may be satisfied or may not be satisfied.) Because the revised notification provided for a different method of filling the seats, it has contributed partly to the unfortunate situation where the entire special reservation quota has been allocated and adjusted almost exclusively again the OC quota.

In this connection, we must reiterate what this court has said in *Indra Sawhney*. While holding that what may be called "horizontal reservation" can be provided under clause (1) of Article 16, the majority judgment administered the following caution in para 144:

(B)ut at the same time, one thing is clear. It is in very exceptional situation and not for all and sundry reasons that any further reservations of whatever kind, should be provided under clause (1). In such cases, the State has to satisfy, if called upon, that making such a provision was necessary (in public interest) to redress the specific situation. The very presence of clause (4) should act as a damper upon the propensity to create further classes deserving special treatment. The reason for saying so is very simple. If reservations are made both under clause (4) as well as under clause (1), the vacancies available for free competition as well as reserved categories would be correspondingly whittled down and that is not a reasonable thing to do.

Though the said observations were made with reference to clauses (1) and (4) of Article 16, the same apply with equal force to clauses (1) and (4) of Article 15 as well. In this case, the reservation fifteen per cent of seats for special categories was on very high side. As pointed out above, two categories out of them representing six per cent out of fifteen per cent are really reservations under Article 15(4), wrongly treated as reservations under Article 15(1). Even otherwise, the special reservation would be nine per cent. The respondents would be well advised to keep in mind the admonition administered by this court and ensure that the special reservations (horizontal reservations) are kept at the minimum.

The learned counsel for the petitioners have drawn immense inspiration from the decision rendered in *Rajesh Kumar Daria* (supra). In the said decision their Lordships were dealing with Rule 9 (3) of the Rajasthan Judicial Service Rules, 1955 which stipulated that reservation for women candidates shall be 20% categorywise in the direct recruitment. The Apex Court referred to the decision rendered in *Indra Sawhney* (supra) and *Anil Kumar Gupta* (supra) and expressed the opinion in the following terms:-

9 The second relates to the difference between the nature of vertical reservation and horizontal reservation. Social reservation in favour of SC, ST and OBC under Article 16(4) are "vertical reservation". Special reservations in favour of physically handicapped, women, etc., under Articles 16(1) or 15(3) are "horizontal reservations". Where a vertical reservation is made in favour of a

Backward Class under Article 16(4), the candidates belonging to such Backward Class, may compete for non-reserved posts and if they are appointed to the non-reserved posts on their own merit, their number will not be counted against the quota reserved for respective Backward Class. Therefore, if the number of SC candidates, who by their own merit, get selected to open competition vacancies, equals or even exceeds the percentage of posts reserved for SC candidates, it cannot be said that the reservation quota for SCs has been filled. The entire reservation quota will be intact and available in addition to those selected under open competition category, (vide *Indra Sawhney*, *R.K. Sabharwal v. State of Punjab*, *Union of India v. Virpal Singh Chauhan* and *Ritesh R. Sah v. Dr. Y.L. Yamul*). But the aforesaid principle applicable to vertical (social) reservation will not apply to horizontal (special) reservations. Where a special reservation for women is provided within the social reservation for scheduled Castes, the proper procedure is first to fill up the quota for Scheduled Castes in order of merit and then find out the number of candidates among them who belong to the special reservation group of "Scheduled Castes women". If the number of women in such list is equal to or more than the number of special reservation quota, then there is no need for further selection towards the special reservation quota. Only if there is any shortfall, the requisite number of Scheduled Castes women shall have to be taken by deleting the corresponding number of candidates from the bottom of the list relating to Scheduled Castes. To this extent, horizontal (special) reservation differs from vertical (social) reservation. Thus, women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women. Let us illustrate by an example.

If 19 posts are reserved for SCs (of which the quota for women is four), 19 SC candidates shall have to be first listed in accordance with merit, from out of the successful eligible candidates. If such list of 19 candidates contains four SC women candidates, then there is no need to disturb the list by including any further SC woman candidate. On the other hand, if the list of 19 SC candidates contains only two women candidates, then the next two SC women candidates in accordance with merit, will have to be included in the list shall have to be deleted, so as to ensure that the final 19 selected SC candidates contain four women SC candidates. (But if the list of 19 SC candidates contains, more than four woman candidates, selected on own merit, all of them will continue in the list and there is no question of deleting the excess women candidates on the ground that "SC women ", have been selected in excess of the prescribed internal quota of four.).

As has been stated earlier, the law in the field of recruitment, promotion and admission to educational courses, is thematically different from the law relating to reservation of wards in Municipal Corporations, Municipalities and Gram Panchayats. Article 243T mandates for reservation for women. True it is, it provides that it is obligatory on the part of the State to provide 1/3rd seats for women from each category. Mr. Sanjay Agrawal, learned counsel appearing in one of the cases, submitted that there is a ceiling up to 1/3rd because of the

phraseology used in the said Article to which we shall advert to at a later stage but as far as the horizontal concept is concerned, the rule has been amended to clarify the position. The reservation for women has been made at 50% in each category keeping in view the constitutional philosophy but the term used, "horizontal reservation" in the present context cannot be construed to mean that there has to be adjustment and in case of absence of adjustment, the provisions occurring in the enactment and the rules framed thereunder would become per se unconstitutional. The real purpose of the statutory provisions is to be understood. It is clearly understandable that the seats are reserved for women for each category so that the proportionality of reservation qua particular category is maintained. It is settled in law that in respect of an unreserved seat a woman can contest either from reserved or unreserved category. Thus, the law as has been laid in the context of horizontal reservation in *Anil Kumar (supra)* and *Rajesh Kumar Daria (supra)* is distinguishable where the concept of reservation for woman in respect of wards in Municipal Corporation and Municipalities are concerned.

At this stage, we may fruitfully refer to certain citations where reservation for women in certain spheres were considered. In *Om Narain Agarwal and others Vs. Nagar Palika, Shahjahanpur and others*, . In the said case, the Apex Court was dealing with continuance of nominated women members during the pleasure of the State Government. While dealing with the said controversy, the Apex Court expressed the opinion on Art. 15(3) of the Constitution, which is as follows:

11. In our view, such provision neither offends any article of the Constitution nor the same is against any public policy or democratic norms enshrined in the Constitution. There is also no question of any violation of principles of natural justice in not affording any opportunity to the nominated members before their removal nor the removal under the pleasure doctrine contained in the fourth proviso to Section 9 of the Act puts any stigma on the performance or character of the nominated members. It done purely on political considerations. In *Dr. Rama Mishra's case* (1992 All LJ 199), the High Court held that the pleasure doctrine incorporated under the fourth proviso to Section 9 of the Act was violative of the fundamental right of equality as enshrined in Article 14 and Article 15(3) of the Constitution. We are unable to agree with the aforesaid reasoning of the High Court, Clause (3) of Article 15 is itself an exception to Article 14 and clauses (1) and (2) of Article 15 of the Constitution. Under Article 14, a duty is enjoined on the State not to deny any person equality before the law or the equal protection of the laws within the territory of India. Article 15(1) provides that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Article 15(2) provides that no citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to-

(a) access to shops public restaurants, hotels and places of public

entertainments; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

Thereafter Article 15(3) provides that nothing in this Article shall prevent the State from making any special provision for women and children. This means that in case any special provision is made for women, the same would not be violative on the ground of sex, which is prohibited under clauses (1) and (2) of Article 15 of the Constitution. Thus, the special provision contained for nominating one or two women members as the case may be provided in Section 9 of the Act would be protected from challenge under clause (3) of Art. 15 of the Constitution. It may also be worthwhile to note that the provision of pleasure doctrine incorporated by adding proviso four does not, in any manner; take away the right of representation of women members in the Board, but it only permits the State Government to keep the nominated women members of its own choice. The High Court in *Dr. Rama Mishra's case* (1992 All LJ 199) took a wrong view in holding that the fourth proviso to Section 9 of the Act was violative of Article 15(3) of the Constitution under an erroneous impression that this provision in any manner curtailed the representation of women members in the Board. We are not impressed with the reasoning given by the High Court that the fourth proviso to Section 9 of the Act in any manner deprived the fundamental right of equality as enshrined in Article 14 of the Constitution. It is well established that the right of equality enshrined under Article 14 of the Constitution applies to equals and not to unequals. The nominated members of the Board fall in a different class and cannot claim equality with the elected members. We are also not impressed with the argument that there would be a constant fear of removal at the will of the State Government and is bound to demoralise the nominated members in the discharge of their duties as a member in the Board. We do not find any justification for drawing such an inference, inasmuch as, such contingency usually arises only with the change of ruling party in the Government. Even in the case of functionary in the Government like the Governors, the Ministers, the Attorney General and the Advocate General discharge their duties efficiently, though removable at the pleasure of the competent authority under the law, and it cannot be said that they are bound to demoralise or remain under a constant fear of removal and as such do not discharge their functions in a proper manner during the period they remain in the office.

In *Vijay Lakshmi (supra)*, the Apex Court was dwelling upon the controversy as regards the preference given to women for being appointed as a Principal of the Government College. It was contended that such preference was violative of Arts. 14, 15 and 16 of the Constitution of India on the face of it. Be it noted, the High Court of Punjab and Haryana had declared the Rule relating to the same as unconstitutional. Their Lordships decided the controversy after referring to

certain established propositions of law, which are as follows:

4. For deciding the issue, we would refer to established propositions of law interpreting Arts. 14 to 16, which are:-

Article 14 does not bar rational classification; Reasonable discrimination between female and male for an object sought to be achieved is permissible;

Question of unequal treatment does not arise if there are different sets of circumstances; Equality of opportunity for unequals can only mean aggravation of inequality:

Equality of opportunity admit discrimination with reasons and prohibits discrimination with out reason - Discrimination with reasons means rational classification for differential treatment having nexus with constitutionally permissible objects - It is now an accepted jurisprudence and practice that the concept of equality before the law and the prohibition of certain kinds of discrimination do not require identical treatment. The equality means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal. To treat unequals differently according to their inequality is not only permitted but required (Re: St. Stephen's College v. University of Delhi (1992) 1 SCC 559).

St. Stephen's College etc., etc. Vs. The University of Delhi Etc., Etc.,

Sex is a sound basis for classification;

Article 15(3) categorically empowers the State to make special provision for women and children;

Articles 14, 15 and 16 are to be read conjointly.

In the light of the aforesaid principles, on the concept of equality enshrined in the Constitution, it can be stated that there could be classification between male and female for certain posts. Such classification cannot be said to be arbitrary or unjustified. If separate colleges or schools for girls are justifiable, rules providing appointment of lady principal or teacher would also be justified. The object sought to be achieved is a precautionary, preventive and protective measure based on public morals and particularly in view of the young age of the girl students to be taught. One may believe in absolute freedom, one may not believe in such freedom but in such case when a policy decision is taken by the State and rules are framed accordingly, it cannot be termed to be arbitrary or unjustified. Hence, it would be difficult to hold that rules empowering the authority to appoint only a lady Principal or a lady teacher or a lady doctor or a woman Superintendent are violative of Art. 14 or 16 of the Constitution.

Secondly, such reservation by the State is permissible in exercise of powers conferred under Art. 15(3), which provides thus :

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

of birth - (3) Nothing in this article shall prevent the State from making any special provision for women and children...

In *Reservation of a woman in the post of Enquiry-cum-Reservation Clerks in Railways*, (1997) 11 SCC 638, the Apex Court has held that the circular providing appointment on the post of Inquiry-cum-Reservation Clerks in four metropolitan cities of Madras, Bombay, Calcutta and Delhi to be manned only by women was not violative of Art. 14 or 16 of the constitution.

In *Govt. of Andhra Pradesh Vs. P.B. Vijaykumar and another*, wherein there was 30% reservation for women in the matter of direct recruitment, the High Court of A.P. had declared the said Rule as invalid. The Apex court over-ruling the same held thus:

9. In the light of these constitutional provisions, we look at Rule 22-A(2) it is apparent that the rule does make certain special provisions for women as contemplated under Article 15(3). Rule 22-A(2) provides for preference being given to women to the extent of 30% of the posts, other things being equal. This is clearly not a reservation for women in the normal sense of the term. Reservation normally implies a separate quota which is reserved for a special category of persons. Within that category appointments to the reserved posts may be made in the order of the merit. Nevertheless, the category for whose benefit a reservation is provided, is not required to compete on equal terms with the open category. Their selection and appointment to reserved posts is independently on their inter se merit and not as compared with the merit of candidates in the open category. The very purpose of reservations, to protect this weak category against competition from the open category candidates. In the case of *Indra Sawhney* (1992 Sup (3) SCC 217 : AIR 1992 SCW 3682), (supra) while dealing with reservation, this Court has observed (at paragraph 836) (of SCC): (Para 111 of AIR.) "It cannot also be ignored that the very idea of reservation implies selection of a less meritorious person. At the same time, we recognise that this much cost has to be paid, if the constitutional promise of social justice is to be redeemed." These remarks are qualified by observing that efficiency, competence and merit are not synonymous and that it is undeniable that nature has endowed merit upon members of backward classes as much as it has endowed upon members of other classes. What is required is an opportunity to prove it. It is precisely a lack of opportunity which has lead to social backwardness, not merely amongst what are commonly considered as the backward classes, but also amongst women. Reservation, therefore, is one of the constitutionally recognised methods of overcoming this type of backwardness. Such reservation is permissible under Article 15(3)."

Rule 22-A(2), however, does not provide for this kind of reservation for women. It is a Rule for a very limited affirmative action. It operates, first of all, in respect of direct recruitment to posts for which men and women are equally suited. Secondly, it operates only when both men and women candidates are equally meritorious, this is an express condition of Rule 22-A(2), thus limiting its

application. In other words, it contemplates a situation where, in the selection test-whether it is written or oral or both, a certain number of men and women candidates have got an equal number of marks. If the number of posts to which these equally situated men and women can be appointed are limited, and all of them cannot be appointed, then preference to the extent of 30% is required to be given to women. This is clearly an affirmative action of preference to the extent of 30% for women. To give an illustration supposing there are in the merit list, at a certain point in the order of merit, 20 candidates - men and women, who have secured equal marks. There are only ten posts which have to be distributed amongst these 20 candidates. In such a situation, 3 out of these 10 posts will be given to women while the remaining 7 posts will have to be allotted among the remaining 11 candidates. In such a situation if there are any departmental rules for giving preference they will operate. For example such rules at times provide that a person who is older in age will be preferred, all other things being equal. This kind of preference may have nothing to do with merit. It may be merely an administrative guideline to select from amongst those who are equally meritorious. Sometimes educational qualifications are looked at to find out the marks obtained by the candidates in the examination. It could be that the examination taken by different candidates is of different institutions or universities and is taken at different times. Nevertheless, these marks are looked at to select some candidates out of a group of equally meritorious persons. These norms for selection out of equally meritorious persons do not come into play under Rule 22-A(2) for giving preference to women. The phrase "other things being equal" does not refer to these other norms for choosing from out of equally meritorious persons. For example, it would be somewhat startling to find men and women who have not merely got the same number of marks in the selection test but are also born on the same day in the same year. It is not the intention of Rule 22-A(2) that it would apply only if all the candidates have not merely the same number of marks in the selection test but are also born on the same date, or have identical marks in the qualifying diploma or degree examination. The preference contemplated under Rule 22-A(2) will come into operation at the initial stage when in the selection test for the post in question candidates obtain the same number of marks or are found to be equally meritorious. Rule 22-A(2) prescribes a minimum preference of 30% for women, clearly contemplating that for the remaining posts also, if women candidates are available and can be selected on the basis of other criteria of selection among equals which are applied to the remaining candidates, they can also be selected. The 30% rule is also not inflexible. In a situation where sufficient number of women are not available, preference that may be given to them could be less than 30%.

We do not, however, find any reason to hold that this rule is not within the ambit of Article 15(3), nor do we find it in any manner violative of Article 16(2) or 16(4) which have to be read harmoniously with Articles 15(1) and 15(3). Both reservation and affirmative action are permissible under Article 15(3) in connection with employment or posts under the State. Both Articles 15 and 16

are designed for the same purpose of creating an egalitarian society. As Thommen, J. has observed in Indra Sawhney's case (AIR 1992 SCW 3682), (supra) (although his judgment is a minority judgment), "Equality is one of the magnificent corner stones of Indian democracy." We have, however, yet to turn that corner. For that purpose it is necessary that Article 15(3) be read harmoniously with Article 16 to achieve the purpose for which these Articles have been framed.

On a perusal of the aforesaid decisions, it is clear as crystal that there is a distinction between the reservations meant for Scheduled Tribes, Scheduled Castes and Other Backward Classes and a special affirmative action under Article 15(3) of the Constitution. The law as has been laid down clearly postulates that both reservation and affirmative action are permissible under Article 15(3) of the Constitution. Article 15(3) has to be read harmoniously with Article 16 so as to achieve the purpose for which the Articles have been incorporated in the Constitution.

At this juncture, we may fruitfully refer to certain other authorities in relating to affirmative action. In *Reservation of a woman in the post of Enquiry-cum-Reservation Clerks in Railways*, (1997) 11 SCC 638, their Lordships opined thus:-

2.....It has been held that Article 15 deals with every kind of State action in relation to the citizens of this country and that every sphere of activity of the State is controlled by Article 15(1) and, therefore, there was no reason to exclude from the ambit of Article 15(1) employment under the State. Since Articles 15(1) and 15(3) go together, the protection of Article 15(3) would be applicable to employment under the State falling under Articles 16 (1) and (2) of the Constitution.

In *Thota Sesharathamma and Another Vs. Thota Manikamma (Dead) by Lrs. and Others*, the Apex Court held as under:-

21.....Article 15(3) relieves from the rigour of Article 15(1) and charges the State to make special provision to accord to women socio-economic equality.....It would mean that the court would endeavour to give full effect to legislative and constitutional vision of socio-economic equality to female citizen by granting full ownership of property to a Hindu female. As a fact Article 15(3) as a forerunner to common code does animate to make law to accord socio-economic equality to every female citizen of India irrespective of religion, race, caste or region.

In *Dr. Satish Menon* (supra) a Division Bench of this Court was called upon to decide the constitutional validity of the M.P. Medical and Dental Post Graduate Course Entrance Examination Rules, 2009 which provide that one seat of orthodontics in Post Graduate Dental Course allocated to the unreserved category be filled up by a female candidate in the year 2009. It was contended before the Bench that such a reservation was not permissible. Reliance was

placed on the decision rendered in *M.R. Balaji and Others Vs. State of Mysore*, wherein it has been held that 68% of seats in technical institute in favour of backward classes or SC/ST is not permissible under Article 15(4) of the Constitution. The other decisions that were relied upon are *Deepak Sibal Vs. Punjab University and Another*, and *Post Graduate Institute of Medical Education and Research, Chandigarh Vs. Faculty Association and Others*, . The Division Bench taking note of the decision rendered in *Toguru Sudhakar Reddy (supra)* and *P.B. Vijaykumar (supra)* speaking through learned Chief Justice has held as under:-

6. We would like to first deal with the provisions of Articles 14 and 15(3) of the Constitution on which the petitioner and respondents rely for their respective cases. Article 14 provides that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory India. Article 15(1) states that the State shall not discriminate against any citizen on grounds only of religion, race caste, sex, place of birth or any of them and Article 15(3) provides that nothing in this Article shall prevent the State from making any special provision for women and children. These provisions of Articles 14 and 15 of the Constitution have been interpreted by Courts while dealing with challenges to special provisions for women made by the State and it has been held that special provisions made by the State under Article 15(3) of the Constitution are saved both from Articles 14 and 15 of the Constitution.

Thereafter, the Bench referred to the decisions in *Dattatraya Motiram More Vs. State of Bombay*, and *Yusuf Abdul Aziz Vs. The State of Bombay and Husseinbhoj Laljee*, and expressed the view in the following terms:

10. It is therefore clear that to enable women of this country, who for centuries were socially and economically handicapped to participate in the socio-economic activities on equal footing with men and to eliminate the backwardness of women, Article 15(3) provides that the State can make special provision for women. Such special provisions for women include reservation of seat in educational institutions or of posts in public employment in favour of women. According to Mr. Sanghi, however, no provision for reservation can be made of a single seat in an educational institution or a single post in public employment in favour of women as per the law laid down in *M.R. Balaji and Others Vs. State of Mysore*, , *Deepak Sibal Vs. Punjab University and Another*, , *Chakradhar Paswan Vs. State of Bihar and Ors*, and *Post Graduate Institute of Medical Education and Research, Chandigarh Vs. Faculty Association and Others*, . But it has been held in *Toguru Sudhakar Reddy and another Vs. The Govt. of Andhra Pradesh* and others, that the decision of the Supreme Court in *M.R. Balaji vs State of Mysore (supra)* that the total reservation of seats in educational institutions under Article 15(4) should not go beyond 50% was confined only to reservation under Article 15(4) of the Constitution. In *Vijay Lakshmi Vs. Punjab University and Others*, , the Supreme Court relying upon *Toguru Sadhakar Reddy v The Government of Andhra Pradesh (supra)* has observed:

Further, this Court in *Toguru Sudhakar Reddy and another Vs. The Govt. of Andhra Pradesh and others*, approved the reasoning of the High Court of Andhra Pradesh wherein it was held reservation beyond the Constitution and that ratio in *M.R. Balaji and Others Vs. State of Mysore*, was only confined to the reservation under Arts. 15(4) and 16(4) of the Constitution of India.

Hence, the decisions of the Supreme Court under Article 15(4) and 16(4) that reservations in favour of SC, ST and OBC categories cannot exceed 50% or cannot be 100% do not apply to a special provision in favour of women under Article 15(3) of the Constitution.

In *P.B. Vijayakumar (supra)*, a two-Judge Bench of the Apex Court expressed thus:-

3.....Article 15, however, prohibits differentiation between classes on certain grounds. It prohibits the State from discriminating against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Clause (3) of Article 15 provides that nothing in this article shall prevent the State from making any special provision for women and children. In other words, while Article 15(1) would prevent a State from making any discriminatory law (inter alia) on the ground of sex alone, the State, by virtue of Article 15(3), is permitted, despite Article 15(1), to make special provisions for women, thus clearly carving out a permissible departure from the rigours of Article 15(1).

Thereafter, their Lordship proceeded to state as follows:

6.....The interrelation between Articles 14, 15 and 16 has been considered in a number of cases by this Court. Article 15 deals with every kind of State action in relation to the citizens of this country.....

In *Rajesh Kumar Gupta and Others Vs. State of U.P. and Others*, , their Lordships of the Apex Court while concurring with the view taken by the High Court of Allahabad in respect of reservation of 50% passed in favour of female candidate has opined thus:-

14. The Division Bench took the view that Article 15(3) of the Constitution enables the State Government to make special provision for women and children notwithstanding the prohibition contained in Article 15(1). Particularly viewed in the back-ground of the fact that a large number of young girls below the age of 10 years were taught in the primary school and recognizing that it would be preferable that such young girls are taught by women, the reservation of 50% of the posts in favour of the female candidates was held to be justified. The classification made was justified and cannot be styled as arbitrary or liable to be hit by the Article 14.

We agree with the Division Bench of High Court that there was no violation of Articles 14, 15 and 16 of the Constitution.

From the principle enunciated in the aforesaid decisions, it is clear as day that

the reservation and affirmative action in favour of women are permissible.

It is submitted by Mr. Sanjay K. Agrawal that the reservation of women categorywise tantamounts to reservation within reservation. To buttress the said submission, he has commended us to the decision rendered in *Than Singh* (supra) to highlight that this Court had not approved the concept of reservation within reservation. In essentiality, the submission of the learned counsel for the petitioner is that the reservation for women which has been styled as horizontal by the State Government by amending the rules is basically a reservation within reservation. In *Than Singh* and others (supra), this Court has expressed the view as follows:

26. There is subtle and fine distinction between protective discrimination and a protective discrimination that destroys a larger public interest or social interest and also defeats the fundamental requirement of the body polity. The proponent that the said provision is in consonance with Articles 15(3) and 15(4), in our considered opinion, is neither correct nor sound inasmuch as the concept of reservation to that extent would not be within the ambit and sweep of protective or affirmative discrimination. We are disposed to think so as there is reservation in respect of seats and a further reservation would tantamount to reservation within reservation. We may hasten to clarify that on the first flush the provision may not appear to be reservation because it has been grafted and woven into the concept of quorum but on a deeper probe and deeper scrutiny it becomes patent that there is reservation in the quorum inasmuch as without the presence of the reserved categories of persons the gram sabha" becomes non-functional. It is so, as no alternative has been provided under the Act. An agreement may be advanced that the empowerment of the women is a necessity and the same has to be done keeping in view the historical and cultural background in which women have led their lives for centuries, and keeping in view that they belong to the weaker sections of the society a balance has to be struck by conferring more power on them. It may be felt that to endow women with more power and proceed for affirmative discrimination as far as scheduled castes and scheduled tribes are concerned, is the call and warrant of the day and should not be deferred till tomorrow. It may be urged that in a progressive democracy such a recognition is sine qua non and the instant provision achieves it but, a pregnant and significant one, that the weaker sections have been protected at the level of the Panchayat and to put them in a further smaller group they have the latent potentiality as well as patent power to act in contra democratic way. It would not be within the ambit and sweep of special provision which would stand the test of reasonableness and non-arbitrariness which is a part of the Article 14 of the Constitution as that would be further than the constitutional latitudes. The conception of mini reservation in fact, destroys the principle of affirmative protection as it has proceeded to such an extent by which if we are permitted to say, a small fish in a big pond threatens the big fishes that it has the sharpness to destroy them.

We have reproduced the said paragraph in extenso as there was a provision under the Act which really pertained to reservation for constituting the quorum. The said decision in our considered opinion was rendered in a different context altogether and does not aid and assist the learned counsel for the petitioners. We may say with profit that a decision should not be read as a statute but understood in the context thereof.

The next limb of submission by the learned counsel for the petitioners in that the reservation for women even if accepted as an affirmative action, the percentage fixed is arbitrary and invites the wrath of Article 14 of the Constitution. The emphasis has been laid on the direct and inevitable impact based on the doctrine enunciated in the case of *Maneka Gandhi (supra)*.

In this regard it will be profitable to reproduce a passage from the recent decision rendered in the case of *E.V. Chinnaiah Vs. State of Andhra Pradesh and Others*, :

39. Legal constitutional policy adumbrated in a statute must answer the test of Article 14 of the Constitution. Classification whether permissible or not must be judged on the touchstone of the object sought to be achieved. If the object of reservation is to take affirmative action in favour of a class which is socially, educationally and economically backward, the State's jurisdiction while exercising its executive or legislative function is to decide as to what extent reservation should be made for them either in public service or for obtaining admission in the educational institutions. In our opinion, such a class cannot be subdivided so as to give more preference to a minuscule proportion of the Scheduled Castes in preference to other members of the same class.

We have referred to the aforesaid paragraph to highlight that the object of reservation is to take an affirmative action in favour of a class. In the said case, in paragraph 42, their Lordships have expressed the view as under:-

42. Reservation must be considered from the social objective angle, having regard to the constitutional scheme, and not as a political issue and thus, adequate representation must be given to the members of the Scheduled Castes as a group and not to two or more groups of persons or members or castes.

In the concurring judgment. S.B. Sinha, J., while dealing with the equal protection clause under Article 14 of the Constitution, has expressed the view as under:-

68. Equal protection clause mandates that all persons under like circumstances should be treated alike. Article 14 is in many respect similar to the Fourteenth Amendment of the American Constitution, the relevant portion where of reads as follows:

.....no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the united States; nor shall any State deprive any person of life, liberty of property without due process of law; nor deny to any

person within its jurisdiction the equal protection of the laws.

Article 14 of the Constitution aims at equality. It prohibits discrimination in any form. At its worst form, it will be violative of a basic and essential feature of the Constitution.

His Lordship while dealing with the concept of reservation in the backdrop of the doctrine of equality, in paragraph 79, has expressed the view as under:-

79. Indisputably, only because the Scheduled Castes and Scheduled Tribes and other socially and economically backward class of citizens are not in a position to compete with the general category candidates, the equality principle has been adopted by way of affirmative action by the State Government in making reservations in their favour both as regards admission in educational institutions and public employment. The doctrine of equality is the fibre with which the constitutional scheme is woven.

In *Western M.P. Electric Power and Supply Company Ltd. Vs. State of U.P. and Another*, , it has been held as follows:

7. Article 14 of the constitution ensures equality among equals: its aim is to protect persons similarly placed against discriminatory treatment. It does not however operate against rational classification. A person setting up a grievance of denial of equal treatment by law must establish that between persons similarly circumstanced, some were treated to their prejudice and the differential treatment had no reasonable relation to the object sought to be achieved by the law.

In *Miss Arti Sapru and Others Vs. State of Jammu & Kashmir and Others*, , their Lordship of the Apex Court, in paragraphs 9 and 10, have expressed the view as under:-

We are of opinion that the classification attempted by the State Government by its order dated September 24, 1980 suffers from the vice of arbitrariness and must be declared invalid. There is no intelligible data before us for sustaining the classification. No doubt the State Government has acted in its own wisdom, but the material to which that wisdom was applied has not been disclosed at all. The fact by itself that some hundreds of villages have been brought within the classification is of no assistance whatever.

Over six years ago, this Court in *State of U.P. v. Pradip Tandon* ruled that in the matter of admission of students to medical colleges a reservation in favour of candidates on the ground that they hailed from rural areas was unconstitutional. The court repelled the argument that it was necessary to reserve seats for candidates from rural areas because they were handicapped in the matter of education. It also rejected the plea that as the number of marks obtained by candidates from rural areas in the qualifying test were much lower than the marks obtained by the general candidates that was an indication of the former's educational backwardness. *Ra*, C.J. Speaking for the Court observed: (SCC

p.277, para 29)

The reservation for rural areas cannot be sustained on the ground that the rural areas represent socially and educationally backward classes of citizens. This reservation appears to be made for the majority population of the State. Eighty per cent of the population of the State cannot be a homogenous class. Poverty in rural areas cannot be the basis of classification to support reservation for rural areas.

As far as the challenge relating to Article 14 is concerned, we think it appropriate to note that it is a legislative intendment for conferring special treatment on women. The submission of the learned counsel for the petitioners is that the reservation is excessive and further the classification between the male and female has no rationale and there is no purpose to achieve. While dealing with the concept of a public policy which has been laid down by the legislature, the same requires to be tested under Article 14 of the Constitution of India and certain principles are to be kept in mind. In *The State of Jammu and Kashmir Vs. Shri Triloki Nath Khosa and Others*, , their Lordships have held as follows:-

The challenge, at best, reflects the respondent's opinion on promotional opportunities in public services and one may assume that if the roles were reversed, respondents would be interested in implementing their point of view. But we cannot sit in appeal over the legislative judgment with a view to finding out whether on a comparative evaluation of rival theories touching the question of promotion, the theory advocated by the respondents is not to be preferred. Classification is primarily for the legislature or for the statutory authority charged with the duty of framing the terms and conditions of service; and if, looked at from the standpoint of the authority making it, the classification is found to rest on a reasonable basis, it has to be upheld.

In the said case, it has been further held as follows:-

But the concept of equality has an inherent limitation arising from the very nature of the constitutional guarantee. Equality is for equals. That is to say that those who are similarly circumstanced are entitled to an equal treatment.

Since the constitutional code of equality and equal opportunity is a charter of equals, equality of opportunity in matters of promotion means an equal promotional opportunity for persons who fall, substantially, within the same class.

Keeping the aforesaid principles in view, the question that emerges and emanates for consideration is whether the reservation for women is without any basis and creates a classification which is irrational and arbitrary. As we have held earlier the power to reserve seats for women occurs in Article 243T of the Constitution of India. The said provision, submits Mr. Sanjay Agrawal, puts a ceiling upto 1/3rd.

First, we will clarify the maze as envisioned by Mr. Agrawal. Article 243T used the word "not less than". In *M.N. Abdul Rawoof Vs. Pichamuthu and Others*, , it has

been held that "not less than" denotes the "minimum". In *Rajeev Chaudhary Vs. State (N.C.T.) of Delhi*, , the Apex Court, while interpreting the term "imprisonment for a term not less than 10 years", expressed the view that the said expression would mean that "imprisonment should be for 10 years or more". In *Karnail Singh and Another Vs. Darshan Singh and Others*, , the Apex Court was considering Section 4 of Punjab Gram Panchayat Act, 1952 wherein the word used are "not less than 500" and in that context, their Lordships opined that if the population is more than 500 there is no prohibition u/s 4(1) for the Government to exercise the power declaring such a gram sabha area within the same revenue set-up to be Panchayat.

In view of the aforesaid, the submission put forth by Mr. Agrawal that the use of the term "not less than" puts a ceiling upto 1/3rd of the words is sans substratum and, accordingly, we repeal the same.

We have already reproduced the Statement of Objects and Reasons for bringing this amendment. It has been brought into existence to involve more women in the decision making process of the urban local bodies and therefore, the legislation is to enhance the existing ratio of reservation to as nearly as possible 50%. Thus, the purpose is to empower women in the participation of the democratic process at the initial or grass root level.

It would not be out of place to refer to the decision rendered in *R.C. Poudyal and Others Vs. Union of India and others*, wherein the challenge was to the constitutionality of the special status conferred on the State of Sikkim by virtue of Constitution 36th Amendment Act, 1975 particularly in the matter of reservation of seats for various ethnic and religious groups in the Legislative Assembly of the State. The said aspect was called in question and a prayer was made to declare the same as unconstitutional. Then the majority speaking through Venkatachalliah, J. (As his Lordship then was) held thus:

119. It is true that the right to vote is central to the right of participation in the democratic process. However, there is less consensus amongst theorists on the propriety of judicial activism in the voting area. In India, the Delimitation Laws made under Art. 327 of the Constitution of India are immune from the judicial test of their validity and the process of allotment of seats and constituencies not liable to be called in question in any court by virtue of Art. 329(a) of the Constitution. But the laws providing reservations are made under authority of other provisions of the Constitution such as those in Art. 332 or clause (f) of Art. 371F which latter is a special provision for Sikkim.

The rationale and constitutionality of clause (f) and the other provisions of the electoral laws impugned in these petitions are sought to be justified by the respondents on grounds that first, a perfect arithmetical equality of value of votes is not a constitutionally mandated imperative of democracy and, secondly, that even if the impugned provisions make a departure from the tolerance limits and the constitutionally permissible latitudes, the discriminations arising are

justifiable on the basis of the historical considerations peculiar to and characteristic of the evolution of Sikkim's political institutions. This, it is urged, is the justification for the special provisions in clause (f) which was specifically intended to meet the special situation. It is sought to be pointed out that throughout the period when the ideas of responsible-Government sprouted in Sikkim, there has been a vigilant political endeavour to sustain that delicate balance between Bhutias-Lepchas on the one hand and the Sikkimese of Nepalese origin on the other essential to the social stability of that mountain-State. Clause (f) of Art. 371F was intended to prevent the domination of the later Nepali immigrants who had, in course of time, outnumbered the original inhabitants. What Art. 371F(f) and the electoral laws in relation to Sikkim seek to provide, it is urged, is to maintain this balance in the peculiar historical setting of the development of Sikkim and its political institution.

Thereafter in paragraphs 126, 127, 129, 130 and 131 the Apex Court ruled thus:-

80. An examination of the constitutional scheme would indicate that the concept of one person one vote" is in its very nature considerably tolerant of imbalances and departures from a very strict application and enforcement. The provision in the Constitution indicating proportionality of representation is necessarily a broad, general and logical principle but not intended to be expressed with arithmetical precision. Articles 332(3A) and 333 are illustrative in this respect. The principle of mathematical proportionality of representation is not a declared basic requirement in each and every part of the territory of India. Accommodations and adjustments, having regard to the political maturity, awareness and degree of political development in different parts of India, might supply the justification for even non-elected Assemblies wholly or in part, in certain parts of the country. The differing degrees of political development and maturity of various parts of the country may not justify standards based on mathematical accuracy. Articles 371A, a special provision in respect of State of Nagaland, 239A and 240 illustrate the permissible areas and degrees of departure. The systemic deficiencies in the plenitude of the doctrine of full and effective representation has not been understood in the constitutional philosophy as derogating from the democratic principle. Indeed, the argument in the case, in the perspective, is really one of violation of the equality principle rather than of the democratic principle. The inequalities in representation in the present case are an inheritance and compulsion from the past. Historical considerations have justified a differential treatment.

Article 371F(f) cannot be said to violate any basic feature of the Constitution such as the democratic principle.

It is true that the reservation of seats of the kind and the extent brought about by the impugned provisions may not, if applied to the existing State of the Union, pass the Constitutional muster. But in relation to a new territory admitted to the Union, the terms and conditions are not such to fall outside the permissible constitutional limits. Historical considerations and compulsions do justify

inequality and special treatment. In *Lachhman Das on Behalf of Firm Tilak Ram Ram Bux Vs. State of Punjab and Others*, this court said (paras 22 and 24):

The law is now well settled that while Art. 14 prohibits discriminatory legislation, directed against one individual or class of individuals, it does not forbid reasonable classification, and that for this purpose even one person or group of persons can be a class. Professor Willis says in his *Constitutional Law* p. 580 "a law applying to one person or one class of persons is constitutional if there is sufficient basis or reason for it.....And if after reorganisation of States and integration of the Pepsu Union in the State of Punjab, different laws apply to different parts of the State that is due to historical reasons, and that has always been recognised as a proper basis of classification under Art. 14.

In *State of Madhya Pradesh Vs. Bhopal Sugar Industries Ltd.*, this court said:

.....The Legislature has always the power to make special laws to attain particular objects and for that purpose has authority to select or classify persons, objects or transactions upon which the law is intended to operate. Differential treatment becomes unlawful only when it is arbitrary or not supported by a rational relation with the object of the statute where application of unequal laws is reasonably justified for historical reasons, a geographical classification founded on those historical reasons would be upheld.

We are of the view that the impugned provisions have been found in the wisdom of Parliament necessary in the admission of a strategic border-State into the Union. The departures are not such as to negate fundamental principles of democracy. We accordingly hold and answer contentions (b), (C) and (d) also against the petitioners.

We have referred to the aforesaid decision inasmuch as the said decision was redereed in the context of election and how participation in a democratic process gets concretized.

While dealing with the conception of reservation for seats for women the basec facet of gender justice cannot be marginalized. The conception of gender justice may at a glance look slightly paradoxical but, on a studied scrutiny, it would be clearly manifest that ramification of the said concept is of enormous magnitude inasmuch as it encapsules as all-embracing and illimitable canvas. One may conceive the notion that if the term "justice" is suffixed to the term "gender", it may invite the wrath of dichotomy but when there is focus on the essential requisites and intrinsic features of the idea and also on the subtleties and niceties of the concretized spectrums, the whole issue becomes comprehensive and clear as noon day. The essence rings like a bell. The quintessence does not seem to be elusive like building a castle in Spain. Our Constitution, the Fountain Head of all laws, is gender sensitive. Jurists have gone to the extent of saying that it is a great codified, compassionate, moving and Organic law. To have a wholesome understanding of the conceptual eventuality of gender justice, one is required to have a rational approach, ability of ratiocination and understanding of

the pragmatic and ground realities of life. Because law is not alien to life and life, if appropriately put, is not absolute logic.

The issue of gender justice has been gaining ground in many national and in many an area for some centuries. Though the traditional view of gender injustice has been given quite a quietus and treated as an event of bygone days, yet the malady still remains, sometimes pouncing with ungenerous monstrosity given a free play. The gender equality is the call of the day and attempts are to be made to achieve satisfactory results. There has to be gender synthesization and while saying so let it not be understood, that gloss is put on the said terms.

In the context of participation of women in the decisionmaking process, we may profitably reproduce an article authored by Justice Sujata V. Manohar which reads as follows:

Perhaps this indicates a very urgent need to have a better representation of women in law-making and decision-making bodies of the country so that the obligations that we owe under the Constitution to ourselves, and to the international community under the international human-rights norms which we have accepted, are adequately fulfilled. We still have a long way to go. It is time that every thinking man and woman of this country decides whether we are willing to accept the egalitarian values in our society, whether we are ready to bring about a transformation in our thinking and way of life as envisaged in the Constitution or whether we will continue to be an archaic hade-bound society where human rights are denied to half its population. Now is the time to take a stand for fulfilling this country's destiny.

In this regard, we may refer to what had been said by Swami Vivekananad:-

Just as a bird could not fly with one wing only, a nation would not march forward if the women are left behind.

In Madhu Kishwar and others Vs. State of Bihar and others, , the Apex Court had observed thus:-

Indian women have suffered and are suffering discrimination in silence. Self sacrifice and self-denial are their nobility and fortitude and yet they have been subjected to all inequities, indignities, inequality and discrimination.

In the national policy for empowerment of women, while dealing with the concept of decision making, it has been expressed thus:

Women's equality in power sharing and active participation in decision making, including decision making in political process at all levels will be ensured for the achievement of the goals of empowerment. All measures will be taken to guarantee women equal access to and full participation in decision making bodies at every level, including the legislative, executive, judicial, corporate, statutory bodies, as also the advisory Commissions, Boards, Trusts etc. Affirmative action such as reservations/quotas, including in higher legislative bodies, will be

considered whenever necessary on a time bound basis. Women-friendly personnel policies will also be drawn up to encourage women to participate effectively in the developmental process.

The way the women have suffered is aptly reflected by an author who has spoken with quite a speck of sensibility:

Dowry is an intractable disease for women, a bed of arrows for annihilating self-respect, but without the boon of wishful death.

Thus, the submission of the learned counsel for the petitioners that women have been empowered and they are already participating in the decision making process is not acceptable regard being had to the affidavit filed by the State and the views expressed by the Apex Court and certain authors in the field. Be it noted, the Declaration of Women Rights, 1948 also lays immense emphasis on equality for women and women development.

The legislation, in our considered opinion, is a real deep inroad into encouraging the participation of women in the decision making process at the ground level of democracy. Women in India are required to participate more in a democratic set-up especially in the ground democratic polity not for nothing, it has been said "educate a man and you educate an individual; educate a woman and you educate a family".

The colossal complaint made by the learned counsel for the petitioners that if women come into the arena of the decision making process, it will be anathema to the administrative set-up as the bureaucrats shall take over the administration in view of the inadequacies of women, in our considered opinion, is a premature thinking based on priory notions and beyond the scope of constitutional tolerance. Democracy is a basic feature of our Constitution and it has to develop from the ground reality level. The participation of socially and educationally backward classes and women could really nurture and foster democracy in the country. Be it noted, though the issue of gender justice has been gaining ground in many nations and in many an area for some centuries and the traditional view of gender injustice has been given quite a quietus and treated as an event of bygone days, yet the malady still remains and deserved to be remedied.

We will be failing in our duty if we do not take note of the submission advanced by Mr. A.P. Shrotri, learned counsel for the petitioner, who has assailed the similar provision of the 1961 Act. He has laboured hard to make a subtle distinction between the terms "ward" and "seat". Any provision has to be read in its context. In this regard, we may refer with profit to the decision rendered in *Kasambhai F. Ghanchi Vs. Chandubhai D. Rajput and Others*, wherein the Apex Court, while dealing with the question whether the backward class candidate who had been elected to the municipality from an unreserved seat could stand for election for the post of President of the Municipality which was reserved for a backward class candidate or whether the candidate for the post could only be a person who was elected to the municipality from a seat which was reserved for

the backward class, dealt with the concept of reservation and expressed the view in the following terms:-

14. The idea of providing reservation for the benefit of the weaker sections of the society is only to ensure their participation in the conduct of the affairs of the municipality but it is also an effort to improve their lot. The reservation ensures that the specified minimum number of persons belonging to that category become members of the municipality. If because of their popularity a larger number of Scheduled Castes, Schedule Tribes, Backward Classes or women get elected to the municipality than the number of reserved seats" that would be welcome. When the idea is to promote the weaker sections of the society, and to improve their lot, it would be a contradiction in terms if members belonging to that section are debarred from standing to the office of the President because such a candidate is popular enough to get elected from a general constituency. It is a fundamental principle of democratic election that a person who is more popular is elected, popularity being measured by the number of votes which the person gets. The language of various legal provisions do not in any way suggest, expressly or by necessary implication, that even though a person who belongs to a reserved category and is popular enough to get elected from a general constituency should be barred from contesting the election of the President when that office is to be filled only by a reserved category person.

In the said case, while scanning the anatomy of Article 243T of the Constitution their Lordships observed that the reservation is in respect of the category/caste to which a person belongs and not the nature of the constituency from which he/she was elected. While overruling the decision in *Saraswati Devi Vs. Smt. Shanti Devi and Others*, , the three-Judge Bench of the Apex Court proceeded to state as follows:

17. The Act and the Rules provide for reservation for Scheduled Castes, Scheduled Tribes, Backward Classes and women. No reservation or classification is made ward wise. To put it differently all members of the Scheduled Castes, for example, will be regarded as belonging to one class irrespective of the fact whether they had been elected to a reserved seat or to a general seat. Similar is the position with regard to the backward classes, Scheduled Tribes and women. The law does not contemplate or provide for any further sub-classification of the type which has been suggested by the respondents. Just as all members of the municipality, irrespective of the fact whether they had been elected to a reserved seat or not, are eligible for election to the post of the President when it falls in the general category, similarly when as per the roster the President is to be one who, say, belongs to the category of Scheduled Caste then all members of the municipality who are Scheduled Caste, irrespective of the seat to which they had been elected, would be eligible to stand for election. Neither the Act nor the rules stipulate that it is only such a member who has been elected to the reserved seat who would be eligible to stand for election to the post of President when it is the turn of that category of candidate to become the President of the municipality.

In view of the aforesaid, the said submission pales into insignificance.

At this juncture, it would not be inappropriate to state here that if the dynamics of women reservation are understood in proper perspective, it would be quite clear that the number of women representatives at various layers of democratic setup is really quite low.

It would not be inapposite to state that women have entered into the Indian Panchayat Raj Institutions by virtue of the Constitutional Amendment but their active participation in the decision making process in actuality remains at abysmal level. It is because their interest in the democratic setup of election has still not been accentuated for the simple pure reason that they have to negotiate and wrestle with the powerful members of the society. The submission of the learned counsel for the petitioners is that women are contesting in the election is of utmost significance and that would irrefragably exposit that they are conscious and there is no justification to marginalise the equality clause. At one point, the U.N. Secretary General, Kofi Annan, has stated "Gender equality is more than a goal in itself. It is a precondition for meeting the challenge of reducing poverty, promoting sustainable development and building good governance." We are of the view that participation in the election and losing the same can never be equated with the decision making process. One can only be a party to the decision making process when one is on the floor of the House as a representative and that is how the recognition of decision making process can be conferred on women. As the affidavit filed by the State would show their success in the election process is extremely low, we are disposed to think, the reservation, an act of special affirmation and a protective discrimination, is a warrant which has been done by the State Legislature in its wisdom. Therefore, the submission that such reservation is not necessary and, in fact, does tantamount to reverse reservation do not deserve acceptance.

It cannot be totally ostracised from the compartment of equality that unless law assists women in an accentuated manner, the basic tenet of the concept of equality would not be achieved and women will be put in the category of non-achievers.

Long back Charles Fourier had stated "The extension of women's rights is the basic principle of all social progress."

In a democracy where Rule of Law governs, the democratic polity it can only be advanced in a cultivated society. It is absolutely imperative to have the help of women where they are given certain rights. The truth is self-evident and that is how the fathers of the Constitution had perceived it.

In view of our aforesaid analysis, we proceed to record our conclusions in serialim:

(1) The decision rendered in Indra Sawhney (supra) and other decisions of the Apex Court in the similar line relate to reservations pertaining to appointment

and promotion in service and in the field of education and are, therefore, not applicable to the concept of reservation of seats meant for women in local bodies which is an affirmative action by the State Legislature.

(2) The provisions contained in Article 15(3) and Article 243T are to be read conjointly and need not be given a restrictive or constricted interpretation.

(3) The decisions rendered in Anil Kumar Gupta (supra), Dr. Preeti Shrivastava (supra) and Rajesh Kumar Daria (supra) are distinguishable as they relate to a different field.

(4) The decisions rendered in Tulsiram Jatav (supra) and Ashok Kumar Tripathi (supra) specifically relate to the matter of reservations in municipal corporations and councils wherein it has been laid down that the law pertaining to appointment and reservation of seats are different and the same, would apply in full force to the case at hand.

(5) The decision rendered in Dr. Satish Menon (supra) is applicable to the case at hand inasmuch as that is a direct pronouncement under Article 15(3) of the Constitution of India by this Court relating to a affirmative action for women.

(6) Article 243T does not put a ceiling by using the terms "not less than 1/3rd". In fact, it prescribes for the minimum reservation but does not create any kind of impediment on the part of the State Legislature to enhance the percentage of reservation for women.

(7) Article 15(3) being set apart from Article 15(1) and if read in a purposive manner along with Article 243T permits reservation of seats in local bodies.

(8) The concept of horizontal reservation as used in the Rules has to be understood in its context only to mean that there would be reservation of 50% in each category and the same is only clarificatory in nature and is not to be construed in the stricto sensu as is understood in the field of reservation meant for education, appointment and promotions. In fact, such terminology have been used by way of abandoned caution despite the factum that the Act is very clear in that regard.

(9) The stand of the petitioners to the effect that if the reservation of seats for women upto 50% is sustained, it will usher in bad governance as the bureaucratic setup would take up the entire policy making decision is totally baseless and, in fact, is absolutely premature.

(10) The contention that there is a subtle distinction between "ward" and "seat" is sans substance and cannot be pressed into service to declare the Act or Rule as ultra vires.

(11) Discrimination in favour of men on the ground of sex alone is not permissible under Article 15(1) of the Constitution of India but discrimination in favour of women is permissible in view of clause (3) of Article 15 of the Constitution.

(12) In the case at hand, apart from the special affirmation in favour of women on the ground of sex, it is perceivable that there has been no adequate representation in the local self government and, therefore, it has become imperative to amend the law.

(13) The impugned Legislation under the 1956 Act and the 1961 Act and the rules framed thereunder are constitutionally valid and not ultravires the Constitution.

Consequently, the writ petitions being sans merit, stand dismissed without any order as to costs.