

(2001) 11 AP CK 0116

In the Andhra Pradesh High Court

Case No : Writ Petition No's. 19392, 20239 and 22823 of 2000

Pulusam Krishna Murthy

APPELLANT

Vs

T. Sujan Kumar and Others

RESPONDENT

Date of Decision : 23-11-2001

Acts Referred:

Andhra Pradesh Education Act, 1982 — Section 78, 79
Andhra Pradesh Gram Panchayats Act, 1964 — Section 12(1)
Andhra Pradesh Mandala Praja Parishads, Zilla Praja Parishads and Zilla Pranalika Abhivrudhi Sameeksha Mandals Act, 1986 — Section 5(2)
Andhra Pradesh Panchayat Raj Act, 1994 — Section 169, 195, 268
Andhra Pradesh Regulation of Reservation appointment to the Public Services Act, 1997 — Section 2
Andhra Pradesh Scheduled Areas Land Transfer (Amendment) Regulation, 1970 — Regulation 2
Andhra Pradesh School Education Subordinate Service Rules, 1992 — Rule 22, 4
Andhra Pradesh State and Subordinate Service Rules, 1996 — Rule 22, 22
Constitution of India, 1950 — Article 13, 14, 15, 15(1), 15(4)
Government of India Act, 1935 — Section 92
Mines and Minerals (Development and Regulation) Act, 1957 — Section 11(5)

Citation : (2002) 1 ALD 423 : (2002) 2 ALT 77

Hon'ble Judges : S.B. Sinha, C.J.;V.V.S. Rao, J;Motilal B. Naik, J

Bench : Full Bench

Advocate : K. Balagopal, in WP No. 19392, -General and Government Pleader for Services-I in WP No. 22823 and P.V. Ramana, in WP No. 20239, for the Appellant; K. Balagopal in WP Nos. 20239 and 22823, J.R. Manohar Rao, Advocate-General and Government Pleader for Services-I in WP Nos. 19392 and 20239, P.V. Ramana in WP Nos. 19392 and 22823 and C.V. Ramulu, SC for Central Government, for the Respondent

Final Decision : Allowed

Judgement

S.B. Sinha, C.J.—These writ petitions involving common questions of fact and law were heard together and are being disposed of by this common judgment. The controversy centres round the validity of the notification issued in G.O.Ms.No. 3, Social Welfare (TW.EDN. II) Department dated 10-1-2000.

Facts in Brief :

2. The fact as stated in Writ Petition No. 19392 of 2000 are being considered for the purpose of deciding the questions involved.

3. The writ petition is directed against the judgment and order dated 19-9-2000 passed by the A.P. Administrative Tribunal in OA No. 2138 of 2000 whereby and whereunder the learned Tribunal allowed the OA., filed by the respondents 1 to 5 herein and quashed G.O.Ms.No. 3, dated 10-1-2000, wherein it was directed that the posts of teachers in the Schools in the Scheduled Areas in State shall be filled in by the local Scheduled Tribe candidates only out of whom 33 1/3% shall be women.

4. The writ petitioners challenged the impugned order of the learned Tribunal, inter alia, on the ground that respondents 1 to 5 herein were non-tribals and were aspirants to the posts of school teachers and by the time the OA., was filed no notification pursuant to the impugned G.O., had been issued by the State Government and that as they were not candidates for selection to the posts of teachers, they have no locus standi to challenge the impugned G.O.

5. Respondents 1 to 5 had questioned the impugned G.O., before the learned Tribunal inter alia contending that the impugned G.O., is contrary to the provisions of the Constitution of India and the decisions of the Apex Court.

Back-ground :

By G.O.Ms.No. 275, dated 5-11-1986 a notification had been issued by the Governor in exercise of his powers under sub-Paragraph (1) of Paragraph 5 of the V Schedule to the Constitution of India directing that the posts of teachers in the educational institutions in the Scheduled Areas of the State shall be filled only by the local members of the Scheduled Tribes notwithstanding anything contained in any other order or rule or law in force.

6. By reason of an order dated 25-8-1989 in RP No. 6377 and 6379 of 1988 the said notification was quashed by the learned Tribunal. The State Government carried the matter in appeal to the Supreme Court of India, which were marked as Civil Appeal Nos.2305 and 2306 of 1991 and the said appeals were later dismissed as withdrawn on 20-3-1998.

7. According to the writ petitioners, G.O.Ms.No. 275 dated 5-11-1986 was also challenged before this Court in WPNo. 16918 of 1988 and a learned single Judge of this Court by reason of an order dated 4-7-1989 dismissed the writ petition relying upon a decision of a Full Bench of this Court in Salyanarayana Reddy v. State of Andhra Pradesh 1987(1) ALT 665. It is contended that the said judgment of the learned single Judge has become final since no appeal there against was filed.

8. By G.O. Ms. No. 73 dated 25-4-1987, the Government has brought in an amendment to G.O. Ms. No. 275, dated 5-11-1986 allowing the appointment of

non-tribals to hold the posts of teachers in Scheduled Areas till the qualified local tribes are available. Then the non-tribals, who were appointed as teachers in Scheduled Areas, filed a writ petition being Writ Petition No. 5276 of 1993. A learned single Judge of this Court by reason of an order dated 5-6-1996 allowed the said writ petition holding that G.O. Ms. No. 73, dated 25-4-1987 and the advertisement are violative of Article 14 of the Constitution of India. But on appeal, a Division Bench of this Court by an order dated 20-8-1997 in Writ Appeal No. 874 of 1997 reported in Project Officer, I.T.D.A. Vs. Ch. Srinivas and Another, , upheld G.O. Ms. No. 73, dated 25-4-1987 by allowing the appeal and setting aside the judgment of the learned single Judge. The Division Bench has approved the order of the learned single Judge in Writ Petition No. 16198 of 1988. Against the judgment of the Division Bench of this Court, the non-tribal appointees have preferred Civil Appeal No. 6437 of 1998 before the Supreme Court and the Apex Court by its order dated 18-12-1998 allowed the said appeal.

Submissions:

Mr. K. Balagopal, learned Counsel appearing on behalf of the writ petitioners would submit that the order of the learned Tribunal dated 25-4-1989 quashing G.O. Ms. No. 275 ought to be held per incuriam inasmuch it was passed after the judgment dated 4-7-1989 of this Court in Writ Petition No. 16198 of 1988, which was binding on the Tribunal and that the withdrawal of civil appeals by the Government does not amount to approval of the order of the learned Tribunal as regards the validity of G.O. Ms. No. 275. He would contend that the reservation provided by the impugned notification is not referable to Article 16(4) but to a reasonable classification made under Article 16(1) of the Constitution as it was not made on the ground that the Scheduled Tribes are inadequately represented in the services of the State and the classification is not hit by upper limit of 50% of reservation. He placed reliance on the decisions of the Apex Court in State of Kerala and Another Vs. N.M. Thomas and Others, and Indra Sawhney etc. etc Vs. Union of India and others, etc. etc., . The learned Counsel would contend that the notification issued in exercise of power conferred under Paragraph 5(1) of Vth Schedule to the Constitution of India could, in any event, be treated to be an executive instruction whereby and whereunder reservation could also be made.

9. Mr. P. V. Ramana, learned Counsel appearing on behalf of the petitioners in Writ Petition No. 20239 of 2000 would contend that the object of V Schedule of the Constitution of India is to preserve the tribal autonomy, its culture and economic empowerment to ensure socio-economic political justice for preservation of peace and good governance in the Scheduled Areas and it is the responsibility of the State to see the upliftment of the tribals within the Scheduled Areas. In support of the said contention he placed reliance on the decisions of the Apex Court in Ram Kirpal Bhagat and Others Vs. The State of Bihar, , Hota Venkata Surya Sivarama Sastry Vs. State of Andhra Pradesh, , and Samatha Vs. State of A.P. and Others, .

10. The learned Counsel would submit that the non-obstante clause has to be

construed widely as has been interpreted by the Apex Court and this Court in P. Rami Reddy and Others Vs. State of Andhra Pradesh and Others, , Seepuri Nagabhushanam and Others Vs. Secretary to Government, Panchayat Raj Government of Andhra Pradesh, Hyderabad, , Ramadoss v. Union of India (1971) II AWR 261. The learned Counsel would further submit that it is not correct to contend that impugned G.O. would not fulfil the constitutional mandate.

11. Mr. P.V. Ramana, the learned Counsel would also contend that cent per cent reservation made in terms of the impugned notification in favour of Scheduled Tribes in the schools situated in the Scheduled Areas for filling up of the posts of teachers is valid and justified and the Tribunal erred in interfering therewith. In support of the said contention, the learned Counsel placed reliance on the decisions reported in Nagabhushanam (supra), Ramadoss (supra), Satyanarayana Reddy, (supra) and an unreported judgment dated 4-7-1989 rendered in WP No. 16918 of 1988. The learned Counsel would further contend that when the A.P. Scheduled Areas Land Transfer Regulation, 1959, which prohibits the non-tribals from settling down in the Scheduled Areas by purchasing immovable properties, has been found to be not violative of Part III of the Constitution of India by the Apex Court in P. Rami Reddy and Others Vs. State of Andhra Pradesh and Others, , the same would apply in the instant case also. As regards the requirement to enact the law on the issue of reservations within the meaning of Articles 15 and 16 of the Constitution of India, the learned Counsel placed reliance on the decision of the Apex Court in Indra Sawhney v. Union of India (supra). It was urged that there cannot be any constitutional mandate on Legislature to enact a law prescribing 100% reservation in respect of appointment to the posts of teachers in favour of Scheduled Tribes of Scheduled Areas of the State.

12. The submission of the learned Counsel for the petitioners is that even if the constitutionality of the legislation cannot be upheld, the same may be sustained as having been made in terms of Article 162 of the Constitution of India.

13. The learned Advocate-General would contend that the notification issued under Clause 5(1) of Vth Schedule to the Constitution by the Governor, who has an unfettered discretion in this behalf, is a law as it enables the Governor to apply or not to apply any laws enacted by Parliament or the State Legislature to the Scheduled areas. He would submit that the intention of a non-obstante clause is to give the enacting part of the provision full latitude uncontrolled by the law mentioned therein and he placed reliance on the decisions of the Apex Court in Smt. Parayankandiyal Eravath Kanapraavan Kalliani Amma and others Vs. K. Devi and others, , Chandavarkar Sita Ratna Rao Vs. Ashalata S. Guram, , R.S. Raghunath Vs. State of Karnataka and another, , and R.C. Poudyal and Others Vs. Union of India and others, , for the said proposition.

14. The learned Advocate-General would contend that the power conferred by Paragraph 5(1) of V Schedule to the Constitution of India could be exercised without reference to any provision in the Constitution in view of the non-obstante

clause contained therein and thus the notification issued thereunder cannot be questioned on any ground if literal meaning is assigned thereto. He would urge that even if it be held that the impugned notification does not satisfy the requirements of Articles 14 and 16, the same would still be lawful.

15. The learned Advocate-General would submit that the Scheduled Areas and Scheduled Tribes have been deservingly treated as geographical unit and a class of people respectively by the Constitution and the said classification is valid and permissible even for the purpose of Article 14 or any other provision in Part III thereof. He, therefore, contends that the ordinary rule prohibiting total reservations has no application to Scheduled areas of Scheduled Tribes in view of the constitutional classification and that cent per cent reservation is permissible for the posts of teachers in the instant case.

16. The learned Advocate-General would also contend that the introduction of provisions so as to improve the economic status and the educational levels of Scheduled tribes is constitutionally permissible. He would submit that the provisions of Parts III and IV of the Constitution have to be interpreted harmoniously and the provisions in Part III thereof have to be read as subject to public purpose, as has been pointed out by the Supreme Court in *Dalmia Cement (Bharat) Ltd. and Another Vs. Union of India (UOI) and Others*, . He further contends that the impugned notification, which is Legislative Act, cannot be challenged on the ground that it offends Articles 14 and 16 of the Constitution. He would submit that the Courts have adopted different standards for applying Article 14 to a law, and particularly in Tax laws considerable latitude is conceded in formulating the law and gradual introduction of reforms has been approved in regard to economic measures. He, therefore, contends that the impugned notification being an instrument of State policy is impermeable to judicial review, so long as the same is within the parameters of the Constitution.

17. Mr. J.R. Manohar Rao, learned Counsel appearing on behalf of respondents 1 to 5, would contend that the validity of the notification issued in G.O. Ms. No. 275 had not been questioned as in Writ Petition No. 16918 of 1988 this Court held that the reservation of all posts in favour of Scheduled Tribes is not illegal and in Writ Petition No. 5276 of 1993 the issue involved therein was confined to regularisation of services of the petitioners. The learned Counsel would submit that the power conferred on the Governor of a State under Paragraph 5 (1) of V Schedule to the Constitution of India is legislative in nature because for issuing any notification under the said provision there ought to be an Act of Parliament or Legislature of the State. In support of the said contention, he placed reliance on the decision of the Apex Court in *Samatha (supra)*. He would further contend that the non-obstante clause contained in Paragraph 5(1) of the V Schedule should not be construed to mean that the Governor has power even to make any law contrary to Part-III of the Constitution or the basic structure of the Constitution of India. In this connection, reliance has been placed on the decisions of the Apex Court in *H.H. Maharajadhiraja Madhav Rao Jivaji Rao*

Scindia Bahadur of Gwalior and Others Vs. Union of India and Another, , His Holiness Kesavananda Bharati Sripadagalvaru Vs. State of Kerala, and Minerva Mills Ltd. and Others Vs. Union of India (UOI) and Others, . He would farther submit that various provisions mentioned in the impugned notification are the rules framed by the Government in exercise of its power conferred under the proviso to Article 309 of the Constitution of India as also of some statutes. He would, therefore, contend that the notification issued under Paragraph 5(1) of the Vth Schedule being inconsistent with Part-III of the Constitution of India cannot be sustained. He would also contend that there is no nexus in making reservation of posts of teachers in favour of local tribe candidates and the object sought to be achieved and that if the teachers had been abstaining from duty, disciplinary action ought to be taken against them. He would also contend that any notification issued by the Governor under Vth Schedule to the Constitution of India is amenable to challenge on the ground of being violative of Part-III of the Constitution of India. It is also contended that there cannot be hundred per cent reservation in favour of Scheduled Tribes in Scheduled areas and reliance has been placed on the decision of the Apex Court in Indra Sawhney v. Union of India, (supra). He would also contend that reference to Sections 78 and 79 of the A.P. Education Act and Sections 169, 195 and 268 of the A.P. Panchayat Raj Act has nothing do with the modification made by the Governor in the notification. Lastly he would contend that the impugned notification issued by the Governor is without jurisdiction as there is no nexus between the notification and the object sought to be achieved.

Findings:

Paragraph 5 of the Vth Schedule to the Constitution of India reads thus:

"Law applicable So Scheduled Areas:--(1) Notwithstanding anything in this Constitution the Governor may be public notification direct that any particular Act of Parliament or of the Legislature of the State shall not apply to a Scheduled Area or any part thereof in the State or shall apply to a Scheduled Area or any part thereof in the State subject to such exceptions and modifications as he may specify in the notification and any direction given under this sub-Paragraph may be given so as to have retrospective effect.

(2) The Governor may make regulations for the peace and good Government of any area in a State which is for the time being a Scheduled Area.

In particular and without prejudice to the generality of the foregoing power, such regulations may-

(a) Prohibit or restrict the transfer of land by or among members of the Scheduled Tribes in such area;

(b) Regulate the allotment of land to members of the Scheduled Tribes in such area;

(c) Regulate the carrying on of business as money-lender by persons who lend

money to members of the Scheduled Tribes in such area.

(3) In making any such regulation as is referred to in sub-Paragraph (2) of this Paragraph, the Governor may repeal or amend any Act of Parliament or of the Legislature of the State or any existing law which is for the time being applicable to the area in question.

(4) All regulations made under this Paragraph shall be submitted forthwith to the President and, until assented to him by, shall have no effect.

(5) No regulation shall be made under this Paragraph unless the Government making the regulation has, in the case where there is a Tribes Advisory Council for the State, consulted such Council."

18. The scheme referred to in the aforementioned Paragraph clearly shows the manner in which the Governor is required to exercise his legislative function. Whereas para 1 confers a limited power, para 2 confers a wide power, but before such power can be exercised, the condition precedents therefore have to be fulfilled. In that view of the matter, it would be impossible to hold that the power of the Governor both under Paragraph 1 and 2 is co-extensive. We shall consider this aspect of the matter in some details a little later.

19. Article 16 of the Constitution of India creates right to equality of opportunity and employment in public offices for all citizens as constitutional right in the following terms:

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

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

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

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

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

20. Part IV of the Constitution of India contains certain directives and the State shall follow them in the matter of administration as well as in the making of laws. Under Article 41 of the Constitution, the State is directed to make effective provision, within the limits of economic capacity and development, for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement and in other cases of undeserved want. The State shall endeavour to provide for free and compulsory education for all children until they complete the age of fourteen years within a period of ten years from the commencement of the Constitution as ordained by Article 45 of the Constitution. Article 46 of the Constitution of India reads as under:

"The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."

21. The Government Order being G.O. Ms. No. 3, dated 10-1-2000, which is the subject-matter of challenge in these writ petitions, whereunder all vacancies in the Educational Institutions within the Scheduled Areas are reserved in favour of local Scheduled Tribes, reads thus:

"Whereas, under sub-paragraph (1) of Paragraph 5 of the Fifth Schedule to the Constitution of India, the Governor of Andhra Pradesh may by public notification direct that any particular Act of Parliament or of Legislature of the State shall not apply to the Scheduled Areas or any part thereof in the State or shall apply to a Scheduled area or any part thereof subject to specified exceptions and modifications;

2. And whereas, in G.O.Ms.No. 275, Social Welfare Department dated 5-11-1986, a notification has been issued exercising the powers conferred under sub-paragraph (1) of Paragraph 5 of the Fifth Schedule to the constitution of India directing that the posts of teachers in the Educational Institutions in the Scheduled Areas of State shall be filled in only by local members of the Scheduled Tribes;

3. And whereas, the Andhra Pradesh Administrative Tribunal in its order dated 25-8-1989 in R.P.Nos.6377 and 6379 of 1988 quashed the orders issued in G.O.Ms.No. 275, Social Welfare Department dated 5-11-1986 on the ground that the notification issued under sub-paragraph (1) of Paragraph 5 of the Fifth Schedule to the Constitution of India does not reflect the existence of either a State or a Central Legislation referable for issuing such notification;

4. And whereas, the Division Bench of the High Court of Andhra Pradesh in its judgment dated 20-8-1997 in Writ Appeal No. 874 of 1997 filed by the Project Officer, ITDA., Rampachodavaram, East Godavari District, directed to continue the petitioners-respondents in their respective posts of teachers without any break as temporary employees until replaced by the qualified local tribals as and

when such tribals are available to fill up those posts.

5. And whereas, the Andhra Pradesh Administrative Tribunal subsequently while disposing of OA No. 4598 of 1997 in its order dated 22-9-1997 directed the respondents to follow the statutory rules while making recruitment to the posts of Secondary Grade Teachers and also Telugu Pandits, Grade-I in Agency Areas without taking into consideration of the orders issued in G.O. Ms. No. 275, Social Welfare Department, dated 5-11-1986.

6. And whereas, the Supreme Court of India while allowing Civil Appeal No. 6437 of 1998 in its order dated 18th December, 1998 set aside the orders of the Andhra Pradesh Administrative Tribunal on the ground that the State withdraw the appeals during out of the SLP Nos.14562-63 of 1989.

7. And whereas, the Government considers that Rule 4 (b) of the Andhra Pradesh School Educational Subordinate Service Rules, 1992 and Rule 22-A of the Andhra Pradesh State and Subordinate Service Rules, 1996 shall be modified to the extent that only Scheduled Tribe Women shall be appointed in Scheduled Areas against 33 1/3% reservation in respect of direct recruitment;

8. And whereas, the consultation of the Tribes Advisory Council has been made as required under sub-paragraph (5) of Paragraph 5 of the Fifth Schedule to the Constitution of India.

9. And whereas, the Government of Andhra Pradesh in order to strengthen the educational infrastructure in the Scheduled Areas, to promote educational development of tribals to solve the phenomenal absenteeism of teachers in the Schools situated in scheduled Areas and with a view to protect the interests of local tribals have decided to reserve the posts of teachers in favour of local Scheduled Tribes candidates;

10. And whereas, the Government considered to re-issue the said orders retrospectively from 5-11-1986 keeping in view the provisions of sub-paragraph (1) of Paragraph 5 of Fifth Schedule to the Constitution;

11. The following notification will be published in part-IV-B extraordinary issue of the Andhra Pradesh Gazette, dated 10-1-2000.

NOTIFICATION

In exercise of the powers conferred by sub paragraph (1) of Paragraph 5 of the Fifth Schedule to the Constitution of India and in supersession of the notification issued in G.O. Ms. No. 275, Social Welfare Department, dated the 5th November, 1986, as subsequently, amended in G.O. Ms. No. 73, Social Welfare Department, dated the 25th April, 1988, the Governor of Andhra Pradesh hereby directs that Sections 78 and 79 of the Andhra Pradesh Education Act, 1982 (Act 1 of 1982) and Sections 169, 195 and 268 of the Andhra Pradesh Panchayat Raj Act, 1994 (Act 13 of 1994) and Rule 4(a) of the Andhra Pradesh School Educational Subordinate Service Rules issued in G.O.Ms.No. 538 Education (Ser.II)

Department, dated the 20th November, 1998 and Rule 22 and 22-A of the Andhra Pradesh State and Subordinate Service Rules, 1996 and any other rules made in this regard shall apply to the appointment of posts of teachers in schools situated in the Scheduled Area in the State subject to the modification that all the posts of teachers in the schools situated in Scheduled Areas in the State of Andhra Pradesh shall be filled in by the local Scheduled Tribe candidates only out of whom 33 1/3% shall be women.

Explanation :--For the purpose of this notification, the "Local Scheduled Tribe Candidate" means, the candidate belonging to the Scheduled Tribes notified as such under Article 342 of the Constitution of India and the candidates themselves or their parents have been continuously residing in the Scheduled Areas of the Districts in which they are residents till to date since the 26th January, 1950."

22. Section 78 of the A.P. Education Act, 1982 provides for constitution of educational service for the State and the State Government, is empowered to make rules to regulate the classification, methods of recruitment, conditions of service, pay and allowances and discipline and conduct of the members of the educational service. Section 79 of the A.P. Education Act provides for dismissal, removal or reduction in rank or suspension etc., of employees of private institutions.

23. Section 169 of the A.P. Panchayat Raj Act, 1994 deals with the creation of posts of officers and employees of Mandal Parishad, the method of recruitment, conditions of service, etc. Section 195 of the said Act provides for the creation of posts of officers and employees of Zilla Parishad, the method of recruitment, conditions of service, etc. Section 268 of the said Act empowers the Government to make rules for the purpose of carrying out the purposes of the Act.

24. Andhra Pradesh State and Subordinate Service Rules were made by the State in exercise of its power conferred upon it under proviso to Article 309 of the Constitution of India.

25. Rule 22 of the Andhra Pradesh State and Subordinate Service Rules, 1996 which provides for reservation reads thus:

Special Representation (Reservation) :--(1) Reservation may be made for appointments to a service, class or category in favour of Scheduled Castes, Scheduled Tribes, Backward Classes, Women, Physically Handicapped, Meritorious Sportsman, Ex-Servicemen and such other categories, as may be prescribed by the Government from time to time, to the extent and in the manner specified hereafter in these rules or as the case may be, in the special rules. The principle of reservation as hereafter provided shall apply to all appointments to a service, class or category-

(i) by direct recruitment, except where the Government by a General or Special Order made in this behalf, exempt such service, class or category ;

(ii) otherwise than by direct recruitment where the special rules lay down specifically that the principle reservation insofar as it relates to Scheduled Castes and Scheduled Tribes only shall apply to such services, class or category to the extent specified therein.

(2)(a) The unit of appointments for the purpose of this rule shall be one hundred vacancies, of which, fifteen shall be reserved for Scheduled Castes, six shall be reserved for Scheduled Tribes, twenty five shall be reserved for the Backward Classes and the remaining fifty four appointments shall be made on the basis of open competition and subject to Rule 22-A of these rules.

X X X X

(e) Appointments under this rule shall be made in the order of rotation specified below in a unit of hundred vacancies.

X X X X

Rule 22-A :--Women reservation in appointments: Notwithstanding anything contained in these rules or special rules or Ad hoc Rules:

(1) In the matter of direct recruitment to posts for which women are better suited than men, preference shall be given to women:

Provided that such absolute preference to women shall not result in total exclusion of men in any category of posts.

(2) In the matter of direct recruitment to posts for which women and men are equally suited, there shall be reservation to women to an extent of 33 1/3% of the posts in each category of Open Competition, Backward Classes (Group-A), Backward Classes (Group-B), Backward Classes (Group-C), Backward Classes (Group-D), Scheduled Castes, Scheduled Tribes and Physically Handicapped and Ex-Servicemen quota.

(3) In the matter of direct recruitment to posts which are reserved exclusively for being filled by women, they shall be filled by women only.

26. Rule 22 is "law" within the meaning of Article 13 and provides for 100 point cycle and reservations were made to various categories including scheduled tribes. A.P. Regulation of Reservation appointment to the Public Services Act, 1997 (hereinafter referred to as the "1977 Act") was enacted to see that the reservations as provided under Rule 22 is followed strictly and the same was not amended. It was enacted for taking action against the officers who violates the rule of reservation while making appointments. The said act is only to regulate the implementation of the rule of reservation in all the appointments. The said Act does not provide any percentage of reservation to the Backward Classes, Scheduled Castes and Scheduled Tribes. The said Act has nothing to do with the percentage of reservations to any particular backward class of citizens.

27. By Constitution (Thirty Second Amendment) Act, 1973, Article 371D, a

special provision with respect to the State of Andhra Pradesh has been inserted in the Constitution of India. Sub-clauses (1), 2 and 10 are relevant for the purpose. They read thus:

371-D. Special provisions with respect to the State of Andhra Pradesh :--(1) The President may by order made with respect to the State of Andhra Pradesh provide, having regard to the requirements of the State as a whole, for equitable opportunities and facilities for the people belonging to different parts of the State, in the matter of public employment and in the matter of education, and different provisions may be made for various parts of the State:

(2) An order made under Clause (1) may, in particular, --

(a) require the State Government to organise any class or classes of posts in a civil service of, or any class or classes of civil posts under, the State into different local cadres for different parts of the State and allot in accordance with such principles and procedure as may be specified in the order the persons holding such posts to the local cadres so organised.

(b) specify any part or parts of the State which shall be regarded as the local area-

(i) for direct recruitment to posts in any local cadre (whether organised in pursuance of an order under this article or constituted otherwise) under the State Government;

(ii) for direct recruitment to posts in any cadre under any local authority within the State; and

(iii) for the purpose of admission to any University within the State or to any other educational institution which is subject to the control of the State Government;

(c) specify the extent to which, the manner in which and the conditions subject to which, preference of reservation shall be given or made-

(i) in the matter of direct recruitment to posts in any such cadre referred to in Sub-clause (b) as may be specified in this behalf in the order;

(ii) in the matter of admission to any such University or other educational institution referred to in Sub-clause (b) as may be specified in this behalf in the order,

to or in favour of candidates who have resided or studied for any period specified in the order in the local area in respective such cadre, University or other educational institution, as the case may be.

(10) The provisions of this article and of any order made by the President thereunder shall have effect notwithstanding any in any other provision of this Constitution or in any other law for the time being in force.

28. In exercise of the powers conferred by Clauses (1) and (2) of Article 371D, the President issued Order called the Andhra Pradesh Public Employment (Organisation of Local Cadres and Regulation of Direct Recruitment) Order, 1975 (for short "Presidential Order"). Para 3 of the said order provides for organisation of local cadres. Recruitment to various categories has to be made to local cadres taking district as unit or three or four districts comprising as a zone. Para 6(1) defines local areas as under:

Local areas :--(1) Each district shall be regarded as a local area-

(i) for direct recruitment to posts in any local cadre under the State Government comprising all or any of the posts in any department in that district belonging to the category of Junior Assistants or to any other category equivalent to or lower than that of Junior Assistant,

(ii) For direct recruitment to posts in any cadre under any local authority within that district, carrying a scale of pay the minimum of which does not exceed the minimum of the scale of pay of a Junior Assistant or a fixed pay not exceeding that amount.

29. There is no dispute that for the purpose of recruitment to the posts of teachers district is a unit. Para 7 defines who shall be regarded as local candidates. Para 8 provides that 80% of the posts to be filled by direct recruitment at any time in any local cadre under the State Government comprising posts belonging to the category of a Junior Assistant or a category equivalent to or lower than that of a Junior Assistant shall be reserved to the local candidates. Therefore, in the matter of recruitment to various local cadres organised in terms of the provisions of the Presidential Order due regard must be had to the provisions of Article 371D and the Presidential Order and in that context also, the validity of the impugned notification has to be examined.

Applicability of sub-para (1) of Para 5 of the Fifth Schedule to the Rules made under the proviso to Article 309 of the Constitution:

30. The provisions contained in schedule V to the Constitution are made applicable by virtue of Clause (1) of Article 244 in regard to administration and control of scheduled areas and scheduled tribes. The administration of justice in the notified scheduled areas is in the hands of executive officials and this was mainly due to the reason that the tribals have not attained sufficient social progress to be governed by the intricacies of the legal system applicable to ordinary citizens. The tribals inhabiting the scheduled areas enjoyed special protection; their way of life, their social structure and primitive living made them unfit to be governed by ordinary laws to a great extent but at the same time it was not intended that for ever these scheduled areas should remain permanent isolated tracts cut off from the main stream. The Scheduled Tribes Order, 1950 includes groups or communities distinguished by tribal characteristics, culture and their isolation from the rest of the population.

31. In terms of sub-para (1) thereof, the Governor may direct that any particular Act of Parliament or of the Legislature of the State shall not apply to a scheduled area or any part thereof in the State or shall apply as may be specified in the notification and any direction given under this sub-Paragraph may be given to have retrospective effect.

32. Can it be said that the power under Para 5(1) of the V schedule is wider than that contained in Para 5(2). The answer to the aforementioned clause must be rendered in negative. In other words, if in the name of modification and exception a new law is made, the same would partake to the regulation making power. It is well settled principle of law that what cannot be done directly cannot be permitted to be done indirectly.

33. No new law can be made while exercising the power under Para 5(1) which is restrictive in nature as in terms thereof only some statutes may be applied or may not be applied with exception and modification. While exercising the said power, the Governor cannot rewrite the entire statute and make some provision, which would be totally contrary to the object and purport of the statute enacted by the Parliament or the State Legislature. If any law is to be framed which would be applicable in the scheduled area, the same has to be done in terms of Para 2 only.

34. In terms of sub-para (2) of para 5, the Governor may for the peace and good governance of any area in a State which is for the time being a scheduled area, make regulations inter alia in the matters specified therein. In the event of application, some exceptions and modifications are permissible. In short, however, wide amplitude of the said power may be, it cannot be equated with the regulation making power of the Governor under Para 5(2). A.P. Regulation of Reservation appointment to the Public Services Act, 1997 received assent from the Governor on 9-8-1997. Clause (e) of Section 2 thereof provides for rule of reservation but not providing the reservation.

35. By reason of the impugned G.O., no reference has been made to the 1997 Act. The said Act applies to the entire State. The 1997 Act has not been applied to the scheduled area with modifications or exceptions. In that view of the matter, the rule of reservation policy as reflected in the rule made in terms of the proviso appended to Article 309 of the Constitution loses its significance. Unless the provisions of the 1977 Act are applied with exceptions and modifications, the doctrine of policy of reservations as stated in the said Act shall apply.

36. The Acts of Parliament or the appropriate Legislature may apply to the scheduled areas on their own force. In terms of sub-para (1), only the provisions of the Act or part thereof can be excluded or included subject to such exceptions and modifications. By using the terminology "subject to exceptions and modifications" a power of amendment has been conferred. Such a power undoubtedly is a legislative power.

37. The rules issued under the proviso to Article 309 of the Constitution of India

and the rules issued under an Act cannot be treated as Act of Parliament or Legislature. The said rules are in the nature of subordinate legislation. Rules issued under the proviso to Article 309 of the Constitution of India can be amended or modified by the Governor exercising the power under the proviso to Article 309 itself. The said rules are independent rules and are not made in terms of any statute enacted by the Parliament or the State Legislature.

38. Having regard to the terminology used in Para 5(1) of the V Schedule of the Constitution, in the opinion of this Court, even the rule of purposive construction may not be taken recourse to. The proviso appended to Article 309 may be a law but is not a legislative or parliament act. It does not lead to logicity because the Governor can achieve the same object by introducing totally a new law in relation to the scheduled area by reason of his regulation making power. The power of the Governor is confined only to the extent of modifying or excepting the Acts of Parliament or of the Legislature of the State. The legislative power of the Parliament or the Legislature is not subject to delegation. Such a power can be exercised only when the provision in that behalf is made by or under act of appropriate Legislature. Thus, for the purpose of Paragraph 5 of the V Schedule both cannot be equated although the same may be "law" within the meaning of Article 13 or 213 or Article 235 of the Constitution.

39. While sub-para (1) of Para 5 confers upon the Governor the power of merely applying or modifying the application of Acts made by Parliament or State Legislature, by reason of Clause (2) thereof, the power of making independent legislation has been conferred. Clause (1) of Para 5 must be construed having regard to plenary regulation of making power conferred upon the Governor under sub-para (2) thereof. It does not speak of any rule made under the proviso to Article 309 of the Constitution of India.

40. The law made under proviso to Article 309 of the Constitution cannot be termed to be as legislative enactment.

The effect of non obstante clause vis-a-vis the applicability of other provisions of the Constitution:

41. Non obstante clause contained in the provision is not meant to prevail over the Constitution. Legislation made under sub-para (1) of Para 5 must satisfy the requirements of Part III of the Constitution of India. Article 13 of the Constitution of India speaks of legislations. Such legislations would include also the legislations made by the Governor in exercise of his power conferred upon him by sub-para (1) of Para 5 of the V Schedule. It, therefore, cannot be said that in making reservations, the legislations made by the Governor is not required to conform to the norms and provisions in Part III of the Constitution of India.

42. By reason of Clause (1) of Para 5, the power of Governor being legislative in nature the words "notwithstanding anything in this Constitution" must be interpreted to mean that such power can be exercised despite the legislative power of the Parliament and the State in terms of Article 245 of the Constitution.

Any Act enacted by the State Legislature or Parliament is subject to Part III and other provisions of Constitution of India and thus the same principle would apply to a law within the meaning of Para 5 of the V Schedule of the Constitution.

43. Only because a non-obstante clause is used, the same per se would not be given a wide meaning. A non-obstante clause contained in one act must be read in the context of the provisions of the Constitution of India vis-a-vis the other acts whether containing non-obstante clause or not. The non-obstante clause contained in Para 5(1) of the V Schedule came up for consideration in *Satyanarayana Reddy v. State of A.P.* (supra). In that case, it has clearly been held that any notification issued under Clause (1) of Para 5 of V Schedule would be subject to Article 14 of the Constitution of India. Having regard to the fact that in the instant case we are concerned with public employment, the same would be subject to the Presidential Order made in terms of the provisions of Article 371D of the Constitution of India also.

44. The Governor applied Sections 78 and 79 of A.P. Education Act, 1982 and Sections 169, 195 and 268 of the Andhra Pradesh Panchayat Raj Act, 1994 and Rule 4(a) of the Andhra Pradesh School Educational Subordinate Service Rules issued in 1998 and Rule 22 and 22-A of the A.P. State and Subordinate Service Rules, 1996. The emphasis made as regards the applicability of the said Act and the rules would be that all posts of teachers in the schools situated in the scheduled areas shall be filled up by local scheduled tribe candidates only. Thus, the intention disclosed in the said notification is absolutely clear and unambiguous. In no unmistakable terms, the said notification provides for filling up of all posts by scheduled tribe candidates only out of whom 33 1/3% shall be women. It is therefore beyond any cavil of doubt that by reason thereof 100% reservation in favour of Scheduled Tribes has been provided. The submission of the learned Counsel for the petitioner to the effect that the said notification has been issued to promote education and to strengthen educational infrastructure in the scheduled areas and to promote educational development of tribals cannot be accepted.

45. The objects and reasons for issuance of G.O. Ms. No. 3 may say so but the charging provision contained therein, namely, all the posts of teachers in the schools located in the scheduled areas shall be filled up by the local scheduled tribe candidates is necessarily to be interpreted having regard to the provisions of Part III of the Constitution of India.

46. Objects and reasons, it is trite, however laudable, must be achieved within the constitutional parameters. It is also trite that the objects and reasons cannot be permitted to prevail over the plain language of the statute. Objects and reasons can only be looked into if two interpretations are possible and to fill in the gap if the statute is obscure and ambiguous. Para 9 of the Statements of Objects and Reasons however itself referred to strengthening of educational infrastructure in the scheduled area and to promote educational development of tribals only with reference to solving the phenomenal absenteeism of teachers in

the schools and with a view to protect the interest of the local tribals.

47. As the legislative power of the Governor has to be exercised having regard to the parameters of sub-para (1) of Para 5 of the V Schedule of the Constitution, the words "any other rules made in this regard" lose relevance. We have therefore to confine ourselves to the provisions specifically mentioned therein. A non-obstante clause contained in Clause (1) of Para 5 of the Fifth Schedule refers to the power of the Governor as regards the applicability or exceptions and modifications to be taken therein, but the same does not and cannot mean that what the Legislature cannot do, the Governor can, In *Kalliani Amma v. K. Devi* (supra), it was observed:

Non-obstante clause is sometimes appended to a section in the beginning, with a view to give the enacting part of the section, in case of conflict, an overriding effect over the provision or Act mentioned in that clause. It is equivalent to saying that inspite of the provision or Act mentioned in the non-obstante clause, the enactment following it will have its full operation or that the provision indicated in the non-obstante clause will not be an impediment for the operation of the enactment.

48. In *B.S. Yadav and Others Vs. State of Haryana and Others*, , the Apex Court made a distinction between the power to pass a law and the power to make rules, which by law have the force of law. It merely held that the conditions of service can be fixed by the Governor by making rules in exercise of the power conferred upon him under proviso appended to Article 309 of the Constitution. In that context, it was held that when it is the Legislature which passes an Act or the Governor who makes rules regulating seniority, the end product is law within the meaning of the second part of Article 235. The said decision is not and cannot be an authority for the proposition that a rule made under proviso to Article 309 of the Constitution of India is a statute made by the Parliament or the Legislature. The Apex Court held that the said power is merely a legislative power. Such a power is exercised when the Legislature had not exercised its power to pass proper law on the subject.

49. In *Dayalbagh Educational Institute Vs. State of U.P. and others*, , regarding the protection given by non-obstante clause, it was observed:

Relying on these two provisions, it was strenuously argued that the non-obstante clause protects all acts done under the RBO. Act and the notification dated 12-8-1993 under the Town Areas Act will have no impact on the boundaries of Dayalbagh Regulated Area. In our view, the submission is misconceived and cannot be accepted in the facts and circumstances of this case. The non obstante clause is appended to a provision to give overriding effect over any existing law which is inconsistent with the new enactment, where both cannot be read harmoniously; for even apart from such clause, a later law abrogates earlier laws clearly inconsistent with it, it can be invoked only in case of irreconcilable conflict where both cannot be read harmoniously.

But where the provisions of two or more Acts can co-exist and can be enforced or applied without abrogating or eroding the provisions of other Act, the non-obstante clause will have no effect. Therefore, where the provisions of this Act cannot be read harmoniously with the provisions of any other law in force at the commencement of this Act is that situation the provisions of this Act shall have overriding effect, otherwise not.

50. In *R.C. Poudyal and Others Vs. Union of India and others*, , it was held that non obstante clause in 371 F cannot be construed as taking Clause (f) of Article 371F outside the limitations on the amending power itself. The provisions according to the Apex Court, must be construed harmoniously consistent with the foundational principles and basic features of the Constitution.

51. In *Keshavananda Bharathi, v. State of Kerala (supra)* and in *Minerva Mills v. Union of India (supra)*, the Apex Court held that the power of Parliament to amend the Constitution will not include to amend the basic structure of the Constitution of India even though Article 368 of the Constitution of India, starts with a nonobstante clause of notwithstanding anything in this Constitution."

52. Article 244 and Schedule V to the Constitution can be amended, but basic feature of the Constitution cannot be. It is therefore idle to contend that the non-obstante clause shall also override Articles 14 and 16 of the Constitution of India.

53. The constitutional provision can be struck down if the same violates the basic feature. (See *L. Chandra Kumar Vs. Union of India and others*,).

54. The Courts shall carry out the obvious intention of the Legislature while interpreting the laws. A plain reading of Para 5(1) of the Fifth Schedule does not indicate that the Governor has been empowered to modify the reservation already provided to the scheduled tribes in terms of Article 16 of the Constitution.

55. In *Dadi Jagannadham v. Jammulu Ramulu* AIR 2001 SCW 3051, the Apex Court held:

The settled principles of interpretation are that the Court must proceed on the assumption that the Legislature did not make a mistake and that it did what it intended to do. The Court must, as far as possible, adopt a construction, which will carry out the obvious intention of the Legislature. Undoubtedly if there is a defect or an omission in the words used by the Legislature, the Court could not go to its aid to correct or make up the deficiency. The Court could not add words to a statute or read words into it which are not here, especially when the literal reading produces an intelligible result. The Court cannot aid the Legislature's defective phrasing of an Act, or add and mend, and, by construction, make up deficiencies which are there.

56. In "The Framing of India's Constitution" by B. Siva Rao it was observed that certain judicial decisions laid down to the effect that it would not be within the power of State to give preferential treatment to backward communities in the matter of admission to educational institutions, as this would be contrary to

Article 15. It was felt that the special responsibility of the State for improving the condition of backward classes required that the State should have such power. The Constitution (First Amendment) Act, 1951 added a new clause to Article 15, which made it expressly clear that nothing in that Article or in Article 29 would prevent the State from making any special provision for the advancement of any "socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes." Having regard to the fact that they were not socially, economically or politically equal to the other categories, it was expected that by reason of grant of such privileges, amenities, culminating in reservation, socially inequality and economic inequality to a large extent would be minimised. The privileges to the members of scheduled tribe must be balanced with the fundamental rights of others who are living in the same area. The fundamental right of education of all citizens particularly those children up to the age of 14 years must be protected having regard to the decisions of the Apex Court in *Miss. Mohini Jain Vs. State of Karnataka and others*, , and in *Unnikrishnan v. State of A.P.* AIR 1994 SC 2178. The deficiencies in standards of social, economical and backward people were contemplated to be wiped out within a period of ten years.

57. It is trite that interpretation leading to logical ends of unworkability of the Constitution using it as a technical interpretation to undo the State policy or causing substantial injustice would be denuding laws of effective operation. But even then the same must work not only within the constitutional parameters but also having regard to the hopes and aspirations of the freedom fighters and the makers of the Constitution.

58. Court should not substitute their social belief for the judgment of the Constitution makers.

59. It is also trite that the provisions of the Constitution should be interpreted keeping in view the will of the makers thereof. See *S.R. Chaudhuri Vs. State of Punjab and Others*, .

60. In *Peerless General Finance and Investment Co. Limited and Another Vs. Reserve Bank of India*, , it has been held:

The State can regulate the exercise of the fundamental right to save the public from a substantive evil. The existence of the evil as well as the means adopted to check it are the matters for the legislative judgment. But the Court is entitled to consider whether the degree and mode of the regulation whether is in excess of the requirement or is imposed in an arbitrary manner. The Court has to see whether the measure adopted is relevant or appropriate to the power exercised by the authority or whether over-stepped the limits of social legislation. Smaller inroads may lead to larger inroads and ultimately result in total prohibition by indirect method. If it directly transgresses or substantially and inevitably affects the fundamental right, it becomes unconstitutional, but not where the impact is only remotely possibly or incidental. The Court must lift the veil of the form and

appearance to discover the true character and the nature of the legislation, and every endeavour should be made to have the efficacy of fundamental right maintained and the Legislature is not invested with unbounded power. The Court has therefore, always to guard against the gradual encroachments and strike down a restriction as soon as it reaches that magnitude of total annihilation of the right.

61. Affirmative action would stop when reverse discrimination begins. See *Ajit Singh-II v. State of Punjab* (1997) 7 SCC 209. The Full Bench decision of this Court in *Satyanarayana Reddy* (supra) cannot be applied fully in the instant case as therein the clause, which arose for consideration, was as regards reservation relating to representation of people. As indicated hereinbefore, reservation in relation to Public employment and education is contrary to Article 371D of the Constitution of India. Any reservation made in terms of Article 371D of the Constitution, in relation where to recourse to Articles 14 and 16 may have to be relaxed; the same principle would not apply to the notification issued in terms of Para 5(1) of the V Schedule. The Governor while providing 100% reservation to tribals in the scheduled area, ought to have made an appropriate provision so as to give effect to the policy of reservation of granting 6% reservation to the members of scheduled tribe throughout the State.

62. Fifty one years have passed from the date of coming into force the Constitution of India. The aspirations of the founding fathers have not been met. Not only that the policy of reservations had been extended for further terms but also even the percentage of reservation has gone up.

63. By reason of notification of this nature, would it not be correct to contend that things are pushed too far so as to cause a reverse discrimination? All those, who are involved and interested in the upliftment and growth of the Nation, have to work out a system by which the injustice done to a section of people in our society at certain period of history can be rectified by providing protections to their descendants. But we have to be conscious, at the same time that the efficiency of the administration of the country is not affected and there is no reverse discrimination. The very concept of equality on closer analysis discloses the facets of inequality compelling resort to unequal measures for achieving equality. However laudable the object may be, it must be remembered that crutches cannot be provided for every thing and for all time to come. A common criticism that one hears about affirmative action is that reservation divides people on caste lines. This may appear to be true at the first sight but on a closer examination, it will be clear that the Indian society which has already been divided along caste lines cannot be welded into a homogenous one in the absence of affirmative action. The laws are the instruments of State policy and so long as the policy is broadly within the parameters of the Constitution, it is impermeable to judicial review. The students in the scheduled areas may be provided with the amenities like free tuitions and free books.

64. While interpreting the provisions of the Constitution, the aspirations of the

founding fathers of the Constitution must be kept in mind. Different standards may be adopted by the Courts depending on the nature of the legislation and the purpose for which it is intended. While interpreting the provisions of the Constitution and particularly in a sensitive matter like the present one, the Court cannot shut its eyes as to what may happen in future if things are pushed too far.

65. Although the legislation reflects the supreme will of the people, the same cannot be contrary to the constitutional provisions. If only the will of the people spoken through State Legislature or Parliament is to be given effect to, Article 13 of the Constitution becomes redundant. The power of judicial review of the Court on legislation goes into oblivion. It is one thing to say that it is law-within the meaning of Article 13, but it is another thing to say that it is a statute.

66. The non-obstante clause in Para 5(1) of the Fifth Schedule should not mean that the Governor has got power even to make law contrary to Part III of the Constitution of India or basic structure of the Constitution of India.

67. The Apex Court in H.H. Maharajadhiraja Madhav Rao Jivaji Rao Scindia Bahadur of Gwalior and Others Vs. Union of India and Another, , held that the said non-obstante clause must be understood in its context and its field delineated having regard to its object. The scope of Article 363, which starts with non-obstante clause, must be determined strictly. The non-obstante clause should be understood that the Governor can modify the Act of Parliament or Legislature, even though the said power vests in the Parliament and the State Legislature under Article 245 of the Constitution of India.

68. In Chandavarkar Sita Ratna Rao Vs. Ashalata S. Guram, , it has been held:

A clause beginning with the expression "notwithstanding anything contained in this Act or in some particular provision in the Act or in some particular Act or in any law for (the time being in force, or in any contract" is more often than not appended to a section in the beginning with a view to give the enacting part of the section in case of conflict an overriding effect over the provision of the Act or the contract mentioned in the non-obstante clause. It is equivalent to saying that in spite of the provision of the Act or any other Act mentioned in the non-obstante clause or any contract or document mentioned the enactment following it will have its full operation or that the provisions embraced in the non-obstante clause would not be an impediment for an operation of the enactment.

69. The provisions contained in School Education Act or the Gram Panchayat Act do not have any direct nexus to the doctrine of reservation. Only Rules 22 and 22-A of the State and Subordinate Service Rules provide for such legislation. The Governor thus cannot make exceptions and modifications to the rules made under proviso to Article 309 of the Constitution, as the same is neither a Parliamentary Act nor a State Act. Proviso to Article 309 of the Constitution merely enables the Governor to make a stopgap arrangement so long as the statutory provision is not made by the Legislature.

70. In our view, the power under Para 5(1) cannot be stretched to the total alteration of the reservation policy of the State, which is exclusively within the domain of the Parliament or State Legislature.

Is the Governor empowered to make 100% reservation in public employment in scheduled area?

71. A question seemingly of some importance would arise for consideration is as to whether the reservation can be made to the extent of 100%. In the instant case, the cent per cent reservation is confined only to the posts of teachers.

72. What is reservation? It implies giving of something out of the whole, be it public employment or admission in an educational institution. If 100% reservation is to be given in favour of any socially or economically backward classes, the concept of reservation would lose all its significance.

73. A question was posed during the Debates in the Constituent Assembly as to what is a backward community. Dr. Ambedkar answered:

A backward community is a community which is backward in the opinion of the Government. My Honourable friend Mr. T.T. Krishnamachari asked me whether this rule will be justiciable. It is rather difficult to give a dogmatic answer. Personally, I think it would be a justiciable matter. If the local Government included in this category of reservations such a large number of seats; I think one could very well go to the Federal Court and the Supreme Court and say that the reservation is of such a magnitude that the rule regarding equality of opportunity has been destroyed and the Court will then come to the conclusion whether the local Government or the State Government has acted in a reasonable and prudent manner.

74. Adequate representation is the backbone of Articles 14 and 16, which by reason of necessary implication excludes cent per cent reservation in whatever small area it may be. Justice Fazal Ali's view in *State of Kerala* (supra) was that the rule of 50% is a rule of caution and the dominant object is to provide for adequate representation. Mathew, J., looking at the problem from a sociological point of view, held that the concept of equality is wide enough to put scheduled castes and scheduled tribes on par with members of other communities which would enable them to get their share of representation in public services. Whether there is equality of opportunity must be judged only by the equality attained in the result.

75. It may be necessary to notice that the preamble of the Constitution proclaims to secure justice to all, which includes social, economical or political justice; equality of opportunity and equality of status. Part IV of the Constitution of India contains the Directive Principles of State Policy. Part IV-A provides for fundamental duties. Article 38 of the Constitution enjoins the State to strive to promote the welfare of the people by securing and protecting, as effectively as it may, the social order in which justice-social, economic and political - shall inform

all the institutions of national life striving to minimise inequalities in income and endeavour to eliminate inequalities in status, facilities, opportunities among individuals and groups of people residing in different areas or engaged in different avocations. Article 39 provides for certain principles of policy to be followed by the State. Article 46 ordains that the State shall promote the educational and economic interests of the weaker sections of the people, particularly of the Scheduled Castes and the Scheduled Tribes with special care and protect them from social injustice and all forms of exploitation.

76. Article 16(4) of the Constitution enables the State for making any provision for reservation of appointments or posts in favour of the backward class of citizens, which is not adequately represented in the services under the State. If equalising principles are found out in affirmative, the question which would immediately crop up for consideration is whether all the public employments should be given in favour of particular class of people. Such a principle would be in negation of the equality clause. The equality clause to the said effect would be violative of the basic structure of the Constitution of India.

77. In *Indra Sawhney*'s case, the Apex Court held:

Just as every power must be exercised reasonably and fairly, the power conferred by Clause (4) of Article 26 should also be exercised in a fair manner and within reasonable limits - and what is more reasonable than to say that reservation under Clause (4) shall not exceed 50% of the appointments or posts, barring certain extra ordinary situations as explained hereinafter.

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

Reservation being extreme form of protective measure or affirmative action, it should be confined to minority of seats. Even though the Constitution does not lay down any specific bar but the Constitutional philosophy being against proportional equality the principle of balancing equality ordains reservation, of any manner, not to exceed 50%.

78. It is apt to notice the dicta of Dr. Thommen in *Indra Sawhney* (supra) that the redressal of backwardness by way of affirmative action must not be unduly unfair to the persons left out of the favoured groups. The relaxation by no stretch of imagination can be brought to the level of 100%.

79. In *R.K. Sabharwal and others Vs. State of Punjab and others*, , the Apex Court observed:

When the State Government after doing the necessary exercise makes the reservation and provides the extent of percentage of posts to be reserved for the said Backward Class then the percentage has to be followed strictly. The prescribed percentage cannot be varied or changed simply because some of the members of the Backward Class have already been appointed/promoted against the general seats. As mentioned above the roster point which is reserved for a Backward Class has to be filled by way of appointment/promotion of the member of the said class. No general category candidate can be appointed against a slot in the roster which is reserved for the Backward Class. The fact that considerable number of members of a Backward Class have been appointed/promoted against general seats in the State Services may be a relevant factor for the State Government to review the question of continuing reservation for the said class but so long as the instructions/rules providing certain percentage of reservations for the Backward Classes are operative the same have to be followed. Despite any number of appointees/promotees belonging to the Backward Classes against the general category posts the given percentage has to be provided in addition.

80. In *R. Chitralekha and Another Vs. State of Mysore and Others*, , the majority view was that reservation should not exceed 50%, but a little relaxation may be permitted, but while doing so, great care should be taken. The 50% reservation rule applies only to reservation proper but not to other forms like exemptions or relaxations if any provided to backward classes.

81. Reservation is aimed at securing equal and protective discrimination. In a case where 100% reservation is to be made, distribution would not be permitted. Recently, the purpose of reservation although in a different context has been stated by the Apex Court in *A.I.I.M.S. Students Union Vs. A.I.I.M.S. and Others*, , wherein it was observed:

Reservation, as an exception, may be justified subject to discharging the burden of proving justification in favour of the class which must be educationally handicapped - the reservation geared up to getting over the handicap. The rationale of reservation in the case of medical students must be removal of regional or class inadequacy or like disadvantage. Even there the quantum of reservation should not be excessive or societally injurious. The higher the level of the speciality the lesser the role of reservation.....

Any reservation, apart from being sustainable on the constitutional anvil, must also be reasonable to be permissible. In assessing the reasonability one of the factors to be taken into consideration would be whether the character and quantum of reservation would stall or accelerate achieving the ultimate goal of excellence enabling the nation constantly rising to higher levels. In the era of globalisation, where the nation as a whole has to compete with other nations of the world so as to survive, excellence cannot be given an unreasonable go by and certainly not compromised in its entirety. Fundamental duties, though not enforceable by a writ of the Court, yet provide a valuable guide and aid to

interpretation of constitutional and legal issues. In case of doubt or choice, people's wish as manifested through Article 51A, can serve as a guide not only for resolving the issue but also for constructing or moulding the relief to be given by the Courts.

82. In the instant case, the overriding effect is to be given only for the legislative power of the Parliament as the same would come in conflict with the power of the Governor under the said Paragraph.

83. Another aspect of the matter must be borne in mind. Legislative policy of reservation in terms of Articles 15 and 16 of the Constitution specifies six per cent civil posts for the members of Scheduled Tribes in the entire State. Can the Government in exercise of its legislative power under Clause (1) of Para-5 of the V Schedule to the Constitution make exceptions and modifications to the effect that it will have an impact over an area which is a non-schedule area? The answer to the said question must be rendered in a big emphatic "no".

84. The legislative power of the Governor is in relation to a particular area. Its application must be confined to that area alone. If expressly or by necessary implication the impact of such legislation spills over to other areas over which the Governor has no legislative power, as a result whereof, it would come in conflict with the law prevailing therein, the same would clearly be ultra vires.

85. The Governor has no independent power having regard to the constitutional scheme to issue instructions under Article 162 of the Constitution of India. The mode and manner in which the two powers are exercised are absolutely distinct and different. In the matter of issuance of executive instructions although the same is issued in the name of Governor having regard to the rules on executive business, the Governor is required to apply his mind in relation thereto in view of rules of executive business. The same may not even be placed before the Governor; whereas when a legislation is made by the Governor in terms of Para 5 of V Schedule to the Constitution of India, the conditions precedent laid down, therefor, must be complied with. It requires application of mind on the part of the Governor. Exercise of executive power, the same must be expressly or impliedly conferred under the Statute. The Governor has limited power in relation to scheduled area. He does not have the power of general superintendence and control over the members of the Scheduled Tribe.

86. The general efficiency of the teachers belonging to the members of the Scheduled Tribe would be less than those of the open category teachers stand admitted. The efficiency of administration being of paramount importance, it is unwise to provide cent per cent reservation at the cost of efficiency.

87. In State of Karnataka Vs. Kumari Gowri Narayana Ambiga etc., , the Apex Court had to consider a peculiar situation in regard to regularisation of the local candidates. When Government found that a large number of local candidates belonging to backward classes could not get absorption on regular basis, made special rules by which all of them were absorbed as regular candidates totally

dispensing with the requirement of any selection process. The Supreme Court agreed with the reasoning of the High Court that even the initial appointment as local candidates was not in accordance with the procedure prescribed under the rules and the assurance of efficiency implicit in competitive selection became the first causality. The procedure provided for absorption of the local candidates belonging to Backward Classes on regular basis was held to be not consistent with the maintenance of standards of efficiency in the State service and that the special rules made by the State for such absorption of local candidates" cannot be protected under Article 16(4) of the Constitution and that they are in violation of Article 16(1) since they "neither provide for any reservation nor any other affirmative action permissible under Article 16(4)". To the extent all posts have been reserved for local candidates, the same would be violative of Article 15 of the Constitution.

88. Six per cent reservation to the members of the Scheduled Tribes of the entire population ought to be provided for in public employment in the entire State. If all persons for whom the legislative policy of reserving six per cent of posts for members of Scheduled Tribes or a big a chunk therein are filled up only within the Scheduled Area, the State cannot implement the roster points which, again, has been made in terms of a legislative policy. In other words, it is unexceptionable that the reservation policy must be applied having regard to the equality clause.

Effect of Presidential Order issued under Article 371-D:

89. In respect of the services in the State of Andhra Pradesh, the President of India has enacted Article 371-D:

of the Constitution of India. A cadre is constituted in respect of Teachers of Andhra Pradesh subject to Article 371-D: of the Constitution. Cadre of teachers is zonal one in terms of the provisions of the Presidential Order. A zonal cadre is created for the purposes of promotion, seniority etc. The State organised a zonal cadre. Can a cadre be created other than the one contemplated under the Presidential Order. Answer to the said question must be rendered in negative. By reason of the impugned G.O., no separate cadre is created. The cadre remains as zonal cadre. The policy of reservation in respect of the teachers employed in the school must be applied in consonance with the provisions of the Presidential Order. Such a right should be organised by the State only within a period of 18 months from the date of commencing into force of the Presidential Order. The same has not been done. Another cadre or another zone could be created in terms of the Presidential Order only with the consent of the President. Pursuant to Six Point Formula agreed upon by various political leaders of the State, by Constitution 32nd Amendment Act, the Parliament introduced Article 371-D: for the State of Andhra Pradesh with the object to ensure equitable opportunities in the matter of Public Employment for persons coming from various parts of the State. In exercise of the powers conferred by Clauses (1) and (2) of Article 371-D: of the Constitution of India, the President issued the order known as Andhra

Pradesh Public Employment (Organisation of Local Cadres and Regulation of Direct Recruitment) Order, 1975. Para 3 of the Order provides for organisation of Local Cadres. Para 3(2) provides that the posts belonging to the category of Junior Assistants and to each of the other categories equivalent to, or lower than that of a Junior Assistant in each department in each district shall be organised into separate cadre. Under Sub-para (3), the posts belonging to each non-gazetted category, other than those referred to in Sub-paragraph (2), in each department in each zone shall be organised into a separate cadre. As per Para 3(4), the posts belonging to each specified gazetted category in each department in each zone shall be organised into a separate cadre. As per Third Schedule appended to the Order, Inspectors of Police in Police Department is a specified gazetted category (S.No.51). According to Para 2(1)(m), zone means a zone specified in the Second Schedule comprising the territories mentioned therein. Para 6 deals with local areas. 90. Under Para 5(1) for the purpose of recruitment, appointment, discharge, seniority, promotion and transfer and such other matters as may be specified by the State Government, each part of the State for which a local cadre has been organised is the Unit.

91. Clause (10) of Article 371-D:

provides that the provisions of the Article and of any order made by the president thereunder shall have effect notwithstanding anything in any other provision of the Constitution or any other law for the time being in force. Therefore, the Presidential Order prevails over any other law existing or made in future. 92. By reason of the exceptions or modifications, the Governor has not by reason of G.O. Ms. No.3 constituted a separate cadre in relation to the Scheduled Area. The said cadre, therefore, remains intact. The reservation policy of the State to the extent of six per cent so far as the members of Scheduled Tribes are concerned must, therefore, be held to have application in relation to the entire cadre and not in relation to those who were to be appointed only in Scheduled Areas.

93. If by reason of G.O.Ms.No.3, a separate cadre is created, various practical difficulties would arise. Scheduled Area may comprise only a part of the local cadre. Thus if a principal, who is himself a member of Scheduled Tribe, is appointed in such a school, the single post reservation would be ultra vires the Articles 15 and 16 of the Constitution. By reason of the provisions of Article 371-D:

of the of the Constitution of India, 80% of the posts must be filled from among the local candidates only. Apart from the practical difficulties, many problems would arise which would make the entire situation unworkable. The definitions of local candidate in the Presidential Order and the impugned rule are different. They are irreconcilable. If the intention of the Government is that if the local candidates are appointed as teachers, they can attend the duties without absenting, the tribals as also non tribals residing in that area can be appointed to achieve the so-called object. 94. In that view of the matter also, the impugned

rule must be held ultra vires the Presidential Order which would prevail over the impugned notification. For comparison, we may notice that Clause (10) of Article 371-D:

of the Constitution of India uses the expressions "the provisions of the Act or Order made by the President thereunder, notwithstanding anything in any other provisions of the Constitution or in any other law for the time being in force." The non-obstanle clause contained in Article 371-D: of the Constitution is much more wider. Article 371-D: shall prevail over sub-para (1) of Para 5 of the Fifth Schedule. (See in Govt. of Andhra Pradesh and Others Vs. Mohd. Ghouse Mohinuddin and Others,). Equality doctrine vis-a-vis principles of reservation:

95. In Marri Chandra Shekhar Rao Vs. Dean, Seth G.S. Medical College and Others, , it was held:

Equality must become a living reality for the large masses of the people. Those who are unequal, in fact, cannot be treated by identical standards; that may be equality in law but it would certainly not be real equality. Existence of equality of opportunity depends not merely on the absence of disabilities but on presence of abilities. It is not simply a matter of legal equality. De jure equality must ultimately find its *raison d'être* in tie facto equality. The State must, therefore, resort to compensatory State action for the purpose of making people who are factually unequal in their wealth, education or social environment, equal in specified areas. It is necessary to take into account de facto inequalities which exist in the society and to take affirmative action by way of giving preference and reservation to the socially and economically disadvantaged persons or inflicting handicaps on those more advantageously placed, in order to bring about real equality.

95. The principle of fixing the percentage of reservation emanates from the doctrine of reasonableness. In M.R. Balaji and Others Vs. State of Mysore, , the Apex Court speaking through Gajendragadkar, J., struck down the Government Order describing it as a fraud on the Constitution and the action of the executive was characterized as "patently and plainly outside the limits of the constitutional authority conferred on the State."

96. We are not oblivious of the fact that in Union of India and Another Vs. Madhav Gajanan Chaubal and Another, , the Apex Court had an occasion to consider the provisions of Article 16(4A) of the Constitution.

97. Dr. Ambedkar who himself belonged to a untouchable class while moving the adoption of the draft Article which became Article 16 pointed out that equality of opportunity in matters of public employment was the rule of reservation and reservation was an exception. He emphasised that the exception could not be allowed to swallow up the rule. He further pointed out that the reservation was meant to continue for a reasonably short period of time till the backward classes were brought into the mainstream of Indian life.

98. It is true that in *State of Kerala and Another Vs. N.M. Thomas and Others*, reservation exceeding 40% had been permitted on the ground that SCs were not castes in a real sense and Article 16(4) was not an exception. Krishna Iyer, J., in *Karmachari Sangh case*, AIR 1981 SC 293, however, abandoned the aforementioned theory wherein his Lordship held that he was prepared to assume that they were castes and in event Article 16(4) was an exception. In the said judgment, the final address of Dr. Ambedkar to the Constituent Assembly was dealt with in extenso. Sri H.M. Seervai in his classic treatise on "Constitutional Law of India," Fourth Edition at page 611 states:

But this passage gives an incorrect impression of Dr. Ambedkar's final address. He was not thinking of the SCs and STs or of the equality code as the following passage clearly shows:

I remember the days when politically minded Indians resented the expression "the people of India." They preferred the expression "the Indian nation." I am of opinion that in believing that we are a nation we are cherishing a great delusion. How can people divided into several thousands of castes be a nation? The sooner we realise that we are not as yet a nation in the social and psychological sense of the word, the better for us. For, then only we shall realise the necessity of becoming a nation and seriously think of ways and means of realising the goal. The realisation of his goal is going to be very difficult - far more difficult than it has been in the United States. The United States has no caste problem. In India there are castes. The castes are anti-national. In the first place because they bring about separation in social life. They are anti-national also because they generate jealousy and antipathy between caste and caste. But we must overcome all these difficulties if we wish to become a nation in reality. For, fraternity can be a fact only when there is a nation. Without fraternity, equality and liberty will be no deeper than coats of paint.

99. The learned author pointed out that grounds upon which *Thomas case* was based having been got rid of by *Karmachari Sangh case* and Article 16(4) having been held to be an exception, reservation theory must be held to be emanating therefrom only. According to the learned author, the Court has to do Justice to five parties viz., (i) the State, to whose service candidates are to be recruited; (ii) the public, as the very phrase "public servant" shows; (iii) the petitioners, who were discriminated against by the reservations in favour of members of SCs and STs; (iv) members of SCs and STs in whose favour discrimination was made by fixing reservation by fixing quotas; (v) the services, that is, each service considered as a whole. The learned author states:

A service which lacks an esprit de corps, that is, consciousness of and pride in belonging to a particular service, lacks an element essential to an efficient and harmonious administration. To balance the claims of these parties, in considering reservation quotas, requires critical analysis and calm deliberation; anger at the treatment meted out to classes to which one of the parties belongs does not help, for anger has been rightly "likened to a hasty servant who runs away

before he has heard half the message".

Further it was opined:

"It is necessary to remember that in litigation there are more parties than one, that it is wrong to gratify the plaintiff to the detriment of the defendant, and that, while sympathy is a most commendable quality, it never appears, in a less attractive guise than when it is practised at the expense of somebody else. Lord Reward, Not without prejudice, at p.228.

If past injustice done to members of SCs and STs because of the accident of their birth calls for condemnation, so does injustice done to members of "advanced classes" because of the accident of their birth. It may be that members of "advanced classes" may have to bear for a time, as best as they can, the injustice done to them by reverse discrimination, if a long standing historical wrong has to be righted. But 40 years have gone by since our Constitution came into force; and every year that passes increases the individual's sense of injustice and injury. It is submitted that Judges who have to balance the claims of all the parties affected by any action under Article 16(4) ought to reflect that if the injustice of the past are to be strongly denounced now, then the future will denounce quite as strongly the injustices suffered by members of "advanced classes" since 1950."

100. In Indra Sawhney it has been clearly held that the doctrine of principles of reservation have to be applied having regard to the vacancy position as existing in the entire area. The only exception being the cases, which would be falling under Article 16(4). Even considering the case from that angle, 100% reservation in a particular area may be held to be unworkable and directly in conflict with Indra Sawkney.

101. We may also refer to the decision of a Full Bench of this Court in Arka Vasanth Rao v. Government of A.P. 1995 (1) ALD 801, wherein the question arose for consideration was whether a notification issued by the Governor under Para 5(1) of V schedule extending the provisions of Andhra Pradesh Panchayat Raj Act, 1994 (Act 13 of 1994) to the scheduled areas for conduct of elections in the scheduled areas for the panchayat raj institutions was valid. M.N. Rao, J., (as his Lordship then was) speaking for the Bench held:

What is not expressed in the Constitution cannot be brought in by judicial interpretation in the name of public good or the spirit of the Constitution. "The organic law is not a mirror in which one sees what one wants to see ... Reading things out of the Constitution order to bring the documents into line with a theory seems no more defensible than leading things into the Constitution for the same reason. (See Laurence H. Tribe and Michael C. Dorf - On Reading the Constitution, P.7 and 27),

Judicial legislation for supporting any particular theory or philosophy in order to perpetuate a state of affairs, which, according to the perceptions of the Judges

would be in public interest, but without foundation in the Constitution, is plainly forbidden. When we say this, we are conscious of the fact that Judges do and must legislate but they could do so only interstitially, they are confined from molar to molecular motions. (Southern Pacific Co. V. Jensen - 244 US 205 (1917) Per Holmes, J).

102. Explaining the scope of the precedent in Chakradhar Paswan Vs. State of Bihar and Ors, , the Apex Court held that even though it was held that single post cannot be reserved as it would amount to 100% reservation, but the "further question whether in the same single point post, reservation by rotation could be granted and whether it will be violative of Article 16(4) was left open in that case".

103. The posts of teachers, in the event the impugned notification is upheld, are to be filled up by the members of scheduled tribes, and necessarily the post of Head Master must also to be filled up by a member of scheduled tribe. The reservation policy cannot be applied to a single post. It is also an indicia to show that 100% reservation is impermissible.

104. Quite paradoxically sometimes, the application of rules concerning the reservation may work to the detriment of more meritorious candidates belonging to the Backward Classes.

105. In P.S. Ghalaut Vs. State of Haryana and Others, , the Supreme Court ruled that the placement of candidates must be at the respective points fixed in the roster and that the roster is a "measure to give effect to the constitutional policy of reservation to render socio-economic justice to the concerned sections". The candidates belonging to backward classes who secured selection in the open competition "cannot complain that having been selected in the merit, they must be placed in the placement reserved for the scheduled castes" and their position is the same as that of general candidates who secured selection by reason of their superior merit but who go down in the seniority list in accordance with the points fixed in the roster.

106. Affirmative action is not conceived of as a remedial measure on permanent basis since it aims at remedying the existing inequalities by resorting to seemingly unequal treatment. What is necessary is to see that the victim groups, who suffered the first order discrimination in the past because of the inbuilt social inequalities of the Hindu society, reach the level of other advanced classes, social integration becomes a distant dream. For the said purpose, progress must be aimed at a quicker pace and not that they should be relegated back to their own position when they have interactions with their own community or members of scheduled tribe. Exploitation from outsiders must be protected. But, that does not mean that the advancement of the members of scheduled tribe should be thwarted.

107. The doctrine of reservations is to be applied having regard to the vacancies in particular areas. At one point of time, the vacancies may occur in the entire

State and at the other they may not. When vacancies are required to be filled in the entire State, having regard to the decision of the Apex Court in *Indra Sawhney*, the reservation cannot exceed six per cent. In the said situation, it is preposterous to contend that there can be hundred per cent reservation in relation to scheduled area alone, which in a given case, would run contrary to or inconsistent with the roster policy.

108. When reservation has already been provided under Article 16(4), there cannot be a former reservation under Article 16(1). In public employment, as Scheduled Caste, Scheduled Tribe and Backward Class candidates are required to be selected in open competition field with the other candidates and if they are so selected on the basis of their merit, for all intent and purport, they would be treated to be selected in open category and excluded from the number of posts reserved for them. This also clearly shows that the competition between two categories viz., reserved category and open category was very much in mind of the founding fathers of the Constitution.

109. The matter requires consideration from another angle. The population in the scheduled areas not only includes the scheduled tribes but also the scheduled castes and others. In Khammam District, out of 31 mandals notified as scheduled areas, the population of the scheduled tribes is less than fifty per cent, except in 9 mandals. In those 9 mandals, the population of the scheduled tribes ranges between 53 per cent and 77 per cent. The percentage of the ST students is around 25 per cent and the remaining students belong to backward classes, scheduled castes and others.

110. In West Godavari District there were three agency mandals viz., Polavaram, Buttayagudem, Jeelugumilli. In the said three mandals, the population of Scheduled Tribes as per 1991 census is only to the extent of 39.31% whereas the population of non-tribals is 60.31%.

111. The upliftment of scheduled tribes cannot be made at the cost of other classes of the community. The percentage of Scheduled Tribes in particular areas, particularly with regard to Kothagudem, where there are many collieries and industries belonging to the public sector undertakings and private sector undertakings. For the purpose of obtaining employment, trade and carrying on business, a large number of people who have come from outside are living in this area. This area also consists of larger number of Scheduled Castes and Backward Class people. Is it permissible to deny the right of education to the children of those people, having regard to the decision of the Apex Court in *Unnikrishnan v. State of A.P.* (supra) at least to the extent of 14 years of age, a fundamental right thereto? The students belonging to non-tribal community must not feel that they have been let down. Equality class would not mean that the meritorious non-tribal candidates shall not be given all opportunities in pursuit of the educational career. If a school is manned by the teachers of a particular class, the students belonging to the other classes would be discriminated against.

112. The reasons assigned in support of G.O.Ms.No.3 dated 10-1-2000 are also not logical. The educational infrastructure in the scheduled areas must be strengthened. The educational development of tribals should undoubtedly be promoted. The phenomenal absenteeism of teachers in the scheduled areas must be resisted. The remedy adopted by the Government for this situation must be in accordance with law. But does it mean that the interest of local tribals can be protected only by reserving the posts to the local candidates of the local areas to the total exclusion of others? The answer to the said question must be rendered in negative. The Government is not expected to make legislation only because of inaction on the part of the teachers. If there had been absenteeism of teachers in the scheduled areas, the answer lies in taking disciplinary action against such teachers and not by making a law, which is unconstitutional. Incapacity on the part of the Government to take disciplinary action against such teachers is itself deplorable. Those, who had taken employment voluntarily for the purpose of serving in scheduled areas, must discharge their functions. If they cannot, they can be discharged from service and they can be replaced by other suitable candidates.

113. The educational infrastructure in the scheduled area can be strengthened by constituting more number of schools. The educational development of tribals can be made taking recourse to several other actions. Direct vigil over the functions of the schools may be kept wherefor the infrastructural facilities by appointing more officers in the higher rank can be made. The teachers working in the scheduled areas should be provided extra amenities so that absenteeism may be reduced to some extent.

114. The posts in the scheduled area are required to be filled up by transfer only from the members of the scheduled tribe, Such transfer of members of the scheduled tribe would not have adverse effect. In any event, as noticed hereinbefore, the posts of Head Masters and other posts must be filled up by way of open competition and they cannot be subjected to reservation.

115. The submission of the learned Counsels for the petitioners as also the learned Advocate-General to the effect that the impugned rule does not refer to the reservation, is stated to be rejected. G.O. Ms. No.3 speaks of filling up of the posts of teachers through public employment. By reason of the impugned notification those living outside as well as those living in the scheduled area from a date posterior to 26th January, 1950 are excluded, "Local scheduled tribe" is a person belonging to a scheduled tribe, who himself or his family has been continuously living in the scheduled area of the district from 26th January, 1950 till date. This creates class within a class. A classification that excludes such a large number of scheduled tribes cannot be described as a reservation for the scheduled tribes nor can it be confounded for any purpose whatsoever. It would create a class within a class, which is impermissible in law. In this case, no regulation has been made. Thus, the question of applying the doctrine of peace and good governance of the scheduled areas and the protection of the interests

and the development of the scheduled tribes does not arise. This doctrine is irrelevant for Part I of the Constitution. The object of the V Schedule of the Constitution is to establish egalitarian society resulting in classless society.

116. Impugned legislation must be tested on the anvil of the Articles 15, 16 as also Directive Principles of the Constitution of India. Even such beneficial legislation must not be stretched too far. What is required to be kept uppermost in the mind of the Court is the purpose for which the same was enacted. (See: Steel Authority of India Ltd. and Others etc. etc. Vs. National Union Water Front Workers and Others etc. etc.,

117. The said decision has recently been considered by the Apex Court in *Tatoba Bhau Savagave v. Vasantrao D. Deshpande* AIR 2001 SCW 4016, in the following terms:

.....there can be no gainsaying the fact that while interpreting a beneficial legislation like the Act under consideration, the Directive Principles of State Policy contained in Article 38 and Clauses (b) and (c) of Article 39 of the Constitution should be uppermost in the mind of a Judge. But that principle cannot be extended to reading in the provision of the Act that which the Legislature has not provided either expressly or by necessary implication.

118. In *Satyanarayana Reddy's* case (supra), a Full Bench of this Court dealt with the reservation of the post of Sarpanch in the scheduled areas. Election to the post of Sarpanch is not a fundamental right. Even if 100% reservation is provided, it cannot be tested under part III of the Constitution of India. However, the Full Bench held that even though 100% Sarpanch posts are reserved for scheduled tribes in the scheduled areas, the total reservation shall not exceed six per cent. *Jeevan Reddy, J.*, (as he then was) held that excessive reservation in favour of the scheduled tribes will result in depriving the scheduled castes and other backward classes and their due representation. The learned Judge also held that excessive reservation is unreasonable and arbitrary. This Court is bound by the decision aforementioned.

119. In the same manner, the impugned notification providing 100 per cent reservation not only affects the open category candidates but also scheduled castes and backward classes.

120. There may be cases where reliance on 50% doctrine as propounded in *Balaji and Indra Sawhney's* case (supra) may have to be relaxed. But the same by any stretch of imagination be extended to 100% reservation. It would be in negation of the policy of reservation. If the rule is to be applied, the members of the scheduled tribe who are not residents of the scheduled areas shall also suffer because they would be deprived of the benefit of the policy decision of the State which is applicable in their cases also to which benefit they are entitled to.

121. The principle underlying the aforementioned constitutional mandates aims at equality and the same does not aim at reverse discrimination. The concept of

socialism has been undergoing changes, the eradication of social injustice through a constitutional order was central ideology. But the same in the opinion of this Court would not mean that such socialistic goal could not be achieved by adopting the process, which would more and more isolate them from the main stream. The State cannot create goals only for the members of the scheduled tribe. A legislation by a Governor in terms of Para 5 of V Schedule to the Constitution is permissible. As noticed hereinbefore, the same would not, having regard to equality clause, run against Articles 14 - 16 of the Constitution deriving the minimum benefit to the other sections. Under the constitutional scheme for the members of the scheduled tribes and scheduled castes, similar protection had been envisioned. Even in relation thereto, by reason of the impugned G.O. discrimination is sought to be meted out. The Constitution aims at promoting reasonable classification. By reason of the doctrine of reasonable classification only, the posts may be reserved in favour of a class which is sustainable under Articles 15(1) and 16(1). The concept of reasonable classification has its origin in reasonableness. What should be the reasonable percentage of reservation is although a State policy, according to the decision of the Apex Court, the reservations should not exceed 50%. The concept of reservation has a direct nexus with meritarianism. The merit system was sought to be negated by a section of jurists on the ground of the participation in the good governance by the members of the weaker sections. In all the decisions, however, the Apex Court, whatever view it had taken, emphasised the need of reservation only at the entry level so that by reason of service, they may acquire equal efficiency and competence. In *The District Manager, Andhra Pradesh State Road Transport Corporation, Bhimavaram Vs. Labour Court, Guntur and Another*, the right of public employment is held to be a new form of property. It has been held that it is a great source of living and happiness to unemployed millions. This view was reiterated by the Apex Court in *State of Maharashtra Vs. Chandrabhan Tale*. The Apex Court stated that public employment opportunity is national wealth in which all citizens have equal share and nobody can monopolize this in the name of efficiency. When the public employment is considered to be a national wealth, equal distribution thereof is having a direct nexus with the class of people among which such assets would be distributed proportionately as adumbrated in the equality clauses.

122. Whatever be the small area, the constitutionalism can never contemplate that all the eggs be kept in one basket, as a result whereof the other citizens of the locality and outsiders who were at least entitled to 15% of employment in all in the district cadre in terms of Clause (10) of Article 371D of the Constitution of India would be totally deprived therefrom.

123. By reason of the impugned notification, class within class has been created. Clause (1) of Article 15 injects the State from making distinction inter alia on the ground of place of birth. By reason of Clause (4) of Article 15 of the Constitution of India, the State is empowered to make any special provision inter alia for the purpose of scheduled castes and scheduled tribes.

124. Can in the aforementioned situation, the definition of "local candidate" as contained in the explanation to the notification be sought to be justified? Even a member of scheduled tribe would not be a local candidate who were not residents of that area prior to 26-1-1950." Thus the members of the scheduled tribe who are residing in the area for a long time would also be deprived of the opportunity of employment, which is guaranteed under Clause (1) of Article 16 of the Constitution of India. The classification can be based on geographical limitation. But no classification can be based in that area from particular date.

125. It is not a case where the culture of minority is to be protected, the education is necessarily required to be imparted. The retardation from the said principle indicates not only the equality concept, but would also blow national integration and development of national economy. How so ever small, a State is to be taken to be a unit, it being contrary to the very concept of social justice. We are of the opinion that the same is not countenanced under the Constitution. The restoration of land and belongings to the scheduled tribes rests on a different concept. In the implementation thereof, the doctrine of restitution is applied. But that is the only for the purpose of restoration of property which rightly belonged to the members of the scheduled tribe from which they have been deprived. Judicial notice can be taken as regards the merit which is manifest from the fact that the lower percentage of marks is always provided for in the written examination in the competitive examinations held in public employment. Those who proved themselves to be exceptions are treated at par with open category candidates. Creative and dynamic interpretation of the Court should not be extended to the extent of denying the benefit of the statutory rules to a section of the community. The interpretation clause is not a positive enactment.

126. For upliftment of the educationally backward people, it is necessary to impart education through teachers who are more informed and more meritorious irrespective of their caste. The thrust should be that such children should join the main stream, compete with other classes, prove their capability and join hands for all round growth of the nation. The aim of the Constitution is not that the members of the scheduled tribes should be confined only to those areas. While judging the constitutionality of a provision, regard must be had to the circumstances whether the provision is in excess of the requirement of the situation. The constitutionality of the said rule therefore cannot be upheld. If the impugned notification is upheld, in the opinion of this Court it will adversely affect the interests of the members of scheduled tribe as by reason thereof it amounts to thwarting the Constitution goal that they join the main stream. The logical corollary whereof is that the judgment of the learned Tribunal must be upheld.

In view of the foregoing discussion, we sum up our conclusions as follows:

1. The impugned notification issued in G.O.Ms.No. 3, in spirit, offends Articles 14 and 16 of the Constitution inasmuch it provides 100% reservation to Scheduled

Tribes in Scheduled Areas to the exclusion of all other categories. Furthermore, the reasons assigned for issuance of the said G.O., are not logical.

2. The Governor has no independent power to make law contrary to Part III or other provisions of the Constitution of India while exercising his power under Clause (1) of Para 5 of Vth Schedule.

3. The impugned G.O., providing for 100% reservation not only affects the open category candidates but also other Scheduled Tribes, Scheduled Castes and Backward Classes and is therefore discriminatory.

4. The policy of the State providing for six per cent reservation in favour of the Scheduled Tribes is in relation to entire cadre and not to the Scheduled Areas. Reservation under Article 16(4) of the Constitution shall not exceed fifty per cent, but, however, a little relaxation is permitted.

5. Rule made under the proviso to Article 309 of the Constitution of India cannot be treated to be an Act of Parliament or of State Legislature. Article 309 of the Constitution merely enables the Governor to make stopgap arrangements so long as statutory provision is not made by the Legislature.

127. The writ petitions are accordingly ismised. No costs.

V.V.S. Rao, J.—In these writ petitions, the order dated 19-9-2000 in OA No.2138 of 2000 passed by the A.P. Administrative Tribunal is challenged. By the said order, the Tribunal quashed "G.O. Ms. No.3, Social Welfare (TW.EDN.II) Department, dated 10-1-2000 whereunder the Governor of Andhra Pradesh issued notification under Sub-paragraph (1) of Paragraph 5 of V Schedule to the Constitution of India. By the said notification the Governor directed that "the provisions of Sections 78 and 79 of Andhra Pradesh Education Act, 1982 (Act No.1 of 1982) and Sections 169, 195 and 268 of Andhra Pradesh Panchayat Raj Act, 1994 (Act No.13 of 1994) and Rule 4(a) of A.P. School Educational Subordinate Service Rules, 1998 ("Special Rules" for brevity) and Rules 22 and 22-A of A.P. State and Subordinate Service Rules, 1996, ("General Rules" for brevity) apply to the posts of teachers in the schools situated in Scheduled Areas subject to modification that all the posts of the teachers in the schools situated in Scheduled Areas shall be filled in by the local Scheduled Tribe candidates only duly following reservation of 331/3% to women".

The Back-ground Fads in Brief

We may take the necessary facts from Writ Petition No,20239 of 2000 filed by Girijan Samkshema Parishad, Khammam and another citizen belonging to Scheduled Tribe. Respondents 1 to 5 filed an original application being OA No.2138 of 2000 u/s 19 of the Administrative Tribunals Act, 1985 ("the Tribunals Act") before the Tribunal praying to hold that G.O.Ms.No.3, dated 10-1-2000 is illegal and arbitrary and to further declare the action of the State of Andhra Pradesh in reserving 100% vacancies in favour of Scheduled Tribes as unconstitutional and violative of Articles 14 and 15 of the Constitution of India.

In the OA, the respondents made averments to the following effect. They are unemployed and eligible for being appointed as teachers. There are 1500 vacancies in Khammam District out of which 1300 vacancies are in Mandals situated in Scheduled Areas. The Government of Andhra Pradesh had issued G.O.Ms.No.275, Social Welfare (E) Department, dated 5-11-1986 in exercise of power under sub-paragraph (I) of Paragraph 5 of V Schedule to the Constitution of India reserving all posts of teachers in Scheduled Areas to Scheduled Tribes. An amendment was issued to the said G.O. vide G.O. Ms. No.73, Social Welfare (E) Department, dated 25-4-1988 whereunder it was clarified that non-tribals can be appointed temporarily till qualified tribals are available.

2. G.O. Ms. No.275, dated 5-11-1986 was challenged before the Tribunal in RP No.6377 of 1988 and 6379 of 1988. The A.P. Administrative Tribunal, which was constituted under Article 371D of the Constitution allowed the RPs and quashed G.O. Ms. No.275, dated 5-11-1986. The State Government filed SLP Nos.14562-63 of 1989 (Civil Appeal Nos.2305-06 of 1991) before the Supreme Court. While granting leave, the Supreme Court by order dated 24-1-1990 suspended the judgment of the Tribunal. The Government later withdrew the appeals and the Supreme Court by an order dated 20-3-1998 dismissed the appeals as withdrawn.

3. The authorities appointed some non-tribals as teachers in accordance with G.O.Ms.No.73, dated 25-4-1988 on temporary basis for 89 days. After completion of the period of 89 days, they were removed. Those candidates filed writ petition being WP No.8467 of 1993 before this Court and a learned single Judge allowed the writ petition holding that the action of the respondents is violative of Articles 14 and 16(4) of the Constitution. A Division Bench of this Court allowed the writ appeal being WA No.874 of 1997 and set aside the judgment of the learned single Judge holding that G.O. Ms. No.73 dated 25-4-1988 does not suffer from any illegality. Aggrieved by the same, a SLP being SLP No.22786 of 1997 was filed. The Supreme Court allowed the appeal being Civil Appeal No.6437 of 1998 by an order dated 18-12-1998.

4. As per the provisions of sub-Paragraph (1) of Paragraph 5 of V Schedule to the Constitution of India, the Governor can issue notification only where there is any Act of Parliament or of the State Legislature directing that such Act shall not apply to Scheduled Areas or any part thereof. A notification can also be issued to the effect that such Act shall apply to Scheduled Areas or part of Scheduled Areas subject to specified modifications. Even while doing so, the Governor cannot abrogate the rights of the citizens under Articles 14 and 16 of the Constitution of India.

5. The writ petitioners in these writ petitions filed necessary applications for impleadment and also seeking vacation of the orders passed by the Tribunal on 5-5-2000 suspending the action of the official respondents in confining the appointments only to Scheduled Tribes. The State as well as the writ petitioners herein filed counter affidavits filed before the Tribunal.

6. The State in their counter-affidavit averred that the High Court in the order dated 4-7-1989 in WP No.16918 of 1998 upheld the validity of G.O.Ms.No.275, dated 5-11-1986. The validity of G.O.Ms.No.73, dated 25-4-1988 was also questioned in WP No.8467 of 1993 which was allowed, but a Division Bench of this Court allowed the writ appeal. An SLP thereagainst was also allowed by the Supreme Court being Civil Appeal No.6437 of 1998. The Government of Andhra Pradesh in consultation with A.P. Tribes Advisory Council as required under Paragraph 5(5) of V Schedule to the Constitution of India and in order to strengthen the educational infrastructure in Scheduled Areas and to promote educational development of tribals, issued G.O.Ms.No.3 dated 10-1-2000 with retrospective effect from 5-11-1986 in supersession of the notification issued in G.O.Ms.No.275, dated 5-11-1986.

7. The Tribunal framed only one point for consideration as under :

Whether it is open to the Government to issue a similar GO once again providing 100% reservation to the local Scheduled Tribes in the vacancies of teachers that are existing in the Scheduled Areas depriving the rights of other castes people. In view of the earlier litigation and the orders passed by Tribunal, High Court and the Apex Court and whether such reservation is in accordance with the constitutional provisions.

8. The Tribunal referred to earlier litigation in relation to G.O.Ms.No.275, dated 5-11-1998, (which is now superseded by the impugned G.O.) and allowed the OA duly setting aside the impugned order. The Tribunal mainly placed reliance on Indra Sawhney etc. etc Vs. Union of India and others, etc. etc., , and held that there cannot be 100% reservation in favour of Scheduled Tribe Candidates.

Submissions of the Learned Counsel

The matter was listed before a Division Bench of this Court, which referred it to the Full Bench having regard to the importance of the question involved in the case. The Court requested the learned Advocate-General to assist the Court. He submits that having regard to the non-obstante clause in Paragraph 5(1) of V Schedule to the Constitution of India, any notification issued by the Governor should have overriding effect over all the laws as the Constitution itself has treated Scheduled Areas and citizens belonging to Scheduled Tribes as a separate class. Such a classification is valid even for the purpose of Articles 14, 15 and 16 of the Constitution. As geographical classification is justified, it is permissible to have different laws for Scheduled Areas, which is even permitted by Part X, and Schedules V and VI to the Constitution of India. The reservation of all vacancies is only confined to the posts of teachers. It was done keeping in view the prevailing chronic absenteeism of teachers, as many of the teachers in Scheduled Areas are non-tribals. They reside elsewhere and do not pay sufficient attention to the teaching. If the tribals are appointed, the problem of chronic teacher absenteeism can be rectified. Further, the non-tribals exploit tribals in Scheduled Areas. The impugned notification also aims at the development of tribals and

improvement of economic and social conditions by providing employment. The notification is applicable to Scheduled Areas and only to local Scheduled Tribes in respect of teachers posts. Only a small fraction of employment in the field of education is subject-matter of the notification and the same does not amount to earmarking all posts in public employment of Scheduled Tribes. The impugned notification/ law is not a device for mere reservation in public employment and it is special provision for ameliorating the lot of the tribal people.

9. Sri K. Balagopal and Sri P.V. Ramana, learned Counsel appearing for the writ petitioners would contend that what is provided by the impugned notification is not reservation in the sense it is understood in the context of Article 16(4). They submit that the schools in Scheduled Areas are treated separately for the purpose of recruitment of teachers. As Article 16(1) of the Constitution permits classification for the purpose of filling up of posts in the schools in Scheduled Areas, teachers belonging to Scheduled Tribes are classified as one category and they alone were eligible for such posts. They would submit that it is a valid classification under Article 16(1) of the Constitution and it is not a reservation under Article 16(1). They placed reliance on the fact that by the impugned G.O. all the Scheduled Tribes residing in Scheduled Areas from 26-1-1950 alone were made eligible for competing to the posts thereby excluding those Scheduled Tribe candidates who had migrated to other places before 26-1-1950.

10. The learned Counsel for the petitioners also would submit that by reason of Seventy-third and Seventy-fourth Amendments to the Constitution of India, even the Constitution provides 100% reservation in political offices like Panchayats and Municipalities. Such classification was with reference to geographical Areas, which the Constitution mandates to be treated as separate units for the purpose of administration. They would also submit that the delegated legislation forms part of main legislation and therefore the Governor is competent even to exclude the application of delegated legislation.

11. The learned Counsel for the respondents/applicants would submit that the Governor has no power to make legislation under Paragraph 5(1) of V Schedule of the Constitution. Even while exercising power under the said Paragraph the Governor cannot ignore the Constitutional limitations in Part 111 thereof. The impugned notification is contrary to the judgment of the Supreme Court in *Indra Sawhney* (supra) wherein it was laid down that the reservations cannot exceed 50%. He would also submit that when the Governor issued a similar notification, the same was quashed by the Tribunal and therefore it is improper for the Governor to issue a notification again reserving 100% vacancies in Scheduled Areas only to Scheduled Tribe candidates.

Points for Consideration

In the background of the submissions made before us, the following points arise for consideration :

(1) What is the true extent and scope of operation of the Notification issued by

the Governor vide G.O.Ms.No.3, Dept, dated 10-1-2000, and whether the impugned notification amounts of reservation of 100% vacancies of teachers in Scheduled Areas?

(2) Whether the impugned Notification is not unconstitutional and illegal?

12. Before we consider the two points that arise for consideration, it is necessary to refer to the relevant provisions of the Constitution of India and the cases, which centre round those provisions.

Constitutional Provisions

Social justice is as much important preambular goal of the Constitution as that of "equality of status and equality of opportunity." The Constitution in more ways than one expresses its anxiety to promote the educational and economic interests of weaker sections of the society especially Scheduled Castes and Scheduled Tribes.

Articles 15(4), 16(4), 17, 29(1) of Fundamental Rights Chapter enable the Government to make special provisions for the advancement of socially and economically backward classes of the nation. The Directive Principles of State Policy, especially Articles 38, 39 and 46 ordain the State to give importance for the upliftment of Scheduled Tribes and mould welfare programmes in that direction. Article 164 of the Constitution deals with the formation of a Cabinet in the State. The proviso to Article 164(1) makes it compulsory in the States of Bihar, Madhya Pradesh and Orissa to have a Minister exclusively in-charge of tribal welfare. Article 244 states that the special provisions in V Schedule to the Constitution shall apply to the administration and control of Scheduled Areas and Scheduled Tribes in each State and reads as under :

Article 244(1) The provisions of the Fifth Schedule shall apply to the administration and control of the Scheduled Areas and Scheduled Tribes in any State other than the States of Assam, Meghalaya, Tripura and Mizoram.

(2) The provisions of the Sixth Schedule shall apply to the administration of the tribal Areas in the State of Assam, Meghalaya, Tripura and Mizoram.

13. Part XVI of the Constitution further provides special provisions of relating to Scheduled Tribes and Scheduled Castes. The reservation of seats in the House of the People (Lok Sabha) and reservation of seats in the Legislative Assembly of every State for Scheduled Tribes is compulsory. Article 338 obligates the State to constitute a National Commission for Scheduled Castes and Scheduled Tribes and the Union and every State Government shall have to consult the Commission on all major policy matters affecting Scheduled Castes and Scheduled Tribes. After the Constitution (Seventy-third Amendment) Act, 1992 and the Constitution (Seventy-fourth Amendment) Act, 1993, by reason of Article 243-D(1) and Article 243T(1). It is mandatory to reserve seats to Scheduled Tribes in every Panchayat and every Municipality respectively. We may also mention that Article 244(2) read with VI Schedule provides for the administration of autonomous

districts and autonomous regions in Scheduled Tribe dominant States like Assam, Meghalaya, Tripura and Mizoram. As per the proviso to Article 275(1), it is permissible for the Union to give grants-in-aid from out of the Consolidated Fund of India to meet the cost of schemes of development undertaken by the State with the approval of the Government of India when such schemes are intended to promote the welfare of the Scheduled Tribes in the State or raising the level of administration of Scheduled Areas to that of the administration of the rest of the Areas of the State.

14. We have referred to these provisions to show that the Constitution makers were very much aware of the special status and special considerations required to be bestowed on the Scheduled Tribes. This is because there is constitutional presumption that Scheduled Tribes are backward and need special measures to uplift and ingrate them into mainstream society. Though such presumption is available even in respect of Scheduled Castes, the Constitution provides different discernible safeguards for Scheduled Tribes. While the members of Scheduled Castes are compelled to occupy the sub-stratum of the socio-economic structure, "Scheduled Tribes are located on the margin both in terms of geographical regions of their habitations and also traditional socio-economic structure". They are deprived of not only the right over the productive sources but also their due entitlement to an equitable return of their work. Though they have plentiful resources at their command they are at a low stage of economic development, See:

Dr. B.D. Sharina: "Dalits Betrayed". Therefore, the various provisions referred to hereinabove seek to remove the disparities cast on them and seek to adopt the strategy of positive discrimination in their favour to help enable to acquire an honourable position due to them in the national life. While ensuring that tribal people do not lose command over the resources in the process of change and development they are motivated to take full advantage of the advances in the knowledge.

15. Generally speaking, affirmative action in favour of weaker sections is taken to remedy the effects of past discrimination. This affirmative action with device of positive discrimination by the State is implemented by a reservation policy. Reservation of seats in Legislatures and posts in Government services as well as reservation of places in academic institutions is one type of reservation. Grant of scholarships, land allotment, special health care etc., for Scheduled Tribes are also part of the device of affirmative action. Yet another type of programme is prohibition of transfer of land in Scheduled Areas by tribal to non-tribal and also prohibition of any adverse economic activity by non-tribals in tribal Areas. For instance, under Article 19(5), it is legitimate for the State to curtail the right to move freely throughout the territory of India, Under article 19(1)(d), every citizen has such fundamental right to move freely throughout the territory of India, or to reside or settle in any part of India, Under Article 19(1)(e), a citizen has right to reside and settle anywhere in India, for protection of the Scheduled

Tribes. We may also as an illustration mention that A.P. Scheduled Areas Land Transfer Regulation 1959 prohibits transfer of land by tribals to non-tribals and declares all such transactions void. Similarly, Section 11(5) of the Mines and Minerals (Regulation and Development) Act, 1957 as amended by the A.P. State Legislature prohibits grant of mining lease to a non-tribal in a Scheduled Area.

16. This brief resume would show that for protection of the Scheduled Tribes and for administration of Scheduled Areas, the Constitution permits to view the fundamental rights of non-tribals in a different perspective; that is to say, the protection and interest of Scheduled Tribes would take precedence over the fundamental rights of the non-Scheduled Tribes. In one way, affirmative action in Indian Constitutional practice being a dynamic concept; can arguably - even override fundamental rights of the non-tribals in non-Scheduled Areas.

V Schedule to the Constitution of India

In these cases we are mainly concerned with the power of the Governor of the State of Andhra Pradesh under V Schedule to the Constitution. V Schedule is part of the Constitution and contains provisions as to administration and control of scheduled Areas and Scheduled Tribes. Indeed, Article 244(1) postulates that the provisions of V Schedule shall apply to the administration and control of Scheduled Areas and Scheduled Tribes. This shows that there could be special schemes aiming only at Scheduled Tribes though such schemes may not actually concern in Scheduled Areas. For example, in a non-Scheduled area, there may be large number of Scheduled Tribe people living by reason of migration. Even in such instances, it is permissible for the Governor to make special provisions for Scheduled Tribes. It would not be correct to assume that the Governor is competent to make provisions for the administration and control of Scheduled Tribes in Scheduled Areas only. The emphasis is on the welfare of the Scheduled Tribes and therefore the Constitution took abundant care while saying that the provisions apply both for Scheduled Areas as well as Scheduled Tribes.

17. The scope of V Schedule has been considered by the Supreme Court on more than one occasion. Before we refer to the judgments we may briefly notice the provisions in V Schedule. As per Article 162 of the Constitution executive power of the State shall extend to matters with respect to which the Legislature of the State has power to make laws in relation to entries in List II of VII Schedule to the Constitution. The said power is however subject to the executive power conferred by the Constitution upon the Union. In contradistinction with this, Part II of V Schedule provides that the executive power of the State extends to Scheduled Areas and it is only subject to provisions of V Schedule and it is not subject to the executive power of the Union or any other authority. To our mind, Paragraph 2 of V Schedule is the only provision in the Constitution, which enables the State Government to exercise executive power without subjecting the same to the executive power of the Government of India. Articles 256 and 257 are to the effect that executive power of the State shall be so exercised (i) as to ensure compliance with Union laws and (ii) as not to impede or prejudice

the exercise of the executive power of Union. This shows the special place given to the administration and control of Scheduled Tribes and Scheduled Areas. Under Paragraph 3, the Governor shall have to send an annual report to the President of India and only on such report being made, the Union may give direction in exercise of its executive power. A Tribes' Advisory Council has to be constituted for each State having Scheduled Areas as well as places where there are Scheduled Tribes. The Tribes' Advisory Council advises on such matters pertaining to the welfare and advancement of Scheduled Tribes in the States as may be referred by the Governor.

18. Paragraph 5 of V Schedule contains five sub-paragraphs. Sub-paragraphs (2), (3), (4) and (5) deal with the regulations that may be made by the Governor for the peace and good governance of any area in a State. Such regulations may prohibit transfer of land, regulate allotment of land or regulate the carrying on business as money-lender by persons who lend money to Scheduled Tribes. While making such regulations the Governor has to consult Tribes' Advisory Council and all the regulations are to be submitted to the President of India for assent. By reason of Sub-Paragraph (3) of Paragraph 5, in making such regulations the Governor may even repeal or amend an Act of the Parliament or of the Legislature of the State or any existing law. It is admitted by all the parties before us that the impugned G.O. notifying the Governor's notification is issued under Sub-paragraph (1) of Paragraph 5, which reads:

Notwithstanding anything in this Constitution, the Governor may by public notification direct that any particular Act of Parliament or of the Legislature of the State shall not apply to a Scheduled Area or any part thereof in the State or shall apply to a Scheduled Area or any part thereof in the State subject to such exceptions and modifications as he may specify in the notification and any direction given under this sub-Paragraph may be given as to have retrospective effect.

19. In exercise of the power under Paragraph 5(1) of V Schedule to the Constitution, the Governor may (i) direct that any particular Act of Parliament or of the Legislature of the State shall not apply to a Scheduled Area; and (ii) may direct that any law of Parliament or Legislature of the State shall apply to a Scheduled Area with such exceptions and modifications as the Governor may specify in the notification. Be it also noted that any notification under Paragraph 5(1) can as well be with retrospective effect. By reason of the words "Notwithstanding anything in this Constitution", the provision is given overriding effect over all the provisions of the Constitution including arguably, the provisions of Part III.

20. The Supreme Court considered the scope of V and VI Schedules in a number of decisions. In *Edwingson Bareh Vs. State of Assam and Others*, a Constitution Bench of the Supreme Court ruled that a Parliamentary legislation is not required to give effect to a notification issued under Paragraph 14(1) of VI Schedule to the Constitution of India. The Supreme Court held that if the Governor wants to

exercise power under Paragraph 1(3) of VI Schedule, Parliamentary approval is not required.

21. In *Ram Kirpal Bhagat and Others Vs. The State of Bihar*, a Constitution Bench held that under Paragraph 5 of V Schedule, the Governor can apply the law as modified, while making regulations. A question was raised as to whether the Governor of Bihar could make Bihar Regulation I of 1951 under Paragraph 5 by extending a law passed by another Legislature. While answering the question in the affirmative, the Supreme Court referred to Section 92 of the Government of India Act, 1935 and laid down the following dicta:

It was contended that the power to make regulations did not confer power on the Governor to apply any law. It was said that u/s 92 of the Government of India Act, 1935 the Governor could do so but under the Fifth Schedule of the Constitution the Governor is not competent to apply laws. This argument is without any merit for the simple reason that the power to make regulations embraces the utmost power to make laws and to apply laws. Applying law to an Area is making regulations which are laws. Further the power to apply laws is inherent when there is a power to repeal or amend any Act, or any existing law applicable to the Area in question. The power to apply laws is really to bring into legal effect sections of an Act as if the same Act had been enacted in its entirety. Application of laws is one of the recognised forms of legislation. Law can be made by referring to a Statute or by citing a Statute or by incorporating a Statute or provisions or parts thereof in a piece of legislation as the law which shall apply,

22. The Supreme Court also held that the regulation made by the Governor is not a piece of legislation or a conditional legislation and for all intent and purpose it is law, which can be applied to Scheduled Areas.

23. In *P. Rami Reddy and Others Vs. State of Andhra Pradesh and Others*, the question was whether A.P. Scheduled Area Land Transfer Regulation 1959 as amended by Regulation 2 of 1970 is constitutionally valid. The Regulation prohibited or restricted the right of transfer of immovable property in Scheduled Areas. The same was impeached on the ground that any control or restriction on the right of transfer would be unreasonable and suffers the vice of Article 19(6) of the Constitution. It was also contended that the Government had exceeded the power under Paragraph 5(2) of V Schedule as the Regulation is not in relation to peace and good governance of Scheduled Areas. The Supreme Court observed that reasonableness or otherwise of the restrictions imposed by the Regulation has to be tested with reference to socio-economic landscape in the backdrop of which the Regulation was made. The Supreme Court noticed this backdrop and came to a conclusion that the legislation was intended to ameliorate the hardship of the tribals who are conclusively presumed to be owners of the land in Scheduled Areas and that a non-tribal in possession of the land shall be deemed to have acquired through a transfer from a tribal. The Court, therefore, repelled the challenge based on unreasonableness in the following terms :

.....A legislation which in essence and substance aims at restoration to the "tribals" of the lands which originally belonged to the "tribals" but which passed into the hands of "non-tribals" in the aforesaid background certainly cannot be characterised as unreasonable. The scanning must be done through the objective lens of the Court representing the collective conscience of the community and not through the tinged lens of appellants whose economic interests may be prejudicially affected by the impugned provisions. In other words, the Courts examining the matter from the perspective of the constitutional mandate armed with the criterion of objectivity and overall interest for the community at large must be satisfied that the restrictions are unreasonable.

24. In *Samatha Vs. State of A.P. and Others*, a question arose whether A.P. Scheduled Area Land Transfer Regulations, 1959 would apply to transfer of Government land to a non-tribal that too by way of mining lease having regard to A.P. amendment to Section 11(5) of the Mines and Minerals (Regulation and Development) Act, 1957 prohibiting granting of any lease in favour of non-tribal. A further question arose as to whether the power of Governor to make regulation under Paragraph 5(2) of V Schedule would also include prohibition to transfer Government land. A three-Judge Bench of the Supreme Court referred to celebrated work by Professor Haimendorf titled "Tribes of India and the Struggle for Survival" and described the plight of the tribals stating that the tribal people are exploited by the non-tribals who lend money at exorbitant rates of interest and in the event of failure to repay, takeover the land by threat of physical force. In such a situation, the Court felt that the regulation prohibiting transfer was justified in the interest of social justice. The Supreme Court held that Paragraph 5(2) of V Schedule must be read as a whole to ensure regulation of transfer of land only among tribals and that impliedly the same prohibits the State from transferring the land to a non-tribal in Scheduled Areas. It was also held that purposive interpretation would ensure distributive justice among the tribals. The following observations (see Paragraphs 87 and 88) are apposite.

.....to effectuate the constitutional objective to preserve the land in the Scheduled Area to the tribals. prohibits the Government from allotting their land to the non-tribals; prohibit infiltration of the non-tribals into the Scheduled Area and prevents exploitation of the tribals by non-tribals in any form. This purposive interpretation would ensure distributive justice among the tribals in this behalf and elongates the constitutional commitment. Any other interpretation would sow the seed beds to disintegrate the tribal autonomy, their tribal culture and frustrate empowerment of them, socially, economically and politically, to live a life of equality, dignity of person and equality of status..... As a facet of interpretation, the Court too adopts purposive interpretation tool to effectuate the goals set down in the Constitution. Equally, the executive Government in its policy options requires to keep them in the backdrop and regulate disposal of their land-property in accordance with the constitutional policy, executive decision backed by public policy and, at the same time, preserve paramount Tribal interest in the Scheduled Area. No abstract principle could be laid in that

behalf. Each case requires examination in the backdrop of the legislative executive action, its effect on the constitutional objectives and the consequential result yields therefrom.

25. In *Arka Vasanth Rao and others Vs. Govt. of A.P. and others*, a contention was raised that A.P. Panchayat Raj Act, 1994 is not applicable to Scheduled Areas in the State of reason of Article 243-M(1) in Part-IX of the Constitution of India. In that context, a Division Bench of this Court considered the extent and scope of power of the Governor under Paragraph 5(1) of V Schedule. After referring to *Edwingson (supra)*, it was observed that under V Schedule the Governor is sole Legislature for the Scheduled Areas and Scheduled Tribes. But, having regard to a special provision in Article 243-M(1) which itself made Part-IX of the Constitution inapplicable to Scheduled Areas, the Court held that the power of the Governor does not extend to matters covered by Part-IX of the Constitution of India. The Court referred to the legislative history of various provisions concerning Scheduled Areas and observed:

From a conspectus of the provisions concerning the Scheduled Areas and the legislative history it is fairly clear that for over 125 years the Scheduled Areas have been treated differently. The tribals inhabiting the Scheduled Areas needed special protection. Their way of life, their social structure and primitive living made them unfit to be governed by ordinary laws to a great extent. But at the same time, it was not intended that forever these Scheduled Areas should remain permanent isolated tracts cut-off from the mainstream.

26. An analysis of the above decisions would show that by reason of V Schedule, the Governor alone is vested with the power to legislate in accordance with Paragraph 5(1) or Paragraph 5(2) in relation to administrative control of Scheduled Areas and Scheduled Tribes. In interpreting the law, regulation or notification, the Court must adopt purposive interpretation tool and any interpretation must ensure distributive justice among tribals and must prohibit infiltration of non-tribals into Scheduled Areas as otherwise the exploitation of the tribals by non-tribals would defeat the constitutional goal of distributive justice among the tribals.

In Re Points I and 2

The basic question that falls for adjudication is whether it is competent for the Governor to promulgate impugned Order under Para 5(1) of V Schedule, which in effect prohibits non-tribals from being appointed as teachers in the schools in Scheduled Areas? The other related questions are (i) whether it is competent for the Governor to apply delegated legislation by way of rules in a modified form to Scheduled Areas and (ii) whether such Notification is contrary to the law laid down by the Supreme Court that reservations must not exceed 50%. Before actually taking up these issues, it is necessary to examine the relevant provisions which are mentioned in the impugned notification.

The effect and purport of the impugned notification

The Governor's notification refers to Sections 78 and 79 of the A.P. Education Act, 1982 ("the Education Act" for brevity), Sections 169, 195 and 268 of the A.P. Panchayat Raj Act, 1994 ("Panchayat Act" for brevity), Rule 4(a) of A.P. School Educational Subordinate Service Rules, 1992 ("Special Rules" for brevity) and Rules 22 and 22-A of A.P. State and Subordinate Service Rules, 1996 ("General Rules" for brevity). After referring to these provisions and Acts, the impugned notification says that these provisions shall apply to the appointment of teachers in schools situated in Scheduled Areas in the State subject to modification that all such posts in schools situated in Scheduled Areas shall be filled by local Scheduled Tribe candidates only duly following the rule of reservation for women at 33 1/3%. It is useful to extract the notification, which is as follows :

In exercise of the powers conferred by sub-paragraph (I) of Paragraph 5 of the Fifth Schedule to the Constitution of India and in Supersession of the notification issued in G.O.Ms.No.275, Social Welfare Department, dated the 5th November, 1986, as subsequently amended in G.O. Ms. No.73, Social Welfare Department, dated the 25th April, 1988, the Governor of Andhra Pradesh hereby directs that Sections 78 and 79 of the Andhra Pradesh Education Act, 1982 (Act 1 of 1982) and Sections 169, 195 and 268 of the Andhra Pradesh Panchayat Raj Act, 1994 (Act 13 of 1994) and Rule 4(a) of the Andhra Pradesh School Educational Subordinate Service Rules issued in G.O.Ms.No.538 Education (Ser.II) Department, dated the 20th November, 1998 and Rules 22 and 22-A of the Andhra Pradesh State and Subordinate Service Rules, 1996 and any other rules made in this regard shall apply to the appointment of posts of teachers in schools situated in the Scheduled Areas in the State subject to the modification that all the posts of teachers in the schools situated in Scheduled Areas in the State of Andhra Pradesh shall be filled in by the local Scheduled Tribe candidates only out of whom 33 1/3% shall be women.

27. An explanation is added to the notification to the effect that the candidates or their parents who have been continuously residing in the Scheduled Areas since 26-1-1950 alone will be treated as "local Scheduled Tribe candidates". Section 78 of the Education Act enables the Government inter alia to constitute a class of teachers appointed under the Act into "educational service" for the State and make rules to regulate the classification, methods of recruitment and conditions of service. Section 79 gives protection to the teachers and members of non-teaching staff in private educational institutions from being dismissed, removed or reduced in rank without prior enquiry and without prior approval from competent authority. Sections 169 and 195 of the Panchayat Act deal with officers and other employees of Mandal Parishad and Zilla Parishad respectively and Section 268 of the said Act empowers the State Government to make rules for carrying out the purposes of the Act and/or inter alia laying down conditions of service of teachers in Mandal Parishad and Zilla Parishad Schools.

28. The General Rules are made under proviso to Article 309 of the Constitution.

Rules 22 and 22-A deal with special representation (reservation) and women reservation in appointments. Sub-rule (1) of Rule 22 provides that reservation may be made for appointments to a service, class or category in favour of SCs, STs, BCs, women, physically handicapped etc. Sub-rule (2) of Rule 22 provides that the unit for the purpose of Rule 22 shall be one hundred vacancies of which 15% ,6% and 25% shall be reserved for SCs, STs and BCs and the remaining 54% appointments shall be made on the basis of open competition subject to Rule 22-A of the General Rules. Rule 22-A provides (i) that in the matter of direct recruitment to posts for which women are better suited than men preference shall be given to women; (ii) that in the matter of direct recruitment to posts for which women and men are equally suited 33 1/3% of posts in each category of OCs, BCs, SCs and STs shall be reserved to women and (iii) that in the matter of direct recruitment to posts which are reserved exclusively for being filled by women they shall be filled by women only. In sum and substance, Rule 22 provides that 46% of the posts in a unit of appointment shall be reserved for SCs/ STs/BCs (15%, 6%, 25% respectively) duly following the rule of reservation for women. This rule of reservation was also "incorporated by reference" in the relevant Special Rules governing appointment of teachers in schools.

29. In exercise of powers conferred by proviso to Article 309 of the Constitution of India, the Governor promulgated the Special Rules vide G.O.Ms.No.40 Education (Ser-II) Department, dated 7-2-1992. Rule 4 thereof by reference applies to Rule 22 of General Rules in appointments by direct recruitment to any post in educational subordinate service and also provides that 33 1/3% posts shall be reserved for women. These rules were superseded by the rules issued vide G.O.Ms.No.558 Education (Ser-II) Department, dated 10-11-1998 issued in exercise of powers conferred under Sections 78 and 79 of the Education Act and also by proviso to Article 309 of the Constitution. Rule 4 of the Special Rules provides that Rule 22 of General Rules would apply in appointments by direct recruitment to any post in the said Rules along with rule of reservation for women. By reason of Rule 4 of the Special Rules, Rule 22 of the General Rules was made applicable to Educational Subordinate Service Rules.

30. By the impugned notification the Governor applied Section 78 of the Education Act as well as the Special Rules to the posts in Scheduled Areas in the State. Though all the laws and rules made by the State equally apply to every Scheduled Area, Paragraph 5(1) of V Schedule empowers the Governor to direct that such law is not applicable or may declare that such law will apply with such modifications as are specified by the Governor. That is what precisely happened in the notification. While applying the provisions of the Education Act, the Panchayat Act and the rules made thereunder as well as the General Rules, the Governor directed that all the posts of teachers in the schools situated in Scheduled Areas shall be filled in by the local Scheduled Tribe candidates only subject to rule of reservation in favour of women. To our mind, for the purpose of Educational Subordinate Service Rules, the Governor has classified all the schools in Scheduled Areas as a class. As per General Rule 22 it is permissible for the

State to provide for reservations for appointments to a service, class or category. All the posts of teachers in the schools in Scheduled Areas are treated as a category of service for the purpose of Rule 22 of the General Rules as well as Section 78 of the Education Act. By reason of the notification, we may mention, at the cost of the repetition, all the schools in the Scheduled Areas have been treated as a class as distinguished from the schools in non-Scheduled Areas and while applying the rule of reservation in Rule 22 of the General Rules as well as Rule 4 of the Special Rules the Governor modified the same to the effect that all such posts of teachers in Scheduled Areas shall be filled in by the local Scheduled Tribes only.

31. We may also notice the circumstances and events that led to the issuance of the impugned notification vide G.O.Ms.No.3, dated 10-1-2000. The material placed before us shows that the Government of Andhra Pradesh so as to provide impetus to the agency Areas in the field of education, issued orders in G.O.Ms.No.302, dated 10-7-1986 according sanction for opening of 1000 primary schools in the school-less habitations/villages in the agency Areas of the State, and ordered that local ST candidates with a pass or fail in X class alone shall be appointed as teachers. So as to enable appointment of such ST teachers, the Governor purporting to exercise power under Para 5(1) of V Schedule, issued notification in G.O.Ms.No.275, dated 5-11-1986 directing that the posts of teachers in the educational institutions in the Scheduled Areas in the State shall be filled in only by the local members belonging to Scheduled Tribes notwithstanding anything contained in any other order or rule or law in force. The G.O. was later amended by another order passed in G.O.Ms.No.73, dated 25-4-1988 incorporating a proviso to the effect that non-tribals be appointed till qualified tribals are available. G.O.Ms.No. 275, dated 5-11-1986 was challenged before the Andhra Pradesh Administrative Tribunal in RP Nos.6377 and 6379 of 1988. The Tribunal by order dated 25-8-1999 quashed the said G.O. on the ground that the notification issued under Para 5(1) of V Schedule does not reflect the existence of either a State law or a Central legislation for issuance of such notification. A civil appeal being CA No.6437 of 1998, filed before the Supreme Court against the judgment of the Tribunal dated 25-8-1999, was dismissed as withdrawn on 18-12-1999. After that, the Government thought it fit to modify the A.P. School Educational Subordinate Service Rules and Rule 22 of the General Rules so as to "strengthen the educational institutions infrastructure in the Scheduled Areas". The Governor also thought it fit to direct appointment of only local Scheduled Tribe candidates in the posts of teachers in die schools situated in Scheduled Areas. This was done to promote educational development of tribals, to solve phenomenal absenteeism of teachers in the schools situated in the Scheduled Areas, and with a view to protect the interest of the tribals. As we have already noticed the effect and purport of the impugned notification is the application of the rule of reservation as per General Rules as well as Special Rules in a modified manner in that all the posts of teachers in the schools situated in Scheduled Areas shall be filled in by the local Scheduled Tribe

candidates following the rule of reservation for women at 33 1/3%.

(i) Whether it is competent for the Governor to direct that the delegated legislation i.e., Rules should be applied in a modified form to Scheduled Areas.

Sri J.R. Manohar Rao, the learned Counsel appearing on behalf of respondents 1 to 5 submits that the impugned notification seeks to make Regulations, which is impermissible under Para 5(1) of V Schedule. He also submits that the provisions of the Education Act and the Panchayat Act, mentioned in the notification do not deal in any manner with reservations. He also submits that para 5(1) of V Schedule only permits the Governor to direct that any Act of Parliament or Legislature shall not apply to Scheduled Areas or places with such modifications, as specified by the Governor. The same does not enable the Governor to direct that the rules issued under proviso to Article 309 or subordinate legislation made in exercise of statutory power shall not apply or shall apply with such modifications. In a nutshell, the submission is that the Governor has no power to modify the subordinate legislation. These submissions, in our considered opinion, are wholly misconceived and are without any merit.

32. All modern Statutes indicate the general principles in the Statute and give power to the Government or an Officer of the Government to "prescribe" by way of rules in relation to matters enumerated in the Statute. The rules and Regulations made by the Government in exercise of such delegated statutory power is generally referred to in legal parlance as "delegated legislation". It is well accepted that delegated legislation is indispensable part of the Government, and the Legislature as well as superior Courts act as balancing factors to oversee that delegated legislation always remains within the limits stipulated by main Statute.

33. The law is well settled that delegated legislation becomes part of the main Statute, and in interpreting delegated legislation, the same principles as to statutory interpretation are applied. In *Wittingale v. Morris* 1909 (1) KB 57, the Kings Bench relying on *Rex v. Walker* (1875) LR 10 QB 355, held that rules once made become part of the main Act. The following statement of law needs execrption.

If it be said that a Regulation is not a provision of an Act, I am of the opinion that *Rex v. Walker* is an authority against that proposition. I should certainly have been prepared to hold apart from authority (that, where a Statute enables the authority to make Regulations, the Regulation made under the Act becomes for the purpose of obedience or disobedience the provision of the Act. The Regulation is only the machinery by which Parliament has determined whether certain things shall or shall not be done.

34. In *Wicks v. Director of Prosecutions* 1947 (1) All ER 205, the House of Lords approved the decision of the Kings Bench in *Willingale* and held that:

There is of course no doubt that when a Statute enables the authority to

make Regulations, the Regulation which is validly made under the Act i.e., which is *infra vires* of the Regulation making authority should be regarded as though it were itself an enactment.

35. In *T.B. Ibrahim Vs. Regional Transport Authority, Tanjore*, a Constitution Bench of the Apex Court held that if the power to make rules is conferred on the Government and rules are made in exercise of such power, such rules are part and parcel of the Statute itself.

36. Therefore, it is futile to contend that the Governor has no power to apply State and Subordinate Service Rules as well as School Education Subordinate Service Rules as modified by him.

37. There is yet another reason to reject the contention of the learned Counsel for respondents. When Para 5(1) of V Schedule permits the Governor to direct that any particular Act of Parliament or of the Legislature shall not apply or applies to Scheduled Area with modifications, as may be specified, it is illogical to hold that the same power does not extend to delegated legislation, which is again made under an Act of Parliament or of the Legislatures of the States. The law especially constitutional provisions, cannot be interpreted in a manner, which will lead to absurdities.

38. The other contention of the learned Counsel for respondents that Para 5(1) of V Schedule does not empower the Governor to make Regulations is also devoid of any merits. It is true that power to make Regulations for peace and good governance of any Area in a State is taken care of by sub-para (2) of Para 5 of the V Schedule. Para 5(1) of the V Schedule, as noticed above, enables the Governor to direct that a particular law does not apply or applies with such modifications. The question raised is no more *res Integra*. In *Edwingson (supra)* Hidayatullah, J., as he then was explained the scope of V Schedule thus:

Under V Schedule, the Governor is the sole Legislature for the Scheduled Areas and Scheduled Tribes. He makes the Regulations after consulting the Tribal Advisory Council and submits them to the President for the latter's consent. The executive authority of the State extends to the Scheduled Areas, but the executive authority of the Union extends to giving of directions to the State as to the administration of such Areas. These Areas are determined by the President by an order, and may be altered from time to time by the President by another order, but the President cannot alter an order made under Sub-para (1) of Para 5 except as laid down in Clauses (a), (b) and (c) of Sub-para (2).

39. In *Ram Kirpal (supra)*, a Constitution Bench of the Supreme Court, an noticed earlier, held that the power to apply law is basically legislative power and under Para 5(1), the Governor can make Regulation by referring to a Statute or by citing a Statute, which is also a recognized method of law making. Therefore, the power to legislate, and the specific power under Sub-para (2) to make Regulations for the peace and good Government does not whittle down the power under Sub-para (1) of Para 5 of the V Schedule. We may mention that

under Article 245 of the Constitution of India. Parliament may make laws for the whole or any part of the territory of India, and Legislature of a State may make laws for the whole or any part of the State. A Division Bench of this Court in *G. Pullaiah Vs. Govt. of A.P. and others*, , held that general law applies to Scheduled Areas also. Therefore as a necessary corollary we must hold that the power of the Governor under Para 5(1) to direct that a law made by the Parliament or Legislature of a State shall not apply, is in fact, legislative power, and the power is wider than the power under Para 5(2), which enables the Governor to make Regulations for the peace and good Government of the Scheduled Areas in the State.

(ii) Whether the impugned notification violates the principle that reservations shall not exceed 50% and thereby violates Articles 14, 15 and 16 of the Constitution of India?

The most contentious issue in these cases is the question as to whether 50% rule of reservation is violated by the impugned notification. In our opinion, the question cannot be adverted to in simplistic terms. Whether Article 16(4) is exhaustive of reservations: Whether Article 16(1) also permits reservations and: Whether 50% maximum rule of reservation applies in Scheduled Areas and to "special provisions" for Scheduled Tribes are the questions which have a bearing on the issue.

Classification under Article 16(4) or Reservation under Article 16(1) ?

Sri. K. Balagopal and Sri. P.V. Ramana, learned Counsel for the petitioners submit that the special provisions in the notification are not strictly reservations under Article 16(4) of the Constitution of India. They submit that the impugned notification seeks to achieve certain objectives, namely, (a) to provide an impetus to the agency Areas in the field of education; (b) to strengthen the educational infrastructure in the Scheduled Areas; (c) to promote educational development of tribals and; (d) to solve phenomenal absentism of teachers in the schools situated in Scheduled Areas. To achieve the above objectives, all the schools in the school-less habitations/ villages in the agency Areas (Scheduled Areas) in the State have been treated as a separate class. So as to achieve the objectives noticed hereinabove, the notification directs that rule of reservation in Rule 22 of the General Rules and Rule 4 of the Special Rules would apply with a modification that all the posts shall be filled in by the local Scheduled Tribe candidates. The submission of the learned Counsel commends itself to us for reasons more than one.

40. The learned Counsel alternatively submit that even if the notification is treated as a device to provide 100% reservation for the Scheduled Tribe teachers in the Scheduled Areas, such a reservation does not suffer any Constitutional infirmity. In support of this submission, reliance was placed on the judgments of this Court in *Seepuri Nagabhushanam and Others Vs. Secretary to Government, Panchayat Raj Government of Andhra Pradesh, Hyderabad*, , *Ramdoss v. Union of*

India 1971 (2) A.W.R. 261, and Satyanarayna Reddy v. State of A.P. 1987 (1) ALT 665 (FB). The learned Counsel submit that "in any event and at all the times", the rule of maximum 50% reservation in public employment applies only for backward classes, and when any affirmative action is taken to uplift the Scheduled Tribes based on the basis of a valid classification under Article 16(1), the rule of 50% reservationn has no application. They placed reliance on the observations made by the Apex Court in Indira Sawhnay.

41. The International Charter on Human Rights exhorts member States to provide equal opportunities to all in sharing power of the State (see Article 25 of the International Covenant on Civil and Political Rights). Public employment being repository of power, always gives status and power, besides means of livelihood. By entrenching such a right in Article 16, the Constitution has taken special care to guarantee equality of opportunity in the matter of public employment. As held by the Full Bench of this Court in *The District Manager, Andhra Pradesh State Road Transport Corporation, Bhimavarm Vs. Labour Court, Guntur and Another*, , and the Supreme Court in *State of Maharashtra Vs. Chandrabhan Tale*, , right to public employment is a new form of property. Public employment is national wealth in which all citizens have equal share. No single class can dominate civil services, as otherwise, the monopolization of public employment and civil services would diminish and dilute constitutional republicanism. We may also mention that right to social development is human right, and no citizen or group of citizens can be denied the right to development. Towards such goal, the State has to device ways and means based on inherent inequalities in the society as well as geographical imbalances. In the confrontation of competing equalities, any reasonable device, which acts as an integrating force, must receive the sanction of a Constitutional Court. Indeed, that has been the guiding principle in all the judgments of the Supreme Court dealing with the cases of reservations in educational institutions, See the following judgments:

- (a) *The State of Madras Vs. Srimathi Champakam Dorairajan*,
- (b) *M.R. Balaji and Others Vs. State of Mysore*,
- (c) *Heggade Janardhan Subbarye Vs. The State of Mysore and Another*,
- (d) *R. Chitralekha and Another Vs. State of Mysore and Others*,
- (e) *Minor P. Rajendran Vs. State of Madras and Others*,
- (f) *State of Andhra Pradesh and Another Vs. P. Sagar*,
- (g) *Tiloknath v. State of Jammu and Kashmir AIR 1969 SC 1*
- (h) *Minor A. Peeriakaruppan and Sobha Joseph Vs. State of Tamil Nadu and Others*,
- (i) *The State of Andhra Pradesh and Others Vs. U.S.V. Balram, etc.*,

- (j) Janaki Prasad Parimoo v. State of Jammu and Kashmir AIR 1973 SC 980
- (k) State of Uttar Pradesh and Others Vs. Pradip Tandon and Others,
- (l) Dr. Pradeep Jain and Others Vs. Union of India (UOI) and Others,
- (m) Ajay Kumar Singh and Others Vs. State of Bihar and Others,
- (n) Ashoka Kumar Thakur Vs. State of Bihar and others,
- (o) Dr Preeti Srivastava and Another Vs. State of M.P. and Others, , as well as public employment, See the following judgments:
- (a) B. Venkataramana Vs. The State of Madras and Another,
- (b) The General Manager, Southern Railway Vs. Rangachari,
- (c) T. Devadasan Vs. The Union of India (UOI) and Another,
- (d) State of Kerala and Another Vs. N.M. Thomas and Others,
- (e) Akhil Bharatiya Soshit Karamchari Sangh (Railway) represented by its Assistant General Secretary on behalf of the Association Vs. Union of India (UOI) and Others,
- (f) K.C. Vasanth Kumar and Another Vs. State of Karnataka,
- (g) Indra Sawhney etc. etc Vs. Union of India and others, etc. etc.,
- (h) R.K. Sabharwal and others Vs. State of Punjab and others,
- (i) Ajit Singh (II) v. State of Punjab (1997) 7 SCC 209
- (j) Indira Sawhney Vs. Union of India and Others,

42. It is axiomatic that Article 15(1) and 15(2) as well as Article 16(1) and 16(2) are the facets of Article 14 of the Constitution of India, which proclaims "equality of law" and "equal protection of laws", which are aimed at providing equal opportunities to all the citizens. When the Constitution proclaims equality as abiding faith, it does not mean that the State is precluded from enforcing the principle of dynamic equality, which permits classifying people, Areas and things having regard to the situation. Subject to satisfying the rationality test (classification must be based on some intelligible differentia) and nexus test (such classification should have nexus with the object sought to be achieved), the classification is permissible. The underlying constitutional principle in Articles 15(4) and 16(4) is precisely this. This does not, however, mean that mere presence of enabling provisions like Articles 15(4) and 16(4) divests the State of the power to make classification if necessary even under Articles 15(1) and 16(1) of the Constitution of India. The question is no more res Integra. In Indra Sawhney, Jeevan Reddy, J., speaking for the majority held that reservation is highest form of "special provision" while preference, concession and exemption are lesser forms. Though Article 16(4) is exhaustive of reservations with regard

to Backward Classes, the State can still take recourse to Article 16(1) for the purpose of classifying persons and confer benefits. All supplemental and ancillary provisions aimed at ensuring full avilment of provisions for reservations can be provided as part of the concept of reservation itself, though strictly they do not amount to reservation under Article 16(4) or Article 15(4). It is apposite to refer to the following passage from *Indra Sawhney*.

... the question is whether any reservation can be provided outside Clauses (4) i.e., underclause (1) of Article 16. There-are two views on this aspect. On a fuller consideration of the matter, we are of the opinion that Clauses (4) is not, and cannot be held to be exhaustive of the concept of reservations, it is exhaustive of reservations in favour of backward classes alone.

Merely because one form of classification is stated as specific class, it does not follow that the very concept and power of classification implicit in Clause (1) is exhausted thereby. To say so, would not be correct in principle. But, at the same time, one thing is clear, it is in very exceptional situations - and not for all and sundry reasons - that any further reservations of whatever kind should be provided under Clauses (I). In such cases, the State has to satisfy if called upon that making such provision was necessary (in public interest) to redress a specific situation.....

43. We may also mention that earlier view in *Balaji* that Article 15(4) is a proviso or exception to Article 15(1) or Article 29(2) was not accepted by a seven-Judge Bench in *State of Kerala and Another Vs. N.M. Thomas and Others*, and *Indra Sawhney*, which held that Article 16(4) is merely an emphatic elucidation of equality principle in Article 16(1). In *Indra Sawhney*, the majority further held that Article 16(1) permits reasonable classification for ensuring attainment of equality of opportunity, and for assuring all equality of opportunity, the State may treat unequally situated persons unequally and differently, as not doing so would perpetuate and accentuate inequality, and that Article 16(4) is an instance of such classification (see Para 57 - AIR in *Indra Sawhney*).

44. While examining the effect and purport of the impugned notification, we have noticed the reasons for issuing the notification. Two reasons, which we need to be repeated, are phenomenal absenteeism of teachers in the schools situated in the Scheduled Areas to promote educational development of tribals.

45. Earlier G.O. Ms. No. 275, dated 5-11-1986 was issued referring to yet another order of the Government in G.O. Ms. No.302, dated 10-7-1986, stating that Government sanctioned 1000 primary schools in the school-less habitations/villages in the agency Areas, and those posts are to be filled up by local Scheduled Tribe candidates. This is ample proof to show that though about a decade and a half ago as many as 1000 primary schools were sanctioned in school-less habitations/villages in Scheduled Areas, the educational development of tribals has not attained the desired result. It is undisputable that the villages and habitations in the Scheduled Areas are situated in far flung inaccessible

Areas, and all Scheduled Tribes have customs, social mores and behaviour patterns of their own that they seldom are willing to come out of their geographical "confines". A non-tribal teacher posted in a far-flung Area naturally finds it difficult to stay in an inaccessible village in a Schedule Area and man a single teacher school. When the teachers in the schools are not regular or are not posted, one can imagine the fate of the pupils and the educational development of the Area. In the system of format education, a teacher plays a crucial important and indispensable role. Any amount of Government spending for establishment of primary schools and development of infrastructure therefore would go waste if teachers with proper altitude are not selected and posted. If the Government, having regard to the experience arrived at a decision by posting local ST teachers in schools in Scheduled Areas results could be achieved, the Court would be slow to find fault with such decision manifesting as notification under Para 5(1) of V Schedule.

46. We have pointed out that for the purpose of A.P., School Education Subordinate Service Rules, all the schools in Scheduled Areas in the State have been treated as a "class of schools". For the reasons mentioned above, the Government thought that all the posts teachers in these schools should be filled in by local Scheduled Tribes and therefore, the Government thought that Rule 22 of the General Rules and Rule 22-A of the Subordinate Service Rules must not be applied. Without any hesitation, we hold that the classification of the schools in Scheduled Areas is one that falls under Article 16(1) of the Constitution of India, and the same cannot be considered to be a reservation for the purpose of Article 16(4). We must emphasise that by not applying Rule 22 of the General Rules and Rule 22-A of the Special Rules the Governor has treated the schools in Scheduled Areas as a special class and the same does not attract any constitutional infirmity.

Whether classification is valid

47. The classification of schools in Scheduled Areas for the purpose of the General Rules as well as the Special Rules has intelligible differentia, and the said classification is intended to achieve the object of educational development of the tribals and, solve the phenomenal absentism of teachers in the schools in the Scheduled Areas. In *The State of West Bengal Vs. Anwar Ali Sarkar*, *Budhan Choudhry and Others Vs. The State of Bihar*, and *Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others*, the Supreme Court adopted this American Law of sustainable classification. In a recent judgment in *State of Andhra Pradesh and Others Vs. Nallamilli Rami Reddi and Others*, the Supreme Court explained the theory of classification vis-a-vis Article 14 lucidly. It is apposite to extrat the Name.

What Article 14 of the Constitution prohibits is "class legislation" and not "classification for purpose of legislation". If the Legislature reasonably classifies persons for legislative purposes so as to bring them under a well-defined class, it is not open to challenge on the ground of denial of equal treatment that the law does not apply to other persons. The test of permissible classification is twofold:

(i) that the classification must be founded on intelligible differentia which distinguishes persons grouped together from others who are left of the group, and (ii) that differentia must have a rational connection to the object sought to be achieved. Article 14 does not insist upon classification, which is scientifically perfect or logically complete. A classification would be justified unless it is patently arbitrary. If there is equality and uniformity in each group, the law will not become discriminatory, though due to some fortuitous circumstance arising out of peculiar situation some included in a class get an advantage over others so long as they are not singled out for special treatment. In substance, the differentia required is that it must be real and substantial, bearing some just and reasonable relation to the object of the legislation.

48. In *In Re: The Special Courts Bill, 1978*, the Supreme Court after referring to all the authorities dealing with the theory of classification permissible under Article 14, *inter alia*, formulated the following principles for testing the validity of classification made by the State.

The State, in the exercise of its Governmental power, has of necessity to make laws operating differently on different groups or classes of persons within its territory to attain particular ends in giving effect to its policies, and it must possess for that purpose large powers of distinguishing and classifying persons or things to be subjected to such laws.

The constitutional command to the State to afford equal protection of its laws sets a goal not attainable by the invention and application of a precise formula. Therefore, classification need not be constituted by an exact or scientific exclusion or inclusion of persons or things. The Courts should not insist on delusive exactness or apply doctrinaire tests for determining the validity of classification in any given case. Classification is justified if it is not palpably arbitrary.

The principle underlying the guarantee of Article 14 is not that the same rules of law should be applicable to all persons within the Indian territory or that the same remedies should be made available to men irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is substantially the same.

By the process of classification, the State has the power of determining who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject. This power, no doubt, in some degree is likely to produce some inequality; but if a law deals with the liberties of a number of well-defined classes, it is not open to the charge of denial of equal protection on the ground that it has no application to other persons. Classification thus means segregation in classes which have a systematic relation, usually found in

common properties and characteristics. It postulates a rational basis and does not mean herding together of certain persons and classes arbitrarily.

The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on a intelligible differential which distinguishes those that are grouped together from others and (2) that that differentia must have a rational relation to the object sought to be achieved by the Act.

The deferentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them. In short, while Article 14 forbids class discrimination by conferring privileges or imposing liabilities upon persons arbitrarily selected out of a large number of other persons similarly situated in relation to the privileges sought to be conferred or the liabilities proposed to be imposed, it does not forbid classification for the purpose of legislation provided such classification is not arbitrary in the sense above mentioned.

49. As rightly contended by the learned Advocate-General classification based on geography, which is the case before us, is permissible under Article 14 of the Constitution of India. In *State of Madhya Pradesh Vs. Bhopal Sugar Industries Ltd.*, , a Constitution Bench of the Supreme Court laid down the principle thus:

.....All persons who are similarly circumstanced as regards a subject-matter are entitled to equal protection of the laws, but it is not predicated thereby that every law must have universal application irrespective of dissimilarity of objects or transactions to which it applies, or of the nature or attainments of the persons to whom it relates. The Legislature has always the power to make special laws to attain particular objects and for that purpose has authority to select or classify persons, objects or transactions upon which the law is intended to operate. Differential treatment becomes unlawful only when it is arbitrary or not supported by a rational relation with the object of the Statute. This Court has held in several cases that where application of unequal laws is reasonably justified for historical reasons, a geographical classification founded on those historical reasons would be upheld,

50. In *R.C. Poudyal and Others Vs. Union of India and others*, , a Constitution Bench considered the validity of Article 371F of the Constitution of India and other relevant provisions of Representation of Peoples Act, 1951 as amended by the Election Laws (Extention to Sikkim) Act, 1976 wherein seats in Sikkim Assembly were reserved for certain categories was challenged as violating basic structure of the Constitution as well as equality principles in Article 14 of the Constitution of India. The Supreme Court by majority 4:1 repelled the challenge.

The question whether reservation of seats in the Legislative Assembly in favour of the particular tribes far in excess of the population violates Article 14 of the Constitution of India was answered in the negative. The Apex Court referred to the judgments of the Supreme Court in *Lachhman Das on Behalf of Firm Tilak Ram Ram Bux Vs. State of Punjab and Others*, , and *Bhopal Sugar Industries (supra)* and held that geographical classification founded on historical reasons cannot be faulted on the principle of Article 14 of the Constitution of India.

51. We have examined the classification made by the impugned notification in regard to schools in Scheduled Areas on the touchstone of the above principles. We are convinced that the classification does not in any way offend Articles 14 and 16(1) of the Constitution of India. We accordingly uphold the contention of Sri. K. Balagopal and Sri. P. V. Ramana that the classification is one made under Article 16(1) and the same is valid.

Whether classification is reasonable

The question of reasonableness in the matter of affirmative action is again relevant at three stages. First, at the stage of identifying the SCs, STs and BCs, who are the beneficiaries of the device of affirmative action as equalising principle, second, at the stage of quantifying the reservations, concessions and preferences, and, third, at the stage of implementation of the policy of reservation.

52. The doctrine of unreasonableness, in effect; it is well settled - is *Wednesbury Unreasonableness*. Indeed, irrationality, as a ground of judicial review of legislative action as well as executive action, is nothing but *Wednesbury Unreasonableness*. (See *Tata Cellular Vs. Union of India*, and *Om Kumar v. Union of India*, 2001 (3) SCC 366.

53. Articles 15(4) and 16(4) of the Constitution are enabling provisions. It is not permissible for the State to make reservations either under Article 15(4) or 16(4) without first identifying the targeted people for providing "special provision". Article 15(4) and 47 do provide some guidelines. Insofar as citizens of SCs and STs are concerned, Articles 341 and 342 provide for specifying castes, races or tribes as SCs or STs, "for the purpose of Constitution" including for the purpose of Articles 15(4) and 16(4). Such specified Scheduled Castes and Scheduled Tribes are deemed to be SCs and STs as per Article 366(24) and 366(25) of the Constitution respectively. In making "special provision" for the advancement of backward classes other than SCs and STs. the State has to evolve rational reasonable and unarbitrary criteria and when called upon the State has to satisfy the Court that such criteria does not offend other provisions of the Constitution. In catena of judgments, this issue has been discussed, and any reference to the various authorities would be out of the context. Nonetheless, we need to advert to three indicated aspects of unreasonableness in any programme of affirmative action.

54. Constitution presumes that Scheduled Castes and Scheduled Tribes suffer

from "lingering effects of past discrimination", that they should be brought up by a policy of affirmative action in their favour, and that they are very low socially, economically and politically for various reasons. How many classes of people come within the category of other backward classes is always a question to be decided by the executive. When the Government decides, what is the material they should rely on and whether the Court can judicially review such decision. In other words, whether Court should apply "strict scrutiny test" to satisfy itself that equality clause is not defaced or is it sufficient to leave the matter to the opinion of the State which will always be decided on "subjective satisfaction" based on relevant data.

55. In *Defunis v. Charles Odegard* (1974) 40 La Ed 2d. 64, the question before U.S. Supreme Court was the constitutionality of an admission programme in University of Washington whereunder certain percentage of seats in Law School were reserved for minorities. The trial Court held the admission policy violates "equal protection clause" in Fourteenth Amendment and the Supreme Court of Washington reversed the same. The U.S. Supreme Court upheld the Special Admission Programme. What is important is that the U.S. Supreme Court in this Judgment referred to the judicial policy of strict scrutiny in matters of "equal protection clause." So to say, any programme employing "rational classification" to favour certain minority groups would be subject to strict scrutiny by the constitutional Court under, "equal protection clause".

56. Public Works Employment Act, 1977 (of USA) provided that 10% of the federal funds granted for local projects must be used by the State, or the local grantee to procure the services of Minority Business Enterprises set up by Negroes, Spanish. Orientals etc. The challenge to the provisions by the Association of Contractors was repelled by the District Court as well as the Court of Appeals. The U.S. Supreme Court in *Fullilove v. Philip M. Klutznick* (1980) 63 La Ed 2n 902, by a majority of 6:3 held that constitutional objectives required assuring minority business participation in Government contracts and that such legislative policy is permissible. The Court, however, added that "doubts" must be resolved in support of the congressional Judgment that this limited programme is a necessary step to effectuate the constitutional mandate for equality of economic opportunity. Thus, in this judgment also, the U.S. Supreme Court propounded the theory of "strict scrutiny" by the Courts in matters of "equal protection clause".

57. The view of "strict scrutiny" by the Courts in matters of reservation/ special programmes was, however, ignored by the U.S. Supreme Court in *Metro Broadcasting Inc. v. Federal Communications Commission* (1990) 111 La Ed 445. In United States in the business of establishing Radio and T.V. Broadcasting stations just 2.1% of minority groups owned such business. The Federal Communications Commission, a body vested with exclusive authority to grant licences for radio and T.V. broadcasting under the Communications Act, 1934 considered the fact that in 1986 only 2.1% minority groups own radio and TV

business and therefore, proposed to provide a preference to minority groups in the matter of evaluation of applications. The Commission also proposed to compel the existing licensee who incurred disqualifications to transfer the radio and TV licences to a member of minority so as to escape the wrath of disqualification. The Metro Broadcasting Corporation Inc. questioned the same and ultimately the case reached the U.S. Supreme Court. The conclusions and ratio of the said decision were analysed and approved in Indra Sawhney case as follows:

.....The decision of the Majority (Brenrtan, White, Marshall, Blackmun and Stevens, JJ) rendered by Brennan, J., is noteworthy for the shift of approach from the earlier decisions. It is now held that a classification based on race (bening race conscious measures) is constitutionally permissible even if it is not designed to compensate victims of past governmental or societal discrimination so long as it serves important Governmental objectives and is substantially related to achievement of those objectives. In other words, it is held that it is not necessary that the Court apply a strict standard of scrutiny to evaluate racial classification to ascertain whether it is necessary for achieving the relevant objective and further whether it is narrowly tailored to achieve a compelling state interest,

58. How to determine backwardness and whether or not there is adequate representation? It is useful to quote the principle laid down by the Apex Court in Indra Sawhney.

Not only should a class be a backward class for meriting reservations, it should also be inadequately represented in the services under the State. The language of Clauses (4) makes it clear that the question whether a backward class of citizens is not adequately represented in the services under the State is a matter within the subjective satisfaction of the State. This is evident from the fact that the said requirement is preceded by the words "in the opinion of the State." This opinion can be formed by the State on its own, i.e., on the basis of the material it has in its possession already or it may gather such material through a Commission/ Committee, person or authority. All that is required is, there must be some material upon which the opinion is formed. Indeed, in this matter the Court should show due deference to the opinion of the State, which in the present context means the executive. The executive is supposed to know the existing conditions in the society, drawn as it is from among the representatives of the people in Parliament/Legislature. It does not, however, mean that the opinion formed is beyond judicial scrutiny altogether,"

59. In Indra Sawheny v. Union of India (II) (2001) 1 SCC 168, a Division Bench of the Supreme Court followed the above dicta and indicated that the scope of judicial scrutiny with regard to matters relating to subjective satisfaction are governed by principles stated in The Barium Chemicals Ltd. and Another Vs. The Company Law Board and Others, .

60. In *Adarand Constructors Inc v. Peña* 515 US 200 (1995), the US Supreme Court, however, revived the strict scrutiny test. In *Ajit Singh (II) v. State of Punjab* (1997) 7 SCC 209, Jagannatha Rao, J, speaking for the Constitution Bench referred to *Adarand Constructors* and observed that in matters relating to affirmative action, the Court has to ensure the rights of citizens under Articles 14 and 16 and attempt to strike a reasonable balance between the two competing claims. In view of the judgment of the Supreme Court in *Indra Sawhney (I)* as well as *Indra Sawhney (II)*, it may be taken as well settled that in India the rule of "strict scrutiny" is not applicable. Further, the State is entitled to form an opinion on the basis of material based on "subjective satisfaction" of the Government. In such a context, as held in *Barium Chemicals* the question whether the material available with the decision making authority is sufficient or insufficient or adequate or inadequate are matters which are not justiciable.

To what extent reservations can be made?

Being a Government action to make special provision, whether it should satisfy the test of reasonableness to stand the scrutiny on the touchstone of Articles 14, 15 and 16 of the Constitution of India. In *M.R. Balaji and Others Vs. State of Mysore*, , *State of Punjab Vs. Hira Lal and Others*, , *AB.S.K. Sangh v. Union of India* AIR 1982 SC 298, *K.C. Vasanth Kumar and Another Vs. State of Karnataka*, , and *Indra Sawhney*, the question of maximum permissible reservation came up for consideration. We may briefly refer to these cases.

61. In *Balaji*, an order of the State of Mysore dated 13-7-1962, made under Article 15(4) for advancement of socially and educationally backward classes was challenged by the Supreme Court under Article 32 of the Constitution of India. The said order provided that 68% of the seats available for admission in Engineering and Medical Colleges were reserved in favour of Scheduled Castes, Scheduled Tribes and Backward Classes (28% for Backward Classes, 22% for more Backward Classes, 15% for Scheduled Tribes and 3% for Scheduled Tribes). It was inter alia contended that reservation of 68% is plainly inconsistent with Article 15(4) of the Constitution of India. Dealing with the question, the Constitution Bench proceeded on the premise that Article 15(4) is a special provision in the nature of an exception to Article 15(1). It was, thus observed and while enforcing the same, there cannot be complete exclusion of other candidates from the rest of the society, and that the exercise of such power should be informed with reason. It was further observed that, "a special provision contemplated by Article 15(4) like reservation of seats in colleges and appointments contemplated by Article 16(4) must be within reasonable limits, and that the interest of weaker sections which have a first charge on the State and the Centre have to be adjusted with the interests of the community as well. The Court also opined that the adjustment of these special claims is undoubtedly a difficult matter, but if under the guise of special provision the State reserves practically all the seats available in all the colleges, that clearly would be subverting the object of Article 15(4). In this matter again, Court should be

reluctant to say definitely what would be an appropriate provision to make. It was held that generally and in a broad way, a special provision would be less than 50% how much less than 50% would depend upon the relevant prevailing circumstances in each case."

62. In *Hira Lal*, the question came up for consideration in relation to public employment, wherein it was laid down that it is for the State to formulate the extent of reservation, and burden lies on the person to show that such reservation offends Article 16(1) of the Constitution. The relevant observations are as under:

The extent of reservation to be made is primarily a matter for the State to decide. By this, we do not mean to say that the decision of the State is not open to judicial review. The reservations must be only for the purpose of giving adequate representation in the services to Scheduled Castes, Scheduled Tribes and Backward Classes. The exception provided in Article 16(4) should not make the rule as embodied in Article 16(1) meaningless. But the burden of establishing that a particular reservation made by the State is offensive of Article 16(1) is on the person who takes the plea. The mere fact that reservation made may give extensive benefits to some of the persons who have the benefit of reservation does not by itself make the reservations bad. The length of the leap to be provided depends upon the gap to be covered,

63. In *N.M, Thomas*, a seven-Judge Constitution Bench of the Apex Court rejected the theory that Article 16(4) is an exception to Article 16(1). *Fazal Ali, J.*, and *Krishna Iyer, J.*, did not favour maximum 50% reservation rule. *Krishna Iyer, J.*, held that the arithmetical limit of 50% in any one year cannot be pressed too far. *Fazal Ali, J.*, even suggested that depending on the circumstances, the reservation can be far in excess of 50%. The relevant passage of the judgment, which is apposite, is as under:

As to what would be a suitable reservation within permissible limits will depend upon the facts and circumstances of each case and no hard and fast rule can be laid down, nor can this matter be reduced to mathematical formula so as to be adhered to in all cases. Decided cases of this Court have no doubt laid that percentage of reservations should not exceed 50%. As I read the authorities, this is, however, a rule of caution, and does not exhaust all categories. Suppose for instance a State has large number of backward classes of citizens which constitute 80% of the population and the Government in order to give them proper representation, reserves 80% of the jobs for them, can it be said that the percentage of reservations is bad and violates the permissible limits of Clause (4) of Article 16? The answer must necessarily be the negative,

64. In *A.B.S.K. Sangh, Chinnappa Reddy, J.*, held that there cannot be fixed ceiling on reservation or preferential treatment in favour of Scheduled Castes and Scheduled Tribes. It was observed:

.....Every lawful method is permissible to secure the due representation of the

Scheduled Castes and Scheduled Tribes through generally reservation may not be far in excess of fifty per cent. There is no rigidity pointed out. 50% rule is only a convenient guideline laid down by the Judges. Every case must be decided with reference to the present practical results yielded by the application of a particular rule of preferential treatment and not with reference to hypothetical results which the application of the rule may yield in future.

65. In Vasant Kumar, Chinnappa Reddy, J, (at para 49 in page 1519 of AIR) reiterated the above view. In Indra Sawhney, a Constitution Bench of nine-Judges considered the question. B.P. Jeevan Reddy, J., writing for the majority framed eleven questions for consideration. Question No.6 reads as under:

To what extent can the reservations be made?

(a) Whether the 50% rule enunciated in Batafi is a binding rule or only a rule of caution or rule of precedence.

(b) Whether 50% rule, if any, is confined to reservations made under Clauses 4 of Article 16 or whether it takes all types of reservations which can be provided under Article 16.

(c) Further while applying 50% rule, if any, whether a year should be taken as a unit or whether the total strength of the cadre should be looked to.

(d) Whether DevaJasan, AIR 1964 SC 1791, was correctly decided.

66. After referring to Balaji, N.M, Thomas and Vasant Kumar, the Supreme Court held:

Just as every power must be exercised reasonably and fairly, the power conferred by Clauses (4) of Article 16 should also be exercised in a fair manner and within reasonable limits - and what is more reasonable than to say that reservations under Clauses (4) shall not exceed 50% of the appointments or posts barring certain extraordinary situations as explained hereinafter.....it needs no emphasis that the principal aim of Articles 14 and 16 is equality and equality of opportunity and that Clauses (4) of Article 16 is but a means of achieving the very same object Clause (4) is a special provision - though not an exception to Clauses (1). Both the provisions have to be harnessed keeping in mind the fact that both are but the restatements of the principle of equality enshrined in Article 14. The provisions of Article 16(4) conceived in the interest of certain sections of society should be balanced against the guarantee of " equality enshrined in Clauses (1) of Article 16 which is a guarantee held out to every citizen and to entire society.

67. In Indra Sawhney, the Supreme Court also explained the rule of 50% applies only to reservations in favour of backward classes made under Article 16(4). Needless to point out that backward classes mentioned in Article 16(4) also include Scheduled Castes and Scheduled Tribes. The ratio in Indra Sawhney cannot be taken to be permitting reservations under Article 16(4) in excess of

50% both for Backward Classes, Scheduled Castes and Scheduled Tribes together. Notwithstanding this, to our mind, the ratio in *Balaji*, which was accepted in *Indra Saivhney*, is to the effect that in a given circumstances the reservations can be far in excess of 50%. As held by Jeevan Reddy, J., in *Indra Sawhney*, in certain extraordinary situations the reservations can exceed 50%.

68. We may also point out that the Supreme Court in *Balaji* and a Full Bench of this Court in *V. Narayana Rao and Another Vs. State of Andhra Pradesh and Another*, , struck down 68% and 65% reservations respectively in favour of Backward Classes, Scheduled Castes and Scheduled Tribes together. No case has been brought to our notice where the exclusive reservation in favour of Scheduled Tribes in excess of 50% in public employment, especially in a special educational programme for Scheduled Tribes, met with curial invalidation. We have only indicated the cases decided by the Supreme Court to drive home the point that 50% rule of reservation is not rigid and inflexible rule. Any classification under Article 16(1) would be permissible, and such classification, if shown to be reasonable and rational must receive the imprimatur of the Court.

69. The third situation is where the question of unreasonableness arises in implementation of reservation. In public employment and admissions in educational institutions, reservations must be enforced in such a manner that the same do not result in disadvantage to members belonging to reserved categories. The State, therefore, evolved a policy of carry forward rule in public employment. This rule enables the Government to keep the posts unfilled in a year when there are no Scheduled Caste/ Scheduled Tribe candidates available for recruitment and also to hold special selections to enable Scheduled Caste/ Scheduled Tribe candidates seeking appointment. The other aspect of the matter is provision of minimum reservation which should be reasonable and rational so that meritorious candidates belonging to Scheduled Castes/Scheduled Tribes, who come up in the merit selection will be treated as general candidates, and other Scheduled Caste/Scheduled Tribe candidates below the merit candidates will be appointed to the required minimum percentage of reservations. In educational institutions also, the Supreme Court laid down that any reservation policy shall be implemented without causing any disadvantage to the more meritorious reserved candidates. (See *R.K. Sabharwal and others Vs. State of Punjab and others*, , and *Ritesh R. Sah Vs. Dr. Y.L. Yamul and others*, .

70. We may therefore conclude this part of the judgment holding that the test of *Wednesbury Unreasonableness* in relation to affirmative action by way of reservation differs from situation to situation. Even in regard to judicial review, generally the same standards cannot be applied. In matters of identification of backward classes, strict scrutiny test cannot be applied, and it is the subjective satisfaction of the Government, which is "the basis for identifying backward classes, and unless there is gross caprice and arbitrariness, such Government action should not be interfered with. In matters of quantity of reservation for backward classes, 50% rule is not rigid nor inflexible, and there could be

extraordinary situations. Further, though Article 16(4) enables the Government to classify citizens as backward classes, the same is not exhaustive of reservations and it is always permissible for the Government to make further reservations of whatever kind showing that such further reservations was necessary in public interest to redress specific situation.

71. We have discussed the impugned notification in detail. It is intended to achieve certain well meaning objectives in public interest, and it seeks to redress a situation in Scheduled Areas where appointment of non-tribal teachers is resulting in phenomenal absentism of teachers, which is for promotion of the educational and economic development of the tribals. Applying the test of Wedmsbury Unreasonableness, we are convinced that the reservation, as rightly contended by Sri K. Balagopal, is one that falls under Article 16(1) and the Government has satisfied this Court that such provision is necessary to redress the specific situation obtaining in Scheduled Areas of the State of A.P.

Effect of non-obstante clause and Fundamental Rights

The impugned notification has effect of earmarking all the posts in all the schools in Scheduled Areas only for local Scheduled Tribe candidates. Does it violate the doctrine of equality? Equality does not prohibit the State from making valid classification subject to constitutional limitation that the State shall not discriminate on grounds only of religion, race, caste, sex, dissent, place of birth, residence or any of them in respect of any employment or office in the State. By reason of non obstante clause in Paragraph 5(1) of V Schedule of the Constitution whether fundamental rights chapter does not apply to a law or regulation made by the Governor regarding administration and control of Scheduled Areas and Scheduled Tribes? In the context, we need to address two questions. First, whether the respondents can challenge the impugned notification by pressing into service the fundamental rights in Part-III of the Constitution of India. Second, if the answer to the question is in affirmative, whether the impugned notification violatives Articles 14 and 16 of the Constitution of India.

72. The learned Advocate-General submits that in view of the non obstante clause in Para 5(1), the power of the Governor cannot be subjected to any restrictions, including Article 13 of the Constitution of India. He submits that non-obstante clause is intended to give the enacting part of the Section full and unconditional latitude by the law mentioned in the non-obstante clause and therefore the Governor can exercise power under Paragraph 5(1) without in any manner influenced by any provision of the Constitution including those in Part-III thereof. Alternatively he submits that even applying the tests of Articles 14 and 16 the impugned notification is lawful if it is examined with reference to the purpose of the notification and the necessity of such provision. As the Constitution has treated Scheduled Areas as a special geographical units deserving separate treatment such constitutional classification based on geographical conditions for all purposes is valid under Articles 14 and 16 of the

Constitution. He placed reliance on various judgments of the Supreme Court.

73. In *Union of India v. G.M. Kokil* 1984 (Supp.) SCC 196 , it was held:

It is well known that a non-obstante clause is a legislative device which is usually employed to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment, that is to say, to avoid the operation and effect of all contrary provisions.

74. In *Chandavarkar Sita Ratna Rao Vs. Ashalata S. Guram*, , the Apex Court laid down as under:

A clause beginning with the expression "notwithstanding anything contained in this Act or in some particular provision in the Act or in some particular Act or any law for the time being in force, or in any contract" is more often than not appended to a section in the beginning with a view to give the enacting part of the section in case of conflict an overriding effect over the provision of the Act or the contract mentioned in the non-obstante clause. It is equivalent to saying that inspite of the provision of the Act or any other Act mentioned in the non-obstante clause or any contract or document mentioned the enactment following it will have its full operation or that the provisions embraced in the non-obstante clause would not be an impediment for an operation of the enactment.....It is well settled that the express "notwithstanding" is in contradistinction to the phrase "subject to" the latter conveying the idea of a provision yielding place to another provision or other provisions to which it is made subject.

75. In *Smt. Parayankandiyal Eravath Kanapraavan Kalliani Amma and others Vs. K. Devi and others*, , the following principle was laid down:

Non obstante clause is sometimes appended to a section in the beginning with a view to give the enacting part of the section, in case of conflict, an overriding effect over the provision of Act mentioned in that clause. It is equivalent to saying that inspite of the provision or Act mentioned in the non-obstante clause, the enactment following it will have its full operation or that the provision indicated in the non-obstant clause will not be an impediment for the operation of the enactment.

76. The learned Advocate-General also relied on the judgment of the Supreme Court in *Dalmia Cement (Bharat) Ltd. and Another Vs. Union of India (UOI) and Others*, , in support of the contention that provisions in Parts III and IV of the Constitution should be interpreted harmoniously and fundamental rights should be read as subject to public interest and public purpose.

77. We may also at this juncture consider the cases cited by the learned Counsel for the petitioners in support of the contention that the reservation of all the posts in the schools in Scheduled Areas in favour of Scheduled Tribe candidates does not violate arithmetic reservation of 50%. In *Seepuri Nagabhushanam and Others Vs. Secretary to Government, Panchayat Raj Government of Andhra*

Pradesh, Hyderabad, , the validity of a notification issued by the Governor of the State of Andhra Pradesh under Paragraph 5(1) of V Schedule directing that Section 7(1) A.P. Panchayat Samitis and Zilla Parishads Act be applied to Scheduled Areas subject to the condition that the office of President and Vice-President of every Panchayat Samiti in the Scheduled Areas be allocated from among the members of Panchayat belonging to Scheduled Tribe was challenged as ultra vires the provisions of V Schedule. The submission was that such reservation in favour of Scheduled Tribes is discriminatory and offends Part II of the Constitution of India. The Division Bench rejected the contention holding as under:

....This provision is further qualified to override anything contained in the Constitution, by the word "notwithstanding". When the Constitution-makers have vested the power in the Governor to apply or not to apply a law of the Parliament or of the Legislature of the State notwithstanding anything contained in the Constitution with such modifications or exceptions as the Governor may deem fit, they were empowering him to apply the law, with the power of amendment of the law as intended to be applied to the Scheduled Area. There can be no doubt that the law has to be applied to the Area but in its application the law can confine itself to certain class of persons in that Area. The power is granted mainly to protect the interests of the Scheduled Area or the persons residing in the Scheduled Area in which no doubt the majority of the persons are Scheduled Tribes. The Governor of the States is bestowed with responsibility for giving special protection to the tribal Areas which are declared by the President to be so under Clause 6 of Schedule V and in discharge of that duty and responsibility he has been given the power to modify or exempt any of the provisions of the law in its application or non-application to that Area.

78. In *Rarndoss, Kondaiah, J*, (as he then was), considered the question of validity of a notification issued by the Governor under Paragraph 5(1) of V Schedule whereunder a proviso to Section 12(1) of A.P. Gram Panchayat Act, 1964 was applied in effect directing that the Sarpanch of every Gram Panchayat in the Scheduled Areas shall be elected from among the members of the Gram Panchayat belonging to Scheduled Tribe. The Notification was challenged on the ground that it violates Article 14 of the Constitution of India, that when Panchayat Act is in force the Governor is divested of the power under Paragraph 5 of V schedule, that the reservation for Scheduled Tribes provided by the impugned notification could not be effectively carried out in several villages as there are no STs living in those villages, that the amendment cannot be introduced in exercise of powers under V Schedule and that the Governor has no power or jurisdiction to issue notification after 20 years after coming into force of the Constitution. A similar notification issued under Zilla Parishads Act was also challenged on the same grounds. The argument that the notification violates Part III of the Constitution was rejected mainly for the following reasons:

In construing the provisions of Para 5(1) of the Fifth Schedule, the non obstante

clause with which it begins, must be given its full meaning. The use of the words "notwithstanding" anything in this Constitution" makes it abundantly clear that while acting under Para 5(1) of the Fifth Schedule, the Governor of a State is invested with overriding powers to make by public notification any law relating to the administration and control of the scheduled Area despite the other provisions including those enshrined in Part III of the Constitution. In order to safeguard and protect the interests of Scheduled Tribes residing in Scheduled Areas who are economically, socially, politically, educationally and otherwise backward, the framers of the Constitution deemed fit and proper to invest the Governor of a State, who acts on the advice of his Council of Ministers, with overriding powers under the aforesaid clause to make any law or modification in the existing law applicable to Scheduled Areas. Hence, in my considered opinion, any notification or regulation issued by the Governor under Para 5(1) of the Fifth Schedule to the Constitution, even if it contravenes the fundamental rights of any citizen, is valid and intra vires of the powers vested in him.

79. In Satyanarayana Reddy, constitutional validity of Explanation II of Sub-section (2) of Section 5 of A.P. Mandal Praja Parishads, Zilla Praja Parishads and Zilla Pranalika Abhivrudhi Mandals Act, 1986 was challenged as unconstitutional. Section 5(2) of the said Act provided reservation in favour of STs, SCs, Women and BCs in the ratio of 6%, 15%, 9% and 20% respectively. The reservation for STs was provided by a different criteria and the same was impugned as offending Article 14 of the Constitution of India. The Court came to a conclusion that Section 5(2) of the said Act has effect of reserving 50% more mandals for STs than they are entitled to and that the same resulted in diminution of number of seats reserved for STs on the basis of their population as well as seats reserved for Women, OCs and BCs. Despite this, reservation was upheld by Jeevan Reddy, J., (as he then was), whose view was also accepted by Jagannatha Rao, J., (as he then was). It is apposite to quote from the opinion of Jeevan Reddy, J.

I must repeat that the State has repeatedly asserted that for determining and applying the rule of reservation it is taking the entire State as one unit, and that for the sake of uniformity it is providing for uniform reservations in all the districts irrespective of their proportion in each "district" population. It was perfectly open to the Legislature to say that all the 47 Mandals situated within the Scheduled Areas shall be reserved for Scheduled Tribes; it would still leave them with 18 Mandals which they could have equally or equitably distributed among the remaining 18 districts. In this manner, each district will have one Mandal reserved for Scheduled Tribes, while in those districts where Scheduled Tribes are in substantial number, i.e., where there are Scheduled Areas, they get a lion's share.

80. Therefore, in Satyanarayana Reddy what was decided was that in Scheduled Areas even reservation of all the posts in favour of Scheduled Tribes is permissible and that despite non-obstante clause in Paragraph 5(1) of V Schedule the applicability of Part III of the Constitution cannot be ignored. Be

that as it may, we may say that Paragraph 5(1) permits the Governor to direct that a law shall not apply or shall apply with such modifications notwithstanding anything contained in the Constitution. For example, if there is a law imposing tax say profession tax and the same is directed not to apply in Scheduled Areas by the Governor, there cannot of any complaint that the citizens in non-Scheduled Areas are discriminated. In effect, After 14 stands excluded. Further, if any law says that all mining leases in Scheduled Areas shall be given only to citizens belonging to Scheduled Tribes to the exclusion of all other citizens who are not Scheduled Tribes can it be said it violates Articles 14 and 19(1)(g) of the Constitution?

81. In *Samata* (supra) the Apex Court upheld that validity of Section 11(5) of Mines and Minerals (Regulation and Development) Act, 1957 as amended by A.P. Legislature which prohibited granting of mining leases to non-tribals thereby reserving all mining leases in favour of STs.

82. The judgment of the Full Bench in *Satyanarayana Reddy* was explained by Jagannalha Rao, J., (who was also one of the members of the said Full Bench) in an unreported judgment dated 4-7-1989 in WPNo.16918 of 1988 in the following terms:

Therefore, I am of the view that the Full Bench is again an authority for holding that in certain cases the reservation of all posts, in Scheduled Areas in favour of Scheduled Tribes is not bad even if Part III overrides Clauses 5 of Schedule V If according to the Full Bench reservation of all the Mandals situated within the Scheduled Areas in favour of Scheduled Tribes is not bad, I do not see any reason why the reservation of all posts in Scheduled Areas in favour of Scheduled Tribes should be bad. In fact the Supreme Court pointed out that there may be extreme cases such as a State where there are predominant tribal population and that in such cases it will not be improper to make reservations in favour of tribals beyond the normal prescribed limit,

83. In view of the judgment of Jagannadha Rao, J., in WP No. 16918 of 1998 as well as the judgment of the Supreme Court in *Samatha*, we hold that whether or not fundamental rights can be ignored in enforcing the provisions of Para 5(1) of V Schedule, reservation of all the posts of teachers in the schools intended for citizens belonging to Scheduled Tribes in Scheduled Area, in favour of local Scheduled Tribes candidates is valid even under Articles 14 and 16(1) of the Constitution of India, and the same does not suffer from any vice of arbitrariness and/or unreasonableness.

The effect of earlier litigation

In 1986, the Governor of A.P. promulgated a notification in G.O. Ms. No.275, dated 5-11-1986 purporting to be in exercise of power under Para 5(1) of V Schedule. The said notification reads:

In exercise of the powers conferred under Sub-paragraph (1) of Paragraph 5 of

the V Schedule to the Constitution of India, the Governor of Andhra Pradesh hereby directs that the posts of teachers in the educational institutions in the Scheduled Areas of the State shall be filled in only by the local members of the Scheduled Tribes notwithstanding anything contained in any other order or rule or law in force.

84. A bare perusal of the above notification shows that the Governor merely directed that the posts of teachers in educational institutions shall be filled in only by local members of Scheduled Tribes notwithstanding anything contained in any other order or rule or law in force. By reading of para 5(1) of V Schedule and the said notification together, one need not strain too much to come to a conclusion that though the said notification purports to be under Para 5(1), it is not so. Be that as it may, the said notification was challenged in RP Nos.6377 and 6379 of 1988 before the A.P. Administrative Tribunal inter alia on the ground that there is no legislation existing either passed by the State or Central Legislature for the Governor to exercise power under Para 5(1) of V Schedule. By a brief order dated 25-8-1989, the then Chairman of the Tribunal quashed G.O. Ms. No.275 holding:

It is therefore, quite patent from the said GO that the Governor, in the purported exercise of powers under Paragraph 5(1) of V Schedule to the Constitution makes an order by notification that a particular Act of Parliament or State Legislature shall apply to a Scheduled Area or part thereof, enabling the local Scheduled Tribes who pass or fail I Oth class alone to be appointed as teachers. This presupposes, inasmuch as the order has been made under Paragraph 5(1), existence of a statutory law passed either by the State or Central Legislature. It is not the case of the respondents that there exists any piece of legislation in this behalf occupying the field already because that is a sine qua nan for exercise of any power under Paragraph 5(1).

85. A reading of the judgment of the Tribunal shows that inspite of adequate time having been granted to the Government for ascertaining as to whether any law has been passed already with reference to which the Governor could be said to have exercised power under Para 5(1), the learned Government Pleader did not furnish any information and therefore, the Tribunal had no other go, but to quash the order. Against the judgment of the Tribunal, the matter was carried to the Supreme Court by way of SLP. Initially, leave was granted and the judgment of the Tribunal was suspended. However, by order dated 20-3-1988, the Civil Appeals being Nos. 2305-06 of 1991, were dismissed as withdrawn.

86. When the civil appeals were pending, writ petition being WP No.5276 of 1993 and batch were filled by three non-tribals questioning the validity of a condition in a recruitment notification to the effect that non-tribal candidates shall be appointed on ad hoc basis only for 89 days, and that they do not have any right over their appointment. Such a condition was imposed by reason of an amendment made to G.O.Ms.No.275, issued in G.O.Ms.No.73, dated 25-4-1987. A learned single Judge of this Court by judgment dated 5-6-1996 declared the

impugned condition as illegal and arbitrary. The judgment of the learned single Judge, however, was reversed by a Division Bench of this Court in appeal being WA No.874 of 1997. In the judgment dated, 20-8-1997, a Division Bench following the Full Bench judgment in Satyanarayana Reddy case (supra) held that the writ petitioners therein cannot claim any right over the posts which were exclusively reserved for candidates belonging to Scheduled Tribes, and that any enforcement of the right claimed under Articles 14 and 16(1) of the Constitution of India by non-tribals would be plainly against the provisions of Para 5 of the V Schedule. This matter was again carried to the Supreme Court by way of appeal being Civil Appeal No.6437 of 1998. The Supreme Court by an order dated 18-12-1998 allowed appeal by passing brief order as under:

Leave granted. The respondent-State issued a Government Order No.275 on 5th November, 1986 which required recruitment of only tribals to the post of teachers in educational institutions run in the Scheduled Areas of the State. The notification was quashed and the State filed Special Leave petitions SLP (C) Nos.14562-63 in this Court. Thereagainst, leave was granted in those SLPs. Counsel agreed that in 1997 the State Government withdraw the appeals arising out of the said SLP No.14562-63 of 1989. It must follow that the present appeal which arises as a consequence of that Government Order must be allowed. Accordingly, the appeal is allowed. The judgment and order under appeal is set aside. No order as to costs.

87. A reading of G.O. Ms. No.275 dated 5-11-1986 and G.O. Ms. No.75," dated 25-4-1988 and various judgments and orders of the Tribunal, this Court as well as the Supreme Court would show that the issue before the Courts in earlier litigation is altogether different. As can be seen from the judgment of the Tribunal in RPNos.6377 and 6379 of 1988, dated 25-8-1989, the notification in G.O. Ms. No.275, was quashed only on the ground that the Government of Andhra Pradesh failed to show any law existing enabling the Governor to exercise power under Para 5(1) of V Schedule. The question whether the Governor can reserve all the posts of teachers in all the schools in Scheduled Areas in favour of local Scheduled Tribe candidates was neither raised nor considered. As noticed, by virtue of the notification impugned in these writ petitions the Governor has applied the relevant provisions of A.P. Education Act, A.P. Panchayat Raj Act as well as the General Rules and Special Rules to all the schools in Scheduled Areas with certain modifications. The exercise of power by the Governor under Para 5(1) of the V Schedule is well in accordance with the said provisions. In view of this, we are convinced that the respondents/applicants cannot draw any support from the judgment of the Tribunal in the earlier litigation.

Conclusion

A programme of affirmative action in favour of citizens belonging to Scheduled Tribes in Scheduled Areas has backing of historical reasons. Even in the days of British Raj, the Scheduled Areas, which were then called excluded and partially excluded Areas, received special treatment. The village administration as well as

administration of justice in those Areas was uniquely different. The land laws, money lending laws and other welfare laws were tailor-made to suit the peculiar geographical situation that existed in those Areas. In spite of this, - it would be truism to say; that the State action did not yield desired results. The policy of the State thus far to make a special provision for ensuring - "adequate representation" to Backward Classes including Scheduled Tribes is itself a complex socio legal device and in that complex Area of governance the effective steps would be those which would enable the members of the Scheduled Tribes to claim equality on par with others and participate in economic activity of the nation as equal citizens. Such a goal would only be possible if the identity, culture and interests of indigenous people is given a fillip first by liberating the Scheduled Areas from the darkness of illiteracy. In our considered opinion, the Notification issued by the Governor is one such device for increasing the literacy in the Scheduled Areas, which can only be achieved by ensuring the presence of a teacher in every school in Scheduled Areas.

88. Though a feeble attempt is made by Sri J. Manohar Rao to contend that when all the posts of teachers are included in A.P. Educational Subordinate Service Rules governed by the Special Rules, the implementation of the G.O. would result in absurdities. In view of the settled legal position that the judicial review of vires of a Constitutional Notification is mainly concerned with validation or invalidation thereof and not with the problems of implementation, the executive wisdom to rise to the occasion to tackle the problems in implementation is not within the scope of this case nor could ever be a reason for invalidating the piece of legislation. Indeed, no such ground was raised before the A.P. Administrative Tribunal nor it was considered.

89. In the result, we hold that the impugned judgment and order of the Tribunal in these writ petitions suffers from grave error apparent on the face of the record. We set aside the same and allow the writ petitions. In the circumstances of the case, there shall be no order as to costs.

Motilal B. Naik, J.

The draft judgment prepared by the Hon"ble the Chief Justice confirming the view taken by the A.P. Administrative Tribunal in the impugned judgment and the draft judgment prepared by my learned brother V.V.S. Rao, J., setting aside the judgment of the A.P. Administrative Tribunal, which is impugned in the writ petitions, are circulated to me.

91. After going through the details of the draft judgments. I do not think, I can lend my concurrence to the view taken by the Hon"ble the Chief Justice. However, I am inclined to agree on all counts with the view taken by my learned brother V.V.S. Rao, J., in his draft judgment.

92. Since my learned brother V.V.S. Rao, J., has written a detailed judgment touching all aspects of the matter, which fell before us for consideration, I do not propose to add anything more. I entirely agree with the findings and conclusions

arrived at by my learned Brother V.V.S. Rao, J.

93. In the result, the view taken by the A.P. Administrative Tribunal in the impugned judgment is set aside. Consequently, the writ petitions are allowed. No costs.

94. In view of the majority opinion, the writ petitions are allowed without there being any order as to costs.