

(1990) 06 KAR CK 0016
In the Karnataka High Court
Case No : Writ Petition No. 16966 of 1989

Dr. Rajkumar and others

APPELLANT

Vs

Gulbarga University and others

RESPONDENT

Date of Decision : 20-06-1990

Acts Referred:

Constitution of India, 1950 — Article 10, 14, 15 (4), 335, 340
Karnataka State Universities Act, 1976 — Section 49 (3)

Citation : AIR 1990 Kar 320 : (1990) ILR (Kar) 2125

Hon'ble Judges : S.R. Rajasekhara Murthy, J;M. Ramakrishna, J;M. Rama Jois, J

Bench : Full Bench

Advocate : H.B. Datar, S.M. Chandrashekar and N.V. Seshachala, for the Appellant; V.A. Mohanrangam, L.G. Havanur and Ravivarmakum, B.V. Acharya, General and Somayaji, Government Advocate, for the Respondent

Judgement

Rama Jois

1. In this writ petition, the petitioners have questioned the legality of the notification issued by the Gulbarga University established under the provisions of the Karnataka State Universities Act, 1976 ("the Act" for short), inviting applications for selection for appointment to 35 teaching posts on the establishment of the University on the ground that out of 35 posts as many as 33 are reserved in favour of persons belonging to backward classes and only two posts are made available for general merit and therefore the reservation was violative of Arts. 14 and 16 of the Constitution of India.

2. The brief facts of the case, stated in the petition, are these: The University has various Departments such as Kannada, English, Urdu, Marathi etc. Each of the Departments constitutes a separate and distinct unit consisting of posts of Lecturers, Readers and Professors in the respective subjects. The seniority of Lecturers, Readers and Professors in each of the Departments is maintained separately. The minimum condition of eligibility prescribed for the posts of Lecturers, Readers and Professors in each of the subjects is the Master's Degree

in the concerned subject and therefore only persons possessing Master's Degree in the concerned subject are eligible for selection and appointment, subject to the possessing of other prescribed qualifications for the posts in any given subject. Having regard to the subject-wise requirement of the teaching posts, in certain subjects the number of posts available are only a few and in certain cases there is only a single post belonging to a particular category. The Gulbarga University issued a notification on 9-8-1989 inviting applications for selection for appointment to as many as 35 posts. The relevant portion of the notification reads :

GULBARGA UNIVERSITY, GULBARGA

No. GUG, ADM. EST. (T) 89-90.

Administrative Office, Jnana Ganga, Gulbarga -- 585 106, Dt. : 9-8-1989.

NOTIFICATION

Applications in the prescribed form in Eight Sets are invited from qualified candidates of Indian Nationality for the following posts in the Gulbarga University. The applications together with necessary documents should reach the Registrar, Gulbarga University, Gulbarga-585 106, by Registered Post Ack. Due on or before 15th September, 1989.

Reservation to SC / ST and other backward classes have been made in accordance with the Government Order issued from time to time and also in accordance with the provisions of the Karnataka State Universities Act, 1976.

1. For vacancies classified as pertaining to SC/ST candidates only, candidates of other categories are not eligible to apply.

2. Candidates who have already applied for the posts in response to earlier Notification should apply afresh. Their earlier applications will not be reconsidered.

Any clarification regarding the advertisements may be had from the Registrar, Gulbarga University, Gulbarga.

The details of posts are as under. The number of post (s) in each subject and the category for which they are reserved is shown against each.

SI.No. Post-Graduate Department Subject No. of vacancies Post reserved as per roster

1 2 3 4

1. Kannada 1 Professor 3 Lecturers 1 SC 1 ST 1 Gr.A 1 Gr.C

2. English 1 Professor

2 Readers 2 Lecturers 1 SC

- 1 SC 1 ST 1 SC 1 ST
3. Urdu and Persian 1 Reader 1 SC
4. Marathi 2 Lecturers 1 SC 1 ST
5. Economics 1 Professor 1 SC
6. M.S.W. 1 Reader 1 SC
7. Political Science 1 Professor 1 SC
8. History 1 Lecturer 1 SC
9. Lib. & Infn. Science 1 Reader 3 Lecturers 1 SC 1 SC, 1 ST, 1 GM
10. Chemistry: Physical Chemistry 1 Reader 1 SC
11. Applied Electronics 1 Lecturer 1 SC
12. Physics 2 Readers 3 Lecturers 1 SC, 1 ST 1 ST, 1 GM, 1 Gr.A
13. Mathematics 4 Lecturers 1 ST, 1 Gr.A 1 Gr.B, 1 Gr.C
14. Microbiology 1 Reader 1 SC
15. Law 1 Professor 1 SC
16. Education 1 Professor 1 SC
17. Botany 1 Reader 1 SC

As may be seen from the above Notification, out of the 35 posts, only 2 posts are made available for general merit and as many as 33 posts are reserved mostly in favour of persons belonging to Schedule Castes and Scheduled Tribes. As a result, several eligible persons including the petitioners, who do not belong to the reserved category were unable to apply as the applications have been invited only from the reserved category. The petitioners therefore have questioned the legality and constitutional validity of the aforesaid notification.

3. The grounds on which the legality of the notification has been challenged may be summarised thus :

(i) According to S. 49(3) of the Act, Universities are required to invite applications by open advertisement for every post of Professor, Reader or Lecturer, as the case may be, and at the stage of inviting applications, the University cannot restrict the invitation only to persons belonging to the reserved category, namely, persons belonging to Backward Classes in whose favour reservation of posts have been made by the State exercising its enabling power under Cl. (4) of Art. 16 of the Constitution of India. It is only at the stage of making the selection as prescribed in sub-sec. (7) of S. 49 of the Act, the Board of Appointment constituted under S. 49 of the Act has to conform to the reservation of posts in favour of backward classes. Sub-sec. (8) of S. 49 of the

Act empowers the Board, in so far as the candidates belonging to Scheduled Castes and Scheduled Tribes, to include their names in the select list if they satisfy the minimum prescribed qualification and are found suitable. Therefore, the impugned notification which creates a bar at the threshold, for candidates not belonging to reserved category to apply for the posts advertised, if contrary to sub-sec. (4) of S. 49 of the Act.

(ii) Even on the basis that on earlier occasions of recruitment to various categories of posts, persons belonging to backward classes and in particular to the category of Scheduled Castes and Scheduled Tribes were not available and therefore it is reasonable to reserve higher number of posts in favour of persons belonging to those categories, the total number of vacancies which could be made available for the purposes of clearing such backlog at any given recruitment could not exceed 50%.

(iii) In the Department in which there are vacancies available for general merit as also for reserved category, the recruitment could not be restricted only to persons belonging to the reserved categories without advertising the posts available for general merit and such a step was violative of Arts. 14 and 16(1) of the Constitution of India.

(iv) In such of the cadres where there is only one post available, there could be no reservation at all, for reservation of such posts would amount to cent per cent reservation and consequently would be violative of Art. 14 and Cl. (1) of Art. 16 of the Constitution and as ruled by the Supreme Court in the case of M.R. Balaji and Others Vs. State of Mysore, the reservation of posts under Cl. (4) of Art. 16 of the Constitution of India could be only less than 50%.

4, In the statement of objection filed on behalf of the University, the stand taken in respect of each of the four points aforesaid, may be summarised thus :

(i) There is no violation of S. 49(4) of the Act as in the advertisement it is specifically stated that persons belonging to the reserved category alone could apply to the posts reserved for them and in respect of unreserved posts, there was no restriction at all and every eligible candidate either belonging to the reserved category or to the category of general merit was entitled to apply.

(ii) As regards the second plea, the stand taken by the University is that as explained in Annexure-R at the "Remarks" column, the posts reserved for Scheduled Castes/Scheduled Tribes or other backward classes in each of the cadres was, as a result of the non-availability of candidates belonging to the said categories in earlier recruitment and therefore just because in the present notification the posts advertised have been reserved in favour of reserved category, it cannot be said that the reservation was excessive or that Cl. (1) of Art. 16 of the Constitution stands violated.

(iii) As regards the plea of the petitioners that in certain cadres where vacancies were also available for general merit and applications have not been invited from

general category, the stand by the University has been that the present recruitment was undertaken pursuant to a direction issued by the State Government to fill up the backlog of vacancies reserved for Scheduled Castes and Scheduled Tribes and therefore the action taken was in accordance with law.

(iv) As regards the last point, the stand taken on behalf of the University is that the Government had prescribed a roster for one hundred vacancies and according to the roster, the first vacancy is required to be made available for Scheduled Caste and therefore in all cases where there was only one post available, the same has been reserved in favour of Scheduled Caste and therefore the action of the University was in accordance with law and not violative of Art. 14 or 16(1) of the Constitution.

5. Sri H. B. Datar, the learned senior counsel, addressed arguments on behalf of the petitioners, Sri V. A. Mohana Rangam, learned counsel, addressed argument on behalf of the University and Sri L. G. Havanur, learned counsel, addressed arguments on behalf of respondents 3 and 4.

6. Sri H. B. Datar, the learned senior counsel for the petitioners, urged the following contentions :

(i) Inviting applications only from persons belonging to the reserved categories was violative of sub-sec. (4) of S. 49 of the Act.

(ii) The reservation of all the vacancies in a given subject advertised, in favour of reserved categories, even on the basis that the step was taken to clear the backlog of vacancies in respect of reserved categories, being excessive was violative of Cl.(1) of Art. 16 of the Constitution.

(iii) Non-advertising of general vacancies even though available and inviting applications only from reserved category was violative of Cl. (1) of Art. 16 of the Constitution.

(iv) The reservation of single post available in several subjects amounted to hundred per cent reservation and therefore clearly unconstitutional in view of the ratio of the decision of the Supreme Court in M.R. Balaji and Others Vs. State of Mysore,

7. We shall now proceed to consider the above contentions one after the other. S. 49 of the Act prescribes the procedure for appointment of teachers of the University. The teaching cadres of the University consists of Professors, Readers and Lecturers in different subjects. Sub-sec. (2) of S. 49 provides for the constitution of a Board of Appointment consisting of Vice-Chancellor and other experts for making selection for appointment to the teaching posts. Sub-section (4) of S. 49 requires the giving of wide publicity to the notification inviting applications from willing candidates for being selected and appointed to the teaching posts. That sub-section reads :

"Appointments of teachers etc.

XXX XXX XXX (4) Every post of Professor, Librarian, Reader or Lecturer to be filled by selection shall be duly and widely advertised together with the minimum and other qualifications, if any, required, the emoluments and the number of posts to be filled, and reasonable time shall be allowed within which the applicants may apply."

Sub-section (6) empowers the Board to call the candidates for interview and to adjudge the merit of each one of the candidates in accordance with the qualification advertised and is required to forward the list of selected candidates to the Syndicate of the University concerned, which is the appointing authority for making the appointment to the said posts. Sub-sections (7) and (8) prescribe the procedure for preparation of list of selected candidates. They read :

"Appointments of teachers etc.

XXX XXX XXX (7) In preparing the list under sub-sec. (6) the Board shall follow the orders issued by the State Government from time to time in the matter of reservation of posts for the Scheduled Castes, the Scheduled Tribes and other backward classes of citizens.

(8) Notwithstanding anything in sub-section (7), preference shall be given to persons belonging to the Scheduled Castes and the Scheduled Tribes in any selection if in the opinion of the Board such persons possess the minimum qualification prescribed and are suitable."

There can be no doubt that in view of sub-sec. (4) of S. 49 of the Act, at the stage of inviting applications, there can be no restriction regarding the categories of candidates who could submit their applications seeking selection and appointment to the posts advertised. The reservation is required to be complied with by the Board of Appointment at the stage of preparing the select list as required under sub-sec. (7) of S. 49 of the Act. Further it is also clear from sub-sec. (8) of S. 49 of the Act that the Board of Appointment is empowered to include the names of candidates belonging to Scheduled Castes and Scheduled Tribes in the list of selected candidates if they possessed minimum prescribed qualification and are found suitable. In the circumstances, there is considerable force in the contention of the petitioners that the University generally at the stage of inviting applications could not restrict the applications only to persons belonging to Scheduled Castes/Scheduled Tribes category or to any other reserved category. But in our opinion, the question as to whether the notification inviting applications from reserved category alone should be declared invalid, should depend upon the facts and circumstances of a given case and in respect of each of the categories of posts in respect of which applications are invited. If applications for any category of posts are invited for the first time or in cases where the vacancies are available for being filled up according to general merit and also from among persons belonging to the reserved category, there can be no doubt that the applications cannot be restricted to persons belonging to the reserved category. But if in a given case it is shown that attempts for recruitment

to any particular cadre had already been made and at that stage candidates belonging to the reserved category were not available and therefore subsequent attempt was being made for giving opportunity to candidates belonging to the reserved category only as against unfilled posts reserved category only as against unfilled posts reserved for reserved category, such restriction cannot be considered as discriminatory and illegal. The question therefore has to be considered with reference to each of the cadres and we shall take up the same for consideration later.

8. We next take up the second and the fourth contentions, as they are intimately connected with each other. The first question for consideration is as to what could be the extent of reservation of posts under Cl. (4) of Art. 16 of the Constitution. Art. 14 of the Constitution is a general Article incorporating the doctrine of equality. It directs the State not to deny any person equality before the law or the equal protection of the laws to any person. Art. 16 is a special provision meant to ensure doctrine of equality in the field of employment under the State to citizens. Cls. (1) and (2) of the Article reads :

"16. Equality of opportunity in matters of Public Employment--

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

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

Clause (1) confers the fundamental right to equality in matters relating to employment under the State positively and Cl. (2) is in the form of an injunction to the State not to discriminate against any citizen in respect of any employment under the State only on any one of the grounds mentioned in the clause. The right conferred under the two Articles are available to all the citizens. It is a fundamental rule of equality that whereas unequal treatment of persons similarly situated amounts to discrimination, equal treatment of persons dissimilarly situated is equally discriminatory. The founding fathers of the Constitution took note of the fact that among the citizens of India for historical reasons certain sections among them were educationally and socially too backward, that mere guaranteeing a fundamental right to equality in matters relating to employment to them would be of no help to them and on the other hand it would be plainly discriminatory. Therefore Cl. (4) was incorporated in Article. It reads :

"(4) Nothing in this Article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State."

This clause confers power on the State to reserve posts in favour of such of the classes of citizens who were identified as backward and who were found to be

inadequately represented in the services of the State. The Constitution itself identified the most backward classes of citizens as Scheduled Castes and Scheduled Tribes and provided for their specification by a Presidential Order or by an Act of Parliament under Arts. 341 and 342 and also provided for the steps to be taken to identify the other backward classes of citizens vide Art. 340. The Constitution also provided guidelines in the matter of the extent of reservation of posts vide Art. 335. It reads :

"335. Claims of Scheduled Castes and Scheduled Tribes to Services and Posts :

The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State."

9. The learned counsel for the petitioners submitted that Cl. (4) of Art. 16 was in the nature of exception to Cls. (1) and (2) of Art. 16 and therefore the power available under Cl. (4) has to be exercised within a reasonable limits and not so as to defeat the right guaranteed under Cls. (1) and (2) and this is the intention of the Constitution was also explicit from Art. 335 and therefore the reservation should always be less than 50% as held by the Supreme Court in Balaji's case (AIR 1963 SC 549).

10. Sri L. G. Havanur, the learned counsel for the respondents 3 and 4 did not take exception to the construction of Cl. (4) of Art. 16 as only an exception. On the other hand, he also supported the view that Cl. (4) of Art. 16 was only an exception. He invited our attention to the debates in the Constituent Assembly on Cl. 10(1), (2) and (3) of the draft Constitution which became Art. 16(1), (2) and (4), during which Dr. Ambedkar, the Chairman of the Drafting Committee of the Constitution explained the scope of three clauses independently and also with reference to Cl. 296 (which corresponds to Art. 335).

Relevant portion of his speech reads :

"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 services 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 sub-clause (i) of Art. 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. Nothing of the rule will remain."

(Underlining by us).

He submitted that Cls. (1) and (2) conferred the fundamental right of equality of opportunity in matters relating to employment under the State and prohibition against discrimination on grounds of caste, religion etc., and that the right conferred under the two clauses was on all the citizens including the backward classes and that clause (4) was intended to be an exception to clauses (1) and (2) in order to ensure equality to persons belonging to certain castes or classes who were educationally and socially backward and were also inadequately represented in the services of the State by reserving certain posts to be filled up by competition inter se among them. He further submitted that as pointed out by Dr. Ambedkar, the exception contained in clause (4) of Article 16 could not be allowed to devour the main clause and that both having regard to the principle of exception and the guideline indicated in Article 335 the reservation has to be in respect of minority of posts.

11. The learned counsel argued that having regard to the scope of clause (4) of Article 16 as explained by Dr. Ambedkar, it was incorporated as an exception to clauses (1) and (2) thereof, and therefore it cannot be used to defeat or devour the main clause to which it was a proviso or an exception. As regards the rule of construction of a proviso or an exception, the learned counsel relied on a large number of authorities, all of which lay down similar principles. Therefore, we consider it sufficient to refer to the latest decision of the Supreme Court in the case of *S. Sundaram Pillai and Others Vs. R. Pattabiraman and Others*, Relevant portion of the judgment reads :

"26. The next question that arises for consideration is as to what is the scope of a proviso and what is the ambit of an Explanation either to a proviso or to any other statutory provision. We shall first take up the question of the nature, scope and extent of a proviso. The well established rule of interpretation of a proviso is that a proviso may have three separate functions. Normally, a proviso is meant to be an exception to something within the main enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. In other words, a proviso cannot be torn apart from the main enactment nor can it be used to nullify or set at naught the real object of the

main enactment.

XXX XXX XX XX 35. While interpreting a proviso care must be taken that it is used to remove special cases from the general enactment and provide for them separately.

XXX XXXX XXX 42. We need not multiply authorities after authorities on this point because the legal position seems to be clearly and manifestly well established. To sum up, a proviso may serve four different purposes :

- (1) qualifying or excepting certain provisions from the main enactment;
- (2) it may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable;
- (3) it may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and
- (4) it may be used merely to act as an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provision."

Learned counsel submitted that clause (4) of Article 16 was similar to a proviso creating an exception to clauses (1) and (2) of Article 16 and therefore its scope cannot be enlarged unreasonably so as to nullify or set at naught the real object of the main provision.

12. It is unnecessary to decide the matter on first principles for the scope and ambit of clause (4) has been the subject matter of interpretation by the Supreme Court. In the case of *The General Manager, Southern Railway Vs. Rangachari*, the question for consideration was, whether the power of the State to reserve posts in favour of Backward Classes was confined to initial recruitment or to promotion also. The Supreme Court in the course of its judgment expounded the scope of clause of Article 16(4) and said thus :

"28. It is true that in providing for the reservation of appointments or posts under Article 16(4) the State has to take into consideration the claims of the members of the backward classes consistently with the maintenance of the efficiency of administration. It must not be forgotten 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. That undoubtedly is the effect of Art. 335. Reservation of appointments or posts may theoretically and conceivably mean some impairment of efficiency; but the risk involved in sacrificing efficiency of administration must always be borne in mind when any State sets about making a provision for reservation of appointments or posts. It is also true that the reservation which can be made under Art. 16(4) is intended merely to give adequate representation to backward communities. It cannot be used for creating monopolies or for unduly or

illegitimately disturbing the legitimate of other employees. In exercising the powers under Art. 16(4) the problem of adequate representation of the backward class of citizens must be fairly and objectively considered and an attempt must always be made to strike a reasonable balance between the claims of backward classes and the claims of other employees as well as the important consideration of the efficiency of administration; but, in the present case, as we have already seen, the challenge to the validity of the impugned circulars is based on the assumption that the circulars are outside Art. 16(4) because the posts referred to in the said Article are posts outside the cadre of services and in any case do not include selection posts. Since, in our opinion, this assumption is not well founded, we must hold that the impugned circulars are not unconstitutional."

The Supreme Court held that the extent of reservation should be reasonable and it could not be used for creating monopolies, but it could be extended both to initial recruitment and promotions by selections also.

13. Next case is that of M.R. Balaji and Others Vs. State of Mysore, . This case arose in the context of reservation of seats in Medical and Engineering colleges to the extent of 68% in favour of educationally and socially backward classes of citizens made by this State under clause (4) of Article 15. The Supreme Court interpreted the scope of clause (1) of Article 15, clause (1) of Article 16 as also clause (4) of Article 15 and clause (4) of Article 16. The relevant portion of the judgment reads:

"30. That takes up to the question about the extent of the special provision which it would be competent to the State to make under Art. 15(4). Article 15(4) authorises the State to make any special provision for the advancement of the Backward Classes of Citizens or for the Scheduled Castes and Scheduled Tribes. The learned Advocate General contends that this Article must be read in the light of Art. 46 and he argues that Art. 15(4) has deliberately and wisely placed no limitation on the State in respect of the extent of special provision that it should make. Art. 46 which contains a directive principle provides that the State shall promote with special care the education and economic interests of the weaker sections of the people, and, in particular of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation. There can be no doubt that the object of making a special provision for the advancement of the castes or communities there specified is to carry out the directive principle enshrined in Art. 46. It is obvious that unless the educational and economic interests of the weaker sections of the people are promoted quickly and liberally, the ideal of establishing social and economic equality will not be attained and so there can be no doubt that Art. 15(4) authorises the State to take adequate steps to achieve the object which it has in view. No one can dispute the proposition that political freedom and even fundamental rights can have very little meaning or significance for the Backward Classes and Scheduled Castes and Scheduled Tribes unless the backwardness and inequality from which they suffer are immediately redressed. The learned

Advocate General, however, suggests that the absence of any limitation on the State's power to make an adequate special provision indicates that if the problem of backward classes of citizens and scheduled castes and tribes in any given State is of such a magnitude that it requires the reservation of all seats in higher educational institutions, it would be open to the State to take that course. His argument is that the only test which can be applied is whether or not having regard to the problem which the State is called upon to meet, the provision made is reasonably adequate or not. Thus presented, the argument is, no doubt, *prima facie* attractive, and so, it must be carefully examined.

31. When Art. 16(4) refers to the special provision for the advancement of certain classes of scheduled castes or scheduled tribes, it must not be ignored that the provision which is authorised to be made is a special provision, it is not a provision which is exclusive in character, so that in looking after the advancement of those classes, the State would be justified in ignoring altogether the advancement of the rest of the society. It is because the interest of the society at large would be served by promoting the advancement of the weaker elements in the society that Art. 15(4) authorises special provision to be made. 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.

XX XX XX XX 34..... A special provision contemplated by Art. 15(4) like reservation of posts and appointments contemplated by Art. 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% how much less than 50% would depend upon the relevant prevailing circumstances in each case.

XXX XXX XXX XXX 37. Whilst we are dealing with this question, it would be relevant to add that the provisions of Art. 15(4) are similar to those of Art. 16(4) which fell to be considered in the case of *The General Manager, Southern Railway Vs. Rangachari*, . In that case, the majority decision of this Court held that the power of reservation which is conferred on the State under Art. 16(4) can be exercised by the State in a proper case not only by providing for reservation of appointments, but also by providing for reservation of selections posts. This

conclusion was reached on the basis that it served to give effect to the intention of the Constitutional makers to make adequate safeguards for the advancement of Backward Classes and to secure their adequate representation in the Services. The judgment shows that the only point which was raised for the decision of this Court in that case was whether the reservation made was outside Art. 16(4) and that posed the bare question about the construction of Art. 16(4). The propriety, the reasonableness or the wisdom of the impugned order was not questioned because it was not the respondent's case that if the order was justified under Art. 16(4), it was a fraud on the Constitution. Even so, it was pointed out in the judgment that the efficiency of administration is of such a paramount importance that it would be unwise and impermissible to make any reservation at the cost of efficiency of administration; that, it was stated, was undoubtedly the effect of Art. 335. Therefore, what is true in regard to Article 15(4) is equally true in regard to Art 16(4). There can be no doubt that the Constitution makers assumed, as they were entitled to, that while making adequate reservation "under Art. 16(4), care would be taken not to provide for unreasonable excessive or extravagant reservation, for that would, by eliminating general competition in a large field and by creating widespread dissatisfaction amongst the employees, materially affect efficiency. Therefore, like the special provision improperly made under Art. 15(4) reservation made under Art. 16(4) beyond the permissible and legitimate limits would be liable to be challenged as a fraud on the Constitution. In this connection it is necessary to emphasise that Art. 15(4) like Art. 16(4) is an enabling provision; it does not impose an obligation, but merely leaves it to the discretion of the appropriate Government to take suitable action, if necessary."

(Underlining by us)

What is plain from the above two decisions is, whereas Art, 16(1) and (2) confers fundamental right of equality of opportunity in matters relating to employment under the State on all the citizens and prohibits discrimination on the ground of caste or religion, cl. (4) of Art. 16 was an exception to the rule of equality incorporated in cls. (1) and (2) of Art. 16 and the exception cannot override the main right and therefore the maximum extent of reservation which could be made under cl. (4) of Art. 16 must be less than 50% and this was also necessary in view of Art. 335 of the Constitution.

14. Sri L. G. Havanur is right in his submission that having due regard to the principles of interpretation of an exception, the Constitution Bench of the Supreme Court in M.R. Balaji and Others Vs. State of Mysore, clearly held that clause (4) of Art. 15 and of Art. 16 was an exception to clauses (1) and (2) of Articles 15 and 16 respectively and therefore cannot be used to the extent of unduly affecting the rights under clauses (1) and (2) and further also having regard to Art. 335 of the Constitution, the reservation in favour of persons belonging to backward classes not adequately represented in the services of the State should always be less than 50%. All the learned counsel appearing in this

case agree that, that is the position in law flowing from the decision in the case of Balaji.

15. The question, however, which arises for consideration is, whether the view taken by a Division Bench of this Court in *Soma-shekarappa v. State of Karnataka* ILR (1979) Kar 1496 to the effect that the ratio of the decision in *M.R. Balaji and Others Vs. State of Mysore*, was not good law after the views expressed by some of the learned Judges in the Seven Judge Bench decision of the Supreme Court in the case of *State of Kerala and Another Vs. N.M. Thomas and Others*, is correct on the ground that clause (4) of Art. 16 was not an exception but was a substantive provision and that reservation of more than 50 per cent of the posts may be justified having regard to the percentage of the persons belonging to backward classes.

16. In the case of *Thomas* certain number of promotional posts in the service of Kerala Government had been reserved in favour of backward classes. Under the Kerala State and Subordinate Services Rules, 1958, departmental tests were prescribed for becoming eligible for promotion. Unless the civil servants concerned passed the prescribed departmental tests prescribed for promotion, they were ineligible to be considered for promotion. A special provision in Rule 13AA was incorporated in favour of the reserved category i.e. Scheduled Castes and Tribes to the effect that as against vacancies reserved for them they may be promoted even though they had not passed the prescribed departmental examination with the condition that they should pass the prescribed tests within two years after promotion. As a result, number of candidates belonging to the general category could not secure promotion as they had not passed the prescribed departmental tests, whereas candidates belonging to the reserved category were promoted because of the exemption given in their favour and giving them permission to pass the departmental tests after promotion within two years. This was challenged by the persons belonging to the general category on the ground that as a result of Rule 13-AA the reservation became excessive in the promotional posts. The Supreme Court upheld the validity of the special rule made in favour of reserved categories, though the number of promotions from the reserved category was higher, compared to the number of promotions of persons belonging to the general category. It was a Seven Judge Bench and in the course of the judgment of the Judges who formed the majority, a view was expressed to the effect that Cl. (4) of Art. 16 was an independent provision and not merely an exception to Cl. (1) of Art. 16 and therefore it was competent for the State to determine the quantum of reservation having due regard to the percentage of the backward classes' population in the State concerned. In the course of their Judgment, Fazl Ali, J., and Krishna Iyer, J., made observations to the effect that under certain circumstances there was no reason why reservations should not exceed 50%. The relevant portion of the judgments are:--

FAZL ALI, J.:

"226. This means that the reservation should be within the permissible limits and

should not be a cloak to fill all the posts belonging to a particular class of citizens and thus violate Art. 16(1) of the Constitution indirectly. At the same time Cl. (4) of Art. 16 does not fix any limit on the power of the Government to make reservation. Since Cl. (4) is a part of Art. 16 of the Constitution it is manifest that the State cannot be allowed to indulge in excessive reservation so as to defeat the policy contained in Art. 16(1). As to what would be a suitable reservation within permissible limits will depend upon the facts and circumstances of each case and no hard and fast rule can be laid down, nor can this matter be reduced to a mathematical formula so as to be adhered to in all cases. Decided cases of this Court have no doubt laid down that the percentage of reservation should not exceed 50 per cent. As I read the authorities, this is, however, a rule of caution and does not exhaust all categories. Suppose for instance a State has a large number of backward classes of citizens which constitute 80 per cent of the population and the Government, in order to give them proper representation, reserves 80 per cent of the jobs for them, can it be said that the percentage of reservation is bad and violates the permissible limits of Cl. (4) of Art. 16? The answer must necessarily be in the negative. The dominant object of this provision is to take steps to make inadequate representation adequate."

KRISHNA IYER, J.:

"168. I agree with my learned brother Fazl Ali, J., in the view that the arithmetical limit of 50 per cent in any one year set by some earlier rulings cannot perhaps be pressed too far. Overall representation in a department does not depend on recruitment in a particular year, but the total strength of a cadre. I agree with his construction of Art. 16(4) and his view about the "carry forward" rule."

17. There were also observations in the Judgments of Fazl Ali, J., Mathew, J., and Krishna Iyer, J., to the effect that Cl. (4) of Art. 16 was not an exception to Cls. (1) and (2) but was an independent provision, and therefore the reasonableness of the quantum of reservation made under it could not be tested on the basis that Cl. (4) was in the nature of exception to Cls. (1) and (2) of the Article. The above decision was cited as an authority before this Court in the case of Somashekarappa ILR (1979) Kar 1496 , in support of the contention that the ratio of the decision in M.R. Balaji and Others Vs. State of Mysore, according to which the extent of reservation under Cl. (4) of Art. 16 should be less than 50% and how much less alone was a matter to be determined by the State, was no longer good law and the reservation could exceed 50% also, if there was justification to do so. The relevant portion of the Division Bench Judgment in Somashekarappa's case including the relevant extracts from the judgment of Supreme Court on which the Division Bench relied reads:--

"30. The principles stated in the above cases may briefly be summarised as follows :

(i) Socially and educationally backward classes is a part of weaker sections of people envisaged in Art. 46. The class or communities envisaged as backward, in the concept in which it has been used in the Constitution, cannot cover a bulk of State's population. It must necessarily cover only the lower layers of the strata with their degree of backwardness comparable to backwardness of the Scheduled Castes and Scheduled Tribes. But that social and educational backwardness need not be exactly similar in all respects to that of the Scheduled Castes and Scheduled Tribes.

(ii) Articles 15(4) and 16(4) do not speak of Castes, but only speak of classes. But caste is not an irrelevant factor to determine whether any class of citizens is socially backward. However, its importance should not be exaggerated and no classification of backward classes should be based solely on the caste of the citizens. The social backwardness of groups or classes of citizens may, in the ultimate analysis, be the result of poverty to a very large extent, but poverty by itself is not the determining factor of social backwardness. Caste and poverty are both relevant for determining the backwardness.

(iii) Though Backward Class is not synonymous with backward caste or backward community, the members of an entire caste or community may in the social, economic, educational and occupational scale of values, may on that account be treated as a Backward Class, but that is not because they are members of a caste or community, but because they by sharing some common characteristics form a distinct class.

AND

(iv) Articles 15(4) and 16(4) are in the nature of exceptions and therefore the conditions which justify the departure from Articles 15(1) and 16(1) must be strictly shown to exist, in justification of special provisions for the advancement of backward class of citizens.

This Just principle of rule and exception so far as Arts. 16(1) and 16(4) are concerned, although consistently accepted by the Supreme Court in a string of decisions cannot, however, be said to be valid after the decision in State of Kerala and Another Vs. N.M. Thomas and Others,

31. Thomas case, of course, was not a case dealing with any reservation for Backward Classes, but the principles stated therein are instructive on some of the questions agitated before us. The case, in essence, involved the validity of promotion for a specified period of 34 persons belonging to Scheduled Castes and Scheduled Tribes as against the available 51 posts, without insisting on a pass in the prescribed examinations. Thomas, who was not so promoted, challenged the validity of the said promotion before the Kerala High Court. The High Court accepted the contention of the petitioner and held that the promotion of 34 out of 51 posts was not conducive to the maintenance of efficiency of administration as envisaged under Art. 335 of the Constitution and R. BAA of the Kerala State and Subordinate Services Rules, 1958, which enabled such

promotion made in unreasonable discrimination between the members of the same service and therefore was invalid.

32. In the appeal preferred by the State of Kerala, the Supreme Court by a split decision, upheld the validity of the rule and the said promotion. The majority further took the view that Art. 16(1) permits reasonable classification just as Art. 14 does and Art. 16(4) indicates one of the methods of achieving equality embodied in Art. 16(1). A. N. Ray, Chief Justice said :

"All the legitimate methods are available for equality of opportunity in services under Art. 16(1). Art. 16(1) is affirmative whereas Art. 14 is negative in language. Art. 16(4) indicates one of the methods of achieving equality embodied in Art. 16(1)."

Mathew, J., said :

"I agree that Art. 16(4) is capable of being interpreted as an exception to Art. 16(1) if the equality of opportunity visualised in Art. 16(1) is a sterile one, geared to the concept of numerical equality which takes no account of the social, economic, educational background of the members of Scheduled Castes and Scheduled Tribes. If equality of opportunity guaranteed under Art. 16(1) means effective material equality, then Art. 16(4) is not an exception to Art. 16(1). It is only an emphatic way of putting the extent to which equality of opportunity could be carried viz., even up to the point of making reservation."

Krishna Iyer, J., said :

".....True, it may be loosely said that Article 16(4) is an exception but, closely examined, it is an illustration of constitutionally sanctified classification....."

Fazl Ali, J., said :

".....It is true that there are some authorities of this Court that Clause (4) is an exception to Article 16(1) but with due respect I am not in a position to subscribe to this view for the reasons that I shall give hereafter."

Thomas case State of Kerala and Another Vs. N.M. Thomas and Others, thus discards the old way of thinking that Articles 15(4) and 16(4) are exceptions to the equality guaranteed under Articles 14, 15(1) and 16(1) of the Constitution. It introduced new principles in the concept of equality. Articles 15(4) and 16(4) are themselves aimed at achieving the very concept of equality guaranteed by Articles 14, 15(1) and 16(1) and are no more than mere illustrative of one of the forms of classification. A Full Bench of the High Court of Jagdish Rai and Others Vs. State of Haryana and Others, has also expressed in similar terms. Chinnappa Reddy, J. (as he then was), speaking for the Full Bench observed :

"The legal position as explained in State of Kerala and Another Vs. N.M. Thomas and Others, may now be taken to be settled, that Article 16(4) is not an exception to Article 16(1) but is illustrative of one of the methods of achieving equality, that it is not exhaustive of the classifications necessary, and therefore,

permissible for achieving equality and that the general principles applicable to situations under Article 14 are equally applicable under Article 16(1)."

33. Upon the principles stated by the Supreme Court in *Mattulal Vs. Radhe Lal, and Union of India (UOI) and Another Vs. K.S. Subramanian*, amid the diversity of decisions, the proper course for this Court is to follow only the views expressed by a larger Bench of the Supreme Court in preference to those expressed by a Smaller Bench.

34. With these principles in mind, we may now proceed to consider the contentions urged for the petitioners..."

Thus the Division Bench held that having regard to the views expressed by a larger Bench of Seven Judges of the Supreme Court in the case of *State of Kerala and Another Vs. N.M. Thomas and Others*, the ratio of decision in *M.R. Balaji and Others Vs. State of Mysore*, could not prevail.

18. Sri H. B. Datar, the learned counsel for the petitioners submitted that though the case of *State of Kerala and Another Vs. N.M. Thomas and Others*, was decided by a larger Bench of Seven Judges and though there were observations made by some of the learned Judges in their respective judgments, which ran counter to the decision in *M.R. Balaji and Others Vs. State of Mysore*, the decision of the Constitution Bench in *Balaji's* case was not overruled by the Court and therefore continued to be the binding law declared by the Supreme Court. He also submitted that the Supreme Court itself has in its subsequent decisions made it clear that the ratio in *Balaji's* case holds the field and therefore the view taken by a Division Bench of this Court in *Somashekarappa ILR (1979) Kar 1496* is not correct and no longer valid. In particular, he invited our attention to the judgment of the Supreme Court in *Akhil Bharatiya Soshit Karamchari Sangh (Railway) represented by its Assistant General Secretary on behalf of the Association Vs. Union of India (UOI) and Others*, In this case Krishna Iyer, J., on whose observations made in the case of *State of Kerala and Another Vs. N.M. Thomas and Others*, also, the Division Bench of this Court in the case of *Somashekarappa* relied to say that the ratio of the decision in *Balaji's* case was no longer good law, has himself clearly stated thus :

"89. It is true that in *M.R. Balaji and Others Vs. State of Mysore*, and *T. Devadasan Vs. The Union of India (UOI) and Another*, "the carry forward" rule for backward classes far exceeded 50% and was struck down. We must remember that the percentage of reservation for backward classes including SC & ST was rather high in both the cases. In *Devadasan's* case the Court went into the actuals, not into the hypotheticals. This is most important. The Court actually verified the degree of deprivation of the "equal opportunity" right and discovered: (Ibid at 693-94).

In the case before us 45 vacancies have actually been filled out of which 29 have gone to members of the Scheduled Castes and Tribes on the basis of reservation permitted by the carry forward rule. This comes to about 64.4% of reservation.

Such being the result of the operation of the carry forward rule we must, on the basis of the decision in Balaji's case hold that the rule is bad. What is striking is that the Court did not take an academic view or make a notional evaluation but checked up to satisfy itself about the seriousness of the infraction of the right. On that footing, the petitioners have not demonstrated that in any particular year, virtually and in actual terms of promotion, there has been a substantial excess over 50% in favour of the SC & ST promotees. Mathematical calculations, departing from realities of the case, may startle us without justification, the apprehension being misplaced. All that we need say is that the Railway Board shall take care to issue instructions to see that in no year shall SC & ST candidates be actually appointed to substantially more than 50% of the promotional posts. Some excess will not affect as mathematical precision is different in human affairs, but substantial excess will void the selection. Subject to this rider or condition that the "carry forward" rule shall not result, in any given year, in the selection or appointments of SC & ST candidates considerably in excess of 50%, we uphold Annexure I."

The learned counsel submitted that that in view of the reliance placed by the Supreme Court on the ratio of the decision in Balaji's case, after Thomas to say that reservation of 64.4 per cent was invalid, it can no longer be contended that the ratio in Balaji's case had stood overruled by Thomas.

19. The learned counsel also pointed out that the question as to whether any specific view was taken in the case of Thomas (AIR 1976 SC 940) to the effect that regarding quantum of reservation the ratio in Balaji does not lay down the law correctly, the Supreme Court once again in the case of K.C. Vasanth Kumar and Another Vs. State of Karnataka, made it clear that it was not so. In particular, the learned Counsel relied on the Judgment of Venkataramaiah, J., (as he then was) referring to the Judgment in the case of Thomas, in which he stated thus:

"After carefully going through all the seven opinions in the above case, it is difficult to hold that the settled view of this Court that the reservation under Article 15(4) or Article 16(4) could not be more than 50 per cent has been unsettled by a majority of the Bench which decided that case."

Further, the learned Counsel submitted that as late as in the year 1988, in the case of Chakradhar Paswan Vs. State of Bihar and Ors, the Supreme Court has reiterated that the ratio of the decision in M.R. Balaji and Others Vs. State of Mysore, continues to hold the field. He referred to the following paragraphs of the said judgment.

"10. We are not aware of any decision of this Court where excessive reservation of appointments or posts in favour of any backward class of citizens to the extent of 100% has been upheld, except in the application of the carry forward rule. Article 16(4) is an exception to Article 16(1) and Art. 16(2) and therefore the power to make a special provision for reservation of posts and appointments in

favour of the backward classes must not be so excessive which would in effect efface the guarantee of equal opportunity in the matter of public employment or at best make it illusory. In *M.R. Balaji and Others Vs. State of Mysore*, which has now become locus classicus on the subject, the Court attempted to impose a constitutional limit to the extent of preference, not on narrower ground of reservation but on broader grounds of policy. It spoke of adjusting the interests of the weaker sections of society to the interests of the community as a whole and declared that a "formula must be evolved which would strike a reasonable balance between the several relevant considerations". While striking down as unconstitutional Government order by which 68% of the seats in educational institutions were reserved for Scheduled Castes, Scheduled Tribes and other Backward Classes on the ground of excessive reservation and as a fraud on the Constitution, the Court observed (at p. 663 of AIR) :

"Speaking generally and in a broad way, a special provision should be less than 50%; how much less than 50 percent would depend upon the relevant prevailing circumstances in each case."

It is quite obvious that the observations in *Balaji* about 50% limit were not to be taken as a precise formula.

11. In less than a year, the Court in *T. Devadasan Vs. The Union of India (UOI) and Another*, while dealing with the effect of a carry forward rule which permitted reservation of over 50% posts (in the third year) held that reservation of 64.4% posts was unconstitutional. The Court by a majority of 4 : 1 held that Art. 16(4) was a proviso or an exception to Art. 16(1) and therefore should not be interpreted so as to nullify or destroy the main provision, as otherwise it would in effect render the guarantee of equality of opportunity in the matter of public employment under Art. 16(1) wholly illusory and meaningless, and added :

"The overriding effect of Cl. (4) of Art. 16 of Cls. (1) and (2) could only extend to the making of a reasonable number of reservations of appointments and posts in certain circumstances. A "reasonable number" is one which strikes a reasonable balance between the claims of the backward classes and those of other citizens."

Thus reservations are legitimate to the extent that they provide the backward classes with an "opportunity equal to that of members of the more advance classes". The maximum permissible limit for the backward classes, according to the majority in *Devadasan's* case is that under which both they and others would enjoy "equal opportunity". The Court further added that the reservation for backward communities should not be so excessive as to create a monopoly or unduly disturb the legitimate claims of other communities. In *State of Kerala and Another Vs. N.M. Thomas and Others*, the majority accepted the dissenting opinion of Subba Rao, J., in *Devadasan's* case and held that Art. 16(4) is not an exception to Art. 16(1), but is a legislative device by which the framers of the Constitution have preserved a power untrammelled by the other provisions of the Article. It is a facet of Art. 16(1) as it fosters and furthers the idea of equality of

opportunity with special reference to under-privileged and deprived classes of citizens. In his dissenting opinion, Khanna, J., speaking for himself and A. C. Gupta, J., adhered to the majority view in Devadasan's case that Art. 16(4) was an exception to Arts. 16(1) and (2). According to the learned Judges, Art. 16(1) only embodies the notion of formal or legal equality and therefore there is no scope for spelling out any concept of preferential treatment from the language of Cl.(1) of Art. 16. In Thomas, the Court upheld reservation to the extent of 68% on the basis of a carry forward rule which related to Class III posts and allowed relaxation to the Scheduled Caste candidates from appearing in the examination for promotion.

12. What is of significance is that Krishna Iyer, J., who formed the majority in Thomas, has gone back upon his view in Akhil Bharatiya Soshit Karamchari Sangh (Railway) represented by its Assistant General Secretary on behalf of the Association Vs. Union of India (UOI) and Others, , and held that Art. 16(4) is an exception to Arts. 16(1) and (2). While considering whether scheduled castes or scheduled tribes were already duly represented or not in specific cadres of the service, the Court reaffirmed the principle of reservation of appointments or posts under Art. 16(4) and upheld the carry forward rule. It was emphasised that what had to be seen was the overall picture and not restriction to a particular service or cadre. The maximum of 50% for reserved quotas in their totality was held to be fair and reasonable. Chinnappa Reddy, J., in his concurring judgment observed (at p. 339 of AIR) :

"When posts whether at the stage of initial appointment or at the stage of promotion are reserved or other preferential treatment is accorded to members of the Scheduled Castes, Scheduled Tribes and other socially and economically backward classes it is not a concession or privilege extended to them; it is in recognition of their undoubted Fundamental Right to Equality of Opportunity and in discharge of the Constitutional obligation imposed upon the State to secure to all its citizens "justice, social, economic and political", and "equality of status and opportunity", to assure the dignity of the individual among all citizens; to "promote with special care the educational and economic interests of the weaker section of the people", to ensure their participation equal basis in the administration of the affairs of the country and generally to foster the ideal of a "Sovereign, Socialist Secular, Democratic Republic". Every lawful method is permissible to secure that due representation of the Scheduled Castes and Scheduled Tribes in the public services. There is no fixed ceiling to reservation or preferential treatment in favour of the Scheduled Castes and Scheduled Tribes though generally reservation may not be far in excess of fifty per cent."

It follows that though the maximum limit of 50% as indicated was not an inflexible rule but in making special provision for reservation of posts or appointments, the State must seek to strike a balance of adjusting the interests of the weaker sections of the society to the interests of the community as a whole. In State of Maharashtra v. Shivaji Y. Garge (C. A. No.4117/84 decided on

19th October, 1984) this Court held the reservation of posts to the extent of 80% as excessive and destructive of the principle of equality of opportunity in matters relating to public employment guaranteed under Art. 16(1) of the Constitution and directed that the State Government would step down the reservation for economically weaker sections of the society from 46% to 21% in future, leaving in tact 34% posts reserved for Scheduled Castes, Scheduled Tribes, denotified nomadic tribes and other backward classes. Thus, the overall picture was that reservation of posts and appointments under Art. 16(1) was reduced from 80% to 55%.

13. Once the power to make reservation in favour of Scheduled Castes and, Scheduled Tribes is exercised, it must necessarily follow that a roster point wise for the purpose of vacancies for which reservation has been made must be brought into effect and in order to do full justice, a carry forward rule must be so applied that in any particular year, there is not more than 50% reservation. According to the 50 point roster, admittedly, the post of Deputy Director (Homeopathic) was the first vacancy in the cadre of Deputy Directors and therefore it had to be treated as general i.e. unreserved.

XXX XXX XXX XXX 16. It is quite clear after the decision in Devadasan's case that no reservation could be made under Art. 16(4) so as to create a monopoly. Otherwise, it would render the guarantee of equal opportunity contained in Arts. 16(1) and 16(2) wholly meaningless and illusory. These principles unmistakably lead us to the conclusion that if there is only one post in the cadre, there can be no reservation with reference to that post either for recruitment at the initial stage or for filling up a future vacancy in respect of that post. A reservation which would come under Art. 16(4), pre-supposes the availability of at least more than one post in that cadre."

The learned counsel submitted that in view of the aforesaid paragraphs of the judgment it can no longer be contended that the judgment in Balaji's case (AIR 1963 SC 619) had been overruled.

20. On giving careful consideration to the arguments of the learned counsel, we are of the view that the three decisions of the Supreme Court rendered subsequent to the decision of the Supreme Court in the case of State of Kerala and Another Vs. N.M. Thomas and Others, and subsequent to the decision of a Division Bench of this Court in the cases of Somasekharappa (ILR (1979) Kant 1496) make it clear that the ratio of the decision in M.R. Balaji and Others Vs. State of Mysore, still holds the field. Therefore, we agree with the submission made by the learned counsel for the petitioners that the view taken by a Division Bench of this Court in Somasekharappa's case, that the ratio of the decision in Balaji's case was no longer good law is not correct and is no longer valid.

21. The next question for consideration is, whether the ratio of the decision in Balaji's case, which is to the effect that the reservation should always be less than 50 per cent applies even to cases in which the extent of reservation in

favour of reserved category exceeds 50% as a result of implementation of what is called carry forward rule, according to which, if in a given year, candidates belonging to the reserved categories are not available the number of unfilled vacancies from the reserved category should be carried forward to subsequent years. According to the learned counsel for the respondents, the principle that generally reservation should be less than 50 per cent laid down in Balaji's case, should not be extended to recruitment against unfilled vacancies reserved for backward classes and on this ground the reservation made in the impugned notification should be upheld. The learned counsel for the petitioners also submitted that he was also not contending that a second attempt to fill up only vacancies reserved for reserved categories was violative of Arts. 14 and 16. He submitted that his main attack against the impugned notification was providing reservation even in cases where there only one post and in cases in which only one post was advertised and also for not advertising and inviting vacancies available for general merit also in certain subjects and restricting recruitment to reserved categories.

22. It is common ground that in the Government order dated 4-3-1977 the extent of reservation provided in favour of Scheduled Castes and Tribes was 15% and 3% of the posts in a cadre. The Government by its order dated 25-9-1984 provided that in cadres in which the representation of Scheduled Castes and Scheduled Tribes was less than 15% and 3% the percentage of reservation in their favour should be increased to 20% and 5% respectively. By Government order dated 12-12-1986, provision was made for carrying forward the unfilled vacancies reserved for reserved category for three consecutive years, and thereafter to start a fresh account in the matter of reservation of posts. By a subsequent Order No. DPAR 28 SEC 86 dated 12-7-1989, the Government directed that the vacancies earmarked for reserved category should not be dereserved and should be continued to be kept vacant and should be filled only as and when persons belonging to reserved category become available.

23. Further, in 1989 the University Grants Commission and the Central Government issued directions to launch a drive for filling up the back-log of vacancies reserved for Scheduled Castes and Scheduled Tribes and the State Government also issued orders to obey these directions. The relevant portions of those orders are:--

(1) Letter dated 26-6-1989 from UGC reads :

"Dear Vice-Chancellor,

As you may be aware, the Government of India has put a complete ban on dereservation of vacancies reserved for SCs/STs and launched a special recruitment drive on 1st June, 1989 to clear the backlog of vacancies reserved for SCs/ STs by 31st August, 1989 in pursuance of the latest directive of the Prime Minister. In this connection, the Secretary, Ministry of Personnel, Public Grievances and Pensions has issued elaborate instructions for strict and prompt

compliance which are contained in his D.O. letters dated 9th and 22nd May, 1989 (copies enclosed).

2. As the matter has been assigned top priority by the Government of India warranting time bound action, I would request you to take immediately necessary action in accordance with these instructions and send us the report on the action taken by you giving statistics of back log of reservation obtaining in your university and steps taken to clear the same as per instructions of Department of Personnel and Training."

(2) Relevant portion of the letter dated 9-5-1989 of the Secretary, Ministry of Personnel, Government of India, reads:--

"Please refer to this Department's O.M. of even number dated 25-4-1989 which introduces a ban on de-reservation in respect of reserved share of vacancies fell through direct recruitment. As per this O.M., vacancies which are reserved for SC and ST for which suitable candidates are not available at the initial recruitment are to be treated as "backlog" vacancies and repeated attempts are to be made to fill up those vacancies.

2. Prime Minister has directed that to the extent these vacancies fall within the purview of the various Ministries/Departments, a special recruitment drive should be launched after the first of June, 1989 and every effort is made to fill those vacancies within a period of three months from that date. You are, there-fore requested to immediately issue instructions to all concerned to initiate necessary action in the matter."

(3) Order dated 25-7-1989 of the State Government, copy of which was sent to the University as an enclosure to the letter of even date (Annexure R-7) reads:--

"READ :--

1) G.O. No. DPAR 19 SBC 89 dated 12-7-89.

2) G.O. No. DPAR 19 SBC 89 dated 22-7-89.

GOVERNMENT ORDER No. DPAR 19 SBC 89, BANGALORE, DATED 25TH JULY 1989

In the orders read above, directions have been issued to identify the backlog vacancies of Scheduled Castes and Scheduled Tribes for recruitment suitable candidates belonging only to Scheduled Castes and Scheduled Tribes through appropriate recruiting agencies.

Government are pleased to direct that for recruitment of candidates belonging to Scheduled Castes and Scheduled Tribes against vacancies categorised and carried forward as backlog vacancies the economy orders shall not apply and consultation with Finance Department shall not be necessary."

24. The aforesaid orders were intended to carry forward the unfilled vacancies/posts reserved for reserved category, so that those posts be made available to the persons belonging to reserved category as and when they become available.

It is true that if vacancies reserved for Scheduled Castes and Tribes are not carried forward and are dereserved the ideal with which the reservation of posts is provided for in Art. 16(4) stands unfulfilled, which would not only be to the disadvantage of the backward classes but also detrimental to National interest as a whole.

25. The question, however, for consideration is, under that circumstances the working of carry forward rule results in violation of Arts. 16(1) and (2) and in what circumstances it does not. The Supreme Court considered this question in the case of T. Devadasan Vs. The Union of India (UOI) and Another, In the said case the Government order the validity of which was challenged provided for the carry forward of unfilled vacancies reserved for SCs and STs for a period of three years. This had resulted in excessive reservation during the third year. The Supreme Court held the rule invalid. Relevant portion of the judgment reads :--

"(12) It is an accepted fact that members of the Scheduled Castes and Tribes are by and large backward in comparison with other communities in the country. This is the result of historical causes with which it is not necessary for us to deal here. The fact, however, remains that they are backward and the purpose of Art. 16(4) is to ensure that such people, because of their backwardness should not be unduly handicapped in the matter of securing employment in the various services of the State. This provision, therefore, contemplates reservation of appointments or posts in favour of backward classes who are not adequately represented in the services under the State. Where, therefore, the State makes a rule providing for the reservation of appointments and posts for such backward classes it cannot be said to have violated Art. 14, merely because members of the more advanced classes will not be considered for appointment to these posts even though they may be equally or even more meritorious than the members of the backward classes, or merely because such reservation is not made in every kind of service under the State. Where the object of a rule is to make reasonable allowance for the backwardness of members of a class by reserving certain proportion of appointments for them in the public services of the State what the State would in fact be doing would be to provide the members of backward classes with an opportunity equal to that of the members of the more advanced classes in the matter of appointments to public services."

xxx xxx xxx xxx 13. By operation of the carry forward rule the vacancies to be filled by persons from amongst the Scheduled Castes and Tribes would be 54 as against 46 by persons from amongst the more advanced classes. The reservation would thus be more than 50%. It has been held by this Court in M.R. Balaji and Others Vs. State of Mysore, , that the reservation of more than half of the seats in an educational institution for being filled from members of the backward classes is unconstitutional."

The carry forward rule which had resulted in excessive reservation during the third year was held to be unconstitutional.

26. After Devadasan's case, in the case of A. R. Chowdhury v. Union of India AIR 1964 SC 532, the Supreme Court considered as to whether the carrying forward of a vacancy reserved for category to a subsequent year is unconstitutional on the ground that the only vacancy available had been reserved for reserved category. The Supreme Court after referring to the decision in Balaji and Devadasan said thus:--

"22. It is urged that only one vacancy occurred in 1968-69 and since the letter of the Railway Board dated January 16, 1964 says that "if there be only one vacancy, it should be treated as unreserved", the Kharagpur vacancy must be treated as unreserved. Such a construction would rob the rule of its prime significance and will render the carry forward provision illusory. Though each year of recruitment is to be treated separately and by itself, a reserved vacancy has to be carried forward over 2 years, if it is not filled in by the appointment of a reserved candidate. The open class reaped a benefit in 1966-67 when a reserved vacancy was treated as unreserved by the appointment of an open candidates Smt. Gita Biswas. If the carry forward rule has to be given any meaning, the vacancy shall have to be carried forward for the benefit of Scheduled Castes and Scheduled Tribes until the close of the financial year 1968-69. The Kharagpur vacancy was to be filled in on January 1, 1969 and hence it cannot go to the petitioner who, admittedly does not belong to the reserved class. The construction sought to be put on the rule by the petitioner would perpetuate a social injustice which has clouded the lives of a large section of humanity which is struggling to find its feet. Such a construction is contrary to the plain language of the letter of the Railway Board, the intendment of the rule and its legislative history."

27. The Supreme Court in the case of S.S. Sharma and Others Vs. Union of India (UOI) and Others, held that if candidates belonging to reserved categories are not available at a given recruitment, there was no right in the candidates belonging to the general category to seek a direction to the State to dereserve the posts and make them available for open competition and that it was lawful for the State to make a fresh attempt to fill up the vacancies earmarked for reserved category and to fill up those posts only from among persons belonging to reserved category. The relevant excerpt from the judgment reads :

"8. Dereservation as a process should be resorted to only when it is not reasonably possible within the contemplation of law to fill the reserved vacancies. The process of de-reservation would otherwise be antagonistic to the principle embodied in Art. 16(4) and Art. 46 of the Constitution. Paragraph 10.4 in the Brochure on Reservation on Scheduled Castes and Scheduled Tribes in the services prepared by the Government of India provides that degeneration should be proposed only when such a course becomes inevitable due to non-availability of Scheduled Caste and Scheduled Tribe candidates for appointment against the reserved vacancies after having fully observed the procedure prescribed in this behalf and after applying relaxed standards in the case of such candidates. Once

a decision has been taken to reserve vacancies for a backward class of citizens, the programming effected to that end should not be disturbed unless the avenues for fulfilling it have been explored and have failed."

28. In our opinion, the aforesaid decisions show that though according to the ratio of the decision in *M.R. Balaji and Others Vs. State of Mysore*, generally the number of posts reserved in respect of any cadre or posts at any given recruitment has to be less than 50%, if the candidates belonging to reserved category are not available at any given recruitment two courses are open for the State in order to ensure that the reservation of posts in favour of backward classes is not frustrated. First, if the exigencies of public administration require, for instance in the case of teaching posts filling up of the posts in any given subject cannot wait till the candidate of reserved category becomes available, as otherwise students would suffer without a teacher, it is open for the State to dereserve the vacancies and fill up the posts from among persons belonging to open category and to make equal number of vacancies available for the benefit of the persons belonging to the reserved category at a subsequent recruitment in addition to the number of posts required to be reserved normally. If as a result of making the said number of vacancies as are equal to the number of vacancies dereserved at an earlier recruitment available in favour of persons belonging to the reserved category, the number of posts advertised on a given case exceeds 50%, it cannot be said that the reservation was excessive as the number of posts reserved in favour of reserved categories cannot be considered without reference to the action taken earlier by deservng vacancies and making them available in favour of persons belonging to open competition.

29. Another course open for the State is not to dereserve the posts when recruitment is made on a given occasion and to make a second attempt in respect of vacancies reserved for reserved categories against which no selections were made earlier for want of candidates among the reserved categories. In such cases also the mere fact that all the vacancies are made available for reserved categories is no ground to say that the reservation was excessive, for, it cannot be considered without reference to the action taken earlier at which the vacancies reserved for reserved candidates were not filled up.

30. We, however, make it clear that the question as to whether the carry forward of vacancies is effected in a manner which is excessive or for a period which is duly long, so as to infringe clauses (1) and (2) of Art. 16, in the light of the ratio in *M.R. Balaji and Others Vs. State of Mysore*, and *T. Devadasan Vs. The Union of India (UOI)* and Another, has to be considered with reference to the actual facts and circumstances of a given case.

31. The next question for consideration is, as to whether in respect of categories of Professors, Lecturers or Readers, as the case may be, if there is only one post, could there be reservation at all. As far as this aspect is concerned, the (matter is no longer res integra. The question is concluded by the decision of the Supreme Court in the case of *Chakradhar Paswan Vs. State of Bihar and Ors*, .

The relevant paragraph 16 of the judgment reads :

"16. It is quite clear after the decision in Devadasan's case that no reservation could be made under Art. 16(4) so as to create a monopoly. Otherwise, it would render the guarantee of equal opportunity contained in Arts. 16(1) and 16(2) wholly meaningless and illusory. These principles unmistakably lead us to the conclusion that if there is only one post in the cadre, there can be no reservation with reference to that post either for recruitment at the initial stage or for filling up a future vacancy in respect of that post. A reservation which would come under Article 16(4), pre-supposes the availability of at least more than one post in that cadre."

In the above paragraph, the Supreme Court has ruled that in respect of cadres where there is only one post, it does not admit of any reservation at all.

32. The next question for consideration is about the method which should be adopted in providing reservation for the cadres of Professors, Readers and Lecturers for, though these posts are in different subjects they any same designation and pay scale. Therefore the question is as to whether reservation has to be worked out in respect of such cadres separately. This question is also no longer res integra. This Court in the case of Dr. L. Krishna Vs. State of Karnataka, has held that in the case of teaching cadres though the designation and pay scale of the posts of Professors, Readers and Lecturers in different subjects are one and the same, still having regard to the fact that the posts of Professors, Readers and Lecturers in each of the subject is distinct and separate, each subject has to be treated as independent unit for the purpose of recruitment and reservation. The said view stands confirmed by the decision of the Supreme Court in the case of Chakradhar Paswan Vs. State of Bihar and Ors, In view of this position in law, the only reasonable method of giving effect to reservation in the cadres in which the number of p6sts available is smaller is by way of providing a reasonable roster. In fact, in view of the judgment of this Court in Krishna, the State Government by its order dated 28-1-1987 (Annexure-R1) prescribed a 100 point roster. The first 10 points prescribed are : (1) Scheduled Caste, (2) Scheduled Tribe, (3) General Merit, (4) Group-A of the backward classes, (5) Group-B of the Backward classes, (6) Scheduled Caste, (7) General Merit, (8) Group "C" of the backward classes, (9) Group "D" of the backward classes and (10) General Merit and the roster continues up to 100 points. As number of posts available in each of the departments in each of the cadres is generally less than ten, and once a person is appointed against a vacancy, normally he continues in service for several years, it appears to us that 100 point roster is Unwieldy because, for the completion of the roster it might take a few centuries. The validity of that order is not challenged in this petition. We should, however, observe that it would be reasonable to fix the roster for points as minimum as possible for cadres in which the posts avail-I able are only a few and therefore the roster requires to be reviewed and modified.

Whatever that may be, in view of the decision in the case of Chakradhar, if there

is only one post in the cadre of Professor or Reader or Lecturer in any subject, there can be no reservation at all.

33. The next question for consideration is, that if in respect of certain cadres there are a few vacancies available for general merit and also for reserved category, is it open for the State to advertise the vacancies reserved for reserved category only without advertising the posts available for general merit? This question has arisen for the reason that in respect of a few cadres to which we shall refer later, even though there were vacancies available both for general merit and reserved category, only vacancies reserved for reserved categories have been advertised. A similar question in another way was considered by a Division Bench of this Court in the case of *Gouri Narayan Ambiga v. State of Karnataka* ILR (1979) Kar 1121. In the said case, the constitutional validity of the Karnataka State Civil Services (Direct Recruitment of Scheduled Castes, Scheduled Tribes and Backward Tribes to Class III posts) (Special) Rules, 1977 was challenged. Under the said Rules, persons who had been appointed as local candidates, i.e. appointed on temporary basis without following the procedure prescribed for recruitment under the relevant Recruitment Rules, belonging to the categories other than Scheduled Castes and Scheduled Tribes, challenged the constitutional validity of the Rules on the ground that when local candidates belonging to general category and reserved category were available in the services of the State Government, the Special Rules for regular recruitment of local candidates who belonged to Scheduled Castes and Scheduled Tribes and backward tribes alone was violative of Art's. Hand 16(1) of the Constitution. The Division Bench declared the rule invalid. The relevant portion of the judgment reads : "25. Article 16(1) or 16(4) only authorises the reservation of posts in favour of the Scheduled Castes and Scheduled Tribes consistently with the maintenance of efficiency of administration. The prescription of reasonable rules with the qualification and standard for the employment or the appointment is not prohibited by Art. 16(1) or 16(2). But it must . be common to all citizens consistent with the doctrine of equality of opportunity. It may be relevant to remember *The General Manager, Southern Railway Vs. Rangachari*, "that Art. 16(1) and (2) really gives effect to the equality before law, guaranteed by Art. 14 and to the prohibition of discrimination guaranteed by Art. 15(1). The three provisions form part of the same constitutional code of guarantees and supplement each other." If different standards are prescribed under the rules for different classes, then it would plainly run counter to the doctrine of equality before law and would be inconsistent with equality of opportunity in matters relating to employment or appointment as guaranteed under Art. 16(1)."

From the ratio of the above decision, it follows that the reservation provided under Cl. (4) of Art. 16 of the Constitution has to be worked out at a common recruitment. It is, therefore, not open to the State to proceed to make recruitment only from among the reserved category keeping the vacancies available for open competition unadvertised. Doing so would be plainly opposed to Arts. 14 and 16(1) of the Constitution, for such a step would :

- (i) deprive the candidates belonging to general category to get themselves recruited at the earliest opportunity;
- (ii) be against the requirement of efficiency in the services of the State which cannot be ignored in view of Art. 335, and
- (iii) would deprive the seniority to candidates belonging to general category which they would get, if recruitment to general category is made simultaneously.

The position would, however, be different if after advertisement of all the vacancies and filling up of vacancies by open competition and/ or by reservation if by way of second or still subsequent attempt to recruit candidates belonging to reserved category is sought to be made to fill up the unfilled vacancies reserved for reserved category only from among them. Such a step cannot be held to be violative of Art. 14 or 16(1) of the Constitution. In such a situation, the candidates who belong to general category cannot complain because the subsequent attempt for recruitment from reserved category should be treated as part of the earlier process of recruitment. Further the candidates belonging to general category should take it in a spirit of sacrifice and accommodation towards their own less fortunate brethren who belong to backward classes and who are inadequately represented in the State services from which category candidates were not available at the earlier attempt. They should also realise that if at such Subsequent attempt, for recruitment also the principle of less than 50% reservation is insisted, the object of Art. 16(4) would be defeated and it is the duty of everyone to avoid such a consequence.

34. Before summing up our conclusions, we consider it to place on record a problem posed by the learned Advocate-General. He pointed out that the view that in respect of such of the cadres in which the post available is only one, there could be no reservation, would mean that in the cadre of Professors as in most of the subjects in the University Departments, Departments of Collegiate Education and Medical Education, there would be only one post, persons belonging to reserved category would have meagre chance of being appointed to such posts if they are required to compete for these posts with others in open competition. He, therefore, submitted that the State should have the liberty of grouping the posts of Professors in different subjects together and after fixing the number of posts to be reserved within the permissible limits, in whichever subject candidates belonging to reserved category are available, they should be selected to that extent and the rest of the posts should be filled up by open competition. In fact such a course was adopted by the Government, for all the teaching posts, but a Division Bench of this Court held in the case of Dr. L. Krishna Vs. State of Karnataka, as stated earlier, that having regard to the right to equality and equal opportunity in matters relating to employment under the State, the reservation should be subject wise as eligibility for selection of candidates in each of the subjects is separate and distinct. Learned Advocate-General submitted that the State has taken the said decision in appeal before the Supreme Court in C.A. Nos. 3814 to 3826 of 1984 and they are still pending. We see considerable force

in the submission of the learned Advocate-General. Though in order to ensure equal opportunity in matters relating to employment under the State to citizens who are similarly situated, generally reservation has to be cadre wise and subject wise, an exception could possibly be made in cases like the one of Professors in which, post available in each of the subjects is only one by grouping all of them together for purposes of reservation so that at least in the subjects in which the candidates belonging to reserved category are available they could be accommodated. It is no doubt true that such a grouping deprives the opportunity to candidates belonging to open competition, who possess the qualification in the subjects in which the reserved candidates are available, but it is equally true that some one has to sacrifice in order to give effect to the noble object and purpose incorporated in Art. 16(4). Therefore, we would have considered as to whether the Division Bench judgment in Krishna's case requires to be modified at least regarding such categories of posts in which only one post is available, but for the circumstance that the view taken by the Supreme Court in Chakradhar Paswan Vs. State of Bihar and Ors, is the same as taken by the Division Bench of this Court in Krishna's case. Therefore, the only course open to the State is to urge the point in their appeals pending before the Supreme Court against the judgment of this Court in Krishna's case.

35. To sum up our conclusions on questions of law arising for consideration in this case are :

(1)(a). The ratio of the decision in M.R. Balaji and Others Vs. State of Mysore, laying down that speaking generally a special provision for reservation of posts in the services of the State in favour of persons belonging to backward classes not adequately represented in the services of the State, to be made by the State under Cl.(4) of Art. 16 of the Constitution should be less than 50 per cent and how much less than 50 per cent would depend upon the relevant prevailing circumstances in each case continues to be the binding law declared by the Supreme Court. The view taken by a Division branch of this Court in Somashekarappa's case ILR (1979) Kar 1496 that the aforesaid ratio of the decision in Balaji's case was no longer valid in view of the decision of the Supreme Court in the case of State of Kerala and Another Vs. N.M. Thomas and Others, is not correct, as is evident from the three subsequent decisions of the Supreme Court in A. B. S. K. Sangh v. Union of India AIR 1980 SC 298 , K.C. Vasanth Kumar and Another Vs. State of Karnataka, and in the case of Chakradhar Paswan Vs. State of Bihar and Ors,

(b) Applying the above principle, reserving of only post in any cadre under Art. 16(4), which amounts to cent percent reservation is impermissible as ruled by the Supreme Court in the case of Chakradhar.

(2) The general principle that the reservation must always be less than 50 per cent cannot be invoked to a case in which a further attempt is being made by the State for filling up vacancies reserved in favour of reserved category remaining unfilled at a recruitment for want of candidates belonging to reserved category or

against vacancies equal to the number of vacancies de-reserved at a recruitment, though all such vacancies are made available only to persons belonging to reserved categories. Such an action would not be violative of Arts. 14 and 16(1) of the Constitution.

(3) If in a given cadre there are number of vacancies available for general merit as well as for backward classes, the posts available for the general category and for reserved category should be advertised together and there can be no exclusive recruitment only for the posts reserved for backward classes. Advertising of only the posts available for reserved category keeping back the posts available for open competition would be violative of Arts. 14 and 16(1) of the Constitution.

36. Now we shall proceed to decide the validity of recruitment in respect of each of the cadres in the light of our conclusions. The University has furnished the number of posts in each of the cadres and other particulars relating to recruitment in respect of each of them in Annexure-R and has also assigned reasons for making available the number of posts available only for reserved category.

1 (a) As regards the one post of Professor in Kannada, it is stated that out of two posts of Professors available, one post is held by a person belonging to general merit and the other post reserved for scheduled caste was also filled up by appointing a candidate belonging to general merit in 1987 and on his retirement the said post was again made available for the Scheduled Caste and that according to roster also the said vacancy has to go in favour of reserved category and therefore the action taken was in accordance with law. Reserving one out of the two posts in the cadre and making it available to the candidates belonging to reserved category cannot be held to be violative of Art. 16(1) and (2) of the Constitution.

(b) Out of 11 posts of Lecturers in Kannada, 7 posts had already been filled up. Out of them 4 posts have already been filled up from among persons belonging to general merit, one from Scheduled Caste and two from Group-A category. Three posts have been advertised and all of them are made available for reserved category, whereas in respect of one post available for general merit applications have not been invited. This is impermissible as held by us.

(2)(a) In the Department of English, there are two posts of Professors. One post has already been filled up on an earlier occasion appointing a candidate belonging to general merit and in respect of another post of Professor, which was available for Scheduled Caste was not filled up for want of eligible candidates from that category. A second attempt was being made to recruit a candidate belonging to Scheduled Caste. We find no illegality in advertising one post exclusively in favour of reserved category.

(2)(b) In the cadre of Readers in English there are three posts. Out of the three posts one post has already been filled up from among persons belonging to

general merit. Out of the two posts available, one post is reserved in favour of Scheduled Caste, another in favour of Scheduled Tribe. It is in accordance with the roster fixed in Government Order dated 28-1-1987, the validity of which is not challenged. Hence, the step taken is valid.

(2)(c) In the case of Lecturers in English, according to Annexure-R there are five posts. Out of them only one post has been filled up by appointing a person belonging to general merit and still there are four posts available. Out of them only two posts have been advertised making one available to Scheduled Caste and another to the Scheduled Tribe, without advertising the two other posts for general merit. Therefore, the failure to advertise and invite applications for the posts available for categories other than Scheduled Castes and Scheduled Tribes renders the notification violative of Art. 16(1) of the Constitution and also sub-sec. (4) of S. 49 of the Act.

(3), (5), (6), (7), (9), (15), (16),(17):- In the category of Readers in the subject of Urdu and Persian, there is only one post. Similarly in the subject of Economics, there is only one post of Professor available. In the cadre of Readers in M.S.W. there is only one post. Similarly in the subject of Political Science, one post of Professor is available. In the cadre of Reader of Library and Information Science also, only one post is available. In the Department of Law, there is only one post of Professor available. So also in the Department of Education, one post of Professor is available and in the case of Botany one post of Professor is available. In each of these cadres, the only available post has been reserved in favour of Scheduled Caste. This amounts to cent per cent reservation and therefore opposed to the ratio of the decision of the Supreme Court in the case of M.R. Balaji and Others Vs. State of Mysore, and reiterated in Chakradhar Paswan Vs. State of Bihar and Ors, . Therefore, the notification to that extent is liable to be declared invalid.

(4) In the case of Lecturers in Marathi, only two posts were available since 1981. They were filled up in June 1983 by selecting a candidate from Scheduled Caste and another from General Merit. They have become vacant. Out of them one is reserved for Scheduled Caste and another for Scheduled Tribe. It is explained that in doing so the roster fixed in Government Order dated 28-1- 1987 has been followed. The validity of that order has not been challenged. Therefore, there is no ground to interfere.

(8) In the Department of History, three posts of Lecturers are available. All the three had been filled up and out of them one post became vacant due to resignation on 24-5- 1988 by a candidate who had been appointed against a post reserved for Scheduled Caste by dereserving, for want of candidate belonging to Scheduled Caste. It has been now made available for Scheduled Caste. This step is in accordance with law.

(9) In the Department of Library and Information service, there are 4 posts of Lecturers. One is held by a candidate belonging to category of General Merit.

Three posts are advertised and out of them one is made available to Scheduled Caste, one to Scheduled Tribe and another to General Merit. It is stated that the vacancies occurred on 10-6-1984, 6-5-1988 and 25-11-1988, consequent on resignation of three persons, all of whom belonged to General Merit, who had been appointed on dereservation of vacancies. It is also stated that in earmarking the vacancies, the roster fixed in the Government order dated 28-1-1987 has been followed. We find no illegality in the step taken.

(10) In the Department of Chemistry, in the category of Readers, the total number of posts are nine. Three have already been filled up and still four posts were available. Only one post is advertised and it is reserved for Scheduled Caste. As the other vacant posts have not been advertised, the notification to that extent is invalid.

(11) In the Department of Applied Electronics, there are three posts of Lecturers. There are two vacancies. Only one of them is advertised and made available for Scheduled Caste. Another is not advertised. This is violative of Art. 16(1) and S. 49(4) of the Act.

(12-a) In the Department of Physics, there are only three posts of Readers. One post has already been filled up by a general merit candidate. Out of the two posts advertised, one is made available for Scheduled Caste and the other for Scheduled Tribe. It is stated that in doing so the roster fixed in Government Order dated 28-1-1987 has been followed, the validity of which order has not been challenged. Hence the step taken is valid.

(12-b) In the cadre of Lecturers in Physics, there are six posts, out of which two posts have been filled up by direct recruitment and one by a person belonging to Scheduled Caste. Out of the three posts advertised, one is reserved for Scheduled Tribe and another for group "A" of the backward classes and the third is available for general merit. It is stated that the earmarking of the posts was in accordance with the roster fixed in the Government Order dated 28-1-1987. The notification to that extent is held valid.

(13) In the cadre of Lecturers in Mathematics, there are seven posts. Out of them, one post is already filled up from general merit category, another from the category of Scheduled Caste. Five posts are vacant. Out of them four posts are advertised and all of them are earmarked for reserved categories. It is stated that it is done according to roster. But, one post available for general merit is not advertised. Therefore, the notification is violative of Art. 16(1) and S. 49(4) of the Act.

(14) In the Department of Microbiology, there are three posts of Readers. Out of them, two have already been filled up at an earlier recruitment from among the persons belonging to general merit. One post of Reader available for Scheduled Caste had been dereserved and filled up by appointing a candidate belonging to general merit and on his appointment as Professor the post is advertised and made available only to persons belonging to Scheduled Castes as backlog.

Therefore, the notification to this extent has to be declared as valid.

37. The result is the validity of the impugned notification in respect of sixteen teaching posts, out of which 14 are reserved for Scheduled Caste and Scheduled Tribe as backlog is upheld and the notification in respect of nineteen posts is held invalid on the ground that the only post existing in some of the cadres had been reserved and in other cases the posts available for general merit has been kept back and not included in the advertisement inviting applications.

38. Accordingly, we make the following order:

(i) The writ petition is partly allowed.

(ii) The impugned notification dated 9-8-1989 in so far it relates to;

Sl. No. 1 :-- Only in respect of the post of Lecturer in Kannada;

Sl. No. 2:-- Only in respect of the post of Lecturers in English;

Sl. Nos. 3, 5, 6, 7, 10, 11, 13, 15, 16 and 17 and Sl. No. 9 only in respect of the Post of Reader in Library and Information Science, is declared invalid.

(iii) The impugned notification in other respects shall remain unaffected and to that extent the writ petition is dismissed.

39. Order accordingly.