
(2008) 11 AHC CK 0089
In the Allahabad High Court
Case No : Writ Petition No. 1208 (S/B) of 2008

Dharam Pal Singh Chauhan And Another	APPELLANT
Vs	
State of U.P.and Others	RESPONDENT

Date of Decision : 19-11-2008

Acts Referred:

Constitution of India, 1950 — Article 16(4), 16(4B)
Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 — Section 3(1), 4

Citation : (2008) 11 AHC CK 0089

Hon'ble Judges : Devi Prasad Singh, J and V.D.Chaturvedi, J

Final Decision : Allowed

Judgement

Devi Prasad Singh, J.—The substantial questions of law cropped up for adjudication in the present writ petition are:

(1) Whether, while enforcing the roster in the matter of promotions or appointments, the State Government may fill up the vacancies travelling beyond the statutory quota provided for the reserved category?

(2) Whether, the percentage of reservation should be determined on the basis of sanctioned strength or the vacancies arisen at a particular point of time?

2. The controversy relates to reservation in promotion on the post of EngineerinChief in the Irrigation Department. The service condition of the Engineers of the Irrigation Department, is governed by the Uttar Pradesh Service of Engineers (Irrigation Department) (GroupA) Rules, 1990 (in short, the 1990 Rules). Admittedly, there are two posts of the EngineerinChief namely, EngineerinChief Irrigation Department and the EngineerinChief (Design & Planning) Irrigation Department, created under 1990 Rules. By the impugned order dated 27.8.2008 (Annexure1 to the writ petition), the State Government took a decision to fill up the post of the EngineerinChief (Design & Planning) Irrigation Department from the candidates belonging to the Scheduled Castes category because of superannuation of one Jai Prakash on 31.8.2008, who also

belongs to Scheduled Castes category. It is not disputed that out of the two posts, one post is occupied by the general category candidate and for the other post, by the impugned order, the respondents have proceeded to fill up the vacancy from the candidate belonging to Scheduled Castes category.

3. According to the submissions of Sri S.K. Kalia learned Senior Counsel appeared for the petitioners, since there are only two posts of the EngineerinChief, and though, one is occupied by a candidate of General category, the other cannot be reserved for the scheduled caste category on the ground that reservation quota of the Scheduled Castes category is 21% and in case one post out of two, is provided to the candidate of the Scheduled Castes category, the reservation quota shall travel beyond the outer limit of 21 % provided by the statute.

4. The petitioner No. 1 was substantively appointed as Assistant Engineer (Civil) in the Irrigation Department on 15.12.1969 whereas, the petitioner No. 2 was appointed as Assistant Engineer (Civil) in the Irrigation Department on 10.3.1972. The petitioner No. 1 was promoted on the post of Executive Engineer substantively on 3.7.1989 whereas the petitioner No. 2 was promoted as Executive Engineer on 31.8.1988. The petitioner No. 1 was promoted as Superintending Engineer on 20.6.2001 whereas the petitioner No. 2 was promoted as Superintending Engineer on 3.5.2000. The petitioner No. 1 was promoted as Chief Engineer LevelII on 9.9.2005 whereas the petitioner No. 2 was promoted as Chief Engineer LevelII on 3.3.2006. Both the petitioners were promoted as Chief Engineer LevelI on 26.6.2007 and 30.6.2008 respectively. It is not disputed that both the petitioners as well as a candidate under scheduled caste category falls within the eligibility zone and promotion to the post of the EngineerinChief is to be done from the persons holding the Office of the Chief Engineer LevelI on merit

5. Being qualified for the post of the Engineerinchief and falling within the field of eligibility, the petitioners claim their right to be considered for promotion on the post of the Engineerinchief assailing the reservation on the one post for Scheduled Castes candidates, out of two posts.

6. The ancient Indian literary and religious manuscripts show that casts system in Indian society was not correlated with birth but it was founded on the occupation and duties of the person concerned. Lord Krishna in Gita says :

"caturvarnyam maya srstam gunakarmavibhagasah tasya kartaram api mam viddhy akartaram avyayam"

[The fourfold order was created by Me according to the divisions of quality and work. Though I am its creator, know Me to be incapable of action or change.]?
[Chapter IV, Verse13]

The emphasis is on aptitude and function and not caste. The varn or the order to which we belong is independent of sex, birth or breeding. A class and vocation is

not caste determined by the birth and heredity. According to Mahabharat, the whole world was originally of one class but later on, it became divided into four divisions on account of specific duties. In Mahabharat, Yudhishtir says it is difficult to find out the caste of a person on account of the mixture of the castes. So, the conduct is the only determining feature of a caste according to Indian jurists and law makers.

Sarvepalli Dr. Radhakrishnan while interpreting this verse of Gita observed as under:

"The fourfold order is designed for human evolution. There is nothing absolute about the caste system which has changed its character in the process of history. Today it cannot be regarded as anything more than an insistence on a variety of ways in which the social purpose can be carried out. Functional groupings will never be out of date and as for marriages they will happen among those who belong to more or less the same stage of cultural development. The present morbid condition of India broken into castes and sub castes is opposed to the unity taught by the Gita, which stands for an organic as against an atomistic conception of society."

7. Even Manu the first Indian law maker, ruled with regard to equality of treatment for all and observed as under, to quote:

"20. If the king did not, without tiring, inflict punishment on those worthy to be punished, the stronger would roast the weaker, like fish on a spit;"...[Manu Smriti page 153]

Again Manu said,

"111. That king who through folly rashly oppresses his kingdom, (will), together with his relatives, ere long be deprived of his life and of his kingdom." ...[Manu Smriti, page 163]

However, Manu Smriti has got several offending portions which seem to be contradictory to the original thoughts and principles contained in ancient text of Manu Smriti. The offending portions seems to be added at later point of time for extraneous reasons.

8. Dipankar Gupta a teacher in the Centre for the Study of Social Systems in Jawaharlal Nehru University, New Delhi and visiting Professor at the University of Toronto, in his book, "Interrogating Caste Understanding Hierarchy & Difference in Indian Society", observed as under to quote:

"The bulk of contemporary sociological literature, with the probable exception of Ghurye (1969), considers an investigation into the social origins of caste to be a nonissue, prone to clumsy ethnologisttype historical conjectures and not worthy of serious sociological study."

...[page 184] from "Interrogating Caste Understanding Hierarchy & Difference in Indian Society"...By Dipankar Gupta.

However, learned author (supra) in the same book observed as under to quote:

"It was the progressive development of this economic structure of localized exploitation within the village nexus which brought about the elaboration of the jati, or what is popularly known as the Indian caste system. The dependence of the lower exploited classes on each other and on their masters in a closed society necessitated greater elaboration of the rules of exchange and intercourse. The rationale of "natural superiority" which served the varna scheme so well was not abandoned. It worked effectively in a more differentiated fashion to underpin the regime of jatis. The general exploitation of the Asiatic mode of production of the previous epoch, whereby the obligations and duties of the artisans and peasants visavis each other had not been elaborated, now gave way to more clearly specified patterns of interaction due to the exigencies of localized feudal exploitation. Also the notion of "untouchability" originated around 200 AD, especially in association with the Chandalas. This institution took on an extreme form by the twelfth century AD as revealed in the Parasamriti" ...[page 221222]

9. The observation of Dipankar Gupta (supra), seems to be near the truth or correct in view of the fact that Kautilya in his "Economic" (321 BC) a famous treatise had elaborately dealt with the governance of the country and its secular credential and uniform application of law has been widely appreciated and acclaimed in the legal field. Fali S. Nariman in his "India's legal system: Can it be saved?", has also accepted the secular credential of Kautilya's Arthshastra.

K. P. Jayaswal had given various lectures in Calcutta University under the Banner of "Tagore Law Lectures 1911-1913" and the compilation was published in the year 1930 by J.C. Ghosh, Cotton Press, 57, Harrison Road, Calcutta. The learned author observed, to quote:

"3. ...The Arthashastra of Kautilya revealed a code of law proper, purely secular, with the express provision that the royal law could supersede the dharma law."

5. ...The Arthashastra is avowedly based on previous works of its class treatises and codes on the applied science of government called Dandanitis and Arthasastras... It may therefore be taken that long before 320 BC, the time of Kautilya, municipal law had developed in the schools of politicians and statesmen. The law which was laid down in that Imperial Code of Government, the Arthashastra, for administration by Judges, was the law which the statesmen and politicians had evolved and developed for centuries in the past."

...excerpts from "Manu and Yajnavalkya"

A comparison and a contrast

A treatise on the Basic Hindu Law

By K.P. Jayaswal under the Banner

"Tagore Law Lectures, 1917"

Lecture 1 "Hindu Law Before the Code of Manu".

10. Learned author in his another lecture (supra) observed that the available "Manusmriti" is not the original one. Virtually, the "Code of Manu" is attributed to the primeval ManuSvavambhuva son of Svavambhu or the Creator. There could not have been two Manavadharmasastras with this claim.

Learned author further observed that Manusmriti available at the moment, was written some time between 188 BC 150 BC and changes were made during reign of Pushyamitra. Virtually name of Manu was adopted by the unknown author because of good will of ancient author Svayambhuva Manu and offending portions were added which have been severely criticised by the jurists from time to time and the present generation.

Though it is not possible to deal this aspect of the matters in detail in the present judgment but on deep scrutiny of old Indian treatises, jurisprudence and religious text, it can be noticed that barring religious vigour to some extent neither there was untouchability nor there was discrimination on the ground of caste, creed or religion. Peoples were recognised by their occupation and respected because of their honesty and excellence in knowledge. It requires research work.

Statutory provisions:

11. Rule 4 of 1990 Rules defines the strength of the cadre. According to it, the strength of service and each category of the posts provided under service Rules, is determined by the State Government from time to time. Appendix prepared under subrule (2) of Rule 4 contains the cadre strength of the Engineers of the civil and mechanical cadre. According to appendix, there is one permanent post of the EngineerinChief and one temporary post (total two posts).

The source of recruitment has been provided under Rule 5 and according to subrule (v) of Rule 5 of the 1990 Rules, the two posts i.e., Engineerinchief in the Irrigation Department and the Engineerinchief (Design and Planning) is to be filled up from amongst the substantively appointed Chief Engineer Levell of civil branch. For convenience Rule 4 of subrule (v) of Rule 5 of the 1990 Rules is reproduced as under:

"4. Cadre of the Service. (1) The strength of the service and of each category of posts therein shall be such as may be determined by the Government from time to time.

(2) The strength of the service and of each category of posts therein shall, until orders varying the same are passed under subrule (1), be as given in the Appendix:

Provided that

(a) the Governor may leave unfilled or may hold in abeyance any vacant post, without thereby entitling any person to compensation;

(b) the Governor may create such additional permanent or temporary posts as he may consider proper.

5. Source of Recruitment (1) Recruitment to the various categories of posts in the Service shall be made from the following sources, namely:

(i) xxx xxx xxx

(ii) xxx xxx xxx

(iii) xxx xxx xxx

(iv) xxx xxx xxx

(v) (a) Engineerinchief, Irrigation Department and Engineerinchief (Design and Planning) Irrigation Department By promotion from amongst, the substantively appointed Chief Engineer, LevelI of Civil Branch;

(b) Engineerinchief (Mechanical) Irrigation Department By promotion from amongst the substantively appointed Chief Engineers, LevelI of Mechanical Branch:

Provided that in case Chief Engineer (LevelI) in either branch is not available or is not found suitable for promotion, the posts of Engineerinchief may be filled by promotion from amongst the substantively appointed Chief Engineers (LevelII) of the respective branch."

12. The procedure for recruitment to the post of the Chief Engineer LevelII, Chief Engineer LevelI and Engineerinchief has been provided under subrule (2) of Rule 8 of 1990 Rules. According to subrule (2) of Rule 8, the recruitment to the post of Chief Engineer LevelII, Chief Engineer LevelI and the EngineerinChief shall be made on the basis of merit through a Selection Committee comprising of; (i) Chief Secretary to the Government to be the Chairman; (ii) Secretary to the Government in personnel Department to be the member; and (iii) the Secretary to the Government in Irrigation Department to be the member. Subrule (3) of Rule 8 of the 1990 Rules provides that the appointing authority shall prepare an eligibility list of the candidates in accordance with the Uttar Pradesh Promotion by Selection (On Posts Outside the Purview of the Public Service Commission) Eligibility List Rules, 1985, and place the same before the Selection Committee along with their character rolls and such other record pertaining to them, as may be considered proper. The relevant portion of subrules (2) and (3) of Rule 8 of the 1990 Rules are reproduced as under :

"8. (2) Recruitment to the post of Chief Engineer LevelII, Chief Engineer LevelI and the EngineerinChief shall be made on the basis of merit through a Selection Committee comprising :

(i) Chief Secretary to the Government ...Chairman.

(ii) Secretary to the Government in ...Member.

Personnel Department.

(iii) Secretary to the Government in Irrigation ...Member.

Department.

(3) The appointing authority shall prepare an eligibility list of the candidates in accordance with the Uttar Pradesh Promotion by Selection (On Posts Outside the Purview of the Public Service Commission) Eligibility List Rules, 1986 and place the same before the Selection Committee along with their character rolls and such other record pertaining to them, as may be considered proper."

13. Under Rule 9 of the 1990 Rules, the persons selected through the committee, shall be entitled for appointment in order of merit list prepared under subrule (5) of Rule 8 and under Rule 10 persons who were appointed, shall be placed on probation for a period of one year. Under Rule 12 the inter se seniority of persons appointed by promotion shall be the same as it was in the cadre from which they have been promoted.

14. Sri S.K. Kalia learned senior counsel assisted by Sri Rajan Roy, has invited attention to the Uttar Pradesh Promotion by Selection (On Posts Outside the Purview of Public Service Commission) Eligibility List Rules, 1986 (in short 1986 Rules). Rule 4 of the 1986 Rules deals with the eligibility list. As amended in the year 1995, it provides that where the criteria for promotion is merit, the appointing authority shall prepare three lists i.e., for General, Scheduled Castes and Scheduled Tribes in the light of vacancy available for each category containing the names as far as possible three times the number of vacancies subject to minimum of 8. The proviso to Rule 4 further provides that in case in a given years of recruitment, no vacancy is available for Scheduled Castes and Scheduled Tribes, but persons belonging to such category are entitled to be included by virtue of his or her seniority; in the eligibility list of general category candidates, such persons shall also be included in the eligibility list of General category candidates. The Rule 4 as amended in the year 2001 through second amendment, is reproduced as under:

"4. Preparation of eligibility list where the criterion is merit. Where the criterion for promotion is merit, the appointing authority shall prepare three lists to be called the eligibility list of the seniormost eligible candidates from each of the category namely, General, Scheduled Castes and Scheduled Tribes, separately, in the light of vacancies available for each of the said categories containing names as far as possible, three times the number of vacancies subject to the minimum of eight:

Provided that, if recruitment is to be made for vacancies occurring during more than one year of recruitment, separate eligibility list will be prepared in respect of each such year and in such a case while preparing the eligibility lists for second and subsequent years of recruitment, the number of candidates to be

included in the eligibility list shall be as follows:

1. For the second year. The number according to the said proportion plus the number of vacancies in the first year;
2. For the third year The number according to the said proportion plus the number of vacancies in the first and second year, and so on:

Provided further that the candidates who are not considered suitable, prime facie, for promotion shall not be taken into account in calculating the said proportion and a notice to the effect that they are not so considered shall be added against their names:

Provided also that if, in a year of recruitment, no vacancy is available for Scheduled Castes or Scheduled Tribes but a person belonging to Scheduled Castes or Scheduled Tribes, as the case may be, is entitled to be included by virtue of his seniority, in the eligibility list of the general category candidates, such person shall also be included in the eligibility list of General category candidates."

15. It has been submitted by the learned counsel for the petitioners that even if it is found that there should not be any reservation since it shall amount to be travelling beyond 21% quota reserved for Scheduled Castes candidates, even then the candidates belonging to Scheduled Castes category shall be entitled to be considered for promotion and appointment on the post of the Engineer in Chief in order of their seniority and merit subject to fulfillment of the required conditions. The reservation in the State of U.P., is governed by the Statutory provisions, an Act of State Legislation namely, Uttar Pradesh Public Service Commission (Reservation for Scheduled Castes and Scheduled Tribes and Other Backward Classes) Act, 1994 (in short 1994 Act) (U.P. Act No. 4 of 1994). The 1994 Act has been broadly made applicable to service of the State Government as well as its local bodies and corporation and the year of recruitment with regard to vacancies is of 12 calendar months commencing on 1st of July of the calendar year within which the process of direct recruitment against a vacancy is initiated.

16. Section 3 of the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 (in short 1994 Act), deals with the percentage of reservation. Subsection (4) of Section 3 provides that for the purpose and enforcement of reservation provided under subsection (1), the Government may issue roster which shall be continuously applied till it exhausts. Section 4 provides that it shall be the duty of the authorities to ensure compliance of the provisions of the Act. For convenience, Section 3 is reproduced as under:

"3. Reservation in favour of Scheduled Castes, Scheduled Tribes and other Backward Classes. (1) In public services and posts, there shall be reserved at the stage of direct recruitment, the following percentages of vacancies to which

recruitments are to be made in accordance with the roster referred to in subsection (5) in favour of the persons belonging to Scheduled Castes, Scheduled Tribes and other backward classes of citizens,

(a) in the case of Scheduled Castes twentyone per cent:

(b) in the case of Scheduled Tribes two per cent:

(c) in the case of other backward twentyseven per cent; classes of citizens:

Provided that the reservation under clause (c) shall not apply to the category of other backward classes of citizens specified in ScheduleII.

(2) If, even in respect of any year of recruitment, any vacancy reserved for any category of persons under subsection (1) remains unfilled, special recruitment shall be made for such number of times, non exceeding three, as may be considered necessary to fill such vacancy from amongst the persons belonging to that category.

(3) If, in the third such recruitment referred to in subsection (2), suitable candidates belonging to the Scheduled Tribes are not available to fill the vacancy reserved for them, such vacancy shall be filled by persons belonging to the Scheduled Castes.

(4) Where, due to nonavailability of suitable candidates any of the vacancies reserved under subsection (1) remains unfilled even after special recruitment referred to in subsection (2), it may be carried over to the next year commencing from first of July, in which recruitment is to be made, subject to the condition that in that year total reservation of vacancies for all categories of persons mentioned in subsection (1) shall not exceed fifty per cent of the total vacancies.

(5) The State Government shall, for applying the reservation under subsection (1), by a notified order, issue a roster which shall be continuously applied till it is exhausted.

(6) If a person belonging to any of the categories mentioned in subsection (1) gets selected on the basis of merit in an open competition with general candidates, he shall not be adjusted against the vacancies reserved for such category under subsection (1).

(7) If, on the date of commencement of this Act, reservation was in force under Government Orders for appointment to posts to be filled by promotion, such Government Orders shall continue to be applicable till they are modified or revoked."

17. By the Government order dated 26.6.2002 issued in pursuance of the powers conferred by subsection (5) of Section 3 of the 1994 Act, the Government has applied reservation in the matter of promotion providing roster system. Out of 100 posts, the first goes to Scheduled Castes candidates, the second, third, fourth and fifth post goes to the General category candidates and the sixth post

again goes to Scheduled Castes category candidate in the following manner:

1st post reserved for SC and ST candidates

2nd post unreserved

3rd post unreserved

4th post unreserved

5th post unreserved

6th post reserved for SC and ST candidates.

and so on.

18. During the course of arguments, Sri P.N. Gupta learned Chief Standing Counsel and later on Sri J.N. Mathur, learned Additional Advocate General invited attention of this Court towards a Government order dated 8.3.1973 and submitted that in case there is one post even then that can be reserved for the Scheduled Castes candidates. However, keeping in view the 1994 Act and the subsequent roster system applied by the State Government in pursuance of power conferred by subsection (3) of Section 3 of the 1994 Act, it appears that the Government order is superseded by the subsequent statutory provisions and the consequential Government orders passed from time to time, as discussed hereinafter.

19. It has been submitted by Sri S.K. Kalia, learned senior counsel for the petitioners that by the Government order dated 8.3.1973, 18% reservation was provided for the Scheduled Castes candidates and 2% for Scheduled Tribes candidates. By the subsequent Government order dated 20.3.1974, it has been provided that even if promotion is done in order of seniority subject to fitness, reservation shall be provided to members of the Scheduled Castes candidates. It has further been submitted by the learned counsel that on 4.2.1985, in the Irrigation Department in addition to promotion of EngineerinChief another post of "Member Officer" was created which was later on, redesignated as Engineerinchief (Design, Research, Investigation, Planning & Training). However, by the subsequent Government order dated 10.10.1994, issued in pursuance of subsection (7) of Section 3 of the 1994 Act, the reservation quota for the Scheduled Castes candidates was enhanced to 21 % and that of Scheduled Tribes was maintained as 2%.

20. Sri S.K. Kalia learned counsel further submitted that later on, by order dated 18.7.2000, the post of the Engineerinchief (Design, Research, Investigation Planning & Training) was abolished by the State Government but again by amending Rule with effect from 10.12.2002, the post of the Engineerinchief (Design, Research, Investigation, Planning & Training) was revived. After revival of the post, it appears that one Sri Jai Prakash was appointed on the said post who attained the age of superannuation on 31.8.2008.

21. Learned counsel for the petitioners further submitted that though the question with regard to grant of promotion in the higher promotional cadre of Engineers and other service cadre in pursuance of Rule 8A of the 1990 Rules, is the subject matter of dispute in another writ petition but so far as the present writ petition is concerned, the petitioners do not raise grievance with regard to validity of Rule 8A of the amended Rule but they confine their grievance against the exceeding of quota more than 21 % applying roster in the matter of promotion to the post of the EngineerinChief of the Irrigation Department.

22. Learned senior counsel appeared for the petitioners further submitted that in any case, the respondents have got no right to provide reservation exceeding the limit of 21% reservation for SC under Section 3 of the 1994 Act and the Government what cannot do directly, it cannot do indirectly. The State may provide reservation only to the extent provided by the Act or statutes and not otherwise. It has also been submitted by the learned counsel that the petitioners had approached this Court on arising of cause of action with regard to promotion to the post of Engineerinchief being falling within the field of eligibility. The Government vehemently relying upon the case of M. Nagraj reported in 2006 (8) SCC 212, learned counsel submitted that promotion cannot be done at the cost of efficiency envisaged under Article 335 of the Constitution. According to the petitioners' counsel, the power conferred by subsection (5) for the applicability of roster is meant to give effect or facilitate the reservation of 21% earmarked for SC candidates and other employees of other category. It cannot be used as tool to expand or enhance the quota of reserved category candidates beyond the percentage prescribed by subsection (1) of Section 3 of 1994 Act.

23. Sri Sakesh Kumar learned counsel for the intervener submits that the petitioners have got no right to challenge the impugned order. It has also been submitted by the learned counsel for the intervener that roster applied by the impugned order, does not extent reservation beyond 50% and being policy matter, it does not call for this Court to interfere into the matter under Article 226 of the Constitution. It has also been submitted that only foundation necessary for applicability of roster is plurality of posts which is being fulfilled.

24. Learned Additional Advocate General while defending the State action, submitted that under Article 46 of the Constitution, it is the constitutional obligation of the State to take necessary steps for promotion of educational and economic interest of the Scheduled Castes and Scheduled Tribes and other weaker sections of the society. The words, "Scheduled Castes and Scheduled Tribes", have been defined in Rule 3 of the 1990 Rules and the Article 342 of the Constitution of India. Learned Additional Advocate General vehemently argued and submitted that the decision taken by the State Government is very well in accordance with the powers conferred on it under Article 16 (1), (2), (4), (4A) and (4B) of the Constitution. Learned counsel also relied upon the Article 335 of the Constitution and submitted that the efficiency of the administration of the State Government is not compromised while providing reservation to one post of

Engineer in chief. He had relied upon the Government order dated 18.3.1973 and 20.3.1994 contained in Annexures CA1 and CA2 to the counter affidavit and submitted that even for one post, the reservation for Scheduled Castes candidate may be provided by applying roster. It has been submitted by the learned Chief Standing Counsel that vide, Government order dated 25.7.1994, contained in Annexure CA3 to the counter affidavit, a separate list of Scheduled Castes and Scheduled Tribes candidates is to be prepared in the matter of promotion. The submission is that in accordance with the Government order dated 25.6.2007, Annexure CA7 to the counter affidavit, it shall be the statutory duty of the departments of the State Government to prepare roster on the basis of cadre strength by indicating reservation points and should be implemented from year to year unless the reservation of the respective categories are achieved or satisfied. According to the learned counsel, the vacancy occurred on 31.8.2008, was occupied by a Scheduled Caste candidate as per roster hence, it cannot be filled up by general category candidate.

25. Learned counsel also relied upon the Constitution Bench judgment of the Hon'ble Supreme Court reported in 2006 (8) SCC 212, *M. Nagaraj and others v. Union of India and others* while claiming right to fill up the vacancy in question by candidate of Scheduled Caste category. It has been submitted that since the vacancy has been reserved for Scheduled Caste candidate as per roster provided by the Government orders, it will not be open for an unreserved category candidate to claim appointment or promotion.

26. It has also been submitted by the learned Additional Advocate General that the service record of the petitioners are also not good and because of censure entries they are not entitled to be promoted on the post in question. Learned Additional Advocate General further submitted that since the post was earlier occupied by Sri Jai Prakash, Mansha Ram and Anand Prakash respectively belonging to Scheduled Caste category, it cannot be filled up by General category candidates.

27. The question of reservation was subject matter of heated debate in the Constitutional Assembly and after long discussion, the constitution framers had accepted to grant reservation to bring all sections of societies at par in the matter of status, honour and opportunity.

28. Dr. B.R. Ambedkar while clarifying the position with regard to reservation, was agreed that there cannot be whole sole reservation nor majority of the Government job may be placed under reservation category. The observations of Dr. B.R. Ambedkar are relevant to adjudicate the present controversy. The observations of Dr. Ambedkar have been considered by Hon'ble Supreme Court in the case of *Indira Sawhney's* case reported in AIR 1993 SC 477, the relevant extracts of which is reproduced as under:

"As I said the Drafting Committee had to produce a formula which would reconcile these three points of view firstly, that there shall be equality of

opportunity, secondly that there shall be reservations in favour of the certain communities which have not so far had a "proper lookin" so to say into the administration. If honourable Members will bear these facts in mind the three principles we had to reconcile, they will see that no better formula could be produced than the one that is embodied in subclause (3) of Article 10 of the Constitution. It is a generic principle. At the same time, as I said, we had to reconcile this formula with the demand made by certain communities that the administration which has now for historical reasons been controlled by one community or a few communities, that situation should disappear and that the others also must have an opportunity of getting into the public services. Supposing, for instance, we were to concede in full the demand of those communities who have not been so far employed in the public service to the fullest extent, what would really happen is, we shall be completely destroying the first proposition upon which we are all agreed, namely, that there shall be an equality of opportunity. Let me give an illustration. Supposing, for instance, reservations were made for a community or a collection of communities, the total of which came to something like 70 per cent of the total posts under the State and only 30 per cent are retained as the unreserved. Could anybody say that the reservation of 30 per cent as open to general competition would be satisfactory from the point of view of giving effect to the first principle, namely, that there shall be equality of opportunity? It cannot be in my judgment. Therefore, the seats to be reserved, if the reservation is to be consistent with subclause (1) of Article 10, must be confined to a minority of seats. It is then only that the first principle could find its place in the Constitution and effective in operation. If honourable Members understand this position that we have to safeguard two things, namely, the principle of equality of opportunity and at the same time satisfy the demand of communities which have not had so far representation in the State, then, I am sure they will agree that unless you use some such qualifying phrase as "backward" the exception made in favour of reservation will ultimately eat up the rule altogether."

29. Now, it is trite in law that debate of the constituent assembly, can be relied upon as an aid for the interpretation of constitutional provisions, vide, AIR 1969 SC 1014, *Madhu Limaye v. State of Maharashtra*; AIR 1967 SC 1643, *Golak Nath v. State of Punjab*; 1972 (2) SCR 33, *Union of India v. H.S. Chaudhary*, (1973) 4 SCC 225, *Kesavananda Bharati v. State of Kerala*; AIR 1993 SC 447, *Indira Sawhney v. Union of India* (para 78); ((2002) 8 SCC 481, *TMA Pai Foundation v. State of Karnataka*; (2003) 6 SCC 697, *Islamic Academy of Education v. State of Karnataka*.

Rider of 50% Reservation

30. It is relevant to consider some of the judgments of Hon^{ble} Supreme Court on Articles 15 and 16 of the Constitution. In the case reported in 1951 SCR 525: AIR 1951 SC 226, *State of Madras v. Smt. Chamakam Dorairajan*, immediately after independence Hon^{ble} Supreme Court was seized with the matter which

called for interpretation of the Articles 15 and 16 of the Constitution. It was observed that clause (4) of Article 16 provides reservation in favour of backward classes but no such provision was made under Article 15 of the Constitution. A Government order providing reservation on the basis of caste was struck down by the Apex Court. However, later on, Parliament inserted clause (4) to Article 15 of the Constitution equipping it with power to provide reservation by making special provisions for advancement of socially and educationally backwardness as for SC and ST. It was in AIR 1962 SC 36, *General Manager Southern Railway v. Rangachari*, Hon"ble Supreme Court by majority judgment while dealing with Article 16 (4) of the Constitution ruled that the purpose of reservation is to provide adequate representation to OBC category but it would not be used for creating monopolies or for unduly or illegitimately disturbing other sections of the society serving in the Government. The reasonable balance should be created between the reserved and unreserved categories of employees to maintain the efficiency of administration.

31. In the case reported in AIR 1963 SC 649 (V 50 C 101), *M.R. Balaji and others v. State of Mysore and others*, Hon"ble Supreme Court for the first time held that the reservation should not be more than 50%. Reservation granted by the Government to the extent of 68% held to be inconsistent with the concept of Article 15 (4) of the Constitution. It was held that reservation to the extent of 68% to the backward classes is fraud on the Constitution. Relevant portion is reproduced as under:

"34. ...A special provision contemplated by Article 15 (4) like reservation of posts and appointments contemplated by Article 16 (4) must be within reasonable limits. The interests of weaker sections of society which are a first charge on the States and the Centre have to be adjusted with the interests of the community as a whole. The adjustment of these competing claims is undoubtedly a difficult matter, but if under the guise of making a special provision, a State reserves practically all the seats available in all the colleges, that clearly would be subverting the object of Art. 15 (4). In this matter again, we are reluctant to say definitely what would be a proper provision to make. Speaking generally and in a broad way, a special provision should be less than 50 per cent; how much less than 50 per cent would depend upon the relevant prevailing circumstances in each case."

32. In *T. Devadasan v. Union of India and another*, AIR 1964 SC 179 (1), the controversy relating to reservation for SC & ST with carry forward rule was struck down by the Apex Court by majority judgment on the ground that the carry forward rule which resulted to fill up more than 50% vacancy in a particular year is bad. The principle enunciated by the Apex Court in the case of *Balaji's* (supra), relating to 50% mark was confirmed.

33. In *R. Chitralekha v. State of Mysore and others*, AIR 1964 SC 1823 (1), by majority judgment Hon"ble Supreme Court upheld the reservation for backward classes on the basis of identification and classification made on the basis of

occupation, income etc.

34. The case reported in AIR 1968 SC 1012 (1), *Minor P. Rajendran and others v. state of Madras and others*, relates to reservation of socially and educationally backward classes with reference to castes. Whether such identification infringes Article 15? the State action was upheld with the finding that though list has been prepared castewise but it includes educationally and socially backward communities. The *Minor P. Rajendran's* case (supra) was followed in AIR 1969 SC 1, *Triloki Nath Tikun and another v. State of J. & K. and others*, and AIR 1971 SC 2303(1), *Minor A. Periakaruppan v. State of T.N. and others*, in AIR 1973 SC 930 (1), *Janki Prasad Parimoo and others v. state of J. & K. and others*, in AIR 1975 SC 563, *state of U.P. v. Pradeep Tandon*, Hon''ble Supreme Court held that poverty alone cannot be basis for determining or identifying socially, educationally backwardness. It was held that Article 15 (4) or Article 16 (4) is not an instance of poverty alleviation programme. They are meant to minimize socially educationally backwardness.

35. In the case reported in AIR 1976 SC 490, *state of Kerala and another v. N.M. Thomas and others*, a Constitution Bench of Hon''ble Supreme Court consisting of 7 Hon''ble Judges, the case of *Bala Ji* (supra) was reiterated. It was held by Hon''ble Supreme Court by the majority in *Thomas's* case (supra), that Article 16 (1) is facet of Article 14 of the Constitution and permits reasonable, classification. Article 16 (4) specifies and clarifies the reservation of backward classes. In *Thomas's* case (supra), the majority judgment ruled that for determination of question whether reservation is excessive or not, one must have to look to the total number of posts in a given unit or department as the case may be. It was reiterated by Hon''ble Supreme Court that the aims and objects of the Constitution is equal opportunity to citizens including those who are socially, economically and educationally backward. However, the concept of equality is that if persons are dissimilarly placed, there cannot be equal treatment for having same treatment. Subject to riders and instructions and efficiency in service provided by Article 335 the process of reservation was held to be justifiable by reasonable classification. While touching the validity of Government order, Hon''ble Supreme Court in *N.M. Thomas''*(supra) case ruled to quote:

"38. The relevant touchstone of validity is to find out whether the rule of preference secures adequate representation for the unrepresented backward community or goes beyond it."

36. It was further held to quote:

"31. The rule of parity is the equal circumstances. The rule of differentiation is enacting laws differentiating between different persons or things in difference circumstances. The circumstances which govern one set of persons or objects may not necessarily be the same as those governing another set of persons or objects so that the question of unequal treatment does not really arise between

persons governed by different conditions and different sets of circumstances. The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position and the varying needs of different classes of persons require special treatment. The legislature understands and appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based upon adequate grounds. The rule of classification is not a natural and logical corollary of the rule of equality, but the rule of differentiation is inherent in the concept of equality. Equality means parity of treatment under parity of conditions. Equality does not connote absolute equality. A classification in order to be constitutional must rest upon distinctions that are substantial and not merely illusory. The test is whether it has a reasonable basis free from artificiality and arbitrariness embracing all and omitting none naturally falling into that category."

37. While upholding 50% criteria of Bala Ji's case (supra), in Thomas's case, the majority judgment observed as under to quote:

"26. It was said that not more than 50 per cent should be reserved for backward classes. This ensures equality. Reservation is not a constitutional compulsion but is discretionary according to the ruling of this Court in Rajendran's case. (AIR 1968 SC 507)."

38. In K.C. Kumar v. State of Karnataka, AIR 1985 SC 1495, the Thomas's case (supra) was reiterated and by majority judgment Hon'ble Supreme Court ruled that reservation for SC and ST should continue for another 15 years and necessity of reservation should be reviewed at the interval of every five years.

39. In Indira Sawhney v. Union of India, AIR 1993 SC 447 (Nine Hon'bSe Judges) the majority judgment was delivered by Hon'ble Justice B.P. Jeevan Reddy and the principle enunciated in Bala Ji's and Thomas's case (supra) was reiterated. However, it was held that there may be minor variation depending upon the facts and circumstances of the particular case. By majority, the earlier judgment of Hon'ble Supreme Court in the case of Devadasan (supra) was overruled.

40. In Ashok Kumar Thakur v. State of Bihar 1995 (5) SCC 403, while reiterating the process of reservation, Hon'ble Supreme Court had struck down the order of the State of U.P. with regard to identification of creamy layer in view of the judgment of Indira Sawhney's case (supra). It was held that identification and exclusion of affluent or creamy layer from backward classes is essential for ensuring the benefit of reservation to poorer and weaker sections of backward classes. The economic ceiling or means test held to be imperative to skim affluent.

41. In Chakradhar Paswan v. State of Bihar, (1988) 2 SCC 214 Hon'ble Supreme Court ruled that reservation for single post, shall not be applicable. However, the case of Chakradhar Paswan seems to be virtually overruled in the cases reported

in (1997) 2 SCC 332, *Union of India v. Madhav*, followed by 1995 Supp. (1) SCC 432, *State of Bihar v. Bageshwari Prasad*; (1997) 4 SCC 278, *Union of India v. Brij Lal Thakur*. In these cases, it was held by Hon'ble Supreme Court that reservation on single post should be provided by applying roster. The dictum of the cases of *Madhav*, *Brij Lal Thakur* and *Bageshwari* (supra), was based on a case reported in (1997) 6 SCC 283, *Post Graduate Institute of Medical Education and Research v. K.L. Narasimhan*.

42. However, review petition was filed in the Hon'ble Supreme Court and judgment reported in *Narasimhan's* case (supra), was reviewed by the Constitution Bench and the judgment is reported in (1998) 4 SCC 1, *Post Graduate Institute of Medical Education and Research Chandigarh v. Faculty Association and others*. Hon'ble Supreme Court reiterated the proposition that only limited reservation not exceeding 50% is permissible. It was further held that Article 15 (4) was enabling provision unlike Article 16 (4). It was the doctrine of equality of opportunity in clause (1) of Article 16 to be reconciled under clause (4) of Article 16 in a such manner that serving the backward classes, it should not unreasonably encroach upon the field of equality. The Constitution Bench of the Hon'ble Supreme Court while overruling the judgment of *Madhav*, *Brij Lal Thakur*, *Bageshwari* (supra), had proceeded to observe as under:

"35. Hence, until there is plurality of posts in a cadre, the question of reservation will not arise because any attempt of reservation by whatever means and even with the device of rotation of roster in a single post cadre is bound to create 100% reservation of such post whenever such reservation is to be implemented. The device of rotation of roster in respect of single post cadre will only mean that on some occasions there will be complete reservation and the appointment to such post is kept out of bounds to the members of a large segment of the community who do not belong to any reserved class, but on some other occasions the post will be available for open competition when in fact on all such occasions, a single post cadre should have been filled only by open competition amongst all segments of the society.

36. Mr. Kapil Sibal has contended that in some higher echelons of service in educational and technical institutions where special expertise is necessary to hold superior posts like Professors and Readers, there should not be reservation even if there is plurality of posts in such cadre as indicated in the majority view in *Indira Sawhney* case. It is, however, not necessary for us to decide the said contention for the purpose of disposal of these matters, where the question of reservation in single cadre post calls for decision.

37. We, therefore, approve the view taken in *Chakradhar* case that there cannot be any reservation in a single post cadre and we do not approve the reasonings in *Madhav* case, *Brij Lal Thakur* case and *Bageshwari Prasad* case upholding reservation in a single post cadre either directly or by device of rotation of roster point. Accordingly, the impugned decision in the case of *Post Graduate Institute*

of Medical Education & Research cannot also be sustained. The review petition made in Civil Appeal No. 3175 of 1997 in the case of Post Graduate Institute of Medical Education & Research, Chandigarh, is therefore, allowed and the judgment dated 2.5.1997 passed in Civil Appeal No. 3175 of 1997 is set aside."

43. The Constitution Bench of Hon''ble Supreme Court in a case reported in 2006 (8) SCC 212, *M. Nagraj and others v. Union of India and others*, where amendments inserted as Article 16A of the Constitution was questioned, had reiterated earlier pronouncement of Hon''ble Supreme Court and held that while granting reservation to any section of society, the Government cannot travel beyond 50% of total strength of the cadre relying upon the basic structure propounded by Hon''ble Supreme Court in the case of *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

44. In *M. Nagraj* (supra), Hon''ble Supreme Court while reiterating the maximum limit of reservation to 50%, held that provisions contained in Article 16 (4A) and 16(4B) are enabling provisions and while exercising the discretion to provide reservation state has to collect quantifiable data showing backwardness of class and inadequacy of representation of that class in public employment in addition to compliance of Article 335 of the Constitution. The relevant portion of the judgment of *M. Nagraj* (supra) as given in para 121, 122 and 123 are reproduced as under:

"121. The impugned constitutional amendments by which Articles 16(4A) and 16(4B) have been inserted flow from Article 16(4). They do not alter the structure of Article 16(4). They retain the controlling factors or the compelling reasons, namely, backwardness and inadequacy of representation which enables the States to provide for reservation keeping in mind the overall efficiency of the State administration under Article 335. These impugned amendments are confined only to SCs and STs. They do not obliterate any of the constitutional requirements, namely, ceiling limit of 50% (quantitative limitation), the concept of creamy layer (qualitative exclusion), the subclassification between OBC on one hand and SCs and STs on the other hand as held in *Indra Sawhney*, the concept of postbased Roster with inbuilt concept of replacement as held in *R.K. Sabharwal*.

122. We reiterate that the ceiling limit of 50%, the concept of creamy layer and the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency are all constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse.

123. However, in this case, as stated, the main issue concerns the "extent of reservation". In this regard the concerned State will have to show in each case the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation. As stated above, the impugned provision is an enabling provision. The State is not bound to make reservation for SC/ST in matter of promotions.

However if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance of Article 335. It is made clear that even if the State has compelling reasons, as stated above, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling limit of 50% or obliterate the creamy layer or extend the reservation indefinitely."

45. The over all reading of the judgment of M. Nagraj (supra), reveals that in case State decides to provide reservation to any section of the society necessary exercise should be done to find out the adequacy of representation, backwardness etc. The power conferred on the State under Article 16 (4A) and 16 (4B) are enabling provisions and are permissive in nature. The power conferred on State is guided power and in case the State exercise power arbitrarily, it may be corrected by Court by setting aside the decision taken keeping in view the material on record. When a controversy is raised before the higher judiciary in each case, the court has to get satisfied that the State has exercised its opinion in making reservation in promotion for SCs and STs based on requisite quantifiable data and State has to satisfy the court that such reservation became necessary on account of inadequacy of representation of SCs and STs in a particular class or classes of posts without affecting general efficiency of service as mandated under Article 335 of the Constitution. However, justification of reservation should be resided on case to case basis. For convenience sake para 117, 118 and 119 of M. Nagraj case (supra) are reproduced as under:

"117. The test for judging the width of the power and the test for adjudicating the exercise of power by the concerned State are two different tests which warrant two different judicial approaches. In the present case, as stated above, we are required to test the width of the power under the impugned amendments. Therefore, we have to apply "the width test". In applying "the width test" we have to see whether the impugned amendments obliterate the constitutional limitations mentioned in Article 16(4), namely, backwardness and inadequacy of representation. As stated above, these limitations are not obliterated by the impugned amendments. However, the question still remains whether the concerned State has identified and valued the circumstances justifying it to make reservation. This question has to be decided casewise. There are numerous petitions pending in this Court in which reservations made under State enactments have been challenged as excessive. The extent of reservation has to be decided on facts of each case. The judgment in Indra Sawhney does not deal with constitutional amendments. In our present judgment, we are upholding the validity of the constitutional amendments subject to the limitations. Therefore, in each case the Court has got to be satisfied that the State has exercised its opinion in making reservations in promotions for SCs and STs and for which the concerned State will have to place before the Court the requisite quantifiable data in each case and satisfy the Court that such reservations became necessary

on account of inadequacy of representation of SCs/STs in a particular class or classes of posts without affecting general efficiency of service as mandated under Article 335 of the Constitution.

118. The constitutional principle of equality is inherent in the Rule of Law. However, its reach is limited because its primary concern is not with the content of the law but with its enforcement and application. The Rule of Law is satisfied when laws are applied or enforced equally, that is, evenhandedly, free of bias and without irrational distinction. The concept of equality allows differential treatment but it prevents distinctions that are not properly justified. Justification needs each case to be decided on case to case basis.

119. Existence of power cannot be denied on the ground that it is likely to be abused. As against this, it has been held vide para 650 of *Kesavananda Bharati* that where the nature of the power granted by the Constitution is in doubt then the Court has to take into account the consequences that might ensue by interpreting the same as an unlimited power. However, in the present case there is neither any dispute about the existence of the power nor is there any dispute about the nature of the power of amendment. The issue involved in the present case is concerning the width of the power. The power to amend is an enumerated power in the Constitution and, therefore, its limitations, if any, must be found in the Constitution itself. The concept of reservation in Article 16(4) is hedged by three constitutional requirements, namely, backwardness of a class, inadequacy of representation in public employment of that class and overall efficiency of the administration. These requirements are not obliterated by the impugned constitutional amendments. Reservation is not in issue. What is in issue is the extent of reservation. If the extent of reservation is excessive then it makes an inroad into the principle of equality in Article 16(1). Extent of reservation, as stated above, will depend on the facts of each case. Backwardness and inadequacy of representation are compelling reasons for the State Governments to provide representation in public employment. Therefore, if in a given case the Court finds excessive reservation under the State enactment then such an enactment would be liable to be struck down since it would amount to derogation of the above constitutional requirements."

46. In *Ashok Kumar Thakur v. Union of India*, (2008) 6 SCC 1 the controversy cropped up before a Constitution Bench of Hon"ble Supreme Court, with regard to reservation for admission in educational institutions, was impugned. The constitution (93rd Amendment) Act, 2005 and enactment of Act No. 5 of 2007 giving reservation to OBC, SC and ST in the educational institutions was questions. Hon"ble Supreme Court had upheld the constitutional amendment and affirmed that reservation to OBC to the extent of 27% is intra vires to the Constitution and does not suffer from any illegality. However, it was held that provision for reservation in the educational institutions are enabling provisions and permissive in nature. Article 15 (5) was held to be constitutionally valid. It was also observed that reservation is not only on the basis of castes but other

mitigating factors are also to be considered as propounded by the earlier Constitution Bench in *M. Nagraj* (supra). With regard to OBC category relying upon *Indira Sawney*'s judgment (supra), Hon''ble Supreme Court (as per Hon''ble Chief Justice K.G Balakrishnan observed as under:

"220. In *Indra Sawhney* the Mandal Commission was accepted in principle though the details and findings of the Commission were not fully accepted by this Court. 27% of reservation in the matter of employment was accepted by this Court."

47. In *Ashok Kumar Thakur*'s case (supra) Hon''ble Supreme Court again held that the reservation may be provided to the extent of respective percentage of various categories namely SC, ST and OBC.

48. From the combined reading of the judgment referred to hereinabove, it is borne out that though the outer limit of reservation should be 50% but in break up, the reservation of various categories should be enforced within the limit provided by an Act or statute.

49. However, lastly, limiting the reservation to outer limit of 50% by Hon''ble Supreme Court has been approved by the Parliament itself by inserting Article 16 (4B) in the Constitution. A close reading of Article 16 (4B) reveals that in the matter of promotion total reservation which the State can provide should be within 50% and too, after clubbing the total quota of reservation made to various class separately.

Statutory Interpretation:

50. The 1994 Act, promulgated by the State Legislature starts with the words to quote:

"An Act to provide for the reservation in public service and post in favour of persons belonging to the SC, ST and other backward classes citizens and for matters, connected therewith or incidental thereby."

51. Thus, from the plain reading of aims and object of 1994 Act is, to provide reservation for SC and ST and Backward classes of citizens separately. Obviously while providing reservation to these three categories of classes or employees, it shall be presumed that Government has exercised powers to find out extent of reservation under the principles enunciated by the Hon''ble Supreme Court in the case of *M. Nagraj* (supra). Percentage of reservation of these three categories are different.

52. Under Section 3 of 1994 Act, for the SC, the reservation is 21% whereas for ST the reservation is 2% and for OBC the reservation is 27%. Meaning thereby, the State, its local bodies while implementing the reservation have to confine the outer limit of number of posts for the purpose of reservation upto 21%, 2% and 27% respectively.

53. Subsection (5) empowers the State Government to apply roster to give effect

to the reservation provided by subsection (1) of Section 3 of 1994 Act.

Thus, it is obvious that while issuing a Government order, circular or notification applying roster, the Government have to confine itself within the limit of 21 %, 2% and 27%. The purpose of roster is to enforce the actual percentage of reservation provided by subsection (1) of Section 3 of the Act. In any case, while applying i ester the State or its local bodies or instrumentalities, have no right to exceed the percentage to reservation for various categories in the manner provided under subsection (1) of Section 3 of the 1994 Act.

54. In case directly or indirectly while providing reservation the number of posts exceeds to 21 %, 2% or 27% of the respective categories, it shall be violative of statutory provisions.

55. The quota of reservation of various categories flows from subsection (1) of Section 27 of the 1994 Act. The outer limit provided by subsection (1) of Section 3 of 1994 Act has got statutory force. The Constitution Bench of Hon''ble Supreme Court in the case reported in 2006 (4) SCC 1, Secretary State of Karnataka v. Umadevi, held that statutory provisions should be enforced in its true sense. It has been consistent view of Hon''ble Supreme Court that authorities while discharging their duties have to adhere with the statutory rules or regulations. The authorities cannot act in derogation of statutory provisions contained in an Act or Rules, Regulations, vide 2006 (5) SCC 493, National Fertilizer Limited v. Somvir Singh; 2006 (1) SCC 667, Sfafe of U.P. v. Neeraj Kumar, 2004 (7) SCC 112, A. Umarani M. Registrar Coop. Societies; 1992 (4) SCC 118, State of Haryana v. Piara Singh; 1997 (1) SCC 245, Union of India v. Mahendra Singh; 1996 (7) SCC 499, Hindustan Shipyard Ltd. v. Dr. P. Sambasiva Rao; 1992 (4) SCC 33, Director Institute of Management Development v. Pushpa Srivastava; and 2003 (3) SCC 374, Ramkrishna Kamatv. State of Karnataka.

56. Learned Advocate General submitted that by issuing the Government order dated 26.6.2002, the first point has been given to scheduled castes and second point has been given to the general category and accordingly, even if there are two posts, one post can be reserved for SC candidates as it will be within the outer limit of 50% provided by Hon''ble Supreme Court through various pronouncements (supra). The submission of the learned counsel seems to be misconceived. While reading subsection (5) of Section 3, we cannot overlook subsection (1) of Section 3. Moreover, subsection (5) It self says that the Government shall "for applying the reservation under subsection (1) by notified order, issue a roster," meaning thereby subsection (5) has been inserted with reference to subsection (1) of Section 3. The aims and object of 1994 Act also sfarts by reference to post, means the total number of posts available in a cadre and from such available post certain percentage is reserved for scheduled castes and scheduled tribes and OBC category candidates in view of the provisions contained in subsection (1) of Section 3.

57. It is settled law that every word of statute should be given a meaning. While

interpreting a statutory provision the entire section or whole of the statute, as the case may be, should be considered. According to Maxwell on the Interpretation of Statutes (12th edition page 36) any construction which may leave without affecting any part of the language of a statute should ordinarily be rejected. Relevant portion from Maxwell on the Interpretation of Statutes (12th edition page 36) is reproduced as under:

"A construction which would leave without effect any part of the language of a statute will normally be rejected. Thus, where an Act plainly gave an appeal from one quarter sessions to another, it was observed that such a provision, though extraordinary and perhaps an oversight, could not be eliminated."

In view of above, the court should always avoid interpretation, which would leave any part of the provision to be interpreted without effect. While doing so every clause of a statute is to be construed with reference to the context and other clauses of the Act to make a consistent enactment of the whole statute. According to Maxwell (supra), statutory language should not be read in isolation but in its context.

58. Aforesaid principle has been reiterated by House of Lords in AG v. HRH Prince Ernest Augustus, 1957 (1) All ER 49 (HL); 2002 (4) All ER 654, R. v. National Asylum Support Service.

59. The exposition "ex visceribus actus" is a long recognised rule of construction. Words in a statute often take their meaning from the context of the statute as a whole. They are, therefore, not to be considered in isolation. Hon'ble Supreme Court in a case reported in, AIR 1992 SC 1, Mohan Kumar Singhania v. Union of India has proceeded to hold as under:

"However, it is suffice to say that while interpreting a statute the consideration of inconvenience and hardships should be avoided and that when the language is clear and explicit and the words used are plain and unambiguous, were/are bound to construe them in their ordinary sense with reference to other clauses of the Act or Rules as the case may be, so far as possible, to make a consistent enactment of the whole statute or series of statute/Rules/regulations relating to the subject matter. Added to this, in construing statute, the court has to ascertain the intention of the law making authority in the backdrop of the dominant purpose and underlying intendment of the said statute and that every statute is to be interpreted about any violence to its language and applied as far as its explicit language admits consistent with the established rules of interpretation."

The aforesaid settled rule of interpretation has been affirmed by the Apex Court from time to time in various cases including 1974 (1) SCC 596, M/s Gammon India Ltd. and others v. Union of India and others (para 19); AIR 1978 SC 995, M/s Punjab Beverages Ltd., Chandigarh v. Suresh Chand and another (para 5); AIR 2002 SC 829, Kailash Chandra and another v. Mukundi Lal and others (para 10); AIR 2000 SC 66, Grasim Industries Ltd. and another v. State of M.P. and

(1985) 1 SCC 591, S. Sundaram Pillai and others v. V.R. Pattabiraman and others.

60. In *Gramin Industries Ltd. v. Collector of Custom*, (2002) 4 SCC 297, Hon'ble Supreme Court reiterated the principle that every word of a statute and provision should be looked into generally in the context to which it is used and not in isolation. In *Deepal Girish Bhai Soni v. United India Insurance Co. Ltd.*, (2004) 5 SCC 385, Hon'ble Supreme Court held that statutes to be read in entirety and purport, and object of the Act should be given its full effect. In *Pradeep Singh v. State of Jharkhand*, (2005) 3 SCC 551, again, Hon'ble Supreme Court ruled that the interpretation of statutes depends upon the text and context thereof and object with which the same was made. Same principle has been reiterated by Hon'ble Supreme Court in the case reported in (2007) 10 SCC 528, *Deewan Singh v. Rajendra Prasad Ardevi* and (2007) 7 SCC 394, *Japani Sahoo v. Chandre Shekhar Mohanty*.

Accordingly, the provisions contained in subsections (5) and (7) of Section 3 of the 1994 Act, cannot be read in isolation but they should be read in reference to context. Meaning thereby, the entirety of provisions contained in 1994 Act as well as Section 3 provides that the purpose of the procedure provided by 1994 Act is to provide reservation to all the three categories i.e., SC, ST and OBC upto the extent of 21 %, 2% and 27% respectively and not beyond that. Provision of roster is to be seen in context of percentage of reservation for various categories.

61. It was vehemently argued by the learned counsel for the State Government as well as by the learned counsel appearing for the intervener placing heavy reliance on the Government order dated 8.3.1973. Though subsection (7) of Section 3 of the 1994 Act provides that reservation which was enforced under the Government order for appointment to the post to be filled up by promotion such Government order shall continue to be applicable till they are modified or revoked but the provision contained in subsection (7) is subject to statutory limitation of subsection (1) of Section 3 and the modified Government order dated 25.6.2002 providing roster at 100 point.

62. The 1994 Act came into picture much after the issuance of the Government order dated 8.3.1973. When the Government order was issued on 8.3.1973 the reservation for scheduled castes was 18% and for scheduled tribes it was 2%. It was enhanced to 21% at later stage. A combined reading of the Government order shows that para 1 of the Government relates to outer limit of scheduled castes and scheduled tribes and para 2 of the Government order relates to carry forward posts. The Government order is of the period when amended Article 15A and 15B of the Constitution of India, was not in picture and as the law stands, at that time from various pronouncements of Hon'ble Supreme Court in [(1964) 4 SCR 680, *T. Devdasan v. Union of India*, and other cases], the outer limit of carry forward posts, could not have exceeded to 45% of the vacancy in a year. Accordingly, the aim and object of para 2 of the Government order dated 8.3.1973, seems to ensure that carry forward posts of SC and ST candidates, should have been filled up without exceeding of outer limit of 45% of vacancies

and in case such carry forward posts are 2 in number, one of such reserved vacancy could have been filled up by promotion. Accordingly, the argument of the learned State counsel does not seem to be sustainable even on the literal interpretation of the Government order dated 8.3.1973 as well as in view of the statutory provisions contained in 1994 Act.

63. It is not necessary to reiterate the settled principle of law that a Government order, Rule or Regulation cannot override or tend to modify a statutory provision contained in an Act or statute in the present case, the 1994 Act. Accordingly, while interpreting the Government order dated 8.3.1973, the provisions contained in Annexure No. 1994 Act providing extent of reservation under subsection (1) of Section 3 of 1994 Act coupled with various pronouncements of Hon''ble Supreme Court (supra), cannot be overlooked.

64. The petitioners'' counsel has invited attention to the Constitution Bench judgment reported in (1995) 2 SCC 745, R.K. Sabharwal and others v. State of Punjab and others, Hon''ble Supreme Court held that when the State Government after doing necessary exercise, makes the reservation and provides the extent of percentage of post to be reserved for the said backward class, then percentage is to be followed strictly. Such percentage cannot be varied or changed. The relevant portion from para4 of the R.K. Sabharwal''s case (supra), is reproduced as under:

"4. ...When the State Government after doing the necessary exercise makes the reservation and provides the extent of percentage of posts to be reserved for the said Backward Class then the percentage has to be followed strictly. The prescribed percentage cannot be varied or changed simply because some of the members of the Backward Class have already been appointed/promoted against the general seats. As mentioned above the roster point which is reserved for a Backward Class has to be filled by way of appointment/promotion of the member of the said class."

65. Thus, in view of the Constitution Bench judgment of Hon''ble Supreme Court in R. K. Sabharwal''s case (supra), the percentage of posts reserved whether for backward class or for the same analogy, for SC and ST that should be followed strictly and the State cannot travel beyond that even by applying roster.

66. It has further been observed in R.K. Sabharwal''s case (supra), that numerical quota of posts is not a shifting boundary but it has been done with due application of mind and roster shall operate till the time the respective appointees or promotees can be on the posts meant for them in the roster. The operation of the roster and the "running account" must come to an end as and when all the seats earmarked for reserved candidates are filled up. Hon''ble Supreme Court in the case of the R.K. Sabharwal (supra), further defined the posts and vacancy and ruled that reservation should be provided keeping in view the cadre strength of posts comprising cadre. For convenience para 6 of R.K. Sabharwal''s case (supra), are reproduced as under:

"6. The expressions "posts" and "vacancies", often used in the executive instructions providing for reservations, are rather problematical. The word "post" means an appointment, job, office or employment. A position to which a person is appointed. "Vacancy" means an unoccupied post or office. The plain meaning of the two expressions make it clear that there must be a "post" in existence to enable the "Vacancy" to occur. The cadre strength is always measured by the number of posts comprising the cadre. Right to be considered for appointment can only be claimed in respect of a post in a cadre. As a consequence the percentage of reservation has to be worked out in relation to the number of posts which form the cadre strength. The concept of "Vacancy" has no relevance in operating the percentage of reservation."

67. With regard to roster point, Hon'ble Supreme Court observed as under:

"7. When all the roster points in a cadre are filled the required percentage of reservation is achieved. Once the total cadre has full representation of the Scheduled Castes/Tribes and Backward Classes in accordance with the reservation policy then the vacancies arising thereafter in the cadre are to be filled from amongst the category of persons to whom the respective vacancies belong..."

68. With the aforesaid proposition of law, Hon'ble Supreme Court in R.K. Sabharwal's case (supra), held that operation of a roster for filling up cadre strength by itself should remain within 50% limit. The limit of 50% includes the reservation of all three categories of employees.

69. The ratio of R.K. Sabharwal's case (supra), was reiterated by Hon'ble Supreme Court in (1999) 1 SCC 546, Bhup Singh v. state of Haryana and others. In Bhup Singh's case (supra), Hon'ble Supreme Court held that in case, the quota is achieved, then roster point could not be followed on arising of subsequent vacancy because of any reason whatsoever. The purpose of roster is to provide guideline for filling up reserved vacancies of different groups. Relevant para 4 of the Bhup Singh's case (supra), is reproduced as under:

"4. Utility of a roster is to provide a guideline for filling up the reserved quota for different groups visavis the candidates from the General category. Once the quota is achieved as for one or the other group of communities entitled to reservation, the roster will cease to have utility for that community because the guideline would already have been followed. This was precisely one of the points urged before the Constitution Bench in R.K. Sabharwal v. State of Punjab, (1995) 2 SCC 745 : 1995 SCC (L&S) 548: (1995) 29 ACT 481."

70. Thus, from Bhup Singh (supra), it is amply clear that maxim of roster is a guideline to fill up the reserved quota of the various categories or groups like SC, ST and OBC. The maxim of roster cannot be used to enhance or increase the extent of reservation provided by the Act or statutes like in the present case 21 % for SC, 2% for ST and 27% for OBC.

71. In the case of *R.S. Garg v. state of U.P. and others*, (2006) 6 SCC 430, the question cropped up before Hon''ble Supreme Court was, with regard to interpretation of provisions for reservation of the candidates of SC, ST and OBC in the State of UP.

72. After considering almost all the previous judgments, Hon''ble Supreme Court (supra) held that Section 3 of 1994 Act provides the extent of reservation for SC upto 21%. While providing reservation, the first and sixth post have been reserved for SC candidates. The Government order dated 25.6.2002 with regard to roster relied upon by the petitioners' counsel and the learned standing counsel has been considered by Hon''ble Supreme Court. Their lordships of Hon''ble Supreme Court held that reservation for SC candidates is to be confined to 21% and when there are six posts, two posts cannot be reserved for SC candidates. Hon''ble Supreme Court held that in the event of conflict between the reservation and roster, the former shall prevail. Relevant portion of the judgment para 34, 38, 39, 40, from the case of *R.S. Garg* (supra) are reproduced as under:

"34. In terms of the 1994 Act, the reservation was to be confined to 21%. There were 6 posts. If the roster was to be followed, 2 posts would be reserved for the Scheduled Caste candidates, which is impermissible.

38. An executive action or a legislative Act should also be commensurate with the dicta laid down by this Court in *Indra Sawhney v. Union of India*, 1992 Supp. (2) SCR 454 ("*Indra SawhneyI*") and followed in *Ashoka Kumar Thakur v. state of Bihar and others*, (1995) 5 SCC 403 and *Indra Sawhney v. Union of India*, 1999 Supp. (5) SCR 229 ("*Indra SawhneyII*").

39. In *Umadevi* (supra), the Constitution Bench referring to *Kesavananda Bharati* (supra), *Indra SawhneyI* (supra) and *Indra SawhneyII* (supra), opined:

"These binding decisions are clear imperatives that adherence to Articles 14 and 16 of the Constitution is a must in the process of public employment."

40. We are not concerned with the reasonableness or otherwise of the percentage of reservation. 21% of the posts have been reserved for Scheduled Tribe candidates by the State itself. It, thus, cannot exceed the quota. It is not disputed that in the event of any conflict between the percentage of reservation and the roster, the former shall prevail. Thus, in the peculiar facts and circumstances of this case, the roster to fill up the posts by reserved category candidates, after every four posts, in our considered opinion, does not meet the constitutional requirements."

73. In view of the above, it appears that reservation for the various categories should be considered within the respective limit provided by the statutes. This proposition of law is also borne out from Article 16 (4B) of the Constitution which provides that unfilled vacancies of separate class of a year may be filled up in any succeeding year and such class of vacancies shall not be considered together, if the vacancy of a year in which they are being filled up for

determining the ceiling of 50% reservation on account of total number of vacancies of that year. For convenience, Article 16(4B) of the Constitution of India is reproduced as under:

"16.(4B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent, reservation on total number of vacancies of that year."

74. Thus, from a close scrutiny of Article 16 (4B) of the Constitution of India, two things are emerged:

(i) Parliament has accepted in principle, the ceiling limit of 50% as propounded by the Hon''ble Supreme Court in catena of decisions;

(ii) The percentage of reservation or quota should be considered as specified by the State Government separately to various class or classes like SC, ST and OBC.

Virtually, the judgment in R.S. Garg's case (supra) holding that in the event of conflict between the reserved quota and roster, the former should prevail, seems to be fortified by Article 16 (4B) of the Constitution of India.

75. The argument of learned counsels for the State defending the State action for reservation of one post out of two, which admittedly comes to 50% is not sustainable for one more reason. State counsel had relied upon the Government order dated 8.3.1973 followed by order dated 25.6.2002 applying roster.

76. Government is empowered to prescribe the condition of service of its employees by executive order in the absence of rules or other statutory provisions. But while doing so by executive order in pursuance to power conferred by Article 162 of the Constitution it cannot travel beyond the statutory provisions.

Administrative order cannot be issued in contravention of the statutory provision. It could be issued only to supplement the rules, vide AIR 1967 SC 1910, Sant Ram Sharma v. State of Rajasthan; AIR 1991 SC 2288, Auditor General v. Mohan Lal Mehrotra; AIR 1993 SC 477, Indira Sawhney v. Union of India (para 56).

In Subhash v. State of Maharashtra, (1995) Supp (3) SCC 332, Hon''ble Supreme Court held that, any administrative circular cannot replace the rules framed under Article 309 of the Constitution.

In the case reported in AIR 1996 SC 2710, Ratan Kumar Tandon v. State of U.P., Hon''ble Supreme Court again held that, an executive order do not have any override effect on operation of statutory provision.

In K. Kuppuswamy v. State of T.N., (1998) 8 SCC 469, Hon''ble Supreme Court

again reiterated and held that, statutory rules cannot be overridden by executive orders or executive practice. Hence where the rules framed under Article 309 had not been amended, the Government could not act contrary to such rules merely because it had taken a decision to amend them.

In the case reported in (2005) 7 SCC 567, Dilip Kumar Ghosh v. Chairman, Hon''ble Supreme Court held that, a circular cannot override the rules occupying a particular field, (para 7)

In the case reported in (2001) 8 SCC 378, Laxaman Dundappa Dhamanekar v. Vishwa Bharat Sewa Samiti, it was held by the Hon''ble Supreme Court that governing statute must empower issue of administrative instructions to supplement the statutory rules. But they should be filled the gaps in the rules and not be inconsistent with them.

In the case reported in (2007) 2 SCC 491, Punjab Water Supply & Sewerage Board v. Ranjodh Singh and others Hon''ble Supreme Court held that, circular issued in contravention to the statutory rules would not be valid and cannot prevail over statutory rules.

In the present case, in case the argument of State is accepted it shall amount to grant reservation more than 21% (for SC), which shall be violative of quota provided in Section 3 (1) of the 1994 Act.

Rival submissions of the parties and case laws referred :

77. Sri S.K. Kalia learned senior counsel has relied upon the judgment of Hon''ble Supreme Court in the case of M.R. Balaji, R.K. Sabharwal, Bhup Singh, R.S. Garg and M. Nagraj (supra), which have been considered in the manner discussed in the preceding paras and call for no repetition.

78. Sri J.N. Mathur, learned Additional Advocate General assisted by Sri P.N Gupta has relied upon the judgment reported in (1997) 6 SCC 129, state of Punjab and others v. GS. Gill and another, (1997) 6 SCC 283, Post Graduate Institute of Medical Education and Research, Chandigarh and others v. K.L Narasimhan and another, (1997) 5 SCC 201, Ashok Kumar Gupta and another v State of U. P. and others; 1989 (4) SLR 257, Jaswant Singh and others v. Secretary to Government Punjab Education Department and others; (1995) 2 SCC 745, R.K. Sabharwal and others v. state of Punjab and others; (1998) 4 SCC 1, Post Graduation Institute Medical Education and Research, Chandigarh v. Faculty Association and others; (1996) 8 SCC 105, Prabhash Chandra Jain v. state of Haryana.

79. So far as the judgment in R.K. Sabharwal and K.L Narasimhan''s case (supra) are, concerned, they have already been discussed in the preceding paras. The judgment relied upon by the learned counsel in K.L. Narasimhan''s case has been considered by the Constitution Bench in the case of Faculty Association (supra) and overruled. Hence, do not call for any discussion.

80. In the case of G.S. Gill (supra), relied upon by the learned Additional Advocate General, the question was with regard to permissibility of carry forward Rule. Hon'ble Supreme Court held that subject to ceiling of 50% vacancies in a year, the carry forward Rule may be implemented but the same be not applied when there is only one post. However, roster applied to single cadre post, was upheld. The facts and circumstances of the case of G.S. Gill, seems to be different than the one in hand. In the present case, the quota of scheduled caste is admittedly 21 %. Accordingly, the question cropped up is, whether while applying roster, it can be enhanced to more than that of 21% of the cadre strength. This question has been dealt with in the subsequent judgment in the case of Faculty Association (supra) clarifies the proposition of law in the manner discussed in the preceding paras.

81. In the case of Ashok Kumar Gupta (supra), the judgment of R.K. Sabharwal (supra), has been reiterated and it has been held that promotion is to be done within the quota provided for SC candidates and no person shall be promoted beyond the quota. Thus, the case of Ashok Kumar Gupta (supra), referred by Sri P.N. Gupta learned Chief Standing Counsel while assisting the learned Additional Advocate General, seems to support the argument advanced by the petitioners' counsel. For convenience, para 44 of Ashok Kumar Gupta's case is reproduced as under:

"44. In R.K. Sabharwal v. state of Punjab the Constitution Bench was called upon to consider whether the reservation in promotion as per the roster was correct in law and, therefore, constitutional and whether the employees belonging to Scheduled Castes have right to be considered for promotion on their own merit, if so, how they are required to be adjusted in the roster prescribed by the Government. The Constitution Bench has pointed out that when the percentage of reservation is fixed in respect of a particular cadre and the roster indicates the reserved points, it has to be taken that the posts shown at the reserved points are to be filled from amongst the members of the reserved categories. The candidates belonging to the general category are not entitled to be considered for the reserved posts. On the other hand, the reserved category candidates can compete for the nonreserved posts. In the event of their appointment to the said posts, their number cannot be added and taken into consideration, for working out the percentage of reservation. When the State Government after doing the necessary exercise makes reservation and provides the extent of percentage of posts to be reserved for the said backward class, then the percentage has to be followed strictly. The prescribed percentage cannot be varied or changed simply because some of the members of the backward classes have already been appointed or promoted against the general seats. The fact that considerable number of members of the backward classes have been appointed/promoted against the general seats in the State may be a relevant factor for the State Government to review the question of continuing reservation for the said class but so long as the instructions/rules providing certain percentage of reservations for the backward classes are operative, the same have to be followed. It was

further held that the reserved vacancies were required to be filled according to the roster like a running account. When the reserved quota is full in the cadre then application of rule of reservation would be stopped until vacancies as per the roster arise and operate. It was also held following Mandal case that the judgment therein could be operative prospectively from that date, viz., 10.2.1995 and all the promotions which became settled rights due to reservation in promotion could not be unsettled. As seen earlier, "right to equality", "equality of status and opportunity", duty to "improve excellence", "opportunities and facilities to remove inequality in status" and "social justice", all should be given their due and full play under the rule of law to bring about equality in results to establish an egalitarian social order. It would therefore, be clear that reservation in promotion is constitutionally valid; the posts earmarked for Dalits and Tribes shall be filled up and adjusted with them. The Dalits and Tribes selected in open competition for posts in general quota should be considered appointees to be general posts in the roster as general candidates. The promotions given in excess of the quota prior to the judgment in Sabharwal case should not be disturbed."

82. The Full Bench judgment reported in Jaswant Singh (supra), though relates to roster point but the facts in issue were different than the present one which does not seem to be applicable in the facts and circumstances of the present case. The case of Prabhas Chandra Jain, (supra) relates to the reservation of one out of two posts. However, from the reading of entire judgment, it does not appear that the extent of reservation provided, was 21% like in the present case. The statutory provision like Section 3 of the 1994 Act was not the subject matter of dispute in Prabhas Chandra Jain's case. Moreover, the judgment of the case was delivered by two Hon''ble Judges whereas, the judgment of R.S. Garg's case (supra) was also delivered by two Hon''ble Judges. The R.S.Garg's case deals with the question of law and statutory provisions of reservation in UP. as involved in the present case more precisely than the case of Prabhas Chandra Jain. Accordingly, the facts in issue and the proposition of law involved in the Prabhas Chandra Jain's case, is not similar as the present one. Rather, the present controversy is identical and fully covered by R.S. Garg's case.

83. Sri Sakesh Kumar for the intervener, relied upon the case reported in 1974 (2) SCR 1, Arati Ray Choudhury v. Union of India and others, it also relates to controversy with regard to carry forward Rule and it does not speak with regard to outer limit of reservation to the extent of 21 % like the case in hand. In the case reported in 1988 (3) S.C.R. 130, Dr. Chakradhar Paswan v. State of Bihar and others; and "1998 (4) SCC 1, Post Graduate Institute of Medical Education & Research, Chandigarh v. Faculty Association and others, the principle enunciated therein, has been upheld and it does not seem to make out a case permitting the respondents to make reservation beyond the limit of 21 % for SC candidates.

84. Sri Sakesh Kumar has also drawn attention towards the judgment dated 25.4.2008 passed by the Hon''ble Supreme Court in Appeal (Civil) No. 2979 of 2008, Shiv Prasad v. Government of India and others decided on 25.4.2008, in

which the controversy does not relate to reservation keeping in view the outer limit of 21 % for 90 candidates. Hence seems to be not applicable.

85. It was vehemently argued by the learned Additional Advocate General that in the event of plurality of posts, reservation can be provided and persons may be promoted keeping in view the roster point. There is no dispute with the proposition that after the Constitution Bench judgment in the case of Faculty Association (*supra*), there cannot be reservation against one post and for the purpose of reservation, there must be plurality of posts but that should be looked into keeping in view the outer limit provided by subsection (1) of Section 3 of 1994 Act. Even if there is plurality of posts, the State while providing reservation whether by direct recruit or by promotion by applying roster that should be done keeping in view the outer limit provided by subsection (1) of Section 3 of 1994 Act i.e., 21%, 2% and 27% for SC, ST and OBC candidates respectively.

86. Needless to say that keeping in view the letter and spirit of the Articles 15 and 16, the reservation is to be provided to respective quotas of various categories. The State does not have got right to travel beyond respective quotas of categories. No reservation can be provided beyond 21%, to SC candidates in view of subsection (1) of Section 3 of 1994 Act, hence it cannot be done by applying roster which is meant to enforce the reservation within respective quota of various categories.

87. It is settled proposition of law that the Court should not place reliance upon a decision without discussing as to how the factual situation fits in with a fact situation of the decision on which reliance is placed and it has to be ascertained by analysing all material facts and issues involved in the case and argued on both sides. The judgment has to be read with reference to and in context with a particular statutory provisions interpreted by the Court as the Court has to examine as to what principle of law has been decided and the decision cannot be relied upon in support of the proposition that it did not decide *vide*, H. H. Maharajadhiraja Madhav Rao Jivaji Rao Scindia Bahadur and others v. Union of India, AIR 1971 SC 530; M/s. Amar Nath Om Parkash and others v. state of Punjab and others, AIR 1985 SC 218; Rajpur Ruda Meha and others v. State of Gujarat, AIR 1980 SC 1707; C.I.T. v. Sun Engineering Works (P) Ltd., (1992) 4 SCC 363; Sarv Shramik Sangh, Bombay v. Indian Hume Pipe Co. Ltd. and another, (1993) 2 SCC 386; Haryana Financial Corporation and another v. M/s. Jagdamba Oil Mills and another; AIR 2002 SC 834; Mehboob Dawod Shaikh v. state of Maharashtra, (2004) 2 SCC 362; ICICI Bank and another v. Municipal Corporation of Greater Bombay and others, AIR 2005 SC 3315; M/s. Makhija Construction and Enggr. Pvt. Ltd. v. Indore Development Authority and others, AIR 2005 SC 2499; and ShinEtsu Chemical Co. Ltd. v. Aksh Optifibre Ltd. and another, (2005) 7 SCC 234.

88. In view of the above, the judgment relied upon by the learned Additional Advocate General, does not seem to extend any help to take a view different than what has been discussed in the preceding paras, while interpreting the

provisions contained in Section 3 of the 1994 Act.

89. One of the arguments advanced by the learned Additional Advocate General is that since one post was earmarked for SC candidate, any interference by this Court shall amount to dereservation of the post which is not permissible. The arguments Advanced by the learned State counsel, seem to be misconceived. The question relates to enforcement of reservation in pursuance of the provisions contained in Section 3 of 1994 Act coupled with the Government order dated 26.6.2002. Only because the illegality was perpetuating since last two or 3 years, the petitioners shall not be deprived to challenge the same being affected by the impugned action in the matter of promotion on arising of cause of action. Perpetuation of illegality in violation of statutory provisions, rules or regulations, or fundamental rights guaranteed under PartIII of the Constitution, shall not create a ground to defend such action on the ground that it was continuing since few years. While interfering under Article 226 of the Constitution for judicial review, this Court has got ample power to enforce the law and stop the continuing illegality whenever it is brought to the notice of the Court. The petitioners has not prayed for dereservation. Rather, they have prayed for implementation of reservation strictly in accordance with 1994 Act to the extent it has been provided by subsection (1) of Section 3 of 1994 Act.

90. It is consistent view of Hon"ble Supreme Court that where settled proposition of law have not been complied with and persons suffer for no fault on their part and important question of law involved, the Court has got right to interfere vide, AIR 1961 SC 372, Calcutta Discount Co. Ltd. v. Income Tax Officer, Companies District 1st, Calcutta and another, 2000 (10) SCC 482, Union of India v. state of Haryana and 2002 (3) SCC, Maharashtra State Judicial Services Association v. High Court of Judicature at Bombay.

91. Moreover, the petitioners seem to be aggrieved party as the promotional avenues to the highest post of the cadre has been affected on account of the impugned order. Hence they have got right to approach this Court for judicial review. Hon"ble Supreme Court in the case reported in AIR 1975 SC 2092, Disciplinary Committee of Bar Council of Maharashtra v. M.V. Dhabolkar, and AIR 1976 SC 2602, Maharaj Singh v. State of U.P., while laying down the criteria with regard to aggrieved party held as under:

"The test is whether the words person aggrieved include "a person who has a genuine grievance because an order has been made which prejudicially affects his interests"."

92. In the case of Disciplinary Committee (supra), Hon"ble Supreme Court held that in case a person is aggrieved because of State action, writ of certiorari may be issued, vide 1976 (1) SCC 671, Jashbhai Motibhai Desai v. Roshan Kumar.

93. Being aggrieved with the State action with regard to impugned promotion order, the petitioners are entitled to approach this Court under Article 226 for judicial review of decision taken by the State.

94. Moreover, since the reserved quota of scheduled caste is 21%, hence whether it is direct recruitment or promotion, State has no right to travel beyond that under the garb of "roster". It is settled law that what cannot be done directly, it cannot be done indirectly, vide, 2003 (8) SCC 593, Dayal Singh and others, v. Union of India.

Abuse of power and consequence :

95. The historical material reveals that there were more than 600 states existing in Preindependent India, and they were formed on the basis of various caste, group, language, or local and cultural unification and religion. Because of the efforts of Sardar Vallabhbhai Patel with the cooperation of others, united India came into existence. Part III of the Constitution in the form of fundamental rights protects each and every citizen belonging to any caste, group or religion. The abuse of administration or legislative power in any manner is against the letter and spirit of Constitution.

96. Hon''ble Supreme Court has cautioned in 1951 against the abuse of reservation in a case reported in AIR 1951 SC 226, State of Madras v. Smt. Champakam Dorairajan and another, and had quashed the Government order providing reservation issued on the basis of religion, race and caste.

97. In the case reported in AIR 1962 SC 36, General Manager Southern Railway v. Rangachari, Hon''ble Supreme Court gave a word of caution pointing out that the efficiency of administration is of such paramount importance that it would be unwise and impermissible to make any reservation at the cost of efficiency of administration and procedure and power of reservation cannot be used to create monopoly. Hon''ble Supreme Court observed as under, to quote:

"It cannot be used for creating monopolies or for unduly or illegitimately disturbing the legitimate interests of other employees."

...[from para 23 of the Rangachari's case (supra)]

98. In Rangachari's case (supra) Hon''ble Mr. Justice K.N. Vachoo observed as under:

"Therefore, in the absence of clear words in Art. 16 (4) which would compel one to hold that reservation was meant to apply not only to the service taken as a whole but also to various grades in which the service might be divided, I feel that an interpretation should not be given which would result in the impairment of efficiency of "administration, which is jealously safeguarded even when considering the claims of the scheduled castes and the scheduled tribes. I am therefore of opinion that giving the words used in Art. 16 (4) as liberal an interpretation as is possible without destroying or making illusory the fundamental right guaranteed in Art. 16 (1) to which Art. 16 (4) is in the nature of an exception or a proviso, Art. 16 (4) can only mean that the State has the power thereunder to reserve numerically a certain percentage of appointments or posts in the manner I have indicated above and it has no power to split the

service into various grades which might exist in it and make reservation in each grade because of the use of the word "posts" therein."

...[From para 36 of Rangachari's case (supra)]

99. In M.R. Balaji's case (supra), Hon"ble Supreme Court observed as under:

"31. ...But if a provision which is in the nature of an exception completely excludes the rest of the society, that clearly is outside the scope of Art. 15(4). It would be extremely unreasonable to assume that in enacting Art. 15 (4) the Constitution intended to provide that where the advancement of the Backward Classes or the Scheduled Castes and Tribes was concerned, the fundamental rights of the citizens constituting the rest of the society were to be completely and absolutely ignored."

Hon"ble Supreme Court further observed:

"36.. ..The context, therefore, requires that the executive action taken by the State must be based on an objective approach free from all extraneous pressures. The said action is intended to do social and economic justice and must be taken in a manner that justice is and should be done."

100. In the case of N.M. Thomas (supra), Hon"ble Mr. Justice H.R. Khanna, gave a word of caution by observing that the scope of reservation should not be expanded beyond the territory of clause (1) of Art. 16 of the Constitution. There shall always be difference of opinion between the eminent thinkers with each others and there shall be logic not only to defend the reservation but also to expand its outer limit. Accordingly, while interpreting the constitutional provisions, Court should find out true purpose and object which underlies an article. The Court should also foresee as to what would be the effect of that construction not only in the present case but in future cases also. The relevant para 62, 63 and 64 of N.M. Thomas's case is reproduced as under:

"62. To expand the frontiers of classification beyond those which have so far been recognised under Clause (1) of Article 16 is bound to result in creation of classes for favoured and preferential treatment for public employment and thus erode the concept of equality of opportunity for all citizens in matters relating to employment under the State.

63. In construing the provisions of the Constitution we should avoid a doctrinaire approach. A Constitution is the vehicle of the life of a nation and deals with practice problems of the government. It is, therefore, imperative that the approach to be adopted by the courts while construing the provisions of the Constitution should be pragmatic and not one as a result of which the court is likely to get lost in a maze of abstract theories. Indeed, so far as theories are concerned, human thinking in its full efflorescence, free from constraints and inhibitions, can take such diverse forms that views and reasons apparently logical and plausible can be found both in favour of and against a particular theory. If one eminent thinker supports one view, support for the opposite view

can be found in the writings of another equally eminent thinker. Whatever indeed may be the conclusion, arguments not lacking in logic can be found in support of such conclusion. The important task of construing the articles of a Constitution is not an exercise in mere syllogism. It necessitates an effort to find the true purpose and object which underlies that articles. The historical background, the felt necessities of the time, the balancing of the conflicting interests must all enter into the crucible when the court is engaged in the delicate task of construing the provisions of a Constitution. The words of Holmes that life of law is not logic but experience have a direct relevance in the above context.

64. Another thing which must be kept in view while construing the provisions of the Constitution is to foresee as to what would be the impact of that construction not merely on the case in hand but also on the future cases which may arise under those provisions. Out of our concern for the facts of one individual case, we must not adopt a construction the effect of which might be to open the door for making all kinds of inroads into a great ideal and desideratum like that of equality of opportunity. Likewise, we should avoid, in the absence of compelling reason, a course that has the effect of unsettling a constitutional position, which has been settled over a long term of years by a series of decisions."

101. Hon^{ble} Mr. Justice V.R. Krishna Iyer (as his lordship then was), in N.M. Thomas's case (supra) gave words of sociological caution and has observed as under:

"149. A word of sociological caution. In the light of experience, here and elsewhere, the danger of "reservation", it seems to me, is threefold. Its benefits, by and large, are snatched away by the top creamy layer of the "backward" caste or class, thus keeping the weakest among the weak always weak and leaving the fortunate layers to consume the whole cake. Secondly, this claim is overplayed extravagantly in democracy by large and vocal groups whose burden of backwardness has been substantially lightened by the march of time and measures of better education and more opportunities of employment, but wish to wear the "weaker section" label as a means to score over their nearequals formally categorised as the upper brackets. Lastly, a lasting solution to the problem comes only from improvement of social environment, added educational facilities and crossfertilisation of castes by intercaste and interclass marriages sponsored as a massive State programme, and this solution is calculatedly hidden from view by the higher "backward" groups with a vested interest in the plums of backwardism. But social science research, not judicial impressionism, will alone tell the whole truth and a constant process of objective reevaluation of progress registered by the "underdog" categories is essential lest a once deserving "reservation" should be degraded into "reverse discrimination". Innovations in administrative strategy to help the really untouched, most backward classes also emerge from such sociolegal studies and audit exercises, if dispassionately made. In fact, research conducted by the A.M. Sinha Institute of Social Studies, Patna, has revealed a dual society among harijans, a tiny elite

gobbling up the benefits and the darker layers sleeping distances away from the special concessions. For them, Arts. 46 and 335 remain a "noble romance" [(As Huxley called it in "Administrative Nihilism" (Methods & Results, Vol. 4 of Collected Essays)], the bonanza going to the "higher" harijans. I mention this in the present case because lower division clerks are likely to be drawn from the lowest levels of harijans humanity and promotion prospects being accelerated by withdrawing, for a time, "test" qualifications for this category may perhaps delve deeper. An equalitarian breakthrough in a hierarchical structure has to use many weapons and Rule 13AA perhaps is one.

150. The core conclusion I seek to emphasize is that every step needed to achieve in action actual, equal, partnership for the harijans, alone amounts to social justice not enshrinement of great rights in Part III and good goals in Part IV. Otherwise, the solemn undertakings in Articles 14 and 16 read with Arts. 46 and 335 may be reduced to a "teasing illusion or promise of unreality". A clear vision of the true intendment of these provisions demands a deep understanding of the Indian spiritualecultural idea that divinity dwells in all and that ancient environmental pollution and social placement, which the State must extirpate, account for the current socioeconomic backwardness of the blackedout human areas described euphemistically as Scheduled Castes and Scheduled Tribes. The roots of our constitutional ideas at least some of them can be traced to our ancient culture. The noble Unpanishadic behest of collective acquisition of cultural strength "sah varya karvavahe" is involved in and must evolve out of "equality", if we are true to the subtle substance of our finer heritage."

102. The observations made in the N.M. Thomas's case (supra), by eminent judges of that time with regard to the possible abuse of reservation process, has been reiterated by some of the judges who were member of the bench in Indira Sawhney's case (supra). The principles of reasonable classification while providing reservation for the purpose of creating another class or planting one class in other, is constitutionally not permissible. For the valid classification the legislature or executive measures must be correlated with the legislative purpose or view. Once, the Constitution itself involves the purpose of achieving the goal of equality by permitting reservation for Scheduled Castes and Scheduled Tribes and OBC, upto specified percentage, any further reservation beyond the constitutional purpose, would be impermissible and perse invalid.

103. The Constitution Bench in M. Nagaraj's case (supra), held that constitutional theory of basic structure is based on concept of constitutional identity. The basic structure jurisprudence is a principle occupation with constitutional identity and is not permissible either for legislature or administrative abuse. The constitutional provisions cannot be permitted to be abused to fulfill the political ambition or as a vote capturing device. The supremacy of the Constitution is of paramount concern. The reservation exceeding the quota provided by statutes or more than 50% of the sanctioned strength hits the basic structure of the Constitution and virtually, it is fraud with Constitution. [.....para 28 of M. Nagaraj

case]

104. It has further been observed that equality is essence of democracy and accordingly, it is the basic feature of the Constitution.

105. Mahatma Gandhi while taking note of the features of the democracy, once observed, "My essence of democracy is that under it, the weakest should have same opportunity as the strongest".

106. Dr. Ambedkar in a lecture given on 22.12.1952, at District Law Library, Pune, while pointing out the conditions precedent for successful working of democracy observed as under:

"My definition of democracy is "a form and a method of government whereby revolutionary changes in the economic and social life of the people are brought about without bloodshed."

Dr. Ambedkar had considered various conditions precedent for successful democracy and according to him, the first condition is there must not be glaring inequalities in the society. To reproduce relevant portion from the lecture:

"The first condition which I think is a condition precedent for the successful working of the democracy is that there must be no glaring inequalities in the society. There must not be an oppressed class. There must not be a suppressed class. There must not be a class which has got all the privileges and a class which has got all the burdens to carry. Such a thing, such a division, such an organization of a society has within itself the germs of a bloody revolution, and perhaps it would be impossible for the democracy to cure them."

107. Madhu Limaye, a famous Indian socialist, leader, while giving lecture on "reservation and social policy", defined the purpose of reservation as under:

"It is argued that the reservation policy has not brought about any general improvement in the economic condition of these sections. But this is not the point at issue at all. The reservation policy was not adopted to improve their economic condition. To achieve economic progress we must get our priorities right. We must have correct economic policies and appropriate development programmes. The reservation policy was designed to raise their social status. The entry into the legislatures and services of scheduled castes and scheduled tribes has certainly helped raise their status."

108. From the observations made by the Hon^{ble} Supreme Court in various cases (supra) and the great leaders of the country, the purpose of reservation is not to improve the economic conditions but it has been designed to raise social status of depressed classes who suffered for centuries. While doing so, the statutory provisions fixing quota of reservation for SC, ST and OBC candidates, should be construed or interpreted strictly to avoid any abuse of power. Precaution should be taken so that different class should not be created in the classes gradually creating hatred, jealousy, or resentment in other unit of the

society. Abuse of reservation provisions or quota or continuance of reservation even after fulfilment of its aim and object, may be counterproductive and result into reverse discrimination and in long run, it may be divisive for the country. Every precaution should be taken by the Government not to expand or abuse the provisions with regard to reservation against the spirit of the Constitution which is the supreme law of land.

109. During British Rule, Sardar Vallabhbhai Patel opposed the separate electorate given to the Muslims in British India. In a letter dated 16.12.1946, to Dr. V.K. John, MLC Barrister at Law, Madras, he observed as under:

"Separate electorate given to the Muslims has done irreparable damage to the cause of India; this was done deliberately as a policy of divide and rule, and we are paying dearly the price for this act of mischief. Let us hope that all communities will realise in course of time that it is more in the interest of the country and of the community as a whole to fall in line with the general national regeneration of the country as a whole."

...[excerpts from a letter dated 16.12.1945 of Sardar Vallabhbhai Patel, as appeared in "Sardar Patel's Correspondence 1945-50 (Vol.III) Edited by Durga Das, Editor in Chief, India News & Feature Alliance Formerly Chief Editor, Hindustan Times, New Delhi]

110. In Constituent Assembly on 14.10.1949, Sardar Vallabhbhai Patel, has given a speech and defended the decision not to provide reservation to scheduled caste Sikh community on the ground that it shall divide the Sikh community and its religion. It shall be appropriate to reproduce the relevant excerpts from the speech as under:

"...We must trust that if the present leaders go, we will have better leaders in the future. If we have trust in the future of our country, we may trust that in the future our country will produce...leaders who will make a name in the history of the world. We have shown it today. We will do it in the future. That is India. India produced a mahatma in a state where slavery was rampant. He went to a country where people could not walk on the footpath, where people could not travel even in the III class with safety, where we were all treated as untouchables even now we are treated as untouchables there. There he made a name and fame all over the world, and presented a new weapon to the world. Then he came here. Here he raised the Sikhs, the Muslims, the Hindus, Scheduled Castes, everybody."

...[excerpts from speech of Sardar Vallabhbhai Patel as appeared in Appendix Three in "Sardar Patel's Correspondence 1945-50 (Vol.VIII) Edited by Durga Das, Editor in Chief, India News & Feature Alliance Formerly Chief Editor, Hindustan Times, New Delhi]

Again Sardar Vallabhbhai Patel said (supra):

"...So, for God's sake, those who are interested in the wellbeing of the country

should create a different atmosphere and not an atmosphere of distrust and discord."

"...One section first comes and gets certain advantages and gives promises to a certain section of the community and thereafter another section comes and charges us with not having given it certain other advantages which it is anxious to have. That is not the way to do things. You may unite and decide what you want. It is not our fault if you have not done so. After all, what is it that you want? You want an insignificant thing, but granting it would mean putting a blot on the Constitution. We agreed about certain things on that day and everybody was pleased with it. Therefore be satisfied with what you have done and there will be no cause for regret."

111. The views expressed by Sardar Vallabhbhai Patel are still true in letter and spirit. He stood firmly against the expansion of reservation. The letter and spirit of the speech of Sardar Patel given in the Constituent Assembly is against the expanding of reservation to cover others with a view that country should take necessary steps or affirmative action to help the poor and downtrodden within the available resources. According to Sardar Patel, the country was divided because of separate electorate given to Muslims by Britishers. Originally keeping in view of the suggestion of Dr. Ambedkar reservation was provided for ten years which has been extended from time to time.

112. Hon"ble Supreme Court of India continuously by various pronouncement, had opined that there should be review of reservation process at the interval of 50 years to find out the necessity for its continuance but it appears that instead of reviewing the necessity of reservation, even after lapse of 60 years, of independence when a new generation has taken over, the national scene and has got no concern with the past exploitation, reservation has become electoral issue as a vote capturing device. Meetings and functions are organised on the basis of caste, creed and religion. A new form of leadership has raised head based on caste, creed and religion with slogan amounting to abuse of reservation process against constitutional mandate.

113. The abuse of reservation process in one or the other way creating fissure in society may fatal to national integrity in due course. In M. Nagraj's case (supra). Hon"ble Supreme Court had applied the principle of strict scrutiny while interpreting the Article 16 (4A) and 16 (4B) and Article 335 of the Constitution. Now, time has come to enforce the constitutional provisions in its strict sense.

114. The Constitution Bench in M. Nagraj's case (supra), has reiterated the law laid down by earlier judgment reported in 1996 (6) SCC 580, Vinod Kumar v. Union of India, and took a view that relaxation in the matters of reservation in promotion, is not permissible under Article 16 (4) of the Constitution in view of command contained in Article 335 (para 99 of the case).

115. We may take notice of the fact that some time elections are contested in the planned manner on the basis of the caste, creed or religion. No effective

effort has been taken, by the constitutional functionaries to develop the sense of national feeling which may unite the countrymen into one thread. In last 60 years castism, corruption and communalism had increased manifold. By sailing in a boat having holes of castism, corruption or communalism, country cannot achieve its target with sense of pride, harmony and peace. Peoples sailing in such a boat cannot fulfill the ambition with respect. The end achieved with such means shall neither be fruitful nor good for the country. In any case, it shall always be short lived.

116. It was around 1650 African and Caribbean peoples (6.6 million) were forcibly brought to America to work as slaves in cotton and fruit plantations. Fierce civil war was fought in United State between pro and antislavery peoples and virtually after civil war of 1863 slavery abolished in America. However, discrimination and violence continued against coloured people. There was complete segregation in schools, residential colonies, restaurants, and buses restrooms and every walk of life between "colour" & "white". Martin Luther King "Junior" and Malcolm XI, fought for integrated schools, voting right, equal pay and above all respect as human being.

117. However, in America coloured people were guided by Martin Luther King, who was inspired by Gandhian philosophy. Vision of Martin Luther King is reflected from the following excerpts from the "I Have a Dream" speech delivered on August 28, 1963 at the Lincoln Memorial, Washington DC, to quote:

"In the process of gaining our rightful place, we must not be guilty of wrongful deeds. Let us not seek to satisfy our thirst for freedom by drinking from the cup of bitterness and hatred. We must not allow our creative protest to degenerate into physical violence. Again and again, we must rise to the majestic heights of meeting physicalforce with soul force.

The marvellous new militancy which has engulfed our community must not lead us to a distrust of all white people, for many of our white brothers, as evidenced by their presence here today, having come to realise that their destiny is tied up with our destiny. And they have come to realise that their freedom is inextricably bound to our freedom. We cannot walk alone.

And... even though we face the difficulties of today and tomorrow, I still have a dream. It is a dream deeply rooted in the American dream. I have a dream that one day this nation will rise up and live out the true meaning of its creed: "We hold these truths to be selfevident, that all men are created equal."

I have a dream that one day on the red hills of Georgia, the sons of former slaves and the sons of former slave owners will be able to sit down together at the table of brotherhood. I have a dream that one day even the state of Mississippi, a state sweltering with the heat of injustice, sweltering with the heat of oppression, will be transformed into an oasis of freedom and justice."

118. It was only in 1961, President John. Fr. Kennedy by executive order

established President's commission on Equal Employment opportunity for Affirmative action. The Civil Right Movement started in 1961 completed with affirmative actions of the Government, gradually minimised the difference of status and honour between black and white, and now almost eradicated. By affirmative actions American Government had given equal opportunity to acquire knowledge, ability and excellency to all and take part in National Development. The steps so taken had virtually united the hearts, to share the responsibility of National Development without creating a distance or division between coloured and white.

The reports reveals that Barack Husain Obama first won the candidature at party level (Democrat) then in presidential race because of his honesty, academic excellency, ability, knowledge, secular credentials and perseverance with the support of both the coloured and white. It is because of quality and merit he won the election.

119. In ancient India also, Valmiki, Vyas and several others were respected without any discrimination because of their ability and knowledge. For National integration and development it is necessary to take affirmative action to produce able and knowledgeable personalities from the deprived class instead of expanding or abusing the process of reservation or keep its continuity for all time to come at the cost of efficiency enshrined in Article 335 of the Constitution.

120. The morality is at its lowest web and things have become worst. The constitutional provisions as well as statutory provisions have been construed loosely and not strictly in the manner the American Supreme Court has done so far. The constitutional provisions must be construed in its strict sense [M. Nagraj (supra)] and law should be enforced with all vigour and promptness without any latitude. The abuse of constitutional power in the matter of reservation in any way is against the constitutional spirit shall cause reverse discrimination and may be counterproductive and divisive in due course of time which should be checked by enforcing the rule of law in its letter and spirit.

Reservation may be provided only keeping in view the inadequacy of representation, backwardness of class, necessity for reservation, judging the adverse affect, without compromising on efficiency of administration and excellency, keeping in view the constitutional mandate.

Conclusion:

121. Subject to above, we record our finding as under:

(1) In the event of conflict between the quota of reservation and roster, the former shall prevail over the later, as held by Hon"ble Supreme Court in the case of R.S. Garg (supra). While applying quota for reservation and roster, the State have to confine the outer limit of reservation provided by 1994 Act for SC, ST and OBC category.

(2) The extent of reservation provided by subsection (1) of Section 3 of 1994

Act, is mandatory. In the matter of promotion or recruitment reservation cannot exceed the outer limit of 21%, 2% and 27% for SC, ST and OBC.

(3) Under the garb of subsection (5) while applying roster or subsection (7) of Section 3 of 1994 Act, the State cannot travel beyond the outer limit of reservation provided by subsection (1) of Section 3 of 1994 Act. Meaning thereby, even while applying roster for SC, ST or OBC, the outer limit of 21%, 2% or 27% should be adhered to.

(4) The outer limit of 50% provided by Article 16 (4B) of the Constitution or by Hon"ble Supreme Court right from M.R. Balaji's case (supra) till date, includes the reservation for all the categories or classes of employees. In case reservation is provided only for one category like in the present case, 21% to SC category, then it does not mean that State has right to enhance reservation upto 50% suo motu exceeding the statutory quota provided by the Act and statute. 50% rider is the outer limit permissible for all categories and in case under the Act or statutes lesser percentage of reservation has been provided to any class, then that will be the outer limit for the respective classes as in the present case, reservation for SC is 21% and it cannot be enhanced to 50%.

(5) While exercising power for purpose of reservation keeping in view the law laid down by the Hon"ble Supreme Court in M. Nagraj's case (supra) to find out the backwardness or ("adequacy of representation keeping in view the necessity and efficiency provided by Article 335 of the Constitution, the Government cannot travel beyond the outer limit of quota provided under subsection (1) of Section 3 of 1994 Act for SC, ST and OBC i.e., 21%, 2% and 27% respectively in the matter of promotion.

(6) Any reservation made exceeding the outer limit provided under the 1994 Act or the statutes, shall be deemed to be excessive reservation and the reservation so made, may be struck down by the court as it would amount to derogation of constitutional requirement as held in M. Nagraj's case, (supra).

In the present case since the sanctioned strength of the post of EngineerinChief is two and the quota of scheduled caste is 21% under subsection (1) of Section 3 of the 1994 Act, one out of two posts cannot be reserved for scheduled caste.

122. Subject to findings recorded hereinabove, the writ petition deserves to be allowed.

Accordingly, the writ petition is allowed. A writ in the nature of certiorari is issued quashing the order dated 27.8.2008 contained in Annexure 1 to the writ petition. A writ in the nature of mandamus is issued directing the opposite parties to proceed while filling the post/vacancies in question, in the light of observations made in the present judgment.

No orders as to costs.