
(2009) 04 AHC CK 0043
In the Allahabad High Court

Dr. Vishwajeet Singh and Others

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 20-04-2009

Acts Referred:

Constitution of India, 1950 — Article 14, 15, 16, 30, 335

Citation : (2009) 3 AWC 2929 : (2009) 2 UPLBEC 1443

Hon'ble Judges : Ashok Bhushan, J;Arun Tandon, J

Bench : Division Bench

Judgement

Ashok Bhushan, J.—The issues raised in the above writ petitions being inter-related, the writ petitions have been heard together and are being disposed of by this common judgment. Civil Misc. Writ Petition No. 48149 of 2003, Dr. Vishwajeet Singh and Ors. v. State of U.P. and Ors. contains extensive pleadings of both the parties hence, the same is being treated as leading writ petition. The other writ petitions are to be decided on the basis of the decision in the leading writ petition.

2. We have heard Sri Rajeev Misra, Sri P. S. Baghel advocates for the petitioners, Sri Jaideep Mathur, Additional Advocate General for the State respondents and Sri H. N. Singh, learned Counsel for the respondent Higher. Education Service Commission.

3. It is sufficient to refer to the pleadings of Writ Petition No. 48149 of 2003, Dr. Vishwajeet Singh, the leading writ petition for considering the issues raised in this bunch of writ petitions. The facts of the leading writ petition are; the petitioners of the writ petition who are four in numbers claim to be duly qualified for appointment on the post of Lecturer in Graduate/Post Graduate Colleges in the State of U.P., have challenged the advertisement No. 37 dated 9.7.2003 published on 16.7.2003 and have also prayed for quashing the Government orders dated 3.7.2003 and 17.4.2003. By advertisement No. 37, the U.P. Higher Education Service Commission has advertised 838 posts of Lecturers in different subjects in various Post Graduates/Graduate Colleges in the State of U.P. by

special recruitment to fill up the carry forward and backlog vacancies of reserved categories candidates. All the posts in different subjects have been shown to be reserved for Scheduled Castes, Schedule Tribes and Other Backward Classes. The advertisement mentions number of vacancies in different subjects. The applications have been called separately for different subjects. The advertisement further mentions that guidelines and list of the colleges shall be made available alongwith the application form. The Government order dated 3.7.2002 was issued for filling up the backlog vacancies of reserved category candidates referring to U.P. Public Services (Reservation of Scheduled Castes, Scheduled Tribes and Other Backward Class Amendments) Ordinances, 2003 (U.P. Ordinance No. 2 of 2002). The Government order mentions that calculation of reserved vacancies shall be made not on the basis of vacancies but on the cadre strength. Letter dated 4.7.2007 has been issued by the Chief Secretary, State of U.P. to the Principal Secretary/Secretary referring to the Government order dated 3.7.2002 for filling up the backlog vacancies of reserved category. The Government order dated 7.4.2003 is also on the same subject of filling the backlog vacancies of reserved category candidates. Petitioner's case in the writ petition is that the entire cadre cannot be taken as a unit for computing reservation for applicability of U.P. Public Services (Reservation of Scheduled Castes, Schedule Tribes And Other Backward Classes) Act, 1994 (hereinafter referred to as 1944 Act). It is further stated that in the advertisement dated 9.7.2003, two types of vacancies have been clubbed, one carry forward vacancies of advertisement No. 29 and secondly the vacancies which have come into existence in the year 2002-03, i.e., a year preceding the year of recruitment. The writ petitioner has prayed for following reliefs:

(i) issue a writ, order or direction in the nature of certiorari to quash the advertisement dated 9.7.2003 as published in the daily News Paper "Dainik Jagaran" in it's daily edition dated 16.7.2003 issued by the respondent No. 4, the Secretary, U.P. Higher Education Service Commission, Allahabad (Annexure-24 to the writ petition) ;

(ii) issue a writ, order or direction in the nature of certiorari to quash the Government orders dated 3.7.2002 and 17.4.2003 issued by the respondent No. 2, the Principal Secretary, Government of U.P. Lucknow (Annexures-21 and 23 to the writ petition) ;

(iii) issue a writ, order or direction in the nature of certiorari to quash the D.O. Letter dated 4.7.2002 issued by the respondent No. 6, the Chief Secretary, Government of U.P., Lucknow (Annexure-22 to the writ petition) ;

(iv) issue a writ, order or direction in the nature of mandamus commanding the respondents to fill the vacancies of lecturers that have occurred preceding the year of recruitment, i.e., 1.7.2003 to 30.6.2004 in accordance with the Scheme of Reservation as provided in U.P. Act No. 4 of 1994 ;

(v) issue a writ, order or direction in the nature of mandamus commanding the

respondents not to treat the vacancies that have occurred in the year preceding the year of recruitment as reserved posts.

4. This Court on 15.7.2005, passed an order directing the standing counsel to produce the record and also to file counter-affidavit giving break up of the vacancies and how these vacancies have been clubbed. Again on 18.7.2005, this Court directed the Secretary, Higher Education U.P. to file his personal affidavit, disclosing all material facts and the manner in which the State proposes to implement the Reservation Act qua the posts of Lecturers in recognized and aided degree colleges. This Court directed that affidavit must also disclose that as to how post of Lecturers in a particular subject available in all the recognized and aided degree colleges of the State could be taken as a unit for the purposes of working out the percentage of reservation provided for reserved categories.

5. A detailed counter-affidavit after the order of this Court dated 15.7.2007 was filed on behalf of State respondents sworn by Dr. Nakachhed Ram dated 17.10.2005, wherein it has been stated in paragraph 3 that it should be taken as only document which could be considered and earlier filed counter-affidavit and supplementary counter-affidavit may not be taken into consideration by this Court. In pursuance of the order of this Court dated 28.11.2007 as noticed above, the affidavit of Principal Secretary, Higher Education, Avinash Kumar Srivastava dated 28.3.2008 has been filed explaining the stand of the State regarding implementation of the reservation. The pleadings as contained in the above counter-affidavit and the affidavit of the Principal Secretary shall be noted and referred to while considering the specific issues.

6. Now facts of other writ petitions which have been heard alongwith this writ petition are to be briefly noted. In Writ Petition No. 53581 of 2005, the advertisement No. 37 as well as advertisement No. 38 have been challenged. A writ of mandamus has also been sought commanding the respondents to make fresh advertisement applying the roster under the provisions of 1994 Act. The petitioner's case in the writ petition is that advertisement Nos. 37 and 38 have been issued reserving all the vacancies therein for reserved category candidates. In advertisement No. 38, 238 vacancies of Lecturers in different disciplines have been advertised. The challenge in the writ petition is founded on the ground that reservation beyond 50% is not permissible. With regard to advertisement No. 37, it has been stated that those vacancies of advertisement No. 29 which have been carried forward, could have been advertised but other vacancies which have been advertised as backlog vacancies are contrary to law. With regard to advertisement No. 38, it is stated that none of the posts advertised (numbering 283) are carry forward posts. In Writ Petition No. 5902 of 2005, challenge is to the advertisement No. 37 and a prayer has been made to quash the advertisement. In Writ Petition No. 54882 of 2008 prayer has been made for quashing the advertisement No. 41. A mandamus has also been sought for commanding the respondents not to proceed with the selection process till the Writ Petition No. 48149 of 2003, Vishwajeet Singh v. State of U.P. and Ors. is

decided. Advertisement No. 41 mentions number of posts for General Category, Other Backward Class, Scheduled Castes, Schedule Tribes against different subjects. In Writ Petition No. 55910 of 2008, again a prayer has been made for quashing the advertisement No. 41 dated 7.2.2007. Writ Petition No. 6162 of 2006 is a writ petition filed by a candidate belonging to reserved category, who has stated that interview letter dated 10.7.2005 has been issued in pursuance of his application against advertisement No. 37. The petitioner has prayed for a writ of mandamus, commanding the respondents to declare the result of subject Geography pursuant to advertisement dated 9.7.2003. The Writ Petition No. 5632 of 2007 is again a writ petition by a candidate belonging to Other Backward Class who has appeared in the interview in pursuance of his application against advertisement No. 37. A mandamus has been sought for declaring the result of selection in pursuance of advertisement No. 37. Writ Petition No. 15963 of 2008 is again a writ petition filed by a candidate belonging to reserved category, who has appeared in the interview in pursuance of the advertisement No. 37 against the subject history. The petitioner has prayed for a mandamus directing the respondents to declare the result of interview held on 27.7.2005 with respect to subject history against advertisement No. 37.

7. Learned Counsel for the petitioners in support of the writ petition of Dr. Vishwajeet Singh challenging the advertisement No. 37, submitted that advertisement is contrary to 1994 Act. It is submitted that 837 vacancies, which have been advertised cannot be termed as backlog vacancies since only part of the vacancies were earlier advertised and not all the vacancies. It is submitted that vacancies which had never been advertised earlier, cannot be treated as backlog nor can be advertised as reserved for Scheduled Castes category candidates only. It is submitted that the petitioners, who are General Category candidates are entitled to apply against the vacancies, which have never been earlier advertised for reserved category candidate and denial of this opportunity violates their right under Articles 14 and 16 of the Constitution of India. It is submitted that reservation has been applied clubbing different vacancies of Lecturers in all the post graduate and graduate colleges situated in the State of U.P. It is submitted that all the vacancies of Lecturers cannot be clubbed together nor can be treated as a unit for applying the reservation. It is submitted that every college is a separate unit and reservation has to be applied college wise, subject wise. It is submitted that roster should be applied against each subject in different colleges separately. Since all the posts of Lecturers even in one college although are in same pay scale but refer to different discipline and different subjects, which have different qualifications, treating the posts of Lecturers as one unit and clubbing them for the purpose of applying reservation is illegal. The clubbing of the vacancies by the Director of Education for the purpose of sending requisition to the Commission for advertisement may be permissible for the purpose of recruitment but the entire vacancies of Lecturers in different post graduate colleges/graduate colleges cannot be treated to be one unit for applying the rules of reservation. The vacancies have to be advertised subjectwise,

collegewise and the roster has to be applied subjectwise and collegewise. Neither the vacancies of Lecturer in different colleges can be clubbed nor the vacancies of Lecturers even in one college can be clubbed together for applying the roster. There is no common cadre of Lecturers in different colleges. The posts are sanctioned by the Director of Higher Education subjectwise, separately for each institution. There is no common cadre of Lecturer throughout the State.

8. Learned Additional Advocate General, Sri Jaideep Mathur refuting the submission of learned Counsel for the petitioners submitted that U.P. Higher Education Service Commission Act, 1980 after its amendment now permits consolidation of vacancies of all the Lecturers in different colleges thus, after the amendment in Section 12 (3) consolidated vacancies have to be treated as one unit for applying the reservation. Before 1992 Amendment in 1980 Act, college was a unit but situation has changed subsequent to the amendment made in the year 1992 in the 1980 Act. The college is to now send the intimation of vacancies to the Director of Higher Education, who has been permitted to consolidate the vacancies. Sections 12 and 13 of the Act, if read together make it clear that reservation is to apply on consolidated vacancies. It is submitted that by virtue of Section 2 (c) (iv) of 1994 Act, the post of Lecturers in different colleges are covered by definition "Public services and posts". Hence, the reservation is applicable on the post of Lecturers. Learned Additional Advocate General has submitted that by virtue of provisions of Section 3 (2) of 1994 Act, as amended by U.P. Act No. 1 of 2002, the 50% ceiling for the carry forward vacancies does not apply. Learned Additional Advocate General has very fairly not disputed the proposition that special recruitment for filling the backlog vacancies can be undertaken only when the vacancies were earlier advertised and could not be filled up. Learned Additional Advocate General has not been able to refute the submission of learned Counsel for the petitioners that 467 vacancies which have been included in the advertisement No. 37, were never earlier advertised therefore, they cannot be reserved only for reserved category candidates.

9. Sri H. N. Singh, learned Counsel appearing for the U.P. Higher Education Services Commission has submitted that there was no reservation in the Higher Education prior to 1994 Act and for the first time reservation has been applied by 1994 Act. He submits that by virtue of Section 60E of U.P. State Universities Act, 1973 the State Government for the first time took responsibility for payment of salary to the teachers of post graduate/degree colleges. He further submits that the quota for reserved category candidates being not fulfilled, backlog vacancies were advertised to be filled by special recruitment.

10. In Writ Petition No. 48149 of 2003, applications have been filed for impleadment by Prabhat Kumar Singh and Ors. Ashish and Anr. Sunil Kumar and six others, praying for impleadment in the writ petition as respondents. The applicants, who pray for impleadment state that they have appeared in the interview as reserved category candidates in response to the advertisement No. 37 and the interim order passed in the writ petition be vacated. Counter-affidavit

has also been filed by the applicants Rina and seven others who had prayed for impleadment. Similar stand has been taken by the applicants sought to be impleaded. It is the case of the applicants-respondents that carry forward vacancies can be advertised since they were not filled up earlier. The applicants were permitted to be impleaded in the writ petition and they have also been given opportunity to place their case.

11. We have heard learned Counsel for the parties and have perused the record. From the pleadings of both the parties, the following issues arise for consideration in this writ petition which are necessary to be decided for effectively deciding all the writ petitions.

(i) Whether 467 vacancies, which were available because of retirement, resignation and death upto 30.6.2003, could have been included and reserved for Scheduled Castes, Schedule Tribes, Other Backward Classes only alongwith 371 carry forward vacancies in advertisement No. 37 of 2003?

(ii) Whether 467 vacancies were rightly reserved only for Scheduled Castes, Schedule Tribes, Other Backward Classes without they having been earlier advertised or offered to General Category candidates?

(iii) What is a unit for applying the Rules of Reservation according to 1994 Act and the roster framed thereunder?

(iv) Whether the reservation is to be applied by consolidating all the vacancies of the Lecturers in different degree colleges / postgraduate colleges?

(v) Whether in case, each college is treated to be a separate unit, the reservation is to be applied by clubbing all the sanctioned posts of Lecturers in a college or the reservation and roster are to be applied subjectwise?

(vi) Whether advertisement No. 37 is in accordance with 1994 Act and whether the number of carry forward vacancies, i.e., 371 have been correctly determined?

(vii) What is the minimum number of posts in a cadre for applicability of roster issued under Sub-section (5) of Section 3 of 1994 Act?

12. Learned Counsel for both the parties have placed reliance on various judgments of this Court as well as Apex Court, which shall be referred to herein after while, considering the respective decisions.

13. The first two issues being inter-related are considered together. The advertisement No. 37 which has been impugned in the writ petition advertised 838 vacancies. The advertisement No. 37 mentions special recruitment for carry forward vacancies of advertisement No. 29 and backlog vacancies. The advertisement gives the number of vacancies reserved for Other Backward Classes, Schedule Tribes and Scheduled Castes subjectwise. Annexure-25 of the writ petition contains a list of the vacancies collegewise, subjectwise as available in different colleges as noticed above. The counter-affidavit on behalf of the State respondents has been filed in pursuance of the order of this Court dated

15.7.2005 and 18.7.2005. It is useful to refer to the order of this Court dated 15.7.2005 which is being quoted hereinbelow:

Heard counsel for the parties.

Shri Rajeev Mishra, learned Counsel for the petitioner has urged that backlog vacancies and vacancies occurred during the year has been clubbed by the Commission and all the vacancies which have been advertised to be filled by Scheduled Caste and Scheduled Tribe and Backward Class candidates only. He has urged that the vacancies which are to be filled by general category could not be clubbed in the advertisement that is for Scheduled Caste and Scheduled Tribe and Backward category candidates.

Shri Pushpendra Singh states that due to inadvertence counter-affidavit could not be filed. However, he is directed to file counter-affidavit by 18.7.2005. Records shall also be produced by him on 18.7.2005. Learned standing counsel shall also file counter-affidavit by 18.7.2005 of the Director of Higher Education giving the break up of vacancies and how these vacancies have been clubbed. He shall also produce the records.

In case counter is not filed within the time allowed aforesaid or the records are not produced then Secretary, U.P. Higher, Education Commission and the Director Higher Education shall appear in person before this Court on 18.7.2005 and show cause as to why they neither filing the counter-affidavit nor producing the records.

List/put up on 18.7.2005.

14. In the counter-affidavit dated 17.10.2005, the details pertaining to 838 vacancies have been mentioned. It is the case of the respondents that 838 vacancies which have been advertised include following:

(a) 371 carry forward vacancies of advertisement No. 29 which could not be filled up because of non-availability of suitable candidate.

(b) The vacancies available because of retirement, resignation and death upto 30.6.2003.

15. Paragraph 14 of the counter-affidavit, which in categorical terms put forward the stand of the State respondents pertaining to vacancies is to the following effect:

14. That after issuance of U.P. Public Service (Reservation for Scheduled Castes, Schedule Tribes and Other Backward Classes) (Amendment) Ordinances on 6.6.2002 which was incorporated into the Reservation Act, 1994 on 31.8.2002. The State Government vide Government orders dated 3.7.2002, 4.7.2002 and 17.4.2003 (Annexures-21, 22 and 23) respectively of the writ petition with a view to complete the backlog directed to fill the rest of available vacancies through carry forward and special drive. Consequently, 371 vacancies, which were advertised in advertisement No. 29 but could not be filled because of non-

availability of suitable candidates, were carry forwarded to advertisement No. 37. At the time of notification of the vacancies to the commission in June, 2003 besides carry forward vacancies of 371, other 467 vacancies were available because of retirement, resignation and death etc. upto 30/6/2003. Therefore, besides carry forwarded vacancies of 371 from advertisement No. 29, other 467 available vacancies (upto June, 2003) were advertised under advertisement No. 37 as reserved vacancies taking total as 838. The breakup of carry forwarded vacancies of 371 is as 100 for Other Backward Class, 238 for S.C. and 32 S.T. and breakup of fresh available vacancies of 467 are 252 Other Backward Class, 206 S.C. and 10 for S.T. Thus, the total advertised vacancies are:

$$\text{O.B.C.} = 100 + 252 = 352$$

$$\text{S.C.} = 238 + 206 = 444$$

$$\text{S.T.} = 32 + 10 = 42$$

$$\text{Total} = 838$$

16. Before noticing the provisions of 1994 Act and various amendments made thereunder, the Constitution Bench judgment in the case of *Indra Sawhney and Ors. v. Union of India* and Ors. 1992 Supp (3) SCC 217, is to be noted. In *Indra Sawhney's* case, the Constitution Bench laid down that provisions of Articles 16(1) and 16(4) have to be harmonised keeping in mind the fact that both are but reinstatement of principle of equality enshrined under Article 14. The provisions of Article 16(4) has been conceived in the interest of certain section of society which should be balanced against the guarantee of equality enshrined under Clause (1) of Article 16. It has been laid down that reservation should not exceed 50%. The Apex Court also considered the question as to whether an year has to be taken as a unit or total strength of cadre for the purpose of applying 50% rule is to be taken. It was held that for the purposes of applying the Rule of 50% an year should be taken as a unit and not the entire strength of cadre. Paragraph 814 of the judgment of the Supreme Court is quoted herein below:

The next aspect of this question is whether a year should be taken as the unit or the total strength of the cadre, for the purpose of applying the 50% rule. *Balaji* AIR 1963 SC 649, does not deal with this aspect but *Devadasan* AIR 1964 SC 179, (majority opinion) does. Mudholkar, J. speaking for the majority says:

We would like to emphasise that the guarantee contained in Article 16(1) is for ensuring equality of opportunity for all citizens relating to employment, and to appointments to any office under the State. This means that on every occasion for recruitment the State should see that all citizens are treated equally. The guarantee is to each individual citizen and, therefore, every citizen who is seeking employment or appointment to an office under the State is entitled to be afforded an opportunity for seeking such employment or appointment whenever it is intended to be filled. In order to effectuate the guarantee each year of recruitment will have to be considered by itself and the reservation for backward

communities should not be so excessive as to create a monopoly or to disturb unduly the legitimate claims of other communities.

On the other hand is the approach adopted by Ray, C.J. in *Thomas State of Kerala and Another Vs. N.M. Thomas and Others*, While not disputing the correctness of the 50% rule he seems to apply it to the entire service as such. In our opinion, the approach adopted by Ray, C.J. would not be consistent with Article 16. True it is that the backward classes, who are victims of historical social injustice, which has not ceased fully as yet, are not properly represented in the services under the State but it may not be possible to redress this imbalance in one go, i.e., in a year or two. The position can be better explained by taking an illustration. Take a unit/service/ cadre comprising 1,000 posts. The reservation in favour of Scheduled Tribes, Scheduled Castes and Other Backward Classes is 50% which means that out of the 1,000 posts 500 must be held by the members of these classes, i.e., 270 by Other Backward Classes, 150 by Scheduled Castes and 80 by Scheduled Tribes. At a given point of time, let us say, the number of members of O.B.Cs. in the unit/service/category is only 50, a short fall of 220. Similarly, the number of members of Scheduled Castes and Scheduled Tribes is only 20 and 5 respectively, shortfall of 130 and 75. If the entire service/cadre is taken as a unit and the backlog is sought to be made up, then the open competition channel has to be choked altogether for a number of years until the number of members of all Backward Classes reaches 500, i.e., till the quota meant for each of them is filled up. This may take quite a number of years because the number of vacancies arising each year are not many. Meanwhile, the members of open competition category would become age barred and ineligible. Equality of opportunity in their case would become a mere mirage. It must be remembered that the equality of opportunity guaranteed by Clause (1) is to each individual citizen of the country while Clause (4) contemplates special provision being made in favour of socially disadvantaged classes. Both must be balanced against each other. Neither should be allowed to eclipse the other. For the above reason, we hold that for the purpose of applying the rule of 50% a year should be taken as the unit and not the entire strength of the cadre, service or the unit, as the case may be.

(d) Was Devadasan correctly decided?

17. Next question of carry forward rule also fell for consideration in *Indra Sawhney's* case. The question was as to whether, if carry forward vacancies are also added, they should also satisfy the 50% rule. The Apex Court held that the same position of 50% rule would apply in the case of carry forward rule as well.

18. After the judgment of the Supreme Court, 1994 Act was enacted in the year 1994. Section 3 (4) of the 1994 Act provided that vacancies reserved if remains unfilled even after special recruitment, it may be carried over to the next year subject to the condition that in that year total reservation of vacancies for all categories of persons mentioned in Sub-section (1) shall not exceed fifty per cent of the total vacancies. 1994 Act was amended by U.P. Act No. 1 of 2002 by which

Sub-section (2) was substituted in following manner:

(2) If, in respect of any year of recruitment any vacancy reserved for any category of persons under Sub-section (1) remains unfilled, such vacancy shall be carried forward and be filled through special recruitment in that very year or in succeeding year or years of recruitment as a separate class of vacancy and such class of vacancy shall not be considered together with the vacancies of the year of recruitment in which it is filled and also for the purpose of determining the ceiling of fifty per cent reservation of the total vacancies of that year notwithstanding anything to the contrary contained in Sub-section (1).

19. In view of Section 3 (2) as quoted above, the carry forward vacancies shall not be considered together with the vacancies of the year of recruitment for the purpose of determining the ceiling of 50% reservation of total vacancies of that year. Thus, the 371 vacancies of earlier advertisement No. 29 can be carried forward and shall not be taken into consideration, while determining the ceiling of 50%. For example for recruitment year ending with 30th June, 2003, 467 vacancies have come into existence and there has been 371 vacancies which are carried forward vacancies of earlier recruitment. For filling the 467 vacancies, it steps are taken and the vacancies are reserved applying the 1994 Act with regard to the vacancies coming into existence till 30.6.2003, the number of vacancies which are reserved for Scheduled Castes, Scheduled Tribes and Other Backward Class out of 467 even if added 371 carried forward vacancies it would cross 50% ceiling. The same shall not violate any provisions of 1994 Act and is fully permissible by virtue of Sub-section (2) of Section 3. But in the facts of the present case, the vacancies which have come into existence upto 30.6.2003, were vacancies which arose due to retirement, resignation and death and whether the said vacancies can be treated to be backlog vacancies, is the issue to be considered. The opening words of Sub-section (2) of Section 3 "If, in respect of any year of recruitment any vacancy reserved for any category of persons under Sub-section (1) remains unfilled, such vacancies shall be carried forward..." The question of vacancies remaining unfilled shall arise only when recruitment is held for filling the vacancies. The word "unfilled" shall arise only when recruitment is held for filling the vacancy. The word "unfilled" has to be given meaning as per scheme of the 1994 Act and the context in which it has been used. Sub-section (1) of Section 3 provides for reservation at the stage of direct recruitment, which contemplates reserving a vacancy for Scheduled Castes, Scheduled Tribes and Other Backward Classes and secondly the vacancy not being filled up remaining unfilled vacancies shall be carried forward. Thus, unless steps are not taken under Sub-section (1) of Section 3 for recruitment, Sub-section (2) shall have no application. The backlog vacancies are thus, those vacancies which were earlier advertised for filling it but could not be filled up. The question fell for consideration before a Division Bench in context of 1994 Act in the case of Dr. Shashi Kant Rai and others Vs. State of U.P. and others, In Shashi Kant Rai's case two advertisements were issued, one advertisement No. 3 of 1996 inviting applications for 47 posts of Medical Officers (Ayurvedic) out of

which 42 posts were reserved for Scheduled Castes and 5 posts for Scheduled Tribes. Another advertisement was issued being Advertisement No. 1 of 1997, inviting applications for 433 posts of Medical Officers (Ayurvedic) out of which 389 posts were reserved for Scheduled Castes and 44 for Scheduled Tribes. Both the aforesaid advertisements were challenged by the candidates belonging to General Category. The Division Bench of this Court held that advertisement are bad in law, which advertisement provided for 100% reservation. The advertisement offend the provisions of 1994 Act and also equality clause contained under Articles 14 - 16 of the Constitution of India. Following was laid down in paragraphs 10 and 14 of the aforesaid judgment:

10. From perusal of subsections (2), (3) and (4) of Section 3 of the Act, it is apparent that the special recruitment can be made for such number of times not exceeding three, as may be considered necessary to fill such vacancies from amongst the persons belonging to that category, provided that in the direct recruitment contemplated under Sub-section (1) of Section 3 for vacancies reserved for any category of persons remain unfilled. Thus, for initiating a special recruitment drive, it is necessary that there should have been a process of direct recruitment in respect of the different services and posts as contemplated under Sub-section (1) of Section 3. The scheme provided under Sub-section (1) does not contemplate a special recruitment independently. For such a move, the condition precedent appears to be an effort of direct recruitment under Sub-section (1) in which the vacancy reserved for any category of persons mentioned therein remained unfilled. The words, "if, even in respect of any year of recruitment" used in Sub-section (2) suggest that the procedure of special recruitment can be adopted both in case of direct recruitment in respect of the vacancies of any year of recruitment or otherwise. Thus, special recruitment providing 100 per cent reservation in favour of a reserved category could only follow a recruitment already undertaken open for all the categories.

14. In our opinion, in view of the judgment of Hon"ble Supreme Court mentioned above, 100% reservation provided for Backward and Scheduled Castes, Scheduled Tribes categories by the impugned advertisement is not only in contravention of the provisions of the Act but it also offends the equality clause contained in Articles 14, 15 and 16 of the Constitution and thus, cannot be sustained.

20. From paragraph 14 of the counter-affidavit filed by the State respondents in the writ petition as quoted above, the fact is not disputed that 371 vacancies are carried forward vacancies of advertisement No. 29 and 467 are the vacancies which came into existence due to retirement, resignation and death upto 30.6.2003. The 467 vacancies are not even claimed to have been ever advertised for filling up by direct recruitment. It is true that it was open for the State to advertise 467 vacancies and reserve the post as per 1994 Act. But without taking steps for recruitment for filling the 467 posts which recruitment could have also given opportunity to the candidates belonging to General Category to participate,

reserving all 467 vacancies for reserved categories candidates is impermissible. The State has done exactly what was disapproved by the Apex Court in Indira Sawhney's case in paragraph 814 as quoted above. If the State is permitted to fill up all the vacancies coming into existence by reserved categories candidate, the channel of recruitment for General Category shall stand choked and the candidates of General Category shall have no opportunity to participate in any recruitment although substantive vacancies had arisen in which they have right to participate. The stand taken by the respondents in clubbing 467 vacancies alongwith carried forward vacancies of 371 and reserving all for reserved category candidates violates rights of petitioners under Articles 14 and 16(1) of the Constitution of India.

21. A Full Bench of Karnataka High Court in the case of Dr. Rajkumar and others Vs. Gulbarga University and others, had occasion to consider similar issue. The Gulbarga University invited applications for selection of 35 teaching posts out of which 33 were reserved in favour of persons belonging to Backward Classes. The recruitment notice was challenged. The Full Bench held that if there are vacancies available both for reserved category candidates and for General Category candidates, it is not open for the State to proceed with the recruitment only from reserved category candidates keeping the vacancies available for open competition. Same is the situation here. 467 vacancies, which arose upto 30.6.2003 by death, resignation and retirement, were the vacancies which were never advertised earlier and on the said vacancies, both reserved category candidates and General Category candidates had right to participate. Following was laid down by Full Bench in paragraph 33:

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 Classes 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, Scheduled Tribes, challenged the constitutional validity of the Rules on the ground that when local candidates belong to general category and reserved category were available in the service of the State Government, the Special Rules for regular recruitment of local candidates who belonged to Scheduled Castes, Scheduled Tribes and Backward

Tribes alone was violative of Articles 14 and 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 Article 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 Article 16 (1) and (2) really gives effect to the equality before law, guaranteed by Article 14 and to the prohibition of discrimination guaranteed by Article 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 Article (1).

From the ratio of the above decision, it follows that the reservation provided under Clause (4) of Article 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 Articles 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 Article 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 Article 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 Article 16(4) would be defeated and it is the duty of everyone to avoid such a consequence.

22. In view of the foregoing discussions, it is held that in advertisement No. 37 of 2003, 467 vacancies were the vacancies which came into existence upto 30.6.2003, could not have been reserved only for the candidates belonging to Other Backward Classes, Scheduled Castes and Schedule Tribes. The above 467 vacancies were never advertised earlier, hence both reserved category candidates and General Category candidates have right to participate. It was, however, open for the State to determine the reserved vacancies out of 467 vacancies and proceed to advertise the same for both general and reserved category candidates in accordance with 1994 Act. Thus, it is held that advertising 467 vacancies were not backlog vacancies and could not have been reserved solely for the Scheduled Castes candidates and inclusion of the said vacancies in the special drive for filling the backlog of Scheduled Castes, Schedule Tribes and Other Backward Classes is impermissible and violates rights under Articles 14 and 16(1) of the Constitution of India.

23. Question Nos. 3, 4 and 5 being inter-related, are being considered together. Before we proceed to examine the respective contentions of the parties on the above questions, it is necessary to have a look over the statutory provisions governing the filling of the posts in post graduate and graduate colleges of the State. The U.P. State Universities Act, 1973 has been enacted to amend and consolidate the law relating to certain Universities. Section 2 (2) of the 1973 Act defines "affiliated college". The recruitment of the teachers of the Degree College/post graduate colleges was being made in accordance with provisions of 1973 Act and the Statute framed thereunder. U.P. Higher Education Service Commission Act, 1980 was enacted to establish a Service Commission for the selection of teachers for appointment to the colleges affiliated to or recognised by a University and for matters connected therewith or incidental thereto. Section 2 (c) defines "college". Section 2 (g) provides that words used and not defined in 1980 Act but defined in U.P. State Universities Act, 1973 shall have the meanings respectively assigned to them in that Act. Section 12 provides procedure for appointment of teachers. Section 12 as amended by U.P. Act No. 2 of 1992 is being quoted below:

12. Procedure for appointment of teachers.-(1) Every appointment as a teacher of any college shall be made by the management in accordance with the provisions of this Act and every appointment made in contravention thereof shall be void.

(2) The management shall intimate the existing vacancies and the vacancies, likely to be caused during the course of the ensuing academic year, to the Director at such time and in such manner, as may be prescribed.

Explanation.-The expression "academic year" means the period of 12 months

commencing on July 1.

(3) The Director shall notify to the Commission at such time and in such manner as may be prescribed subjectwise consolidated list vacancies intimated to him from all colleges.

(4) The manner of selection of persons for appointment to the posts of teachers of a college shall be such, as may be determined by regulations:

Provided, that the Commission shall with a view to inviting talented persons " give wide publicity in the State to the vacancies notified to it under Sub-section (3):

Provided further that the candidates shall be required to indicate their order of preference for the various, college vacancies wherein have been advertised.

24. According to Section 12 of the 1980 Act, the management is required to intimate the existing vacancies and the vacancies, likely to be caused during the course of ensuing academic year to the Director at such time and in such manner, as may be prescribed. The Director shall notify to the Commission at such time and in such manner as has been prescribed subjectwise consolidated list of vacancies intimated to him from all colleges. Proviso to Section 12 (4) requires that Commission shall give wide publicity to the vacancies notified to it under Sub-section (3). Second proviso requires a candidate to indicate their order of preference for the various colleges vacancies wherein have been advertised. Section 30 of the Act, provides that provisions of the Act shall have effect notwithstanding anything to the contrary contained in the U.P. State Universities Act, 1973 or the Statutes or Ordinances made thereunder. In exercise of powers u/s 32 of the 1980 Act, the U.P. Higher Education Services Commission Rules, 1981 has been framed. Part III of the Rules provides procedure for recruitment. Rules 7 and 8 of the 1981 Rules, which are relevant are quoted herein below:

7. Intimation of vacancies (Section 32).-The management of the college shall so far as practicable determine and intimate to the Commission in Form I the number of vacancies to be filled in by recruitment during the course of the year by May 31 each year.

8. Publicity (Sections 12 (3) and 32).-Advertisement of the vacancies in three issues of each of any three leading newspapers having adequate circulation in the State shall be deemed sufficiently wide publicity within the meaning of the proviso to Sub-section (3) of Section 12 of the Act.

25. Rule 7 requires the management of the college to intimate to the Commission in Form I the number of vacancies. Form I has been given in Appendix to the Rules. A perusal of Form I indicates that intimation of vacancies to be made by the management to the Secretary, U.P. Higher Education Service Commission giving details as provided for in different column of the Form I. A perusal of the different columns indicate that there was no column for

mentioning about vacancies reserved for Scheduled Castes, Schedule Tribes and Other Backward Classes. However, column No. 7 which is relevant for the purpose is being quoted herein below:

7. Any other requirements or conditions not covered by the above columns....

26. Regulations have also been framed u/s 31 namely; U.P. Higher Education Services Commission (Procedure for Selection of Teachers) Regulations, 1983. Regulation 3 provides that minimum qualifications for appointment of a teacher shall be as given in the Statute referred to in Section 50 of the U.P. State Universities Act, 1973. Regulations 4 and 5 provides for determination and intimation of vacancies and notification of vacancies. Regulations 4 and 5 are quoted hereinbelow:

4. Determination and intimation of vacancies.-(1) The management shall determine and intimate to the Commission in the proforma, given in Appendix Form 1 to the Uttar Pradesh Higher Education Services Commission Rules, 1981 and in the manner hereinafter specified, the vacancies existing or likely to fall vacant during the year of recruitment.

(2) The statement of vacancies shall be sent by the Management to the Commission by May 31, preceding the year of recruitment with a copy to the Director and where the vacancy has occurred during the session or after the requisition has already been sent within 15 days of the documents of the vacancy:

Provided that where the Commission is satisfied that there are sufficient reasons for doing so, it may with the approval of the Government, relax or modify the time schedule in respect of any year generally or in respect of any particular college.

(3) Where the Management has failed to notify the vacancy or the vacancies by the specified date or in the manner prescribed, the Commission may require the Director to notify the vacancy and the vacancy so notified shall be deemed to be notified by the Management.

5. Notification of vacancies submission of application and indication of preference.-The Commission shall advertise the vacancies in the three issues of at least three newspapers. The Commission shall send a copy of the advertisement to the Director and may, if it considers proper, also send a copy thereof to the District Inspector of Schools and to the Colleges. Such advertisement shall, inter alia, indicate the total number of vacancies as also the number of vacancies in women's colleges and other colleges separately, the names of the college (s) and where they are situate and shall require the candidates to apply in prescribed form and to give if he so desires, the choice of not more than five colleges in order of preference. Where a candidate wishes to be considered for a particular college or colleges only, and for no other, he shall mention the fact in his application:

Provided that where the number of colleges is large or for any other reason the Commission considers it inexpedient, it may, instead of mentioning the names and particulars of the colleges in the advertisement, send the copy thereof to the colleges and to the District Inspector of Schools and mention in the advertisement that particulars of the colleges may be seen in the office of the Commission, the office of the District Inspector of Schools or in the colleges:

Provided also that the Commission shall not be bound by the choice given by the candidate and may, in its discretion, recommend him for appointment in a college other than indicated by him.

27. U.P. Act No. 4 of 1994 has been enacted to provide for reservation in public services and posts in favour of the persons belonging to Scheduled Castes, Schedule Tribes and Other Backward Classes of citizens and for the matters connected therewith or incidental thereto. Section 2 (c) defines "public services and posts". Section 2 (c) (iv) which is relevant for present purpose is being quoted hereinbelow:

2 (c)

(i)

(ii)

(iii) ...

(iv) an educational institution owned and controlled by the State Government or which receives grants-in-aid from the State Government, including a university established by or under a Uttar Pradesh Act, except an institution established and administered by minorities referred to in Clause (1) of Article 30 of the Constitution.

28. By Section 60E of the U.P. State Universities Act, 1973, the State Government is liable to make payment of salary against such posts of teachers and employees of every such college that was taken in grant-in-aid list by the State Government on or after 31.3.1975. Section 60A (iv) defines "teachers" which is to the following effect.

60A (iv) "teacher" in relation to a college, means a teacher in respect of whose employment maintenance grant was being paid by the State Government during the financial year 1974-75, or who is employed with the approval of the Vice-Chancellor of the University concerned-

(a) to a post created, before April 1, 1975, with the permission of the Vice-Chancellor concerned; or

(b) to a post created, after March 31, 1975 with the permission of the Director of Education (Higher Education).

29. There is no dispute that post of Lecturers have been created and sanctioned as per provisions of 1973 Act and definition of "public services and posts" in the

1994 Act is applicable on the post of Lecturers in Degree College/Post Graduate Colleges. Section 3 (1) of 1994 Act provides for percentage of reservation for Scheduled Castes, Schedule Tribes and Other Backward Classes of citizens. Section 3 as amended upto date quoted herein below:

3. (1) In Public services and posts, there shall be reserved at the stage of recruitment, the following percentage of vacancies to which recruitments are to be made in accordance with the roster referred to in Sub-section (5) in favour of persons belonging to Scheduled Castes, Schedule Tribes and Other Backward Classes of citizens,-

----- (a) in the case of Scheduled Castes Twenty-one per cent. (b) in the case of Scheduled Tribes Two per cent; (c) in the case of Other Backward Twenty-seven per cent; Classes of citizens -----

Provided that the reservation under Clause (c) shall not apply to the category of Other Backward Classes of citizens specified in Schedule II:

Provided further that reservation of vacancies for all categories of persons shall not exceed in any year of recruitment fifty per cent of the total vacancies of that year as also fifty per cent of the cadre strength of the service to which the recruitment is to be made ;

(2) If, in respect of any year of recruitment any vacancy reserved for any category of persons under Sub-section (1) remains unfilled, such vacancies shall be carried forward and be filled through special recruitment in that very year or in succeeding year or years of recruitment as a separate class of vacancy and such class of vacancy shall not be considered together with the vacancies of the year of recruitment in which it is filled and also for the purpose of determining the ceiling of fifty per cent reservation of the total vacancies of that year notwithstanding anything to the contrary contained in Sub-section (1):

(3) Where a vacancy reserved for the Scheduled Tribes remains unfilled even after three special recruitments made under Sub-section (2), such vacancy may be filled from amongst the persons belonging to the Scheduled Castes ;

(5) The State Government shall for applying the reservation under Sub-section (1), by a notified order, issue a roster comprising the total cadre strength of the public service or post indicating therein the reserve points and the roster so issued shall be implemented in the form of a running account from year to year until the reservation for various categories of persons mentioned in Sub-section (1) is achieved, and the operation of the roster and the running account shall, thereafter, come to an end, and when a vacancy arises . thereafter in public service or post the same shall be filled from amongst the persons belonging to the category to which the post belongs in the roster.

30. In exercise of power under Sub-section (5) of Section 3 State Government vide notification has issued 100 points roster. A perusal of the provisions of 1980

Act, Rules and Regulations framed thereunder indicate that although Section 12 of the 1980 Act, has been amended by Act No. 2 of 1992, w.e.f. 22.11.1991 now requiring the Director to notify to the Commission subjectwise consolidated list of vacancies but the rules and proforma mentioned in the Rules and Regulations still contain the requirement of management to intimate the vacancies to the Commission. The provisions of the Act having been amended requiring the college to intimate the existing vacancies and vacancies likely to cause during the ensuing academic year to the Director, sending the said intimation to the Director is a mandatory requirement and the proforma for sending the intimation has to be accordingly amended to make the Rules and Regulations workable. It is also to be noticed that with regard to intimation of reserved category vacancies to the Director and Commission, there is no specific provision in 1980 Act, Rules and Regulations framed thereunder but 1994 Act, being applicable, the requirement of 1994 Act, has to be fulfilled and all necessary and consequential actions have to be taken by the authorities entrusted to carry on recruitment in accordance with the objective and purpose of 1994 Act. As quoted above, column No. 7 of the Form of Appendix to the U.P. Higher Education Services Commission Rules, 1981 provide a column for any other requirement or conditions not covered by any other column. 1994 Act having been enforced, the requirement of giving details for determining as to whether the vacancies which have arisen have to be filled by candidates of Scheduled Castes, Schedule Tribes and Other Backward Classes category candidates, is now mandatory requirement and thus, the management is required to give the details regarding applicability of reservation as per 1994 Act and roster points in their intimation. Sub-regulation (3) of Regulation 4 of 1983 Regulations specifically provide that where the management has failed to notify the vacancy by the specified date or in the manner prescribed, the Commission may require the Director to notify the vacancy, if the same is not notified in the manner prescribed. Thus, statutory obligation of the Director to notify the vacancy, if so required by the Commission. After amendment of Section 12 by U.P. Act No. 2 of 1992, it is the Director who is now authorised to notify the vacancy to the Commission. The Director thus, has, all necessary powers and jurisdiction to determine the applicability of reservation as per 1994 Act.

31. After noticing the above provisions, now the question to be considered is "what is a unit?" for applying the Rules of reservation according to 1994 Act.

32. The post of Lecturers which have been advertised by Advertisement No. 37, are posts in different colleges affiliated to different Universities. The colleges are not run by a common management but the colleges are run by different managements and the appointing authority for the Lecturers is the management. "Management" has been defined in the U.P. State Universities Act in Section 2 (13). There is no common services of Lecturers in different colleges nor Lecturers can be transferred from one college to another in the normal course. Thus, it cannot be said that there is a common cadre of Lecturer throughout all the colleges in the State of U.P. The stand of the respondents as to what is a unit for

applying the rules of reservation has been brought on record by an affidavit of Principal Secretary, Higher Education, U.P. in pursuance of the order of this Court dated 28.11.2007, asking the Secretary, Higher Education how the post of Lecturers in a particular subject available in all the recognised and aided degree college can be taken as a unit. Paragraphs 11 and 12 of the counter-affidavit brings out the stand of the State which is quoted herein below:

11. That it is pertinent to mention that from the perusal of Section 12 (3) of the U.P. Higher Education Services Commission Act, 1980 it is clear that for applying rules of reservation neither a college nor a subject is a unit but the entire consolidated vacancies intimated from all colleges of the State in all subjects is a unit. In order to work out the number of reserved vacancies for different categories the subjectwise vacancies (in Hindi alphabetical order of the subjects) are placed in hundred point roster one by one in continuation on entire consolidated vacancies. The method can be explained through the following example:

Example.-Total pooled vacancies subjectwise:

----- Arthashastra (Economics)- 37 Angraezi
(English)- 39 Urdu- 08 Hindi- 15 Ganit (Maths)- 20 Rasayan (Chemistry)- 16
Bhugol (Geography)- 17 ----- Consolidated
vacancies- 152 -----

Now the roster has to be applied on entire 152 vacancies. In Hindi alphabetical order the aforesaid subjects shall be put in the following order:

----- 1. Angarezi (English)- 39 2.
Arthashastra (Economics)- 37 3. Urdu- 08 4. Ganit (Maths)- 20 5. Bhugol
(Geography)- 17 6. Rasayan (Chemistry)- 16 7. Hindi- 15

Now first of all 39 vacancies of Angarezi (English) shall be put in 100 point roster and number of reserved category vacancies shall be worked out. Then 37 vacancies of Arthashastra (Economics) shall be put in roster from the 40th point in roster upto 76th point in continuation and the number of vacancies falling in reserved category shall be worked out. Then in order to work out reserved vacancy categorywise in Urdu, from 77th point to 84th place in roster same process shall be applied. Then for 20 vacancies in Maths (Ganit) the reserved vacancies shall be determined by putting 20 vacancies in 100 point roster from 85th to 104th place. But since roster is of 100 points only, 101st place shall be taken as 1st, 102nd as 2nd, 103rd as 3rd and 104th as 4th in the same hundred point roster and accordingly their number shall be determined. Similarly, the number of reserved vacancies in Bhugol, Rasayan and Hindi shall be determined.

12. That from the aforesaid example it is clear that roster is applied on consolidated vacancies subjectwise in continuation. It is also pertinent to mention that the commission calls candidates for interview subjectwise only.

Thus, it requires exact number of vacancies for each reserved category as well as unreserved category in each subject. Therefore, the reservation is applied on consolidated subjectwise vacancies so that exact number of vacancies for each category in each subject may be determined.

33. Learned Additional Advocate General also referring to Section 12 (3) submits that since the Director is required to send consolidated subjectwise list of the vacancies, the said consolidated list is the unit for applying the reservation. As noted above, different institutions are separate entities and there being no common service of Lecturers throughout the State, the consolidated list required to be prepared u/s 12 (3), is at best preparation of consolidated list of vacancies for the purpose of recruitment and cannot be treated as a unit for applying the reservation. It is relevant to refer to recent decision of the Apex Court in *Balbir Kaur and Anr. v. U.P. Secondary Education Services Selection Board, Allahabad and Ors.* 2008 (3) UPLBEC 2376. The number of posts of Principal of Secondary Institutions . were advertised by U.P. Secondary Education Services Selection Board for recruitment. One of the submissions was that the post of Principals in different institutions have to be clubbed together and rule of reservation are to be applied and posts have to be reserved for reserved category candidates. The Apex Court held that post of Principals in different institutions are not required to be clubbed for the purpose of reservation. Following was observed in paragraph 28:

28. Having examined the issue in the light of 1994 Act, Section 10 of the Principal Act and the settled position in law, we are of the view that the stand of the respondents is not well founded. u/s 10 of the Principal Act, the Management is required to intimate the number of vacancies to be filled by way of selection by direct recruitment. While doing so, the Management is also required to intimate the number of vacancies to be reserved for the candidates belonging to Scheduled Castes, Schedule Tribes and Other Backward Classes of citizens in accordance with the 1994 Act. However, Section 10 expressly excludes the post of the Principal from the purview of the 1994 Act. Thus, from a plain reading of the said provision, the intention of the Legislature is manifestly clear. The Legislature, in its own wisdom did not think it proper to provide for any reservation under the 1994 Act for the post of head of the institution. Indubitably, there is no challenge to the validity of Section 10 of the Principal Act. Moreover, the post of the Principal in an educational institution being in a single post cadre, in the light of the clear dictum laid down by this Court, such a post cannot be subjected to reservation. It will result in 100 per cent reservation, which is not permissible in terms of Articles 15 and 16 of the Constitution of India. In *P.G.I. Chandigarh's case* (supra) a Constitution Bench of this Court, while holding that plurality of posts in a cadre is a sine qua non for a valid reservation, affirmed the view taken in *Chakradhar Paswan v. State of Bihar and Ors.* (supra). In that case, it was held that there cannot be any reservation in a single post cadre and the decisions to the contrary, upholding the reservation in a single post cadre either directly or by device of rotation of roster were not

approved. Besides, as noted above, neither the Principal Act, nor the rules made thereunder or the 1994 Act, provide for clubbing of all educational institutions in the State of U.P. for the purpose of reservation and therefore, there is no question of clubbing the post of the Principals in all the educational institutions for the purpose of applying the principle of reservation under the 1994 Act. We are, therefore, in agreement with the High Court that the advertisements impugned in the writ petition were not vitiated for want of provision for reservation. It is also pertinent to note that none of the respondents belong to the reserved category of Scheduled Castes or Schedule Tribes or Other Backward Classes. All of them are from the general category. Therefore, even otherwise they have no locus standi to raise the plea of reservation.

34. The question regarding application of rules of reservation on the post of Lecturers in different Universities of State of U.P. had been considered in several decisions of this Court and the Apex Court. For appointment against the post of Lecturers in various subjects in a University, the posts of Lecturers were clubbed for applying the rules of reservation, which was not approved by this Court as well as by the Apex Court. It is relevant for deciding the present case to note the ratio laid down in the following cases.

35. In the case of Dr. Suresh Chandra Verma and others Vs. The Chancellor, Nagpur University and others, the advertisement issued by the University for filling the post of Professors, Readers and Lecturers came for consideration. The University issued an advertisement inviting applications for total number of 77 posts which included 13 posts of Professors, 29 posts of Readers and 35 posts of Lecturers in different subjects. The advertisement mentioned the number of posts to be reserved categorywise but not subjectwise. For example against the 13 posts of Professors, it was mentioned that three posts for Scheduled Castes, 2 posts for Schedule Tribes shall be reserved. Similarly against 35 posts of Lecturers, it was mentioned that 7 posts for Scheduled Castes and 5 posts for Schedule Tribes shall be reserved. The said notice was challenged in the High Court. One of the questions before the High Court as to whether the reservation ought to have been subject-wise in the employment notice came for consideration. There being conflicting views of the two Division Benches, the matter was referred to the Full Bench by the High Court. The Full Bench held that reservation as made in the advertisement was against the reservation policy. Appeal was filed in the Apex Court against Full Bench judgment of High Court. The Apex Court laid down following in paragraph 7:

7. ...According to us, the word "post" used in the context has a relation to the faculty discipline, or the subject for which it is created. When, therefore, reservations are required to be made "in posts", the reservations have to be postwise, i.e., subjectwise. The mere announcement of the number of reserved posts is no better than inviting applications for posts without mentioning the subjects for which the posts are advertised. When, therefore, Section 57 (4) (a) requires that the advertisement or the employment notice would indicate the

number of reserved posts, if any, it implies that the employment notice cannot be vague and has to indicate the specific post, i.e., the subject in which the post is vacant and for which the applications are invited from the candidates belonging to the reserved classes. A non-indication of the post in this manner itself defeats the purpose for which the applications are invited from the reserved category candidates and consequently negates the object of the reservation policy. That this is also the intention of the Legislature is made clear by Section 57 (4) (d) which requires the selection committees to interview and adjudge the merits of each candidate and recommend him or her for appointment to "the general posts" and "the reserved posts", if any, advertised.

36. The applicability of rules of reservation under 1994 Act in respect to appointment on the post of Lecturers, Readers and Professors of the University of Allahabad came for consideration before the Division Bench in the case of Dr. Dina Nath Shukla v. State of U.P. and Anr. 1996 ALJ 1579 : 1996 (3) AWC 1495. Allahabad University issued an advertisement on January 30, 1995, inviting applications for the posts of Professors, Readers and Lecturers in various Departments. The advertisement contains the details of vacant posts and the posts reserved for Scheduled Castes, Schedule Tribes and Other Backward Classes. The Government order dated 19.4.1995 was issued by the State of U.P. directing reservation for post of Professors, Readers and Lecturers taking the University as one unit. The reservation was applied by the University by clubbing all the posts of Lecturers, Readers and Professors respectively. The Division Bench relying on the judgment of Apex Court in the case of Dr. Suresh Chandra Verma and Ors. v. Chancellor, Nagpur University and Ors. (supra) held that rules of reservation has to be applied subjectwise and all the posts of teachers cannot be clubbed together categorywise for applying the reservation. Following was laid down in paragraph 8:

8. ...When the posts are created subjectwise and the appointment of the teachers are also made subjectwise and the teachers of one department cannot be treated as teachers of the other department, all the posts of the teachers of the University cannot be clubbed together categorywise for applying the reservation. Each department of teaching is a separate unit. Therefore, reservation has to be applied subjectwise. This will ensure reservation in all categories of teachers in all subjects departments. If the reservation is not applied subjectwise, it will result in violation of Article 16 of the Constitution. If all the Professors working in all the subjects in the University are treated as belonging to one unit, the result would be that in some subjects there will be no reservation while in others there might be hundred per cent reservation. Uncertainty and serious consequences including the violation of Article 16 of the Constitution, as highlighted by the Supreme Court in Dr. Suresh Chandra Verma and others Vs. The Chancellor, Nagpur University and others, (supra) are bound to occur. Nor the reasons given above, the impugned order cannot be sustained.

37. The Government order dated 19.4.1995, which had directed for clubbing of

all the posts of Lecturers, Professors, Readers respectively for applicability of reservation was quashed by the High Court. The State of U.P. filed an appeal in the Supreme Court against the Division Bench judgment of this Court in the case of Dina Nath Shukla (supra). The Supreme Court decided the appeal which is in State of Uttar Pradesh Vs. Dr. Dina Nath Shukla and another, The Apex Court approved the view of the High Court that rules of reservation has to be applied subjectwise and if, there are more than one post in a cadre, different posts of Lecturers cannot be clubbed together. However, with regard to single post in a cadre, it was laid down that reservation be applied even on a single cadre post by resorting to rotation. Following was laid down in paragraph 13 of the judgment:

13. Thus, it could be seen that if the subjectwise recruitment is adopted in each service or post in each cadre in each faculty, discipline, speciality or super-speciality, it would not only be clear to the candidates who seek recruitment but also there would not be an over-lapping in application of the rule of reservation to the service or posts as specified and made applicable by Section 3 of the Act. On the other hand, if the total posts are advertised without subjectwise specifications, in every faculty, discipline, speciality or super-speciality, it would be difficult for the candidates to know as to which of the posts be available either to the general or reserved candidates or whether or not they fulfil or qualify the requirements so as to apply for a particular post and seek selection. As indicated earlier, if there is any single post of Professor, Reader or Lecturer in each faculty, discipline, speciality or super-speciality which cannot be reserved for reserved candidates, it should be clubbed roster applied and be made available for the reserved candidates in terms of Section 3 (5) of the Act. Even if there exists any isolated post, rule of rotation by application of roster should be adopted for appointment. For achieving the said object, the Vice-Chancellor, who is responsible authority u/s 4 to enforce the Act, would ensure the single posts in each category are clubbed since admittedly all the posts in each of the categories of Professors, Readers or Lecturers carry the same scale of pay. Therefore, their fusion is constitutional and permissible. The Vice-Chancellor should apply the rule of rotation and the roster as envisaged under Sub-section (5) of Section 3. The advertisements are required to be issued so that the reserved and the general candidates would apply for consideration of their claims for recruitment in accordance therewith. This interpretation would subserve and elongate constitutional objective " and public policy of socioeconomic justice serving adequacy of representation in a service or posts, grade or cadre as mandated and envisaged in Articles 335 and 16(4) read with Articles 14 and 16(1), Preamble, Article 38 and Article 46 of the Constitution and all other cognate provisions.

38. The judgment of the High Court quashing the advertisement was maintained and it was directed that fresh advertisement shall be issued. Another decision, which is relevant in this context is the judgment in the case of Dr. Ram Niwas Pandey v. State of U.P. and Ors. (1996) 3 UPLBEC 1869. In the said case

Lucknow University invited applications for different post of Professors existing in different Departments by advertisement No. 5 of 1993. One of the grounds for challenge of the advertisement was that all the posts of Professors cannot be clubbed together and treated in one cadre for applying the Rules of Reservation. The said arguments was accepted by the Division Bench and following was laid down in paragraph 29:

29. Thus, in view of the decision in the case of Dr. Suresh Chandra Varma (supra) and the Division Bench case mentioned above, it is clear that the reservation has to be applied subjectwise and the Professors of all the departments cannot be clubbed together and treated as one cadre for the purpose of applying reservation. Thus, it is held that the advertisement issued in the year 1995 cannot be upheld and is liable to be quashed.

39. Relying on the judgment of Dr. Ram Niwas Pandey (supra), a Division Bench of this Court disposed of a writ petition, challenging the reservation in respect of Professors in the University of Allahabad. State of U.P. filed an appeal against the Division Bench judgment of the Allahabad High Court pertaining to University of Allahabad, which has been decided by the Apex Court in the case of State of U.P. and Ors. v. M. C. Chattopadhyaya and Ors. (2004) 12 SCC 333. The Apex Court in the above case has noticed the judgment of Ram Niwas Pandey (supra) and held that said judgment stood approved by the Supreme Court in the case of State of U.P. v. Dr. Dina Nath Shukla (supra). Following was laid down in paragraphs 1 and 6 of the judgment:

1. These appeals arise out of the judgment of the Division Bench of the Allahabad High Court, wherein the Court has held that there cannot be any reservation in respect of the post of Professor in the University. The aforesaid conclusion is based upon the earlier Division Bench decision of the said Court in a batch of writ petitions which were disposed of by the judgment in Ram Niwas Pandey (Dr.) v. State of U.P. In the aforesaid judgment in paragraph 29, the Division Bench of the Allahabad High Court has held that Departments cannot be clubbed together and treated as one cadre for the purpose of applying reservation. The aforesaid observation has been construed in the impugned judgment to be a total prohibition for applying the reservation policy to the post of Professor. Further, the Court in the impugned judgment is of the conclusion that because of a different selection mechanism for the post of Professor, principle of reservation will have no application. This judgment of the Allahabad High Court in Ram Niwas Pandey (Dr.) v. State of U.P., was assailed before this Court. But this Court being of the opinion that no exception can be taken to the judgment, did not entertain the special leave petition. The very advertisement of the University which had been issued in the year 1995 and was the subject-matter of challenge before the Allahabad High Court in the impugned judgment, had also come up for consideration before this Court in State of U.P. v. Dr. Dina Nath Shukla. A Bench of two learned Judges of this Court construed the provisions of the Reservation Act and also the provision of the University statute

and came to hold that it would not be permissible to club all posts of Professors together and then apply the principle of reservation. It was felt that if the total posts are advertised without subjectwise specification in every faculty, discipline, speciality or superspeciality, it would be difficult for the candidate to know as to which of the posts would be available either to the general or reserved candidates or whether or not they fulfil or qualify the requirements so as to apply for a particular post and seek selection. Necessarily therefore, the Court approved a part of the earlier judgment of the Allahabad High Court in Ram Niwas Pandey case (supra) even though that judgment had not been cited, by holding that the reservation has to be applied subjectwise and the Professors of all departments cannot be clubbed together and treated as one cadre. The Court, however, interfered with the conclusion of the Allahabad High Court on the question as to whether there can at all be a reservation on a single post. The Court was of the opinion that if there exists any isolated post, rule achieving the said objective of the Vice-Chancellor, who is the responsible authority u/s 4 has to enforce the Act, would ensure that single post in each category of Professors, Readers or Lecturers carrying the same scale of pay would be subject to reservation by applying the principle of rotation. This conclusion of the Court in the aforesaid case of Dr. Dina Nath Shukla is no longer good law in view of the Constitution Bench judgment of this Court in the case of Post Graduate Institute of Medical Education and Research, Dr. Dina Nath Shukla relied upon the judgment in Madhav case.

6. While, therefore, we are of the considered opinion that there can be a reservation in respect of post of Professor and the provisions of the Reservation Act would apply, but the same cannot be applied taking all the professors as a cadre and it has to be made subjectwise, as has been earlier construed and held by this Court. We are also of the opinion that there cannot be a reservation for an isolated post. We further observed that in deciding the question of reservation the appropriate authority must follow the roster as has been published in exercise of power u/s 3 (5) of the Reservation Act and then the roster should be duly complied with in accordance with the principles enunciated by this Court in Sabharwal case.

40. Thus, the ratio of the Apex Court in the cases of Suresh Chandra Verma and Dr. Dina Nath Shukla (supra) is to the effect that post of one category, i.e., post of Professors, Readers or Lecturers cannot be clubbed together for applying the rules of reservation and the Rules of reservation has to be applied subjectwise. In the present case, the stand of the respondents as taken in paragraphs 11 and 12 of the counter-affidavit of the Principal Secretary of the Higher Education, quoted above, is that reservation has been applied clubbing all the posts of Lecturers of different colleges in the State of U.P. The stand taken by the respondents that roster is applied on consolidated vacancies on subject-wise is not in accord with the ratio laid down by the Apex Court in the aforesaid cases. In paragraph 11 of the said affidavit, the manner of applicability of 100 points roster has also explained. It has been stated in paragraph 11 that on

consolidated subjectwise vacancies, the roster is applied in continuation from one subject to another subject. Illustrated stand of the State Government, which has been stated in paragraph 11 is that 39 vacancies of English which are consolidated vacancies in different colleges have to be put on roster and thereafter the vacancies of another subject in alphabetical order shall occupy the next point in the roster. The post of Lecturers in different subjects in different colleges may carry the same scale pay but that is neither the reason nor ground for clubbing various posts of a subject in different colleges or vacancies in different subjects in the same college. The subject-wise vacancies in a college form a separate unit for applying the rules of reservation. The vacancies of different subjects even in one college, cannot be clubbed together. Another case of the Apex Court relevant to be noticed is *Chakradhar Paswan Vs. State of Bihar and Ors*, In the aforesaid case, challenge was made by the respondents to the advertisement issued by the Bihar Public Services Commission inviting applications for the post of Deputy Director of Homeopathic from Scheduled Castes candidates. A Scheduled Castes candidate was appointed. The High Court set aside the appointment. The reserved category candidate filed an appeal in the Apex Court and had contended that two posts of Deputy Director of Ayurvedic and Unani were sanctioned. Three posts have been sanctioned, one post of Director of Indigenous Medicine, one post of Deputy Director of Homeopathy and another post of Deputy Director, Unani. It was contended that out of three posts, the post of Deputy Director of Homeopathy should be treated as reserved for Scheduled Castes. The Apex Court repelled the contention and held that three posts of Deputy Director, Homoeopathy, Unani and Ayurvedic are distinct and separate as they pertain to different disciplines and each one is isolated post by itself carried in the same cadre. There can be no grouping of isolated posts even if they are carried on the same scale. Following was laid down in paragraph 9 of the aforesaid judgments:

9. There is another aspect. The three posts of Deputy Directors of Homeopathic, Unani and Ayurvedic are distinct and separate as they pertain to different disciplines and each one is isolated post by itself carried in the same cadre. There can be no grouping of isolated posts even if they are carried on the same scale. The instructions issued by the Government of India from time to time relating to reservations of posts and appointments for the Scheduled Castes and Scheduled Tribes are contained in the Brochure on Reservation for Scheduled Castes and Scheduled Tribes in Services. Chapter II Part I gives the percentage of 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. These instructions have been issued to carry out the mandate of Article 16(4) consistent with the equality clause under Article 16(1) and 16(2) and the requirements of Article 335, namely, the maintenance of efficiency of administration. Para 2.4 provides that the reservations will be applied to each grade or post separately but isolated posts will be grouped as provided in Chapter VI. Paragraph 6.1 of Chapter VI which is relevant for our

purposes, states that in the case where the posts are filled by direct recruitment, isolated individual posts and small cadres may be grouped with posts in the same class for purpose of reservation, taking into account the status, salary and qualifications prescribed for the posts in question." For this purpose, it provides that a cadre or a grade or a division of a service consisting of less than 20 posts may be treated as a small cadre. A group so formed should not ordinarily consist of 25 posts. It then adds:

It is not intended that isolated posts should be grouped together only with other isolated posts." That precisely is the situation here. The Government of India instructions clearly show that there can be no grouping of one or more isolated posts for purposes of reservation. To illustrate, Professors in medical colleges are carried on the same grade or scale of pay but the posts of Professor of Cardiology, Professor of Surgery, Professor of Gynaecology pertain to particular disciplines and therefore each is an isolated post.

41. The judgment in the case of Chakradhar Paswan case has been approved by the Constitution Bench of the Supreme Court in the case of Post Graduate Institute of Medical Education and Research, Chandigarh Vs. Faculty Association and Others, The Constitution Bench laid down that for applicability of reservation there has to be more than one post. Following was laid down in paragraph 25:

25. By a Circular dated November 8, 1975, the State Government prescribed a 50 point roster to implement the policy of reservation to posts and appointments for members of the backward classes under Article 16(4). It was laid down that:

If in any grade, there is only one vacancy for the first time, then it will be deemed to be unreserved and for the second time also, if there be only one vacancy, then it will be deemed to be reserved.

For the purpose of determining the quantum of reservation according to the roster, the Government grouped together all the Class I posts, viz., the posts of Director as well as of Deputy Directors and as the post of the Director had already been filled up treating it to be unreserved, the second post, viz., the Deputy Director (Homeopathic) was treated as reserved. Accordingly, the State Public Service Commission issued advertisement inviting applications from Scheduled Castes candidates for selection to the same posts and ultimately the State Government appointed a member of Scheduled Caste to the post of Deputy Director (Homeopathic). A general candidate thereafter filed a writ petition before the High Court challenging the advertisement issued by the State Public Service Commission and also the consequent order of appointment. The High Court allowed the petition and quashed the impugned advertisement and the appointment order. Such decision of the High Court was assailed before this Court in Chakradhar Paswan Vs. State of Bihar and Ors, The appeal was dismissed by this Court by holding that in service jurisprudence, the term "cadre" has a definite legal connotation. It is not synonymous with "service". It is open to the Government to constitute as many cadres in any particular service

as it may choose according to the administrative convenience and expediency and it cannot be said that the establishment of the Directorate constituted the formation of a joint cadre of the Director and the Deputy Directors because the posts are not interchangeable and the incumbents do not perform the same duties or carry the same responsibilities or draw the same pay. The posts of the Director and those of the Deputy Directors constitute different cadres of the service. The first vacancy in the cadre of the Deputy Directors was that of the Deputy Director (Homeopathic) and it had to be treated as unreserved, the second reserved and the third unreserved. Therefore, for the first vacancy of the Deputy Director (Homeopathic), a candidate belonging to the Scheduled Caste had, therefore, to compete with others. Relying on the decision in *M.R. Balaji and Others Vs. State of Mysore*, it was held in *Chakradhar's* case that once the power to make reservation in favour of Scheduled Castes and Scheduled Tribes is exercised, it must necessarily follow that 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. The whole concept of reservation for application of the 50-point roster is that there are more than one post, and the reservation can be* upto 50%. If there is only one post in the cadre, there can be no reservation with reference to that post either for recruitment of the initial stage or for filling up a future vacancy in respect of that post. A reservation which would come under Article 16(4), presupposes the availability of at least more than one post in that cadre. No reservation could be made under Article 16(4) so as to create a monopoly. Otherwise, it would render the guarantee of equal opportunity contained in Article 16 (1) and (2) wholly meaningless and illusory. The reservation of the post of Deputy Director (Homeopathic) amounted to 100% reservation which was impermissible under Article 16(4) as otherwise it would render Article 16(1) wholly elusive and meaningless. Article 16(4) is an exception to Article 16 (1) and (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. Reference was also made in *Chakradhar's* case AIR 1988 SC 959, to the decision in *Arati Ray Choudhury's* case AIR 1974 SC 532, by indicating that in the facts of that case when the open class had reaped a benefit in 1966-67 when a reserved vacancy was treated as unreserved by the appointment of an open candidate, if the carry-forward rule had to be given any meaning, the vacancy had to be carried forward for the benefit of Scheduled Castes and Scheduled Tribes until the close of the financial year 1968-69. It was pointed out in *Chakradhar's* case that the decision in *Arati Ray Choudhury's* case turned on the carry-forward rule and such decision was clearly distinguishable and the same does not support reservation in a single cadre post.

42. The recent judgment of this Court dated 24.7.2008 in Writ Petition No. 53197 of 2006, *Dr. Durga Prasad Yadav and Ors. v. State of U.P. and Ors.* has again laid

down that the vacancies of Lecturers and Readers cannot be clubbed and the advertisement has to be subject-wise. In the above case, advertisement was issued by Deen Dayal Upadhyay Gorakhpur University inviting applications for the post of Readers and Lecturers in various subjects in the University. Following was laid down by the Division Bench:

With these pronouncement of Supreme Court the law in respect of the applicability of rules of reservation to the teaching posts in University is fairly well-settled. The State Government, however, by an apparent misreading of the judgment in *M. C. Chattopadhyaya's* case issued a Government order dated 1st August, 2003 providing that where there is single post of Professor, the rules of reservation will not be applicable to it treating it to be one unit but when in para 4 of the same Government order dated 1st August, 2003 it is stated that for applicability of the roster of the year 1994 of the Reservation Act all the posts of Lecturers and Readers in the University shall be taken to be a single cadre. It was in pursuance of this Government order that the impugned advertisement dated 9th August, 2006 was issued by the Gorakhpur University ignoring the ratio in *M. C. Chattopadhyaya's* case, and to the extent it departed from *Dr. Dina Nath Shukla's* case.

The Division Bench held the advertisement of the University not conforming to the Apex Court judgment in the case of *Dr. Deena Nath Shukla (supra)* and *M. C. Chattopadhyaya (supra)*, the writ petition was allowed.

43. From the above mentioned discussions, it is amply clear that it is now well-settled by various pronouncements of the Apex Court that in a State University, the provisions of U.P. Public Services (Reservation of Scheduled Castes, Schedule Tribes and Other Backward Classes) Act, 1994 have to be applied not by clubbing all the posts of Lecturers, Readers or Professors but reservation has to be applied subjectwise. Although all the post of Lecturers in a University are in a common pay scale but that cannot be basis for clubbing of the posts of Lecturers and applying the reservation and roster on all the posts together rather the reservation has to be applied subjectwise. The question to be answered is as to whether, while applying the reservation in the post of Lecturers in post-graduate colleges and degree colleges affiliated to different universities governed by the provisions of U.P. State Universities Act, 1973 the same principle of applying the reservation, i.e., subjectwise, collegewise are to be adopted or as contended by learned Additional Advocate General and counsel appearing for the U.P. Higher Education Services Commission, reservation has to be applied by clubbing all the posts of Lecturers together.

44. *Sri P. S. Baghel* and *Sri Rajeev Misra*, learned Counsel for the petitioner emphasised that the manner of applicability of reservation in postgraduate and degree college has to be same which is being applied in the post of Lecturers of a University as laid down by the Apex Court, i.e., subjectwise. *Sri Rajeev Misra* submits that what is not being permitted in the university regarding applicability of the reservation is sought to be applied in the post graduate colleges and

degree colleges affiliated to the University. It is submitted that all the posts are created subjectwise by Director of Education Higher in different post graduate and degree colleges which carry different qualifications as laid down under the provisions of U.P. State Universities Act, 1973. Sri Jaideep Mathur, learned Additional Advocate General submits that firstly all the posts in different colleges have to be clubbed together and roster has to be applied thereafter as per the method stated in the affidavit of the Principal Secretary of the Higher Education quoted above and in alternative in case, each college is treated to be a separate unit, the post of all the Lecturers have to be clubbed together and reservation has to be applied thereafter. Sri P. S. Baghel, learned Counsel for the petitioners has also placed reliance on a Government order dated 1.8.2003 by which Government order, the State Government has laid down methodology for applying the roster in different posts of lecturers in a University. Sri Baghel submitted that the principles laid down in the aforesaid Government order for applicability of the roster, i.e., taking the subject in a descending order has to be followed. Learned Additional Advocate General submitted that the Government order dated 1.8.2003 has been issued only for the University and is not applicable with regard to determination of methodology for reservation in degree/post graduate colleges. As observed above, there is no provision in the U.P. Higher Education Service Commission Act, 1980, Rules and Regulations framed thereunder with regard to reservation nor even after enforcement of 1994 Act, any amendment has been made in the Higher Education Act regarding reservation. The U.P. Higher Education Service Commission Act, 1980 was enacted for selection of teachers. According to Regulation 3 of 1983 Regulations, the minimum qualification of a teacher shall be as given in the Statute referred to in Section 50 of the U.P. State Universities Act, 1973. Thus, for qualification we have to look into the Statute of the University. The provisions of 1973 Act and the Statutes apply with regard to course of study, examination, conditions of service of the teachers of the affiliated colleges and by virtue of Section 30 of 1980 Act, provisions of 1980 Act, shall have effect notwithstanding anything to the contrary contained in U.P. State Universities Act, 1973 or the Statutes and Ordinances framed thereunder. Thus, the provisions of the U.P. State Universities Act, 1973, Statutes and Ordinances framed thereunder, in so far as provisions made in 1980 Act shall become inoperative but other provisions are still to be looked into. There are no provision under the 1980 Act, with regard to conditions of service, seniority of teachers of the degree colleges and post graduate colleges. For considering the submission of learned Counsel for the petitioner that reservation has to be applied subjectwise, whether the concept of subjects, departments and faculties is also present in the State Universities Act, 1973 qua the degree colleges and affiliated colleges is to be first looked into.

45. The Apex Court by its pronouncements in the case of Dr. Suresh Chandra Verma, Dr. Dina Nath Shukla and State of U.P. v. M. C. Chattopadhyaya (supra) has laid down that the posts of Lecturers in a University cannot be clubbed together for the purpose of applying reservation and roster and the reservation

and roster in the post of Lecturers have to be applied subjectwise. Thus, each subject of study has been treated to be a unit for applying the rules of reservation. As noticed above, the petitioners have advocated for applying the same principle regarding reservation, which has been accepted in a University, whereas learned Advocate General appearing for the respondents have made two alternative submissions firstly, different posts in different colleges in each subject are to be clubbed together and thereafter reservation has to be applied in the manner as mentioned in the affidavit of Principal Secretary, Higher Education, quoted above and in alternative if a college is treated to be a unit, all the posts of Lecturers in a college have to be clubbed together and reservation has to be applied as is being applied in the Secondary institutions governed by the provisions of U.P. Secondary Education Services Selection Board Act, 1982. For coming to a correct conclusion, it has to be first found out as to whether concept of Faculty, department and subject is also present in Degree Colleges or post graduate colleges as it exists in a University.

46. Section 27 of the U.P. State Universities Act, 1973 provides for the Faculties, Section 27 (2) provides that each Faculty shall comprise such departments of teaching as may be prescribed. Section 27 also contemplates Board of each Faculty and also Dean of each Faculty. In each department of teaching in the University there shall be a Head of Department to be appointed according to Statute. Section 27 (1) (2) (3) and (4) are quoted herein below:

27. The faculties-(1) The University shall have such faculties as may be prescribed.

(2) Each faculty shall comprise such departments of teaching as may be prescribed and each department shall have such subjects of study as may be assigned to it by the Ordinance.

(3) There shall be a Board of each Faculty, the constitution (including the term of office of its members) and powers and duties of which shall be such as may be prescribed.

(4) There shall be a Dean of each Faculty who shall be chosen from amongst the Professors by rotation in order of seniority and shall hold office for three years.

47. The Statutes have been framed u/s 50 of the Act. The First Statute of the University of Agra is hereinafter referred to since the Statute of all the Universities governed by the U.P. State Universities Act, 1973 are on similar lines. Chapter VII of the First Statute of Agra University provides for "The Faculty". The Statute 7.01 provides that there shall be Faculties namely; (a) Faculty of Agriculture, (b) Faculty of Arts, (c) Faculty of Commerce, (d) Faculty of Engineering, (e) Faculty of Law, (J) Faculty of Medicine, (g) Faculty of Science (h) Faculty of Education, (i) Faculty of Home Science, (J) Faculty of Homeopathic Medicines and (k) Faculty of Fine Arts. Statute 7.02 deals with constitution of Faculties of Commerce, Engineering, Law and Education and Fine Arts. Statute 7.02 is quoted as below:

7.02. (1) The Board of each Faculty other than Faculties of Commerce, Engineering, Law and Education and Fine Arts, shall be constituted as follows-

(i) The Dean of the Faculty who shall be the Chairman.

(ii) One senior-most teacher who shall either be a Principal or senior-most teacher of a postgraduate department for each of the subjects comprised in the Faculty and recognised upto post-graduate standard.

(iii) One seniormost teacher who shall be a Principal or seniormost teacher of a Department for each of the subjects comprised in the Faculty and recognised upto first degree standard only.

(iv) Five seniormost teachers in the Faculty other than Principals and teachers mentioned in Clauses (ii) and (iii) above provided that no two such teachers shall profess the same subject and belong to the same college, where there is more than one college recognised for the teaching of the subject. The teachers so passed over shall not lose their turn in rotation next time.

(v) Seven persons possessing expert knowledge of the subjects comprised in the Faculty or subjects allied to them, not in the service of the University or any of its colleges, to be nominated by the Vice-Chancellor from the following categories:

(a) Professors in Universities ;

(b) Present or retired Principals of Postgraduate colleges ;

(c) Directors of Research Institutes or in the case of Medical Faculty, the Civil Surgeon of Agra ;

Provided that at least four of the above persons shall belong to category (a) and (c).

(2) The teachers under items (ii) and (iii) and (iv) of Clause (1) shall be chosen by rotation in order of seniority.

48. Statute 7.03 deals with the Board of the Faculty of Commerce, Statutes 7.04 deals with Faculty of Engineering, 7.05 Faculty of Law, 7.06 Faculty of Education, 7.06A Faculty of Home Science, 7.06, 7.06B Faculty of Homeopathic Medicine. Statute 6.06C provides for Board of the Faculty of Fine Arts. Statute 7.03 which deals with Faculty of Commerce is being quoted herein below:

7.03. The Board of the Faculty of Commerce shall be constituted as follows:

(i) The Dean of the Faculty, who shall be the Chairman.

(ii) Five teachers of the subject who shall be either Principals or the seniormost teachers of post-graduate department by rotation in order of seniority from among teachers of affiliated colleges.

(iii) Three teachers teaching post-graduate classes other than Principals and

teachers mentioned in Clause (ii) above, by rotation in order of seniority from among the teachers of affiliated colleges, provided that not more than one shall belong to one college. The teachers so passed over shall not lose their turn in rotation next time.

(iv) Convenor of the Board of Studies in Economics in the University.

(v) Three persons possessing expert knowledge of the subjects comprised in the Faculty or subjects allied to them, not in the service of the University or any of its colleges, to be nominated by the Vice-Chancellor from the following categories:

(a) Professors in Universities ;

(b) Present or retired "Principals of Postgraduate colleges ;

(c) Directors of Research Institutes:

Provided that at least two of the above persons shall belong to categories (a) and (c).

49. Statute 7.07 refers to various departments comprised in the Faculty of Agriculture, Statute 7.08 refers to departments comprised in the Faculty of Arts and Statute 7:09 to 7.14C refer to departments comprised in different other faculties. Statute 7.08 refers to various departments comprised in Faculty of Arts. A combined reading of the provisions of the U.P. State Universities Act, 1973 and the First Statute of the Agra University indicates that Board of each faculty is constituted comprising the Professors of the University and the Principal or seniormost teachers of department of affiliated colleges. The reference of seniormost teachers in the Statute 7.02 is reference of senior-most teacher of a department for each of the subjects comprised in the Faculty. Thus, the senior-most teachers of departments in degree colleges/post graduate college are part and parcel of the Faculty Board of each of the Faculty. Thus, the Board of each Faculty is a unified body headed by Dean of Faculty and comprises of the Professors of the University and members and senior-most teachers of the respective departments of degree colleges or post graduate colleges. The Board of Faculty have various responsibilities and duties and the Board of Faculties constituted under the State Universities Act and as per the Statute of the University guides the teaching course curriculum both for University and colleges. The above provisions thus, indicate that in the degree college/post graduate college also the concept of department and subjects are contemplated. Thus, the concept of different subjects, teachers appointed in different subjects and different departments are very much present in the Statute qua the degree college and post graduate college.

50. There are other provisions under the First Statutes which clearly contemplate different faculties in a college. Chapter XII of the Statutes deals with "Affiliated Colleges". Statutes 12.06 contemplate application for affiliation in different faculties including Commerce, Education, Law, Science etc. Statute 12.06 also

contemplate affiliation in different subjects also. Statute 12.11 is quoted herein below:

12.11. Every application from an affiliated college for starting courses of instructions for a new degree or in view subjects shall be made so as to reach the Registrar before the 15th August of the year preceding the one in which it is proposed to start such courses.

51. The above provisions thus, clearly indicate affiliation facultywise and subjectwise. Like wise Statute contains the provisions of determination of seniority of teachers of the University as well as teachers of the affiliated colleges. Statute 17.02 contemplates maintenance of seniority list in respect of each category of teachers in a University. Statute 17.08 contains contemplation of seniority of teachers in the same department. On the other hand, Statute 17.10 contains rules for determination of seniority of principals and teachers of affiliated colleges. Statute 17.13 contemplates relative seniority of teachers appointed in the same department or in the same subject in a college. Statute 17.13 (1) is quoted below:

17.13 (1) When two or more persons are appointed as teachers in the same department or in the same subject, their relative seniority shall be determined in order of preference or merit in which their names were recommended by the Selection Committee.

52. Thus, the above provision does contemplate the concept of departments and subjects in affiliated colleges also.

53. Section 31 of the U.P. State Universities Act, 1973 contemplates selection of the teachers of the University through a Selection Committee. Section 31 (4) contemplates different Selection Committees with regard to different departments. Appointment of Lecturers of Degree Colleges/Post Graduate College is governed by U.P. Higher Education Services Commission Act, 1980. Regulations have been framed under the U.P. Higher Education Services Commission Act, namely the U.P. Higher Education Services Commission (Procedure and Conduct of Business) Regulations, 1983, Regulation 5 of which contemplates separate "Interview Board". Regulation 5 (1) is quoted below:

5. Interview Board.-(1) Separate Interview Board shall be constituted for the posts of Principals in Post-Graduate Colleges, Principals in Degree Colleges and for the post of other teachers in each subject.

54. Thus, selection is also contemplated subjectwise in regard to teachers of degree colleges/post graduate colleges. Learned Additional Advocate General has also referred to rules of reservation as applied in the Secondary schools governed by the provisions of U.P. Secondary Education Services Selection Board Act, 1982. He contends that while applying the rules of reservation in different subjects of Lecturers in an intermediate college, all subjects are clubbed together and thereafter rules of reservation are applied. As noted, the provisions of U.P.

Higher Education Services Commission Act, 1980 and rules and regulations framed thereunder do not refer to 1994 Act in selection of Lecturers of degree/post graduate college but the rules of reservation have been made applicable by virtue of 1994 Act itself. In the intermediate colleges governed by U.P. Act No. 5 of 1982, there are specific statutory provisions which make the rules of reservation applicable. The 1982 Act and 1998 Rules specifically refer to applicability of provisions of 1994 Act and selection and reservation in the intermediate colleges is done in accordance with the procedure prescribed thereunder. Rule 10 of the U.P. Secondary Education Services Selection Board Rules, 1998 refers to source of recruitment of "teachers of Lecturer's grade" as 50% by direct recruitment and 50% by promotion. The other provisions of 1998 Rules also indicate applicability of reservation in Lecturer's grade which means applicability of reservation on all posts of lecturers together which is referred to as lecturer's grade. Rule 12 (6) again specifically refers to applicability of reservation on the post of teachers in Lecturer's grade, Rule 12 (6) is extracted below:

12 (6) The Board, having regard to the need for securing due representation of the candidates belonging to the Scheduled Castes/Scheduled Tribes and Other Backward Classes of citizens in respect of the post of teacher in Lecturers and trained graduates grade, call for interview such candidates who have secured the maximum marks under Sub-clause (4) above/and for the post of Principal/Head Master, call for interview such candidates who have secured maximum marks under Sub-clause (5) above in such manner that the number of candidates shall not be less than three and not more than five times of the number of vacancies:

Provided that in respect of the post of the Principal or Headmaster of an Institution, the Board shall also in addition call for interview two seniormost teachers of the institution whose names are forwarded by the Management through Inspector under Clause (b) of Sub-rule (2) of Rule 11.

55. The use of words "Lecturer's grade" in the Rules 1998 is an indication that all posts of Lecturers in different subjects in an intermediate college are taken together for applicability of reservation. We, however, hasten to add that in the present case the question of applicability of reservation in posts of Lecturers in an intermediate college does not fell for consideration directly and we do not propose to express any final opinion in that regard, the above provisions have been referred to only to highlight that in U.P. Act No. 5 of 1982 and Rules 1998 there are specific reference of applicability of reservation which is not present in 1980 Act and Rules and Regulations framed thereunder, thus the manner of applicability of reservation in an intermediate college is not relevant for applying the same in a degree college/post graduate college affiliated to a University. When the question arises to follow the pattern of applicability of reservation, we have no hesitation that the parrtern which is applicable for applying the rules of reservation in the post of Lecturers in a University have to be accepted as compared to those which are applied on the post of Lecturers in intermediate

colleges. As noted above, the concept of faculties, departments and subjects, the rules of seniority as noted above in the U.P. State Universities Act, 1973 and the Statutes framed thereunder are applied in some what similar manner regarding the degree college/post graduate colleges which are applied on the teachers of the University.

56. The submission, which has been much pressed by respondents is that since all the posts of Lecturers in degree colleges/post graduate colleges carry the same scale of pay and are under one management with more or less same duties and responsibilities all the posts fall in one cadre, there cannot be different cadres for different subjects. As noted above, the post are created by Director of Higher Education in a college subjectwise. For qualification for appointment of Lecturers in a degree college different qualifications are prescribed in Statutes framed under the U.P. State Universities Act, 1973. The post of one department is not interchangeable with another department. A common seniority list of all the Lecturers in a college is maintained for utilising it for different purposes as laid down in the Statute of University. When two Lecturers are appointed in one department or in one subject by same selection committee their inter se seniority in the department is contemplated and worked out. There is no doubt that post of Lecturers are the posts which are covered by definition of public services and costs as given in Section 2 (c) of 1994 Act. Thus, all the post of Lecturers of a degree colleges and post graduate colleges are covered by 1994 Act. There cannot be any denial of applicability of 1994 Act to the post of Lecturers in a degree college. For applying the reservation Act on the post of Lecturers, concept of a unit for application of reservation rules have to be found out and the mere fact that all the posts belong to the same pay scale does not lead to an inference that all the posts of different subjects have to be clubbed together for applying the rules of reservation. The post of Lecturers in different subjects have to be treated as a unit for applicability of reservation as has been laid down by the Apex Court with regard to filling up the post of Lecturers in a University. Same principle which have been held to be applicable on the post of Lecturers in a University have to be applied on the post of Lecturers in degree college/ post graduate college.

57. Learned Additional Advocate General have submitted that in the event the submission is accepted that reservation has to be applied subjectwise there shall be very few post in a college which may be reserved for Scheduled Castes, Schedule Tribes and Other Backward Classes. Since there may be many subjects, which may have only one post, two posts or three posts. Submission is that the above method will frustrate the applicability of 1994 Act, and shall not advance the socioeconomic justice. There is no dispute that reservation of posts under Article 16(4) of the Constitution of India have been contemplated to give opportunity to backward classes to come up in the main stream of the society and this is an affirmative action by the State to provide for equal opportunity for backward classes. The 1994 Act does not provide for reserving all the posts of Lecturers. Posts shall be reserved when it falls within the requisite percentage as

provided under Act 1994. Apex Court while applying reservation in the posts of lecturers in a University has laid down applying the 1994 Act "subjectwise". Can it be said that 1994 Act, has been frustrated in all the universities of the State? The answer has to be No since the Apex Court has not laid down that 1994 Act shall not apply to the posts of Lecturers in a University but has only laid down the manner of applicability. Similarly 1994 Act is fully applicable to the posts of Lecturers in a college but its manner of applicability is same as held to be applicable in a University.

58. A person, who acquires a qualification for appointment in one particular subject has right to participate in the selection only against the said subject. Not applying the reservation subject-wise, will lead to uncertainty and violation of the rights under Articles 14 and 16 of the Constitution of India. The Division Bench of our Court in the case of *Dr. Dina Nath Shukla v. State of U.P. and Anr.* 1996 ALJ 1579 : 1996 (3) AWC 1495, have laid down in paragraph 8, quoted above, that subjectwise reservation if not applied, uncertainty and serious consequences including violation of Article 16 of the Constitution of India shall be the result. Thus, the submission that provisions of 1994 Act shall be frustrated by accepting the submission of learned Counsel for the petitioner, cannot be accepted. 1994 Act is fully applicable in the post of Lecturers in a college and its full effect shall be given but while applying the reservation, collegewise subjectwise unit is to be followed in view of the law laid down by the Apex Court in the above mentioned judgments.

59. A very recent judgment of the Apex Court in the case of *State of Karnataka and Others Vs. K. Govindappa and Another*, has again upheld the subject-wise applicability of reservation. It is necessary to note the facts in detail and ratio of the said case. The Apex Court was considering the applicability of reservation in an aided private college. The respondents in appeal was appointed as Lecturer in history in an aided private college owned and managed by a society. The college applied for approval of the appointment of the respondent which was refused by the State of Karnataka on the ground that appointment has been made in violation of the roster policy and the respondent was appointed on a post which was reserved for Scheduled Castes candidate. The college claimed there was single post of Lecturer in History hence, reservation would not apply. The State Government rejected the review petition filed by respondent, writ petition was filed by the respondent before the High Court. The State of Karnataka contended that even though the management was running only one college, it had different disciplines for which there were several Lecturers. The college had to maintain roster for the purpose of making appointments after taking into consideration the entire cadre of Lecturers irrespective of the subjects. It is useful to quote paragraph 4 of the judgment which has noted the contentions, which is as follows:

Contesting the claim of respondent No. 1 the appellants contended before the writ court that even though the Management was running only one college, it

had different disciplines for which there were several Lecturers. It was contended that the college had to maintain the Roster for the purpose of making appointments after taking into consideration the entire cadre of Lecturers, irrespective of subjects. It was also contended that in the college in question there were six posts of Lecturers and hence, post of Lecturer in History could not be as a single post.

60. Learned single Judge upheld the claim of the respondents and held that reservation policy would not apply to the post of Lecturers. The matter was taken ? up in Division Bench. The Division Bench confirmed the view of the learned single Judge. State took up the matter in Apex Court. The submissions of the learned Counsel for the State of Karnataka as noted by the Apex Court in paragraph Nos. 9, 10, 11 and 16 are quoted below:

9. Mr. Hegde urged that the posts in the different were meant to be filled by Lecturers who formed a cadre and each discipline which consisted of a single post of Lecturer did not constitute a separate cadre in respect of the said discipline as otherwise without applying the principle of roster rotation, the said single post would always have to be filled up from amongst general candidates and a Scheduled Caste 6r Scheduled Tribe candidate would always have to compete against general candidate for such purpose would destroy and/or negate the very object and purpose of Article 16(4) of the Constitution.

10. Mr. Hegde submitted that all the posts of Lecturers, irrespective of the subjects taught, were treated by the college as one cadre for purpose of maintaining the roster system for reservation of posts. However, by applying the ratio in Chakradhar Paswan case (supra), the High Court had quite erroneously quashed the appointment of the respondent No. 1 as Lecturer in History which, according to the roster, had been reserved for a Scheduled Caste candidate.

11. It was next urged by Mr. Hegde that the expression "cadre" could not be equated with the expression "post" as defined in Fundamental Rules 9 and 4, nor could the expression "cadre" be understood as synonymous to the expression "service". Mr. Hegde submitted that "cadre" as defined in the Fundamental Rules refers to the strength of a service and has no concern with individual posts in a particular discipline which all form part of one cadre, particularly when all the posts in the cadre of Lecturer pertained to the same institution.

16. Mr. Hegde submitted that since the posts of Lecturers in the college constituted one single cadre, only the roster principle would apply, as had been made applicable in the instant case and the High Court had erred in treating each discipline as a separate unit for the purpose of reservation. It was submitted that the impugned order passed by the learned single Judge, as also the Division Bench, were liable to be set aside.

61. The submission of learned Counsel for the State was refuted and it was contended that Lecturers in History being a single post, the question of reservation would not arise. The Apex Court after considering the rival

submissions, laid down that each discipline which consists of single post have to be dealt with as a separate cadre. Following was laid down in paragraphs 20, 22 and 24:

20. We have carefully " considered the submissions made on behalf of the respective parties and the directions cited by learned Counsel in support thereof. In dealing with the issue raised in this appeal, it has to be kept in mind that some of the earlier decision in Madhav case, in Suresh Chandra v. J. B. Agarwal and Post Graduate Institute of Medical Education and Research v. K. L. Narsimhan, in which reservation by rotation even in respect of a single post had been approved, was subsequently, overruled in the Constitution Bench decision in Post Graduate Institute of Medical Education and Research v. Faculty Assn. And it was held that in no case could reservation be made applicable in respect of a single post. The Constitution Bench approved the views expressed in Chakradhar Paswan (Dr.) case following those expressed by the earlier Constitution Bench in Arati Ray Choudhury case. In view of the above, the only question which we are called upon to consider is whether the High Court was right in treating the post of Lecturer in History in respondent 2 college as a single isolated post forming a separate cadre in itself and no part of the cadre of Lecturers comprising all the different disciplines taught in the college.

22. While there can be no difference of opinion that the expression "cadre", "post" and "service" cannot be equated with each other, at the same time the submission that single and isolated posts in respect of different disciplines cannot exist as a separate cadre cannot be accepted. In order to apply the rule of reservation within a cadre, there has to be plurality of posts. Since there is no scope of interchangeability of posts in the different disciplines, each single post in a particular discipline has to be treated as a single post for the purpose of reservation within the meaning of Article 16(4) of the Constitution of India. In the absence of duality of posts, if the rule of reservation is to be applied, it will offend the constitutional bar against 100% reservation as envisaged in Article 16(1) of the Constitution.

24. In our view, the present case falls within the category of single isolated posts within a cadre in respect whereof the rule of reservation is inapplicable and the said principle has been correctly applied by the High Court in the facts of this case. As indicated by the High Court, each discipline which consisted of a single post will have to be dealt with as a separate cadre for the said discipline and in view of the settled law that there can be no reservation in respect of a single post, the appointment of respondent No. 1 cannot be faulted. This is particularly so having regard to the fact that the several disciplines are confined to one college alone. This is what distinguishes the facts of this case from those of Arati Ray Choudhury case in which the rule of rotation could be applied on account of the fact that two posts of headmistress were available in two colleges run by the same management. Moreover, in Chakradhar Paswan (Dr.) case on which reliance was placed by the High Court it was noticed that while upholding the rule of

rotation the Constitution Bench in Arati Ray Choudhury case did not support reservation in a single cadre post.

62. The ratio laid down in the above case is that to apply rules of reservation there has to be plurality of posts and since there is no scope of inter changeability of post in different disciplines, each single post in a particular discipline has to be treated as a single post for the purpose of reservation within the meaning of Article 16(4) of the Constitution of India.

63. Learned Additional Advocate General, Sri Jaideep Mathur submits that the above judgment of the Apex Court at best be confined to single cadre post in different subjects in a college. The judgment of the Apex Court clearly knocks down the submission that all the post in one college in different subjects have to be clubbed together. The question of applicability of reservation in different subjects presupposes that all the posts cannot be clubbed together. The above judgment also thus, clearly supports the view that in a degree college/post graduate college, the reservation has to be applied subjectwise. If in a particular subject, there are plurality of posts, reservation and roster shall come into play. But all the post of Lecturers in one college cannot be clubbed together for applying the reservation and roster. As observed above neither 1980 Act nor 1973 Act give any indication how the 1994 Act is to be applied with regard to selection and appointment of teachers. However, there is some indication available in the 1973 Act and action taken thereunder with regard to applicability of reservation for Scheduled Castes, Schedule Tribes and Other Backward Classes regarding admission in various course of study in the University. Section 28 (5) provides for reservation of seats for admissions in any course of study in University, Institute, constituent college, affiliated college or associated college. Section 28 (5) of 1973 Act is quoted as below:

28 (5) Notwithstanding anything contained in any other provision of this Act,-

(a) reservation of seats for admission in any course of study in University, Institute, constituent college, affiliated college or associated college for the students belonging to the Scheduled Castes, Schedule Tribes and Other Backward Classes of citizens may be made and regulated by such orders as the State Government may, by notification, make in that behalf:

Provided that reservation under this clause shall not exceed fifty per cent of the total number of seats in any course of study:

Provided that reservation under this clause shall not apply in the case of an institution established and administered by minorities referred to in Clause (1) of Article 30 of the Constitution:

Provided also that the reservation under this clause shall not apply to the category of Other Backward Classes of citizens specified in Schedule II to the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Schedule Tribes" and Other Backward Classes) Act, 1994,-

(b) admission to medical and engineering colleges and to courses of instruction for degrees in education and Ayurvedic or Unani systems of medicine (including the number of students to be admitted), shall subject to Clause (a), be regulated by such orders (which if necessary may be with retrospective effect, but not effective prior to January 1, 1979) as the State Government may by notification, make in that behalf:

Provided that no order regulating admission under this clause shall be inconsistent with the rights of minorities in the matter of establishing and administering educational institutions of their choice ;

(c) In making an order under Clause (a), the State Government may direct that any person who wilfully acts in a manner intended to contravene, or defeat the purposes of the order shall be punishable with imprisonment for a term not exceeding three months or with fine not exceeding one thousand rupees, or with both, as may be specified in the order.

64. It is noted that the above policy is also applicable with regard to associated/affiliated colleges. An order has been issued by the State Government namely; U.P. State Universities (Reservation in Admission for Scheduled Castes, Schedule Tribes and Other Backward Classes) Order, 1994 in exercise of power u/s 28 (5) of the 1973 Act. Order II of the said order provides for reserving different percentage of seats in any course of study in an university, institute, constituent colleges, affiliated colleges or associated colleges. Order II is quoted as follows:

2. (1) Subject to the provisions of Sub-section (5) of Section 28 of the Uttar Pradesh State Universities Act, 1973, with effect from the academic Session of 1994-95, following percentage of seats in any course of study in a University, Institute, Constituent College, Affiliated College or Associated College shall be reserved for admission for the candidates belonging to the Scheduled Castes, Schedule Tribes and Other Backward Classes of citizens, namely ;

----- Scheduled Castes Twenty-one per cent
Schedule Tribes Two per cent
Other Backward Classes of citizens Twenty Seven per cent -----

Provided that where any University has provided for reservation in admissions in favour of any other category of candidates than those referred to above, the candidate selected for admission on the basis of such reservation shall be placed in the appropriate category to which he belongs. For example, if a candidate, selected for admission to any course of study on the basis of reservation in favour of sports person, belongs to the Scheduled Castes, Schedule Tribes and Other Backward Classes, he will be placed in the respective category to which he belongs by making necessary adjustments and similarly, if he belongs to general category, he will be placed in that category after making necessary adjustment:

Provided further that the seats, If any, reserved under any other law for the time being in force, or under any order of the Government of India, for the students

belonging to any other State, shall not be included in the total number of seats for the purpose of computing the percentages under this paragraph.

65. The relevant word which has been used both in Section 28 (5) and Order, 1994 is percentage of reservation of seats in any course of study. Thus, the reservation contemplated in admission of the students relates to various courses of study. Each course of study has to be treated separate unit for applying the percentage of reservation. There is no indication of clubbing various course of studies for applying the reservation in admission. Although the manner of applying reservation in admission of the students has no direct bearing with regard to method of applying reservation and roster on various posts of lecturers in a college but at least said statutory provision gives an indication that different course of studies have been accepted as a unit for applicability of reservation in admission.

66. In view of the foregoing discussions, we are of the opinion that different posts of Lecturers in one college cannot be clubbed together for applying the reservation and roster. The reservation and roster as per 1994 Act has to be applied subjectwise in a college. Thus, the same methodology for applying the reservation and roster has to be adopted in a degree college/post graduate college which is applied in respect of university to which the college is affiliated. With regard to submission of learned Counsel on the basis of the Government order dated 1.8.2003, suffice it to say that learned Additional Advocate General has contended that the said Government order was issued with regard to applicability of principles of reservation in university only and the same is not applicable with regard to reservation in degree college/post graduate college, we need not further consider the submission based on the Government order dated 1.8.2003. Thus, in our considered opinion the reservation and roster in a college which is treated to be a unit for applicability of reservation and roster has to be applied subjectwise. The Government order dated 1.8.2003 also came for consideration before Division Bench of this Court in the case of Dr. Durga Prasad Yadav and Ors. v. State of U.P. and Ors. (supra). The Division Bench of our Court found the Government order dated 1.8.2003 directly in conflict with the pronouncement of the Apex Court. Following was held by the Division Bench in the aforesaid case:

After hearing learned Counsel for the petitioners and the learned Counsel appearing for the State and the University, we find that Government order dated 1st August, 2003 and consequent advertisement, in respect of post of Readers and Lecturers is in direct conflict with the judgment in Dr. Dina Nath Shukla's case, which was departed only with regard to single post of Professor in M. C. Chattopadhyaya's case....

67. As noticed above, the Lecturer in different subjects required to possess different qualifications as provided by the Statute of the University and the posts are not interchangeable. Different subjects in a college are in a different disciplines and post in a college is created subjectwise. Thus, it is held that

neither all the posts of one subject in different colleges can be clubbed together for applying the rules of reservation nor all the post of Lecturers in one college can be grouped together for applying the reservation. The reservation according to 1994 Act and roster thereunder, is to be applied collegewise and subject-wise.

68. What is the minimum number of posts in a cadre for applicability of roster issued under Sub-section (5) of Section 3 of 1994 Act? The question No. 7 relates to the minimum number of posts in a cadre required for applicability of 100 points roster issued by the State Government in exercise of power under Sub-section (5) of Section 3 of 1994 Act.

69. As noticed above by earlier order of this Court dated 28.11.2007 passed in Writ Petition No. 48149 of 2003, Secretary, Higher Education was directed to file his affidavit disclosing all material facts and the manner in which the State proposed to implement the Reservation Act qua the post of Lecturers in a recognised and aided Degree College. In compliance of the order of this Court dated 28.11.2007, the Principal Secretary of Higher Education has filed his affidavit dated 28.3.2008. The stand of the State as taken in the aforesaid affidavit was to the effect that "roster is applied on consolidated vacancies subject-wise in continuation." As held by us, while considering the question Nos. 3, 4 and 5 that roster is not to apply on consolidated vacancies subjectwise in continuation rather it has to be applied collegewise, subjectwise. Alongwith counter-affidavit dated 17.10.2005, the State has brought on record, the details received from different colleges of the State regarding number of sanctioned posts, number of Lecturers working, number of persons working from General Category, Scheduled Castes, Schedule Tribes and Other Backward Classes category and the details of the vacancies which occurred in the college. For example taking details of the first college mentioned in Annexure-3 to the counter-affidavit, i.e., Meerut College, Meerut affiliated to Chaudhary Charan Singh Vishwavidyalaya, Meerut at Item No. 1 is the post of Lecturer Chemistry, which is having sanctioned strength of 26. In subject of Urdu, there are only three sanctioned vacancies. Further, in the subject of physical education there are three vacancies, one teacher was working from General Category candidate and two posts are shown to be vacant. For applying the roster for finding out the reserved points, the question necessarily has arisen as to how the 100 points roster issued under Sub-section (3) of Section 5 shall be applied, when there is only three vacancies in a cadre. It has thus, become necessary to look into this issue and to find out as to how roster shall be applied, while determining the reserved points in subjects where the cadre strength is one, two, three or more. The next college mentioned in Annexure-3 is N. A. S. College, Meerut. The first subject is mathematics, which has five sanctioned strength. There is history and sociology which has four sanctioned strength. In Sanskrit, Art there are only three sanctioned posts, in Statistics and Physical Education there are only one sanctioned post. In foregoing discussions, we have already found that when there is only one post in a cadre, the said post cannot be held to be reserved and solitary post in a cadre has always to be treated as unreserved. This view has

been reiterated by the Constitution Bench of Apex Court in the case of Post Graduate Institute of Medical Education (*supra*). Thus, there cannot be any difficulty with regard to single post in a cadre, which position is now well-settled. The question thus, remains when there is more than one post in a cadre.

70. The answer to the above issue has to be found out in the provisions of 1994 Act, which has been enacted to provide reservation in Public Services and Posts in favour of Scheduled Castes, Schedule Tribes and Other Backward Class citizens. Section 3 (1) mandates that "there shall be reserved at the stage of direct recruitment, the following percentage of vacancies..." Different percentage of vacancies for backward class have been mentioned in Sub-section (1) of Section 3. The Sub-section (1) next mentions that "...recruitment are to be made in accordance with the roster referred to in Sub-section (5). Sub-section (5) of Section 3 provides that : "The State Government shall for applying the reservation under Sub-section (1), by a notified order, issue a roster comprising the total cadre strength of the public service or post indicating therein the reserve points...." Thus, the roster issued under Sub-section (5) is for applying the reservation under Sub-section (1). A reading of provisions of Section 3 makes it clear that object and purpose of the provisions is to provide reservation percentage for the vacancies of backward classes, which can be said to be substantive provision and the roster issued under Sub-section (5) is the object to achieve the main purpose of the Act. Roster thus, has to subserve and is to comply the percentage of reservation as mentioned in Sub-section (1) of Section 3. Different percentage has been provided for in Sub-section (1) of Section 3, i.e., 21% for Scheduled Castes, 2% Schedule Tribes and 27% for Other Backward Classes. There is maximum ceiling of total reservation, which may be provided under Article 16(4) of the Constitution of India, i.e., 50%. The reservation to different classes has a definite percentage and 50% is the ceiling for total reservation under Article 16(4) of the Constitution of India. It goes without saying that different percentage for different classes have been prescribed. The reservation has to remain both within the percentage as prescribed under Sub-section (1) of Section 3 as well as 50% ceiling has now been laid down by the Constitution Bench judgment of this Court in *Indra Sawhney*" case (*supra*). For illustrating further, if we take an example of two posts cadre. (In Annexure-3 to the counter-affidavit, there are several subjects which have only two sanctioned posts), the details of Deonagari Mahavidyalaya, Meerut mentions at Item No. 1 (five) posts of statistics, which has only two sanctioned posts in Raghunath Girls Inter College, Meerut at Item No. 32, the subject of Geography has only two sanctioned posts. Whether out of two posts, one post can be reserved either for Scheduled Castes or Other Backward Class, is the question to be answered. The notification issued by the State Government in exercise of power under Sub-section (5) of Section 3 provides following roster which is 100 points roster. The first ten points at this stage which are as follows:

1. Scheduled Castes. 2. Unreserved. 3. Other Backward Class. 4. Unreserved.
5. Scheduled Castes. 6. Unreserved. 7. Other Backward Class. 8. Unreserved.

9. Other Backward Class. 10. Unreserved. ... 100. Unreserved.

71. Although first point is reserved for Scheduled Castes but there is no dispute that if there is a single post cadre that has to be treated to be unreserved and in that context, the roster will be inapplicable. Now taking the example of two posts cadre, if out of 2 posts, even one post is reserved for Scheduled Castes of Other Backward Class, there will be reservation of 50% either for Scheduled Castes or Other Backward Class. The reservation for Scheduled Castes and Other Backward Class being respectively 21% and 27%, if one post is filled by Scheduled Castes, then 50% posts have to be treated to be filled by Scheduled Castes hence, out of 2 posts cadre one post can neither be reserved for Scheduled Castes or Other Backward Classes since in either case, the reservation for that category be 50% which is contrary to Sub-section (1) of Section 3. A Division Bench of our Court has occasion to consider the applicability of reservation when there are only two posts in a cadre in Writ Petition No. 1208 (S/B) of 2008, Dharam Pal Singh Chauhan and Anr. v. State of U.P. and Ors. decided on 19.11.2008. In the Irrigation Department there were two posts of Engineers-in-Chief. The State took a decision to fill up one post of Engineer-in-Chief (Designing and Planning) from the candidate belonging to Scheduled Castes category. The promotion of Scheduled Castes category on second post was challenged in the writ petition by two candidates claiming that second post cannot be reserved for Scheduled Castes category candidate. The submission raised on behalf of the petitioner has been noted in paragraph 3 of the judgment, which is quoted herein below:

According to the submission of Sri S. K. Kalia learned senior counsel appeared for the petitioners, since there are only two posts of the Engineer-in-Chief, and though, one is occupied by a candidate of General category, the other cannot be reserved for the Scheduled Caste category on the ground that reservation quota of the Scheduled Castes category is 21% and in case one post out of two, is provided to the candidate of Scheduled Castes category, the reservation quota shall travel beyond the out limit of 21% provided by the Statute.

72. Learned Advocate General, who defended the State action contended before the Bench that even if out of 2 posts, one post is reserved for Scheduled Castes, the reservation is well within 50%. The said contention was rejected by the Bench. Following was laid down in paragraph 56:

Learned Advocate General submitted that by issuing the Government order dated 26.6.2002, the first point has been given to Scheduled Castes and second point has been given to the general category and accordingly, even if there are two posts, one post can be reserved for S.C. candidates as it will be within the outer limit of 50% provided by Hon'ble Supreme Court through various pronouncements (supra). The submission of the learned Counsel seems to be misconceived. While reading Sub-section (5) of Section 3, we cannot overlook Sub-section (1) of Section 3. Moreover, Sub-section (5) itself says that the Government shall "for applying the reservation under Sub-section (1) by notified order, issue a roster, "meaning thereby Sub-section (5) has been inserted with

reference to Sub-section (1) of Section 3. The aims and object of 1994 Act also starts by reference to post, means the total number of posts available in a cadre and from such available post certain percentage is reserved for Scheduled Castes and Scheduled Tribes and O.B.C. category candidates in view of the provisions contained in Sub-section (1) of Section 3.

73. The Division Bench held that reservation for Scheduled Castes which is prescribed as 21% u/s 3 (1) of 1994 Act, cannot exceed. Considering the roster points as prescribed by notification dated 25.6.2002, the Division Bench held that following the Supreme Court judgment in R. S. Garg case (supra) that in the event of conflict between reservation and roster, the former shall prevail. Paragraphs 86, 94 and 121 being relevant are quoted below:

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

94. Moreover, since the reserved quota of Scheduled Castes is 21%, hence whether it is direct recruitment or promotion, State has no right to travel beyond that under the garb of "roster". It is settled law that what cannot be done directly, it cannot be done indirectly, vide *Pure Helium India Pvt. Ltd. Vs. Oil and Natural Gas Commission*, Abuse of Power and consequences,

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

(1) In the event of conflict between the quota of reservation and roster, the former shall prevail over the later, as held by Hon''ble Supreme Court in the case of R. S. Garg (supra). While applying quota for reservation and roster, the State have to confine the outer limit of reservation provided by 1994 Act for S.C., S.T. and O.B.C. category.

(2) The extent of reservation provided by Sub-section (1) of Section 3 of 1994 Act, is mandatory. In the matter of promotion or recruitment reservation cannot exceed the outer limit of 21%, 2% and 27% for S.C., S.T. and O.B.C.

(3) Under the garb of Sub-section (5) while applying roster or Sub-section (7) of Section 3 of 1994 Act, the State cannot travel beyond the outer limit of reservation provided by Sub-section (1) of Section 3 of 1994 Act. Meaning thereby, even while applying roster for S.C., S.T. and O.B.C, the outer limit of 21%, 2% or 27% should be adhered to.

(4) The outer limit of 50% provided by Article 16(4B) of the Constitution or by Hon''ble Supreme Court right from M. R. Balaji's case (supra) till date, includes the reservation for all the categories or classes of employees. In case reservation is provided only for one category like in the present case, 21% to S.C. category,

then it does not mean that State has right to enhance reservation upto 50% suo motu exceeding the statutory quota provided by the Act and Statute. 50% rider is the outer limit permissible for all categories and in case under the Act or Statutes lesser percentage of reservation has been provided to any class, then that will be the outer limit for the respective classes as in the present case, reservation for S.C. is 21% and it cannot be enhanced to 50%.

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

(6) Any reservation made exceeding the outer limit provided under the 1994 Act or the Statutes, shall be deemed to be excessive reservation and the reservation so made, may be struck down by the Court as it would amount to derogation of constitutional requirement as held in M. Nagraj's case (supra). In the present case, since the sanctioned strength of the post of Engineer-in-Chief is two and the quota of Scheduled Castes is 21% under Sub-section (1) of Section 3 of the 1994 Act, one out of two posts cannot be reserved for Scheduled Caste.

74. Now example of 3 posts cadre is taken. If in 3 cadre posts, one post is reserved for Scheduled Castes that will be 33% reservation or one post is reserved for Other Backward Class that shall be again 33% reservation which is against the percentage prescribed under Sub-section (1) of Section 3. Now, example of 4 cadre posts is taken. With regard to 4 posts in one stream recently, a Division Bench of this Court has considered the question of applicability of reservation in the case of Smt. Pholpati Devi Vs. Smt. Asha Jaisawal and Others, The said case was with regard to intermediate college, where there were seven posts of Lecturers. The Division Bench took the view that 50% posts, which were reserved for promotion shall be at best 4 out of 7 and out of 4 posts no post can be reserved for Scheduled Castes since reservation of Scheduled Castes is only 21%. The Division Bench laid down that even when there are 4 posts one post cannot be reserved for Scheduled Castes since reservation of one post shall amount to 25% reservation which shall be exceeding the prescribed 21% reservation u/s 3 of 1994 Act. Following was laid down in paragraphs 6, 7 and 8:

6. However, there is another aspect of the matter which also goes to the root of the case that in any case, the appointment of respondent No. 1 treating the vacancy reserved for Scheduled Castes could not have been made and, therefore, the ultimate conclusion drawn by Hon''ble single Judge that the writ petition has to be allowed would have to be upheld.

7. In the case in hand, there were only seven sanctioned posts of Lecturers wherein 50% were to be filled in by direct recruitment and 50% by promotion.

Therefore, at best four posts would have been availed for one source of recruitment, i.e., direct recruitment or promotion. The reservation for Scheduled Castes is 21%. If we treat one of the vacancies in either of the source of recruitment in the institution as reserved for Scheduled Castes, it would be more than 21%. The Apex Court in *R.S. Garg Vs. State of U.P. and Others*, has held as under:

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

8. Thus, it is clear that in no manner a vacancy can be filled in which would exceed the prescribed limit of reservation as the extent of reservation is maximum and it cannot be exceeded thereto. In the case in hand, one of the vacancy if treated to be reserved for Scheduled Castes candidates out of four vacancies, the reservation would come to 25% which would exceed the maximum extent of reservation prescribed for Scheduled Castes candidates under the Statute. That being so, such reservation could not have been upheld and the appointment and promotion of respondent No. 1 treating one post of the Lecturer reserved for Scheduled Castes in promotion quota, therefore, was illegal and has rightly been set aside by Hon'ble single Judge.

75. In 4 cadre posts, if one post is reserved for Scheduled Castes then reservation for Scheduled Castes be 25% which is impermissible. However, if one post is treated to be reserved for Other Backward Class then reservation for Other Backward Class shall be only 25%, i.e., within 27% as prescribed under Sub-section (1) of Section 3. Thus, out of four posts, one post can be validly reserved for Other Backward Class. Now an example of five posts cadre is taken. For five posts cadre, if one post is reserved for Scheduled Castes that will be 20% and will be within 21% as prescribed under Sub-section (1) of Section 3. One post for Other Backward Class can also be very well reserved out of five cadre posts since it shall be within the 27% as prescribed. Thus, for giving reservation to Scheduled Castes and Other Backward Class, it is clear that there has to be five posts in a cadre. In the roster point, the first point which comes for Schedule Tribes is at serial No. 47. Thus, even according to roster, Schedule Tribes can get reservation at the 47th post. The above view of ours is fully supported by the judgment of the Supreme Court in the case *R.S. Garg Vs. State of U.P. and Others*. The facts of *R. S. Garg* case needs to be noted in some detail. In the aforesaid judgment, both the appellant and respondents were working as Assistant Directors. The appellant having been appointed in the year 1972 whereas the third respondent was appointed on 13.1.1987 on ad hoc basis. There were six posts of Deputy Director of Factories in the State of U.P., out of

which four posts were designated of Deputy Director of Factories (Administration), one as Deputy Director of Factories (Chemical) and one Deputy Director of Factories (Engineering). The post of Assistant Director of Factories was the feeder post. The Government converted the post of Deputy Director Factories (Chemical) to Dy. Director Factories (Administration). The third respondents was promoted as Deputy Director of Factories (Administration) as a reserved category candidate, which promotion was challenged in the Supreme Court. One of the grounds of challenge was that reservation to the post of Scheduled Castes was illegal and unjust by reason thereof percentage of reservation for promotion cannot be raised from 21 to 33%. The contention raised before the Apex Court has been noted in paragraph 6 of the judgment to the following effect:

6. The said writ petition had been dismissed by the impugned Judgment. The contentions raised before the High Court as also before us, on behalf of the appellant are:

(i) The 3rd respondent was illegally appointed as Assistant Director of Factories as his services were regularized without referring the matter to the Public Service Commission as was required by Rule 5 (iii) of the 1992 Rules;

(ii) The order of promotion passed in favour of the " 3rd respondent was mala fide;

(iii) The purported conversion of the post of Deputy Director of Factories (Chemical) to Deputy Director of Factories (Administration) being contrary to the 1992 Rules and having been done with a view to favour the 3rd respondent, was illegal ;

(iv) The 3rd respondent was not eligible to be promoted, as he did not complete 5 years" substantive service on the date of selection, i.e., in the year 1997 in terms of Rule 5 (iii) ;

(v) Reservation to the post in favour of a Scheduled Caste was illegal and unjust by reason thereof the percentage of reservation in promotion would be raised from 21% to 33%.

(vi) The post of Deputy Director of Factories (Administration) has already been occupied by a candidate belonging to the reserved category. namely Shri Ghanshyam Singh.

76. The Apex Court also noticed the roster issued in 1994 Act and noticed that out of 6 posts, first and fourth posts shown to be reserved for Scheduled Castes. The Apex Court clearly held that such reservation was impermissible. The Court further held that reservation could not have exceeded 21% for Scheduled Castes. Following was laid down in paragraphs 34 and 40:

34. In terms of the 1994 Act, the reservation was to be confined to 21%. There were 6 posts. If the roster was to be followed, 2 posts would be reserved for the

Scheduled Caste candidates, which is impermissible.

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

The Apex Court thus, held that the promotion given to third respondents was not in accordance with law. The appeal of the General Category candidate was allowed.

77. In the above judgment, the Apex Court has clearly held that in the event of conflict between percentage of reservation as prescribed u/s 3 of the 1994 Act and roster issued under Sub-section (5) of Section 3, the percentage of roster shall prevail. Another judgment, which is relevant in the present context is the judgment of the Supreme Court in the case of State of U.P. and Ors. v. Pawan Kumar Tiwari and Ors. (2005) 2 SCC 10 : 2005 (1) AWC 363 (SC). Pawan Kumar Tiwari, the respondent in the appeal had appeared in the selection for the post of Civil Judge (Junior Division) in U.P. Judicial Service. In the General Category candidates his merit position was 47. There were only 93 posts advertised. The respondent was not selected and 46 General Category candidates were selected. Rest 47 seats were distributed amongst Scheduled Castes 20 posts, Other Backward Class 26 posts, Schedule Tribes 1 post. The writ petition was filed by Pawan Kumar Tiwari, which was allowed, against which State of U.P. filed an appeal. The Apex Court affirmed the judgment of the High Court and took a view that reservation for Scheduled Castes, Other Backward Classes and Schedule Tribes shall not exceed 50% and since 47 posts were given to the reserved category candidates out of 93, which was more than 50%. Among General Category candidate 47 candidates ought to have been appointed. Paragraphs 2, 8 and 9 of the judgment of the Apex Court is quoted herein below:

2. The percentages of reservation, as applicable and as was actually applied, are set out in the following table:

					Category	Percentage
Percentage	Number	of	(prescribed)	worked	posts out to	reserved
					General	50% 46.50 46
					Scheduled Castes	21%
19.53	20				Other Backward	
27%	25.11	26			Classes	
					Schedule Tribes	2% 1.86 1

8. It was submitted by the learned Counsel for the appellants that if this principle of rounding off is to be applied then the percentage of reservation in Schedule Tribe category would come to 2 by rounding off 1.86, to the nearest higher

value, and in that case a candidate from Schedule Tribe category and not the respondent would be entitled to appointment. We cannot agree. No candidate in Schedule Tribe category has chosen to lay challenge to the selection. We are also not aware if there is any Schedule Tribe category candidate available and qualified for appointment consequent upon his having participated in the process of selection. This plea of the appellants is without any foundation and hence does not deserve to be taken note of.

9. There is yet another reason why the judgment of the High Court has to be maintained. The total number of vacancies was 93. Consequent upon the allocation of reservation and calculation done by the appellants, the number of reserved seats would be 47, leaving only 46 available for general category candidates. Meaning thereby, the reservation would exceed 50% which would be unconstitutional. The total number of reserved seats could not have been more than 46 out of 93.

The Supreme Court in the above case thus, laid down that reservation could not exceed 50%. One more principle which was noticed in the above judgment was principle of rounding off. It is necessary to look into the above principles and examine with regard to applicability of above principle with regard to application of 1994 Act.

78. The principles of rounding off is a principle for rounding a fraction to a nearest whole. The principle has been adopted in those cases, where something cannot be expressed in fraction. The principle of rounding off has been adopted while computing the votes, while computing the posts or vacancies for allocating the different categories. The issue can be looked into from another angle. Let us take an example of a cadre having two posts only. As observed above, in a cadre having two posts, no vacancy can be reserved for Scheduled Castes, Scheduled Tribes or Other Backward Classes. Since reserving one vacancy in favour of either Scheduled Castes, Scheduled Tribes or Other Backward Classes, there shall be reservation for that category upto 50%, which is not permissible under Sub-section (1) of Section 3. It can further be contended on behalf of reserved category candidates that even when there are two posts 27% of 2 posts will be .54% which can be rounded off to one. Thus, one post can be reserved for Other Backward Classes even in cadre of two posts. The contention appears to be attractive but on a closer scrutiny, it does not commend us. There cannot be a dispute that principle of rounding off can be applicable with regard to computation of vacancies for reserved for Scheduled Castes, Scheduled Tribes and Other Backward Classes. We had occasion to consider the principle of rounding off in another context in the context of percentage of votes in the case of North Central Railway Mens Union, Allahabad v. North Central Railway Employees Sangh 2008 (7) ADJ 390. Following was laid down in paragraph 15 of the aforesaid judgment:

The principle of rounding off a fraction of a number to a whole number had been applied by the Courts and in some cases have also been provided in statutory

Rules under certain circumstances. There are certain factors which cannot be expressed in fraction hence, the Rule of rounding off has been applied as a Rule of necessity. The most common example is with regard to number of seats or posts when are required to be filled by different categories whose percentage is fixed like Rule of reservation for filling posts by candidates of Scheduled Castes, Scheduled Tribes, Other Backward Class and other categories. Certain percentage of seats are required to be filled up by Scheduled Castes candidates for example in the State of U.P. by U.P. Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Class) Act, 1994 provides that 21% posts are to be reserved at the stage of direct recruitment for the Scheduled Castes 2%, for Schedule Tribes 27% for Other Backward Class. The percentage of reservation qua the number of posts is often expressed in fraction. For example, if the posts are ten, 21% will be 2.1 and 27% will be 2.7, applying the principle of rounding off 2.1 shall be treated as 2 and 2.7 shall be treated as 3. This is because the number of posts cannot be expressed in fraction and as a necessity, it has to be expressed in whole number. Contrary to above is the case with admission to a course or for calculation of percentage of the minimum marks in an examination required under rule or advertisement. Percentage of marks can be expressed in fraction hence, the rule of rounding off has not been held to be applicable with regard to percentage of marks. The judgment of this Court in the case of Vani Pati Tripathi v. Director General, Medical Education and Training, Jawahar Bhawan and Ors. 2003 (1) UPLBEC 427 : 2002 (5) AWC 4226, of which one of us (Justice Ashok Bhushan) was a member, had considered the principles and laid down following in paragraphs 6 and 7:

6. The second instance where the fraction is rounded up are the cases where seats have to be determined according to percentage of reservation for appointment or for admission in an educational institution. When number of seats come into fraction, the said fraction is rounded up according to the prescription of Rule or Statute. In those cases Rule or Statute always provides that fraction to be rounded upto whole or a fraction upto some extent be ignored. The above principle has been applied since a seat or a post cannot be expressed in a fraction because seats and posts are always in whole number. For a competitive examination eligibility and the selection on the basis of merit sometimes depend on one mark. One mark when expressed in percentage may generally come in fraction but the said fraction cannot be ignored nor it can be said that the said fraction is insignificant.

7. Learned Counsel for the appellant placed reliance on a single Judge judgment of this Court in Rajan Seth v. State of U.P. and Ors. (1992) 1 UPLBEC 636 : 1992 (2) AWC 1189. The aforesaid case arose out of admission in M.B.B.S. in Medical College, Jhansi. The writ petitioner made an application to the Principal, Medical College, Kanpur seeking his transfer to Medical College, Kanpur. From the facts of the case it appears that 5% vacancies were to be filled up by transfer. Since 5% of 191 seats come to 9.55, for working out the number of seats, the fraction less

than .5 has to be ignored and the figure has to be rounded upto make 10 seats. In the facts and circumstances of the aforesaid case this Court held that 9.55 should be rounded upto 10 seats. The aforesaid decision does not help the appellant in the present case. As observed above rounding up principle has been applied while determining the quota of seats or while determining the majority of votes. The said case relates to seats. Seats and posts cannot be expressed in fraction, hence, in this case fraction is rounded up but marks obtained by candidate in an examination can be expressed in fraction and when a particular merit is required as eligibility the principle of rounding up of less marks to the next higher percentage cannot be accepted. There is no principle that percentage of marks can only be expressed in round figure. Counsel for the appellant could not able to show any authority or Rule in support of his submission.

79. Thus, although principles of rounding off is applicable while computing the percentage of vacancies for allocation to reserve category candidates but such rounding off is to be conform to the statutory requirement of percentage of reservation as contained in Sub-section (3) of Section 1. In case rounding off exceed the percentage of reservation, the said rounding off cannot be resorted to. The percentage of reservation being fixed by Sub-section (3) of Section 1, any method to give effect to said percentage including the application of roster has to be subservient to the percentage of reservation as provided under Sub-section (1) of Section 3. The Apex Court in R. S. Garg's case (supra) has categorically laid down that in event there is conflict between percentage provided u/s 3 (1) and roster provided u/s 3 (5), the percentage is to prevail.

80. The judgment of the Apex Court in State of U.P. and Anr. v. Pawan Kumar , Tiwari and Ors. (supra) also supports our view that rounding off cannot be resorted when reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes exceeds the percentage as provided u/s 3 (1). In paragraph 9 of the judgment, the said submission that the percentage worked out for Schedule Tribes comes to 1.86 and should be rounded as 2 was rejected by the Supreme Court holding that accepting the said rounding off, the number of reserved vacancy will exceed 50% ceiling which is unconstitutional hence, the rounding off vacancy of Scheduled Tribes was not approved. Thus, it is held that if vacancies for reserved category candidate comes to in fraction of figure, the same can be rounded off but rounding off can be resorted only when reservation is within permissible limit as provided u/s 3(1).

81. A Full Bench of Bombay High Court had occasion to consider the issue of minimum number of posts in application of 50 points roster in the case of New English High School Association, Nagpur and Anr. v. Baldev and Anr. 2008 (5) ESC 3110. Reference was made to the Full Bench in the Bombay's case questioning the correctness of a Division Bench laying down that permissible reservation of 24% can be applied only on one post out of four such posts. A 50 point roster was issued in the State of Bombay and the percentage of reservation under relevant rules governing the recruitment on the post of Assistant Teacher

was 24% (13% for Scheduled Castes, 7% for Scheduled Tribes and 4% for Denotified Tribes or Notified Tribes). The Full Bench approved the view taken by the Division Bench and has laid down that for giving effect to 24% reservation, there has to be more than three posts in a cadre. Following was laid down in paragraphs 27 and 28:

27. Undoubtedly, the Constitution mandates implementation of reservation policy. However, at the same time, it assures opportunities to all the open class category candidates. The implementation of the reservation policy should not lead to absurd result. The application of reservation percentage has to be with reference to the number of posts. It is always to be remembered that the reservation percentage is to be applied and the 50 point roster is to be followed taking into consideration the total number of posts in a cadre and at the same time care has to be taken that other category candidates are not prejudiced in the sense that the statutory recognised reservation percentage does not exceed while implementing the reservation policy. Undisputedly, the relevant rule requires 24% of reservation out of which 13% for the S.C., 7% for the S. T. and 4% for the D.T./N.T. Considering the 24% reservation, if one applies the 50 point roster, it would result in reservation in excess of the statutorily specified percentage. In a cadre comprising of three posts with 24%. It is settled law that the reservation cannot be allowed to exceed the percentage prescribed for reservation as it would result in injustice to the candidates falling outside the reservation category. Considering the same, we are in respectful agreement with the view expressed by the Division Bench in Sow. Singh's case that 24% reservation can be applicable only in cases where there are minimum of four posts in a cadre and not otherwise.

28. The fall out of the above discussion is that in case the cadre consists of three or less number of posts and the total percentage of reservation is 24%, there cannot be any reservation in such a case and it would be only in case of four posts that one of those will have to be filled in by the reserved category candidate. The applicability of the reservation policy would depend upon the number of posts in a cadre and the percentage of reservation. The 50 point roster can be made applicable only when the applicability thereof would not result in implementation of reservation policy in excess of the percentage statutorily prescribed for the reserved category candidates. The reference and the points formulated above are answered accordingly. The matter now are required to be placed before the regular Bench dealing with the similar matters.

82. One more judgment of the Apex Court needs to be noticed in this context, i.e., in the case of Prabhush Chand Jain v. State of Haryana and Ors., (1996) 8 SCC 105 In the aforesaid case, State of Haryana has laid down reserved points by a roster by Government order dated 9.2.1979 introducing 100 points roster. Two executive letters were issued by the Chief Secretary of the Social Welfare Department and Finance Commissioner observing that wherever there are two posts, the same are not to be filled in by applying the reservation policy. The

Apex Court in that context laid down that unless the State Government has completely given up its policy as enunciated by letter dated 9.2.1979, it was not possible to implement the two letters mentioned above. The above Supreme Court judgment has been noticed by the Full Bench of Bombay High Court and Full Bench has after noticing the facts and ratio laid down that the said decision was not on the point under consideration. It is sufficient to refer to paragraph 25 of the judgment of the Full Bench, which is quoted as follows:

25. In Prabhash Chand Jain's case (supra) the Apex Court had not dealt with the issue about the applicability or roster on consideration of the percentage of reservation. In the said case, Prabhash Chand was relying upon letters dated 27.5.1988 by the Chief Secretary and 8.3.1999 by the Finance Commissioner while contending that those letters amount to amendment to the circular dated 9.2.1979. While rejecting the said contention, the Apex Court had held that:

Unless the State Government completely gives up the policy of reservations, as enunciated in the earlier circular of 9.2.1979, it will not be possible to implement the latter decision. Mr. Rohtagi, learned Counsel appearing for the State Government was pointedly asked by us a question as to whether the Government had given up the policy of reservation enunciated in the circular of 9.2.1979. He fairly conceded that was not the case. However, he contended that when there are two posts, reservation policy enunciated earlier, cannot be implemented. When we pointed out to him that it is possible to implement it, and in fact it is to implement the policy that the roster was introduced, he had no answer. We are a little puzzled as to why the Chief Secretary and the Finance Commissioner should have in their letters in question stated that the reservation policy will not apply when there are only two posts available. It is obvious that none of them has applied his mind either to the roster and the roster points or to the law on the subject.

Evidently, the decision is not on the point under consideration. The decision is on the point that the letters issued by the officers of the Government contrary to the circular disclosing the Government policy on reservation, cannot ipso facto amount to amendment to the Government policy nor on the strength of the said letters, the authorities can ignore to apply the rosters merely because there are two posts. It is pertinent to note that the Apex Court was not dealing with a case where the cadre consisted of two posts. The subject-matter related to two vacancies which had arisen then. In that case, the facts reported by the Apex Court in the judgment reveal that:

The reservation in favour of Scheduled Castes was 20 per cent and that in favour of Backward Classes was 5 per cent. The roster indicted points at which the Scheduled Castes and Backward Class candidates would be given appointment both in direct recruitment and in promotion. We are concerned in the present case with appointments of the Scheduled Castes and Backward Class candidates by promotion to the said post of Deputy Superintendent, which is a Class III post. According to the roster points introduced, the Scheduled Caste candidates

should be appointed at points 4, 8, 14, 18 and so on upto 100 and the Backward Class candidates at points 10, 16, 32 and so on. Between 9.2.1979 and 15.7.1987, candidates all belonging to the General Category were appointed by promotion to the said post in some of the departments ignoring the claims of the Scheduled Caste candidates who ought to have been appointed, as stated above at the relevant roster points. On the other hand, the candidates appointed earlier according to the roster points in some other departments were reverted.

It was in the background of those facts, the Apex Court while explaining the decision in R. K. Sabharwal's case held that:

The Court has then gone on to explain that the word "post" means the position to which the person is to be appointed. The vacancy means a non-occupied post or office. The plain meaning of the two expressions make it clear that there must be posts to enable the vacancies to occur. The cadre strength is always measured by the number of posts comprising the cadre and the right to be considered for appointment can only be claimed in respect of a post in a cadre. As a consequence, the percentage of reservation has to be worked out in relation to the number of posts which form the cadre strength. The concept of vacancy has no relevance in operating the percentage of reservation. The Court has then explained that when all the roster points in the cadre are filled, the required percentage of reservation in post is achieved. The roster point in a cadre can be filled in only when the vacancies occur and not otherwise.

83. We are also of the view that in Prabhash Chand Jain's case the issue which had arisen was not decided and the Full Bench of Bombay High Court has also noticed that the said case is not on the point which was up for consideration.

84. Learned Additional Advocate General could not refute the submission that there should be at least 5 posts for applicability of roster and reservation. When there are 5 posts in a cadre according to percentage prescribed u/s 3 (1) of 1994 Act, one post for Scheduled Castes, one post for Other Backward Class can be reserved and rest for general category.

85. In view of the foregoing discussions, we are of the view that in , a cadre which has three or less number of posts, no post can be reserved for any of the categories mentioned u/s 3 (1) of 1994 Act. However, in a cadre where there are 4 posts, one post is to be reserved for Other Backward Classes and a cadre where there are minimum 5 posts, one post is to be reserved for Scheduled Castes and one post is to be reserved for Other Backward Classes but reservation as per roster point has to be meticulously followed, when there are six posts or more in a cadre. We may not be understood to lay down that when there are 4 or 5 posts in a cadre, first post cannot be reserved for Scheduled Castes and third post for Other Backward Classes. Even in a cadre where there are 4 or 5 posts, the roster points as laid down by notification dated 25.6.2002 has to be followed upto the extent it is in accordance with percentage of reservation as provided u/s 3 (1) of the 1994 Act.

86. Now comes the last question as to whether the advertisement No. 37 dated 9.7.2003 is in accordance with 1994 Act and whether the number of carry forward vacancies, i.e., 371 has been correctly determined?

87. We have already held that advertisement No. 37 insofar as it includes 467 vacancies which arose upto 30.6.2003 due to resignation, retirement and death and which vacancies were never advertised, was clearly impermissible and the advertisement insofar as 467 vacancies cannot be sustained. Now the question which has cropped up is as to whether when the advertisement insofar as 467 vacancies have become illegal, whether the selection process which was initiated for 371 carry forward vacancies should be proceeded to its logical end specially when the basis for applying the reservation as claimed by the respondents is also erroneous. The consideration which have weighed with us for permitting the recruitment process for 371 carried forward vacancies to its logical end are two folds. Firstly, it has not been brought to our notice that with regard to 371 carried forward vacancies, there has been no challenge and the said vacancies were advertised for being filled up by Scheduled Castes candidates and remained unfilled. Secondly, advertisement was issued in July, 2003. Number of reserved category candidates have applied and they are waiting for results of selection, in between the sufficient time has elapsed and at this juncture, not permitting the finalisation of results with regard to carried forward vacancies shall cause prejudice to the rights of the reserved category candidates. Thus, the selection process with regard to carry forward vacancies which were advertised by advertisement No. 37, should come to its logical end. However, before concluding the process of declaration of result, the Director is required to satisfy himself regarding applicability of reservation on carry forward vacancies in view of the fact that the respondents have adopted an erroneous premise for applying the rules of reservation, as held above, the reservation has to be applied subject-wise, college-wise. Thus, to avoid any further complications and dispute, the Director has to re-check. We have also noticed that in the counter-affidavit dated 17.10.2005, the respondents have brought on record various information received from different colleges pertaining to number of vacancies in different subject with dates. A rejoinder-affidavit has been filed by the petitioners in which various information given in the said chart has been disputed by giving details. Due to this, although it is not necessary for this Court to enter into the aforesaid issues but this oblige the Director to examine and recheck.

88. After having examined the issues as noticed above and recording our observations as above now we proceed to decide all the writ petitions. The Writ Petition No. 48149 of 2003, Dr. Vishwajeet Singh and Ors. v. State of U.P. and Ors. which is leading writ petition have made four prayers as quoted above. The prayer of the petitioners are to quash the advertisement dated 9.7.2003 as published on 16.7.2003 advertisement No. 37 and also to quash the Government order dated 3.7.2002 and 17.4.2003 as well as D.O. Letter dated 4.7.2002. In Writ Petition No. 48149 of 2003 an interim order was passed by this Court on 18.7.2005, directing that until further orders selection process scheduled to

commence from 19.7.2003 may go on but result of selection shall not be declared. We have held that advertisement No. 37 insofar as it advertise 467 vacancies which arose upto 30th June, 2003 due to resignation, retirement and death could not be treated as backlog vacancies and could not be advertised alongwith special recruitment. The advertisement No. 37 in so far as 467 vacancies is concerned is quashed. However, the selection process insofar as 371 carry forward vacancies are concerned should be taken to its logical end. The Government order dated 3.7.2002 Annexure-21 to the writ petition insofar as it directs computation of reservation on the basis of entire cadre strength instead of vacancies, being not in accordance with law is quashed. We having held that the criteria for computation of reservation and the unit for applicability of reservation having been erroneously taken by the respondents, the applicability of reservation requires to be redetermined, while implementing the selection with regard to 371 backlog vacancies. The Writ Petition No. 48149 of 2003, Dr. Vishwajeet Singh and Ors. v. State of U.P. and Ors. is partly allowed with following directions:

(i) The advertisement No. 37 dated 9.7.2003 insofar as it advertised 467 vacancies which arose upto 30.6.2003 due to death, resignation or retirement is quashed. However, the advertisement insofar as it advertises 371 carry forward vacancies which remained unfilled is maintained.

(ii) The Director, Higher Education shall before declaring the result against 371 carry forward vacancies shall re-determine the number of vacancies against which select list be issued by applying reservation and roster subjectwise and college-wise. The declaration shall be confined only to those vacancies which were carry forward vacancies and were advertised earlier by advertisement No. 29 and could not be filled up. The Director may determine on the basis of records available with him or may call for any other reports or record from management or any other competent authority. The candidates whose names are included in the select list shall be given option to give fresh choice of the colleges as required by the second proviso to Section 12 (4) which has become necessary in view of quashing the advertisement against 471 vacancies and direction issued by this order to the Director to redetermine the correct number of reserved vacancies out of carry forward vacancies against which select list is to be issued. The Director shall complete the aforesaid exercise within three months from the date of production of certified copy of this order and thereafter take appropriate steps for issuing recommendation for appointment in accordance with U.P. Higher Education Services Commission Act, 1980.

(iii) The Director shall take steps for advertising 471 vacancies which were covered by advertisement No. 37 applying the rules of reservation and roster as per the above directions by taking necessary steps at an early date.

(iv) The rules of reservation and roster shall be applied collegewise and subjectwise when there are plurality of posts as indicated above.

89. The Writ Petition Nos. 53581 of 2005, 5902 of 2005 and 6162 of 2006, 5632 of 2007 and 15936 of 2008 are also disposed of in terms of the orders passed in Writ Petition No. 48149 of 2003. The Writ Petition No. 54882 of 2008 and Writ Petition No. 55910 of 2008 have challenged the advertisement No. 41 dated 7.2.2007 by which advertisement posts of Lecturers were advertised for General Category, Other Backward Class, Scheduled Castes and Scheduled Tribes. The advertisement specifically made the selection process subject to final decision in Writ Petition Nos. 48149 of 2003 and 53581 of 2005. The Writ Petition Nos. 48149 of 2003 and 53581 of 2005 having been decided by this common judgment, the Writ Petition No. 54882 of 2008 as well as Writ Petition No. 55910 of 2008, are also disposed of with direction to recheck and recalculate the vacancies which could be reserved according to Act No. 4 of 1994 as per direction issued in leading writ petition. All the writ petitions are decided accordingly.

90. The parties shall bear their own costs.