

(1998) 07 GAU CK 0026

In the Gauhati High Court

Case No : Writ Appeal No. 95 of 1996 and Civil Rule No. 149 of 1988

Samarendra Mukherjee and Others

APPELLANT

Vs

Bikash Deb Barma and Others

RESPONDENT

Date of Decision : 15-07-1998

Acts Referred:

Constitution of India, 1950 — Article 14, 15(4), 154, 16, 16(4)
Environment (Protection) Rules, 1986 — Rule 5(3)
General Clauses Act, 1897 — Section 3(60)
Government of India Act, 1935 — Section 240, 244, 254, 255, 256
Tripura General Clauses Act, 1966 — Section 2
Tripura Judicial Service Rules, 1974 — Rule 10, 20, 6(3), 9(1), 9(5)
Tripura Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Services and Posts) Act, 1991 — Section 12, 2, 3, 4, 5
Tripura Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Services and Posts) Rules, 1992 — Rule 10, 9(1), 9(5)

Citation : (1998) 3 GLT 325

Hon'ble Judges : D.N. Chowdhury, J; A.K. Patnaik, J

Bench : Division Bench

Advocate : B.B. Deb, A.M. Lodh and A.K. Deb, in C.R. No. 149 of 1988, for the Appellant; Ashok Chakraborty, A.G., B. Das, S. Deb, K.N. Bhattacharjee, S. Talapatra, S. Majumdar, P.K. Paul, R. Dasgupta, A. Bhattacharjee and N. Majumdar, in C.R. No. 149 of 1988, for the Respondent

Judgement

A.K. Patnaik, J.—In this writ appeal we are concerned with reservation in favour of Scheduled Tribes in matters of promotion in the Tripura Judicial Service.

2. Sri Bikash Dev Barma, Respondent No. 1 herein filed a writ petition under Article 226 of the Constitution numbered Civil Rule No. 149/88. In the said writ petition, the case of the Respondent No. 1/writ Petitioner was that he applied as a Scheduled Tribe candidate for appointment to a post in Grade-III of the Tripura Judicial Service pursuant to a notification issued by the Tripura Public Service Commission (hereinafter referred to as "the TPSC") and on the recommendation of the TPSC was appointed to the Tripura Judicial Service Grade-III in the year 1982 and he joined pursuant to the said appointment. Rule 10 of the Tripura

Judicial Service Rules, 1974 (for short, "the 1974 Rules") provided that appointment to the service made by direct recruitment would be subject to the orders regarding special representation in the services for the Scheduled Castes and the Scheduled Tribes issued by the Government of India from time to time. Rule 20 of the 1974 Rules stipulated that in regard to matters not specially covered by the rules or by regulations or orders issued thereunder or by special orders, the members of the service shall be governed by the rules, regulations and orders applicable to corresponding officers serving in connection with the affairs of the State Government. By a Memorandum dated 19.2.77 issued by the Government of Tripura, Appointment & Services Department, it was announced that the Government had decided that the percentage of reservation against promotion quota for Scheduled Tribes and Scheduled Caste candidates should be equivalent to the percentage of reservation in the matter of direct recruitment with immediate effect in respect of all categories of posts under the Government. Thus, the case of the writ Petitioner was that the aforesaid Memorandum dated 19.2.77 of the Government of Tripura, Appointment & Services Department provided for reservation in case of Scheduled Tribes at 29% of the vacancies in matters of promotion in respect of all categories of posts under the Government in the same way as in matters of direct recruitment in respect of said posts under the Government and that by virtue of Rule 10 of the 1974 Rules, the said Memorandum dated 19.2.77 was applicable to the Tripura Judicial Service and the writ Petitioner was entitled to be promoted to the quota of 29% of the vacancies reserved for the Scheduled Tribes in the Tripura Judicial Service Grade-II with effect from the date he completed his probation as an officer of the Tripura Judicial Service Grade-III. But the writ Petitioner was not promoted and instead the Gauhati High Court promoted various other officers of Tripura Judicial Service Grade-III to Tripura Judicial Service Grade-II. In the circumstances, the writ Petitioner made representations from time to time to the Gauhati High Court and the Registrar, Gauhati High Court received the said representations but did not pass any order of promotion in favour of the writ Petitioner. Aggrieved, the writ Petitioner filed the aforesaid Civil Rule No. 194/88 for directions on the Gauhati High Court and the State of Tripura to promote the writ Petitioner to Grade-II of the Tripura Judicial Service with effect from 22.3.84, that is, the date when he completed probationary period as an officer of Grade-III of the Tripura Judicial Service and to appoint him to Grade-I of the Tripura Judicial Service in accordance with the reservation policy.

3. No counter-affidavit was filed in the said Civil Rule by the Registrar on behalf of the Gauhati High Court, but a counter-affidavit was filed on behalf of the State of Tripura on 7.12.91 contending, inter alia, that while framing the 1974 Rules, the authority concerned kept in consideration the constitutional provisions for reservation subject to the maintenance of efficiency of administration as enshrined in Article 335 of the Constitution and decided to make provisions for reservation to the posts for Scheduled Tribes and Scheduled Castes only at the initial stage of direct recruitment in service and decided not to extend the

reservation provision in case of promotion. In the said counter-affidavit filed on behalf of the State of Tripura on 7.12.91, it was also contended that merit-cum-seniority was the criterion prescribed by rule 7(1) of the 1974 rules for promotion to higher grade of the service and hence the writ Petitioner could not be automatically promoted superseding his seniors as soon as he completed the probationary period. In paragraph-12 of the said counter-affidavit filed on behalf of the State of Tripura, it was further stated that having been misadvised the writ Petitioner had filed the meritless petition and that neither the Gauhati High Court nor the State of Tripura failed to discharge their obligation by not promoting the writ Petitioner to higher grade. On 22.8.94, however, the State of Tripura filed an application for amendment of the said counter-affidavit filed on 7.12.91 and took a new stand therein. In the said application dated 22.8.94, the State of Tripura contended that although in the 1974 Rules, provision was initially made for reservation for Scheduled Tribes and Scheduled Castes at the time of direct recruitment, the State Government by Executive Instructions under notification dated 19.2.77 communicated to all concerned the decision of the Government that the percentage of reservation against promotion quota for Scheduled Tribes and Scheduled Castes communities would be equivalent to the percentage of reservation in the matter of direct recruitment in respect of all categories of posts under the Government and that in the said Instructions no exception was made with regard to filling up of promotional posts in the Tripura Judicial Service. It was further contended in the said application for amendment dated 22.8.94 that the said Executive Instructions read with Rule 20 of the 1974 Rules made it clear that reservation at the prescribed percentage was to be maintained even in matters of promotion in the Tripura Judicial Service. A further case was made out in the said application for amendment dated 22.8.94 of the State of Tripura that after enactment of the Tripura Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Services and Posts) Act, 1991, (for short, "the 1991 Act"), the contention of the writ Petitioner to the effect that reservation for Scheduled Castes and Scheduled Tribes existed in respect of promotional vacancies in the Tripura Judicial Service could no longer be opposed. By the said application for amendment dated 22.8.94 therefore the State of Tripura supported the case of the writ Petitioner.

4. Grade-III officers of the Tripura Judicial Service who had been promoted to Grade-II of the Tripura Judicial Service filed their counter-affidavits in the said Civil Rule opposing the prayer of the writ Petitioner. A common counter-affidavit was filed by the officers who had been impleaded as Respondent Nos. 3,5,7,9,10,14,16,18,20,23,25,30,31 and 32 in the said Civil Rule, contending, inter alia, that Article 15(4) and 16(4) of the Constitution of India had to be read in consonance with Article 335 of the Constitution which provided that the claims of the members of the Scheduled Castes and Scheduled Tribes would be taken into-consideration consistently with the maintenance of efficiency of administration and hence the writ Petitioner could not claim promotion to Grade-11 or Grade-I of the Tripura Judicial Service only because he was a

member of a Scheduled Tribes. It was also contended in the said counter-affidavit that there was no provision for reservation in promotion in the Tripura Judicial Service and that the writ Petitioner whose seniority position in Grade-III of the Tripura Judicial Service was at serial No. 10 did not even come within the zone of consideration for promotion as only five persons were to be considered for promotion to one vacancy. The further contention in the said counter-affidavit was that the Memorandum dated 19.2.77 of the Government of Tripura providing for reservation for Scheduled Tribes and Scheduled Castes in respect of all categories of posts under the Government could not supersede or substitute any provision of the 1974 Rules and that any modification of the 1974 Rules could only be done by the authority who framed the said Rules, namely, the Governor in consultation with the High Court and the Public Service Commission as provided in Article 234 of the Constitution. It was also contended in the said counter-affidavit that the 1991 Act did not make any provision for reservation in promotion in the Tripura Judicial Service. A separate counter affidavit was also filed by the officers who had been impleaded as Respondent Nos. 13, 34 and 26 in Civil Rule opposing the prayer of the writ Petitioner on similar grounds. A separate counter-affidavit was also filed by the officer who was impleaded as Respondent No. 21 in the Civil Rule contending that the writ petition was liable to be dismissed. Affidavits were filed by the writ Petitioner in reply to the counter-affidavits of different Respondents. An application was filed by Sri Data Mohan Jamatia, a member of Scheduled Tribes, praying for intervention in of reservation in matters of promotion under the notification dated 19.2.77 and u/s 5 of the 1991 Act in other services, it would be discriminatory and contrary to the mandate of Article 16(4) of the Constitution, if the same benefit was not extended in judicial service. The learned Single Judge also held that by the Constitution (Seventy-Seventh Amendment) Act, 1995 a new Clause (4A) had been added in Article 16 of the Constitution stipulating that nothing in the said Article would prevent the State from making any provision for reservation in matters of promotion of any class or classes of posts in the services under the State in favour of Scheduled Castes and the Scheduled Tribes which in the opinion of the State were not adequately represented in the services under the State and that after the said Constitution (Seventy-Seventh Amendment) Act, 1995, Section 5 of the 1991 Act providing for reservation in matters of promotion for the members of Scheduled Castes and Scheduled Tribes in the services survived. Finally, the learned Single Judge held that the writ Petitioner was entitled to be considered for promotion on the basis of the notification dated 19.2.77 and Section 5 of the 1991 Act and directed the Gauhati High Court and the State of Tripura to consider the case of the Petitioner for promotion to the post of Grade-II of the Tripura Judicial Service with effect from the date from which he became eligible for such consideration and thereafter to grant him all consequential reliefs. It is this judgment dated 4.10.96 of the learned Single Judge which has been challenged in this writ appeal by the eight officers of the Tripura Judicial Service who were impleaded as Respondents in the Civil Rule. At the time the appeal was admitted by a Division Bench, an interim order was

passed on 19.11.96 staying the operation of the impugned judgment and order of the learned Single Judge and the said interim order has continued since then.

6. At the hearing of this appeal, Mr. B.B. Deb learned Counsel appearing for the Appellants, made the following submissions:

(i) Though the writ Petitioner was a member of Scheduled Tribes, it was not clear from the records that he was appointed against a post reserved for Scheduled Tribes, and in the absence of a clear finding that the writ Petitioner had been appointed against a post reserved for Scheduled Tribes and not as a general candidate, the writ Petitioner was not entitled to the benefit of reservation. In support of this submission Mr. Deb cited the decision of the Supreme Court in the case of Post-Graduate Institute of Medical Education and Research etc. Vs. K.L. Narasimhan and another etc., to the effect that "if a Dalit (SC) or ST candidate gets selected for admission to a course, or appointment to a post, on the basis of merit as a general candidate, he should not be treated as reserved candidate and only one who does get admission or appointment by virtue of relaxation of eligibility criteria should be treated as a reserved candidate."

(ii) Rule 6(3)(b) of the 1974 Rules provided for promotion from Grade-II to Grade-I post other than the Legal Remembrancer and Secretary, Law Department and the Registrar High Court and Rule 6(3)(c) (ii) provided for promotion from Grade-III to Grade-II posts other than the posts of Deputy Legal Remembrancer and Deputy Secretary and the Deputy Legislative Counsel and Deputy Secretary, Law Department, but the Rules did not make any mention for reservation for Scheduled Castes and Scheduled Tribes in such promotions whereas Rule 10 of the 1974 Rules specifically provided for reservation for Scheduled Tribes and Scheduled Castes in appointment to service made by direct recruitment. By implication, therefore, the 1974 Rules excluded reservation for Scheduled Castes and Scheduled Tribes in matters of promotion and Rule 20 of the said Rules could not be interpreted in a manner contrary to the said intendment of the Rules.

(iii) Judicial Service has been defined in Article 236(b) of the Constitution to mean a service consisting exclusively of persons intended to fill the post of district judge and other civil judicial posts inferior to the post of district judge, and the 1991 Act has no application whatsoever to such constitutionally defined judicial service. In support of this submission Mr. B.B. Deb relied on the observations of the Supreme Court in the case of All India Judges' Association and Others Vs. Union of India and Others, to the effect that there is distinction between the judicial service and the other services and the judicial service is not service in the sense of employment as the members of the judiciary exercise the sovereign judicial power in the same way as the members of the council of ministers and the members of the legislature exercise sovereign executive and sovereign legislative power respectively. Mr. B.B. Deb also cited the decision of the Supreme Court in the case of Union of India and others Vs. Pratibha Bonnerjea and another, wherein it was held that the provisions of Chapter VI in

Part V of the Constitution dealing with Courts below the State High Court also showed that the constitution-makers were equally keen to insulate even the subordinate judiciary, and that Articles 233 to 237 have, therefore, provided a wholly different mode of selection and appointment of Judicial Officers at the grass roots level and upto the District Courts from the one provided for other civil posts.

(iv) Rule 9(1) and 9(5) of the Tripura Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Services and Posts) Rules, 1992, made under the 1991 Act would show that the promotion to the vacancies reserved or unreserved have to be made in accordance with the provisions of the concerned/respective service rules and, therefore, unless and until the 1974 rules are amended and a provision is made therein for reservation for Scheduled Castes and Scheduled Tribes in matters of promotion, Section 5 of the 1991 Act providing for reservation of 29% of the vacancies for the Scheduled Tribes cannot be worked out.

(v) As a matter of fact, copies of the letters dated 7th November, 1994 and 10th November, 1995 of the Secretary to the Government of Tripura, Appointment and Services Department and the Chief Secretary to the Government of Tripura respectively to the Registrar of the Gauhati High Court which have been annexed to the Additional Affidavit of the State of Tripura filed in the Civil Rule on 4.3.96 would show that there is a proposal for amendment of Rule 10 of the 1974 Rules providing for reservation not only in direct recruitment but also in promotion in accordance with the 1991 Act and the rules made thereunder in Tripura Judicial Service, but the said proposed amendment to the 1974 Rules has not yet been effected.

(vi) The legislative power of the Legislature under Article 309 of the Constitution to make law as well as the power of the Governor under the -proviso to the said Article 309 of the Constitution to make rules for regulating the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of any State are subject to the provisions of the Constitution. Similarly, the executive power of a State under Article 162 of the Constitution is also subject to the provisions of the Constitution. The 1991 Act and the executive instructions contained in the notification dated 19.2.77 providing for reservation for the members of the Scheduled Castes and Scheduled Tribes in matters of promotion therefore cannot over-ride Articles 233, 234 and 235 of the Constitution. Mr. B.B. Deb cited the decision of the Supreme Court in the case of High Court of Judicature at Bombay through its Registrar Vs. Shirish Kumar Rangrao Patil and another, in which it has been held that in Chapter V of the Constitution, by operation of Article 235, total and absolute control over the subordinate judiciary of the District Courts and Courts subordinate thereto is entrusted to and is being exercised by the High Court concerned.

(vii) While Article 162 of the Constitution provides the source of executive power

of a State, Article 166 of the Constitution provides the manner in which such executive power can be exercised. Clause (2) of Article 166 clearly states that orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in the rules. Rules of business have been made by the Government of Tripura under the said Article 166 allocating all matters relating to Tripura Judicial Service to the Judicial Department of Government of Tripura. But the Memorandum dated 19.2.77 has not been issued by the Judicial Department of Government of Tripura and is also not authenticated in the name of the Governor. Mr. B.B. Deb relied on the decision of the Supreme Court in *Gulabrao Keshavrao Patil and Others Vs. State of Gujarat and Others*, , to the effect that the order of the State Government must be expressed in the name of the Governor.

(viii) In *Indra Sawhney's* case (supra) the Supreme Court observed that Article 16(4) of the Constitution did not provide for reservation in matters of promotion. Thereafter, Clause (4A) was inserted in Article 16 of the Constitution providing that nothing in Article 16 would prevent the State from making a provision for reservation in matters of promotion of any class or classes of posts in the services under the State in favour of Scheduled Castes and the Scheduled Tribes. The said provision is only an enabling provision under which the State may make provision for reservation in matters of promotion and does not confer any right on a member of a Scheduled Castes or Scheduled Tribe to reservation in matters of promotion. In support of this submission, Mr. B.B. Deb cited the decision of the Supreme Court in the case of *State Bank of India Scheduled Caste/Tribe Employees Welfare Association and another Vs. State Bank of India and others*, in which it has been held that Article 16(4) is an enabling provision and confers a discretionary power on the State to make reservation and does not confer any right on the Petitioner nor any constitutional duty on the State to make a provision for reservation.

(ix) Article 335 of the constitution expressly stated that the claims of the members of the Scheduled Castes and the Scheduled Tribes could be taken into consideration in the making of appointments to service and posts in connection with the affairs of a State "consistently with the maintenance of efficiency of administration". Efficiency of judicial administration may be adversely affected in case the members of the Scheduled Tribes are promoted superseding their seniors in the Tripura Judicial Service.

(x) The Court while considering the question as to whether the executive instructions contained in the notification dated 19.2.77 and the 1991 Act applicable to officers working under the State Government are also applicable to officers of the State judiciary has to keep in mind the directive principle in Article 50 of the Constitution which required the State to separate the judiciary from the executive in the public services of the State.

(xi) The State of Tripura, initially having taken a stand in its counter-affidavit in the Civil Rule that there was no provision in the 1974 Rules for reservation in

matters of promotion and that the writ Petitioner who was junior to the Appellants was not entitled to be promoted in any reserved quota, could not be permitted to change its stand by amending the said counter-affidavit and contend that the writ Petitioner was entitled to be considered for promotion in the reserved quota for Scheduled Tribes under the notification dated 19.2.77 and the 1991 Act.

(xii) The relief in the writ petition as originally filed by the writ Petitioner was based on the notification dated 19.2.77 and not on the 1991 Act, and therefore no relief could be granted to the writ Petitioner on the basis of the 1991 Act.

7. Mr. B. Das, learned Counsel appearing for the private-Respondents in this appeal, adopted the aforesaid arguments of Mr. B.B. Deb, learned Counsel for the Appellants. In addition, he cited the observations of the Apex Court in the case of A.K. Bhatnagar and Others Vs. Union of India (UOI) and Others, to the effect that the rules framed in exercise of powers conferred under the proviso to Article 309 of the Constitution were solemn rules having binding effect and that very often Government themselves get trapped on account of their own mistakes or actions in excess of what was provided in the rules. In the said decision, the Supreme Court took a serious view of such lapses and hoped and trusted that the Government both at the Centre and in the States would take note of the position and refrain from acting in a manner not contemplated by their own rules. Mr. B. Das further pointed out that in the decision of the Supreme Court in the case of Union of India and others etc. Vs. Virpal Singh Chauhan etc., which was rendered after Clause (4A) was inserted in Article 16 of the Constitution by the Constitution (Seventy-Seventh Amendment) Act, 1995, the Supreme Court again reiterated the principle affirmed in Indra Sawhney etc. etc Vs. Union of India and others, etc. etc., that providing reservation in promotion was not warranted by Article 16(4) of the Constitution. He finally submitted that Clause (4A) of Article 16 has been challenged in Anr. case before this Court and the question as to whether the said Clause (4A) of Article 16 is constitutionally valid or not should be decided first.

8. On the other hand, Mr. S. Deb, learned Counsel appearing for the Respondent No. 1/writ Petitioner, made the following submissions:

(i) In this case, the writ Petitioner is claiming promotion from Grade-III to Grade-II of the Tripura Judicial Service and, therefore, Article 233 of the Constitution which provides for appointment, posting and promotion of, district judges is not relevant for the purpose of this case. Similarly, Article 234 which only applies to initial appointment of persons other than district judges to the judicial service of a State has no application to the present case. Mr. S. Deb cited the decision of the Andhra Pradesh High Court in the case of Sathya Kumar and Others Vs. The state of Andhra Pradesh and Others, in which it has been held that the word "appointment" in Article 234 of the Constitution means initial appointment, i.e. recruitment, and not promotion from lower cadre to higher cadre.

(ii) Article 235 of the Constitution vests in the High Court the control over district Courts and Courts subordinate thereto including the posting and promotion of persons belonging to the judicial service of a State and holding any post inferior to the post of district judge, but the law regulating the conditions of service of such persons may be made by the Legislature under Article 309 of the Constitution and until such law is made, the rules regulating the conditions of service of such persons are to be made by the Governor under the proviso to Article 309 of the Constitution. In support of this submission, Mr. S. Deb relied on the judgment of the Supreme Court in the case of B.S. Yadav and Others Vs. State of Haryana and Others, in which it has been held that Article 235 does not confer upon the High Court the power to make rules relating to conditions of service of judicial officers attached to district Courts and the Courts subordinate thereto and that under Article 309 and Article 246(3) read with Entry-41 of List-II of the Seventh Schedule to the Constitution Acts of the appropriate legislature may regulate the recruitment and conditions of service of persons appointed to the judicial service of a State and until such law is made, the conditions of service of the judicial officers of such State can be regulated by a rule made by the Governor under the proviso to Article 309 of the Constitution.

(iii) The writ Petitioner has a fundamental right to social justice through reservation in favour of Scheduled Tribes in matters of promotion under Article 16(4) and 16(4A) of the Constitution. In support of this submission, Mr. S. Deb relied on the observations of the Supreme Court in paragraphs 26 and 30 of its judgment in the case of Ashok Kumar Gupta and Another Vs. State of U.P. and Others,

(iv) Rule 10 of the 1974 Rules provided for reservation only in matters of direct recruitment, but it was silent with regard to reservation in matters of promotion. But Rule 20 of the 1974 Rules expressly stated that in regard to matters not specially covered by the 1974 Rules, the members of the Tripura Judicial Service shall be governed by the Rules, regulations or orders applicable to corresponding officers serving in connection with the affairs of the State Government. Hence, the executive instructions contained in the notification dated 19.2.77 of the State Government providing for reservation in matters of promotion would be applicable to the Tripura Judicial Service by virtue of Article 162 of the Constitution read with the said Rule 20 of the 1974 Rules. Mr. S. Deb cited the decision of the Supreme Court in Prem Prakash Vs. Union of India (UOI) and Others, wherein it has been held that administrative instructions with regard to reservations cannot be ignored by the High Court until the rules are amended.

(v) Section 2(b) of the 1991 Act has defined the word "establishment" to mean any office of the State Government, a local or statutory authority constituted under the Constitution of India or any other law for the time being in force. Hence, office of the subordinate judiciary is an office of the State Government and is therefore "establishment" within the meaning of the 1991 Act. In any case, Section 3 of the 1991 Act states that the Act will not apply in relation to

any employment under the Central Government and any employment in domestic service, but does not state that the Act will not apply to employment in the Tripura Judicial Service. Hence, the 1991 Act applies to the Tripura Judicial Service and Section 5 of the 1991 Act providing for reservation for Scheduled Castes and Scheduled Tribes in vacancies to be filled up by promotion is applicable to the Tripura Judicial Service.

(vi) Rule 19(1) of the Tripura Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Services and Posts) Rules, 1992, provided that on the commencement of the Rules, every order, notification, memorandum, office memorandum etc. in force immediately before such commencement would in so far as it provided for any of the matters contained in the said Rules ceased to operate. Since the said Rules provided for reservation in matters of promotion, and came into force with effect from 2.10.92 as per notification dated 17.9.92, the Memorandum dated 19.2.77 providing for reservation in matters of promotion, ceased to be operative with effect from 2.10.92 but was valid till 1.10.92.

(vii) The writ Petitioner was therefore entitled to be considered for promotion to the vacancies which had to be reserved for Scheduled Tribes as per the said Memorandum dated 19.2.77 which was in force till 1.10.92 and thereafter was entitled to be considered for such promotion to vacancies which had to be reserved for Scheduled Tribes in accordance with Section 5 of the 1991 Act and the 1992 rules made thereunder. Therefore, there was no infirmity in the impugned judgment and order of the learned Single Judge.

9. The aforesaid arguments of Mr. S. Deb, learned counsel appearing for the Respondent No. 1/writ Petitioner, were adopted by Mr. Ashok Chakraborty, learned Advocate General, Tripura. He however stated that the constitutional validity of Clause (4A) of Article 16 of the Constitution was challenged in Civil Rule No. 529/97 and the said Civil Rule has already been disposed of on 26.2.98 and the said Clause (4A) of Article 16 of the Constitution has not been struck down by the Court. The learned Advocate General added that while making an Act regulating the recruitment and conditions of service of officers belonging to judicial service of a State under Article 309 of the Constitution, the legislature is not required to consult the High Court. According to the learned Advocate General, therefore, no consultation with the High Court was necessary for the legislature to enact the 1991 Act. Mr. K.N. Bhattacharjee, learned Counsel appearing for the intervenor, Sri Data Mohan Jamatia, adopted the aforesaid arguments of Mr. S. Deb, learned Counsel appearing for the Respondent No. 1/writ Petitioner and Mr. Ashok Chakraborty, learned Advocate General, Tripura, and cited in particular paragraph 43 of the judgment of the Supreme Court in the case of B.S. Yadav v. State of Haryana, and paragraph - 42 of the judgment of the Andhra Pradesh High Court in the case of Sathya Kumar v. State (supra). In support of his submission that Article 235 of the Constitution does not vest any power in the High Court to make any law or rule relating to conditions of service

of officers belonging to the State Judicial Service and Article 234 of the Constitution provides only for appointment by way of direct recruitment to the judicial service and not for promotion from lower grade of judicial service to higher grade of judicial service.

10. Though several constitutional questions have been raised by the learned Counsel appearing for the parties, I will not like to delve into every such question raised before us. I will keep in mind the note of caution by the Supreme Court in *Union of India (UOI) and Others Vs. C. Damani and Co. and Others*, that Constitutional questions should be considered by Courts only when it is absolutely necessary, not otherwise. Instead, I will deal only with those questions which are strictly relevant for the purpose of deciding the case before us.

11. The first question which needs to be decided in this case is whether the writ Petitioner was to be treated as a member of Scheduled Tribe for the purpose of reservation in matters of promotion in Grades-II and I of the Tripura Judicial Service. In para 2 of the writ petition, the writ Petitioner had stated on affidavit that the TPSC issued the notification for appointment to different posts out of which one post was reserved for Scheduled Tribe candidate and the writ Petitioner applied for the same as a Scheduled Tribe candidate and on the recommendation of the TPSC, was appointed to the Tripura Judicial Service Grade-III. The State of Tripura in para 3 of its counter-affidavit filed on 7.12.91 has stated that the statement made in para 2 of the writ petition was matter of record and was substantially correct. The private-Respondents who have filed their counter-affidavits in the said writ petition have not disputed the said statement of the writ Petitioner in para 2 of the writ petition. The question as to whether the writ Petitioner was a member of Scheduled Tribe and was appointed as such to a post reserved for Scheduled Tribe in the Tripura Judicial Service Grade-III, is a question of fact. Since the statement made by the writ Petitioner on affidavit in the writ petition that he was a member of Scheduled Tribe and applied and was appointed as such in the Tripura Judicial Service Grade-III was not disputed by any of the parties in the Civil Rule. I am not prepared to entertain at this appellate stage the contention of the Appellants and the private-Respondents that the writ Petitioner was not to be treated as a member of the Scheduled Tribe for the purpose of reservation in favour of Scheduled Tribes in matters of promotion to Grades-II and 1 of the Tripura Judicial Service.

12. The next question that needs to be decided is whether reservation can at all be made in matters of promotion to Grade-II and Grade-I of the Tripura Judicial Service by the State in view of the decisions of the Supreme Court in *Indra Sawhney v. Union of India* and *Union of India v. Virpal Singh Chauhan* (supra) cited by Mr. B.B. Deb and Mr. B. Das. In both the aforesaid cases, the Supreme Court held on an interpretation of Article 16(4) of the Constitution that the said Article did not permit reservation in matters of promotion. The decision of the Supreme Court in *Union of India v. Virpal Singh Chauhan* (supra) was rendered in October, 1995 subsequent to the Constitution (Seventy-Seventh Amendment)

Act, 1995, in June 1995 inserting Clause (4A) in Article 16 of the Constitution. But on a reading of the said decision of the Supreme Court in the case of Union of India v. Virpal Singh Chauhan (supra) we find that the Court was not called upon to interpret the said provision in Clause (4A) of Article 16 of the Constitution to the effect that nothing in Article 16 of the Constitution would prevent the State from making any provision in matters of promotion in favour of Scheduled Castes and Scheduled Tribes . In the case before us, the validity of the said Clause (4A) of Article 16 of the Constitution has also not been challenged. I will therefore have to interpret the said Clause (4A) of Article 16 of the Constitution as it stands and decide this case accordingly.

13. Clauses (4) and (4A) of Article 16 of the Constitution as they now stand are to the following effect:

(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.

(4A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion of any class or classes of posts in the services under the State in favour of Scheduled Castes and the Scheduled Tribes which in the opinion of the State are not adequately represented in the services under the State.

Interpreting Clause (4) of Article 16 of the Constitution, in the case State Bank of India Scheduled Caste/Tribe Employees Welfare Association and another Vs. State Bank of India and others, the Supreme Court relying on its earlier decisions in the cases of C.A. Rajendran Vs. Union of India (UOI) and Others, and P and T Scheduled Caste/Tribe Employees" Welfare Association (Regd.) and Others Vs. Union of India (UOI) and Others, has held that Article 16(4) does not confer any right on the Petitioner and that there is no constitutional duty imposed on the Government to make reservation for Scheduled Castes and Scheduled Tribes and that it is an enabling provision which confers a discretionary power on the State Government to make reservation either at the stage of initial recruitment or at the stage of promotion in favour of a backward class of citizens which in its opinion, is not adequately represented in the service of the State. Since Clause (4A) of Article 16 only provides that nothing in Article 16 shall prevent the State from making any provision for reservation in matters of promotion of any class or classes of posts in the services under the State in favour of Scheduled Castes and the Scheduled Tribes which, in the opinion of the State are not adequately represented in the services under the State, the said Clause (4A) of Article 16 of the Constitution does not confer any right as such on the writ Petitioner to claim any reservation in matters of promotion in the Tripura Judicial Service and the said Clause (4A) of Article 16 is only an enabling provision conferring a discretionary power on the State to make reservation in favour of the Scheduled Castes and the Scheduled Tribes which in the opinion of the State are not

adequately represented in the services under the State. This position of law has not been altered in any way by the Supreme Court in *Ashok Kumar Gupta and Another Vs. State of U.P. and Others*, cited by Mr. S. Deb and in paragraphs 26 and 30 of the said judgment, the Supreme Court has explained that the purpose of Article 16(4) and 16(4A) of the Constitution is to bring about social justice by providing for protective discrimination in favour of dalits and tribes, and has further held that such protective discrimination does not in any way affect the right to equality of every citizen under Article 14 of the Constitution.

14. The next question is whether the State of Tripura has made any provision for reservation in matters of promotion to Grade-II and Grade-I posts in the Tripura Judicial Service in favour of the Scheduled Castes and the Scheduled Tribes. It has been settled by the Supreme Court in various decisions including *Indra Sawhney v. Union of India* (supra) that such provision for reservation can be made by law or rules made under Article 309 of the Constitution and if the law or rules are silent regarding such reservation by executive instructions. The Court will therefore have to examine the 1974 Rules, the Executive Instructions and the 1991 Act to find out whether the State of Tripura has made any provision for reservation in matters of promotion to Grade-II and Grade-I posts in the Tripura Judicial Service.

15. The 1974 Rules made under Article 309 read with Articles 233 and 234 of the Constitution provide for direct recruitment as well as for promotion. Rule 6(3)(b) of the 1974 Rules provides for appointment to the posts in Grade-I of the Tripura Judicial Service by promotion from Grade-II of the said service. Rule 6(3)(c) provides for appointment to the posts in Grade-II by way of promotion from Grade-III. Rule 6(3)(d) provides for appointment to the posts in Grade-III by direct recruitment. Rule 10 of the 1974 Rules is quoted hereinbelow:

10. SPECIAL PROVISION FOR SCHEDULED CASTES AND SCHEDULED TRIBES.

10. Appointment to the service made by direct recruitment shall be subject to the orders regarding special representation in the services for the Scheduled Castes and the Scheduled Tribes issued by the Government of India from time to time. If no such suitable candidate is available, the posts will be filled up by the candidates other than those of the Scheduled Castes and the Scheduled Tribes.

Thus the aforesaid Rule 10 of the 1974 Rules provided that appointment to the service made by direct recruitment shall be subject to the orders regarding special representation in the services for the Scheduled Castes and the Scheduled Tribes issued by the Government of India from time to time. Orders regarding special representation in the services for the Scheduled Castes and the Scheduled Tribes have been issued by the Government of India from time to time and are contained in the Brochure on Reservation for Scheduled Castes and Scheduled Tribes in Services published by the Government of India, Ministry of Personnel, Public Grievances & Pensions, Department of Personnel and Training, New Delhi. Since, it is not possible to extract herein the orders issued by the

Government of India from time to time as contained in the Seventh Edition of the said Brochure published in the year 1987.¹ extract herein below only the important aspects of the Scheme of reservation for Scheduled Castes and Scheduled Tribes from the said Brochure:

4. Important aspects of the Scheme of reservation for Scheduled Castes and Scheduled Tribes:

4.1 On the attainment of Independence, instructions were issued on 21.9.47 providing for reservation of 12-1/2 per cent of vacancies for SCs in respect of recruitment made by open competition. In case of recruitment otherwise than by open competition this percentage was fixed at 16-2/3 per cent. After the Constitution was promulgated, MHA, in its Resolution of 13.9.50, provided 5 per cent reservation of STs apart from the percentage fixed for SCs already in force. The 1951 census showed that the percentage of SCs in the total population was 15.05 per cent and that of ST 6.31 per cent. The percentages were not revised at that time as a comprehensive bill revising the lists of SCs and STs was under consideration. The other reason for not revising the percentage was that reservation had already been provided for SCs in posts filled otherwise than by open competition to the extent of 16.66 per cent and instructions had also been issued for following a regional and local percentage for Class-III and Class IV posts attracting candidates from a locality or a region. The 1961 census revealed that the SC and ST population in proportion to the Indian population stood at 14.64 per cent and 6.80 per cent respectively. Accordingly, the percentage of reservation for SCs and STs was increased from 12-1/2 and 5 per cent to 15 per cent and 7-1/2 per cent respectively on 25.3.70.

Reservation have been extended to other modes of promotion in stages. In 1957, reservations were provided for SC and ST in departmental competitive examinations. Reservations in promotion by selection in Group C and Group D were provided in 1963 and in the same year reservation in departmental competitive examination was limited to Class III and Class IV only. The position was slightly changed in 1968 when reservation in limited departmental examination to Class II, III and IV and promotion by selection to Class III and IV were subjected to a condition that element of direct recruitment should not exceed 50 per cent. Reservation in promotion by seniority subject to fitness came in 1972 subject to the condition that the element of direct recruitment does not exceed 50 per cent. In 1974, reservations in promotion by selection from Group C to Group B, within Group B and from Group B to the lowest rung of Group A were introduced provided the element of direct recruitment does not exceed 50 per cent. The limitation of the direct recruitment not exceeding 50 per cent was raised to 66-2/3 per cent in 1976.

4.2 The rule regarding carry forward has also undergone change in these years. In 1952, the unfilled reserved vacancies for SC/ST was required to be carried forward to one subsequent recruitment, two subsequent recruitment year in 1955 and from 1970 unfilled reserved vacancies for SC/ST are to be carried

forward to 3 subsequent recruitment years except in promotion by selection from Group C to Group B, within Group B and from Group B to the lowest rung of Group A where the principle of carry forward does not apply. Along with the principle of carry forward, the provision regarding exchange of vacancies between SC and ST has also changed. The position in 1955 was that reserved vacancies between SC/ST were to be exchanged in the same year of recruitment. The position was rescinded in 1962 in pursuance of recommendations of Scheduled Areas and Scheduled Tribe Commission. From 1970 reserved vacancies can be exchanged between SC and ST in the third and final year of carry forward except in promotion by selection from Group C to Group B, within Group B and from Group B to the lowest rung of Group A where such exchange is permitted in the same year of recruitment. The present percentages which have crystallized after the passage of nearly 3 decades is given below:

Present percentage fixed SC ST (i) Direct recruitment on an all India basis: (a) by open competition (i.e. through the UPSC or by means of open competitive test held by any other authority) 15% 7 1/2% (b) Otherwise than at (a) above 16 2/3% 7 1/2% (ii) Direct recruitment to In proportion Group C and Group D to the population (Clause III & IV) posts of SC & ST in normally attracting the respective candidates from a locality States/ or a region Territories (iii) Posts filled by promotion in grades or services in which the element of direct requirement if any, does not exceed 66-2/3% : (a) through limited departmental competitive examination in Groups B, C & D (Clause II, III & IV) 15% 7 1/2% (b) by selection from Group B (Clause II) to the lowest rung or category in Group A (Clause 1) and in Groups B, C and D (Clause II, III and IV) 15% 7 1/2% (c) on the basis of seniority subject to fitness in Groups A, B, C & D (Clause I, II, III & IV) 15% 7 1/2%

From the aforesaid extract it is clear that the scheme of reservation for Scheduled Castes and Scheduled Tribes as formulated by the Government of India in its orders issued from time to time contemplated 15% reservation for the Scheduled Castes and 7 1/2% reservation for the Scheduled Tribes with effect from 25.3.70 on the basis of the Scheduled Castes" and the Scheduled Tribes" population in proportion to the Indian population as revealed in the 1961 Census. The aforesaid extract would further show that as per the orders of the Government of India reservations were to be provided not only for direct recruitment but also for promotion to some classes of posts under the Government of India before the 1974 Rules were framed and the percentages of reservation for Scheduled Castes and Scheduled Tribes for direct recruitment and promotion were to be the same i.e. 15% for the Scheduled Castes and 7 1/2% for the Scheduled Tribes. But, it is relevant to note that in Rule 10 of the 1974 Rules quoted above, the Rule-making authority provided that appointment to the Tripura Judicial Service made by direct recruitment only shall be subject to the aforesaid orders regarding special representation in the services for the Scheduled Castes and the Scheduled Tribes issued by the Government of India from time to time, but did not provide therein that appointment by way of

promotion to Grade-II or Grade-I of the service would also be subject to the orders regarding special representation in the services for the Scheduled Castes and the Scheduled Tribes issued by the Government of India from time to time. No other provision of the 1974 Rules specifically makes any provision for reservation for Scheduled Castes and Scheduled Tribes in matters of promotion in the Tripura Judicial Service.

16. Rule 20 of the 1974 Rules, however, is to the following effect:

RESIDUARY MATTERS.

20. In regard to matters not specially covered by these rules or by regulations or orders issued thereunder or by special orders the members of the service shall be governed by the rules, regulations and orders applicable to corresponding officers serving in connection with the affairs of the State Government.

The aforesaid rules thus provides that in regard to matters not specially covered by the 1974 rules or by regulations or orders issued thereunder or by special orders, the members of the service shall be governed by the rules, regulations and orders applicable to corresponding officers serving in connection with the affairs of the State Government. The contention of Mr. S. Deb, learned Counsel for the Respondent No. 1/writ Petitioner is that by virtue of the aforesaid Rule 20 of the 1974 Rules, orders or executive instructions issued by the State Government from time to time and applicable to corresponding officers serving in connection with the affairs of the State Government including the executive instructions contained in the Memorandum dated 19.2.77 providing for the reservation in matters of promotion in the State Government services will also apply to the Tripura Judicial Service. Before I deal with the aforesaid contention, I will have to take note of the orders/executive instructions issued by the State Government from time to time with regard to reservation in favour of the Scheduled Castes and the Scheduled Tribes in the State Government services.

17. It appears that prior to 13.9.74, the percentage of reservation for the Scheduled Tribes and the Scheduled Castes in the services of the Government of Tripura in force was determined on an All India basis, but by Memorandum dated 13.9.74 issued by the Government of Tripura in the Appointment and Services Department, the State Government found that the percentage of Scheduled Tribes" and Scheduled Castes" population in Tripura was 28.95 and 12.33 respectively according to the 1971 Census and, accordingly, decided to increase the representation of Scheduled Tribes and Scheduled Castes in the services of the State Government to 29% and 13% respectively in the field of direct recruitment in respect of all categories of posts without any detriment to the efficiency of services. Thus, while the percentage of reservation in favour of Scheduled Tribes and Scheduled Castes in services as per the orders of the Government of India continued to remain 7 1/2% and 15% respectively, with effect from 13.9.74, the percentage of reservation in favour of the Scheduled Tribes and the Scheduled Castes in the services under the State Government of

Tripura became 29% and 13% respectively. Further, as per the said Memorandum dated 13.9.74 of the Government of Tripura, such reservation in favour of the Scheduled Tribes and the Scheduled Castes in services under the State Government of Tripura was confined to direct recruitment in respect of all categories of posts and did not extend to promotion. Thereafter, by Memorandum dated 19.2.77, the Government conveyed its decision that the said percentage of reservation of 29% in case of Scheduled Tribes and 13% in case of Scheduled Castes would also be applicable against promotion quota for Scheduled Tribe and Scheduled Caste candidates. The said Memorandum dated 19.2.77 of the Government of Tripura, Appointment and Services Department is quoted hereinbelow:

MEMORANDUM

Subject: Reservation for Sch. Tribes & Sch. Castes in services under the Government of Tripura against promotion quota.

The undersigned is directed to say that percentage of reservation for Sch. Tribe & Sch. Caste candidates in public services that is now in force is applicable only in the field of direct recruitment in respect of all categories of posts without any detriment to the efficiency of the services. The percentage of reservation was fixed at 29% in case of Sch. Tribes and 13% in case of Sch. Castes with effect from 13.9.74.

The position in respect of representation of Sch. Tribes and Sch. Castes in Government services has been reviewed and it is found that the representation of Sch. Tribes & Sch. Castes is still not satisfactory in most of the Departments. With a view to provide adequate representations by those communities, it has now been decided by the Government that the percentage of reservation against promotion quota for Sch. Tribes and Sch. Caste candidates should be equivalent to the percentage of reservation in the matter of direct recruitment with immediate effect in respect of all categories of posts under this Government. In view of fixing of reservation quota against promotion posts, the Sch. Tribes and Sch. Caste candidates should not be entitled to any concessional grading than what was reflected in their ACRs which were so long allowed at the time of considering their cases for promotion against unreserved vacancies.

All Departments/Heads of Departments are advised to follow the instructions in right earnest so as to enable the State Government to attain the goal of adequate representation by these communities in all classes of posts and services.

Receipt of this Memo may kindly be acknowledged within 7 days of receipt.

Sd/-

A. Sinha

Addl. Chief Secretary to the Government of Tripura.

18. Thus, the scheme of reservation in favour of Scheduled Tribe and Scheduled Caste candidates in the services under the Government of Tripura as per the executive instructions of the State Government as contained in Memorandum dated 13.9.74 and the Memorandum dated 19.2.77 was that the percentage of reservation for the Scheduled Tribe and the Scheduled Caste candidates would be the same in cases of direct recruitment as well as promotion and would be 29% in case of Scheduled Tribes and 13% in case of Scheduled Castes. Further, the language used in the aforesaid Memorandum dated 19.2.77 quoted above would show that the aforesaid scheme of reservation in favour of the Scheduled Tribes and the Scheduled Castes both in matters of direct recruitment and promotion was in respect of all categories of posts under the State Government and did not apply as such to the posts in the Tripura Judicial Service.

19. The question then is whether the aforesaid executive instructions contained in Memorandum dated 19.2.77 for reservation against promotion quota for the Scheduled Tribe and the Scheduled Caste candidates could be applied to the Tripura Judicial Service by virtue of Rule 20 of the 1974 Rules which, inter alia, provided that matters not specially covered by the 1974 Rules or by regulations or orders issued thereunder or by special orders the members of the service would be governed by the rules, regulations and orders applicable to corresponding officers serving in connection with the affairs of the State Government. In case, I hold that the said executive instructions contained in Memorandum dated 19.2.77 do apply to the Tripura Judicial Service, the result would be that while for direct recruitment to the said service the scheme of the Government of India as incorporated in Rule 10 of the 1974 Rules for representation of Scheduled Castes and Scheduled Tribes to the extent of 15% and 7 1/2% of the vacancies as well as the Rules for carry forward of unfilled reserved vacancies will apply to the Tripura Judicial Service by operation of Rule 10 of the 1974 Rules, for promotion in different scheme of reservation in favour of the Scheduled Castes and the Scheduled Tribes to the extent of 13% and 29% of the vacancies respectively as well as the rules for carry forward contained in the executive instructions issued from time to time by the Government of Tripura including the executive instructions contained in the Memorandum dated 13.9.74 and the Memorandum dated 19.2.77 would apply. In other words, the Rulemaking authority could not have intended that while appointment to the Tripura Judicial Service made by direct recruitment would be subject to the orders regarding special representation in the services for the Scheduled Castes and the Scheduled Tribes issued by the Government of India from time to time, appointment by way of promotion to the higher grades of the said service would be governed by orders of the State Government of Tripura regarding representation of Scheduled Castes and Scheduled Tribes in the State Government services. Rule 10 of the 1974 Rules incorporates the orders of the Government of India relating to special provision for Scheduled Castes and Scheduled Tribes in the services and Rule 20 of the 1974 Rules which provides that orders applicable to corresponding officers serving in connection with the

affairs of the State Government would be applicable to the Tripura Judicial Service would not cover the orders of the State Government relating to special provision for the Scheduled Castes and Scheduled Tribes for State Government services.

20. As a matter of fact, this inconsistency between the scheme of reservation as provided in Rule 10 of 1974 Rules in the Tripura Judicial Service and the scheme of reservation as provided in the Executive instructions or orders issued by the State Government of Tripura has been realized by the State Government and by letter dated 16.9.91 addressed by the Under Secretary to the Government of Tripura, Law Department to the Registrar, Gauhati High Court, a proposal has been made for amending Rule 10 of the 1974 Rules so that appointment to the service made by direct recruitment is made subject to the orders regarding representation in the services for the Scheduled Castes and the Scheduled Tribes issued by the Government of Tripura from time to time and in the proposal Rule 10, it has been stated that out of the posts to be filled up by direct recruitment, 15% of the posts are to be reserved for the Scheduled Castes and 29% of the posts are to be reserved for the Scheduled Tribes. It appears that by the time the said proposal was made, the State Government had decided to increase the reservation for the Scheduled Castes from 13% to 15%. In reply to the said letter dated 16.9.91 of the Under Secretary to the Govt. of Tripura, Law Department, the Registrar, Agartala Bench of the Gauhati High Court in his letter dated 4.2.92 to the Secretary to the Government of Tripura, Law Department informed him that the High Court while agreeing to part of the proposed amendment, suggested some changes to the proposed amendment. But the fact remains that as yet the proposed amendment to Rule 10 of the 1974 Rules making appointment to the Tripura Judicial Service by direct recruitment subject to orders regarding special representation in the services for the Scheduled Castes and the Scheduled Tribes issued by the Government of Tripura from time to time has not been effected, and Rule 10 of the 1974 Rules as it stands even today still provides that such representation of the Scheduled Castes and the Scheduled Tribes by way of direct recruitment to the Tripura Judicial Service shall be subject to the orders issued by the Government of India from time to time. In *Prem Prakash v. Union of India* (supra), cited by Mr. S. Deb and relied on by the learned Single Judge in the impugned judgment and order, the Supreme Court has held that though the rules ought to be amended, that did not mean that administrative instructions could be ignored, but the Supreme Court found that there was no inconsistency between the statutory rules and the administrative instructions in that case. Similarly, in the case of *Indra Sawhney v. Union of India* (supra), on which reliance has been placed by the learned Single Judge in the impugned judgment and order, Jeevan Reddy, J. delivering the majority judgment has quoted in para 56 of the judgment the decision of the Supreme Court in the case of *Comptroller and Auditor General of India and others Vs. Mohan Lal Mehrotra and others*, to the effect that administrative orders could not be issued in contravention of the statutory rules but it could be issued to

supplement the statutory rules where the rules did not provide for any reservation. In the instant case, since the scheme of reservation in favour of Scheduled Castes and Scheduled Tribes as provided in the administrative orders of the State Government applicable to the State Government servants are not consistent with the scheme of reservation of the Government of India incorporated in Rule 10 of the 1974 Rules, the administrative orders could not be given effect to until the 1974 Rules were amended.

21. Before I come to the 1991 Act to find out whether the provisions therein for reservation for Scheduled Castes and Scheduled Tribes apply to the Tripura Judicial Service, I have to bear in mind that under Article 234 of the Constitution, appointments of persons other than district judges to the judicial service of a State can be made by the Governor of the State in accordance with the rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State. Thus, so far as appointments of persons other than District Judges to the Tripura Judicial Service are concerned, the rules for such appointment have to be made by the Government of Tripura in consultation with the TPSC and the Gauhati High Court. Since, under Articles 245(1) and 309 of the Constitution, the powers of the legislature to make law regulating the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the State are "subject to the provisions of the Constitution", such power of the legislature will be subject to rules relating to appointments of persons other than district judges to the judicial service of the State as contemplated by Article 234 of the Constitution. Therefore, any rule for reservation for Scheduled Castes and Scheduled Tribes in matters of appointments to vacancies in posts in the Tripura Judicial Service other than those of District Judges can only be made by the Governor of the State in consultation with the State Public Service Commission and the High Court, and the legislature exercising powers under Articles 245, 246 and 309 read with Entry-41 of List-II of the Seventh Schedule to the Constitution relating to "State Public Services" cannot make any law providing for reservation for Scheduled Castes and the Scheduled Tribes in matters of appointment to posts other than district judges in the judicial service of a State. For these reasons, the Orissa High Court in the case of *Manoj Kumar Panda v. State of Orissa* and Ors. 1982 Lab IC 1826, a Division Bench of the Orissa High Court after taking into consideration the decision of the Supreme Court in *B.S. Yadav v. State of Haryana* (supra) relied on by Mr. S. Deb, learned counsel for the Respondent No. 1/writ Petitioner and Mr. K.N. Bhattacharjee, learned counsel appearing for the intervenor, has held that the Orissa Reservation of Vacancies in Posts and Services (For Scheduled Castes and Scheduled Tribes) Act (38 of 1975) cannot apply to judicial service covered by Article 234 of the Constitution so far as appointment is concerned.

22. A reading of the 1974 Rules would show that they have been framed by the Governor in exercise of his power under Articles 233, 234 and 309 of the

Constitution. Hence, the provisions of the 1974 Rules which relate to appointments of persons other than district judges to the judicial service of Tripura are rules under Article 234 of Constitution and in respect of such rules the legislature of Tripura would have no power under Articles 245, 246 and 309 of the Constitution to legislate. Rule 10 of the 1974 Rules is a provision relating to appointments to the Tripura Judicial Service by direct recruitment inasmuch as it provides for reservation in favour of Scheduled Castes and Scheduled Tribes in such appointments to service by direct recruitment. The said Rule 10, as it stands now, provides that the orders regarding special representation in the services for the Scheduled Castes and the Scheduled Tribes issued by the Government of India from time to time will be applicable to appointment to services made by direct recruitment. The State Legislature of Tripura cannot make any law in exercise of its power under Articles 245, 246 and 309 of the Constitution read with Entry-41 of List-II of the Seventh Schedule to the Constitution over-riding the aforesaid scheme of reservation in favour of the Scheduled Castes and the Scheduled Tribes of the Government of India incorporated in Rule 10 of the 1974 Rules in matters of appointments to posts other than district judges in the Tripura Judicial Service covered under Article 234 of the Constitution. Keeping this constitutional limitation contained in Article 234 of the Constitution in mind, the 1991 Act has to be examined.

23. Coming now to the 1991 Act, Sections 2(b), 3 and 4 of the 1991 Act which are relevant are quoted hereinbelow:

2. Definitions:

...

(b) "Establishment" means any office of the State Government, a local or statutory authority constituted under the Constitution of India or any other law for the time being in force or a Corporation in which not less than fifty one per cent of the paid up share capital is held by the State Government and includes Universities and Colleges affiliated to the Universities, Primary and Secondary Schools and also other educational institutions which are owned or aided by the State Government and also includes an establishment in Public Sector.

3. Act not to apply in relation to certain establishment:

This act shall not apply in relation to:

- (a) any employment under the Central Government;
- (b) any employment in domestic service

4. Reservation for Scheduled Castes and Scheduled Tribes in vacancies to be filled up by direct recruitment.

At the commencement of this Act, all appointments to services or posts in the establishment which are to be filled up by direct recruitment shall be regulated in the following manner, namely:

(a) subject to the other provisions of this Act, fifteen per cent of the vacancies shall be reserved for the candidates belonging to the Scheduled Castes and twenty nine per cent for the Scheduled Tribes in the manner set out in the Schedule;

(b) The candidates belonging to the Scheduled Castes and the Scheduled Tribes who qualify for selection on merit shall be included in the general list and not against reserved quota;

(c) Fees, if any, prescribed for any examination for selection to any service or post shall be reduced to one-fourth in the case of candidates belonging to the Scheduled Castes and the Scheduled Tribes;

(d) The numbers of the Scheduled Castes and the Scheduled Tribes shall be entitled to a concession of five years over the prescribed maximum age limit for appointment to any service or post.

5. Reservation for Scheduled Castes and Scheduled Tribes in vacancies to be filled up by promotion.

The reservation for members of the Scheduled Castes and the Scheduled Tribes in vacancies in services or posts to be filled up by promotion in any establishment shall be regulated in the following manner, namely:

(a) There shall be reservation at fifteen per cent for members of the Scheduled Castes and twenty nine per cent for the members of the Scheduled Tribes.

(b) A separate hundred point roster in the form and manner set out in the Schedule shall be maintained by each establishment.

(c) The candidates belonging to the Scheduled Castes and the Scheduled Tribes, who qualify for selection on merit shall be included in the general list and not against reserved quota.

It will be clear from the provisions of the 1991 Act quoted above that the Scheme of reservation for the Scheduled Castes and the Scheduled Tribes under the 1991 Act is that in respect of vacancies to be filled up by direct recruitment in any establishment, 15% of the vacancies shall be reserved for candidates belonging to the Scheduled Castes and 29% for the Scheduled Tribes as indicated in Section 4 of the 1991 Act and similarly in respect of vacancies to be filled up by promotion in any establishment, 15% shall be reserved for the members of the Scheduled Castes and 29% shall be reserved for the members of the Scheduled Tribes as indicated in Section 5 of the 1991 Act. "Establishment" has been defined in Section 2(b) to mean any office of the State Government, a local or statutory authority constituted under the Constitution of India or any other law for the time being in force or a Corporation in which not less than 51% of the paid up share capital is held by the State Government. The aforesaid definition of "establishment" is not an inclusive but an exhaustive definition. Section 3 of the 1991 Act further provides that the Act shall not apply in relation

to any employment under the Central Government and any employment in domestic service.

24. The contention of Mr. S. Deb, learned Counsel appearing for the Respondent No. 1/writ Petitioner is that the offices of the subordinate judiciary would be covered within the meaning of offices of the State Government. The expression "State Government" has not been defined in the 1991 Act and hence one has to take the aid of the Tripura General Clauses Act, 1966, to find out the meaning of "State Government". Section 2 of the Tripura General Clauses Act, 1966, states that unless the context otherwise requires, the General Clauses Act, 1897, shall apply for the interpretation of the Acts of the legislature of the then Union Territory of Tripura as it applies for interpretation of a Central Act. Accordingly, the definition of "State Government" as contained in Section 3(60) of the General Clauses Act, 1897 applicable to Central Acts has to be looked into. On a reading of the said definition of "State Government" in Section 3(60) of the General Clauses Act, 1897, I find that it refers to the authority exercising executive powers or the Governor. Interpreting the said Section 3(60) of the General Clauses Act, 1897, the Supreme Court in the case of *The State of Uttar Pradesh Vs. Mohammad Naim*, has held:

...Under Article 154 of the Constitution the executive power of the State is vested in the Governor and shall be exercised by him either directly or through officers subordinate to him. The expression "State Government" has a meaning assigned to it under the General Clauses Act, 1897 (X of 1897). Briefly stated, it means the authority or person authorised at the relevant date to exercise executive government in the State, and after the commencement of the Constitution, it means the Governor of the State...

Since, subordinate Courts do not exercise executive power, they cannot come within the meaning of "State Government" and, accordingly, offices of the subordinate Courts cannot be held to be offices of the State Government. Had the legislature used the expression "State" instead of "State Government", then obviously offices of subordinate Courts would have been covered within the meaning of offices of the State, because the expression "State" includes the judiciary also.

25. In the impugned judgment and order, the learned Single Judge has however held that from the definition of "establishment" in Section 2(b) of the 1991 Act, it clearly appeared that "the establishment was inclusive of statutory authority constituted under the Constitution of India. Judicial service was constituted under the Constitution." After recording the aforesaid finding, the learned Single Judge has held that Section 5 of the 1991 Act was also applicable to the judicial service in the State of Tripura. In Section 2(b) of the 1991 Act defining "establishment", no reference as such has been made to any service, but it has been stated that it includes any office of a statutory authority constituted under the Constitution of India or any other law for the time being in force. But the expression "statutory authority constituted under the Constitution of India or under any other law for

the time being in force" finds place in Section 2(b) of the 1991 Act along with "State Government" "local authority" and Corporation in which not less than fifty one per cent of the paid up share capital held by the State Government" and cannot be so widely interpreted as to include also subordinate Courts in the State of Tripura performing judicial function.

26. Mr. S. Deb, however, vehemently contended that since Section 3 of the 1991 Act states that the Act will not apply in relation to any employment under the Central Government and any employment in domestic service, the 1991 Act will apply to the Tripura Judicial Service. In case we adopt this interpretation and hold that the 1991 Act applies to the Tripura Judicial Service, Section 4 of the 1991 Act which provides for reservation for Scheduled Castes and Scheduled Tribes in vacancies to be filled up by direct recruitment will be in direct conflict with Rule 10 of the 1974 Rules inasmuch as it provides for reservation of 29% for Scheduled Tribes in vacancies to be filled up by direct recruit whereas the orders of the Government of India incorporated in Rule 10 of the 1974 Rules provides for reservation of only 7 1/2% for the Scheduled Tribes in respect of vacancies to be filled up by direct recruitment. Obviously, the legislature could not have intended to transgress its own power and overstep into the power of the Governor exclusively conferred by Article 234 of the constitution to make rules in consultation with the State Public Service Commission and the High Court relating to appointment to posts in the judicial service other than those of District Judges. Mr. S. Deb argued that Section 4 of the 1991 Act does not make any law relating to appointments of persons to the posts in the Judicial Service of the State covered under Article 234 of the Constitution and only provides for reservation in favour of Scheduled Castes and Scheduled Tribes in such appointments. It is difficult to accept this submission of Mr. Deb because any provision for reservation in matters of appointment can only be made by the authorities empowered by the Constitution to make rules relating to appointment and under Article 234 of the Constitution, it is the Governor of the State who is authorised to make the rules in consultation with the High Court and the Public Service Commission relating to appointment to posts in the Judicial Service other than those of District Judges including rules relating to reservation in matters of such appointment.

27. Once I hold that the legislature could not have intended to cover reservation for the Scheduled Castes and the Scheduled Tribes in vacancies to be filled up by direct recruitment to the posts other than district judges in the Tripura Judicial Service, it is difficult for me to hold that the legislature intended to cover reservations for the Scheduled Castes and the Scheduled Tribes in vacancies to be filled up by promotion in different posts of the Tripura Judicial Service by the 1991 Act. This is because, under the scheme of reservation in the 1991 Act as contained in Sections 4 and 5 thereof a uniform percentage of reservation at 15% in favour of the Scheduled Castes and 29% in favour of the Scheduled Tribes has been adopted for both direct recruitment and promotion and the legislature has not intended that the percentages of reservation in favour of the

Scheduled Castes and the Scheduled Tribes in direct recruitment and in promotion are to be different. Further, though Sections 4 and 5 of the 1991 Act refer to appointment by direct recruitment and promotion to services or posts in the or any establishment, the opening words of Section 2 make it clear that the word "establishment" would have the meaning as defined in Section 2(b) of the 1991 Act "unless the context otherwise requires". In paragraph 2.19 of the Constitutional Law of India by H.M. Sreevai (Third Edition), it has been stated thus:

2.19. Our discussion has shown that the rule of literal construction now stands modified by the principle that words, however clear they may appear to be, must be read in the "context" in which they appear. And if they appear in an Act, the whole Act, or the relevant parts of it dealing with the subject in hand, must be looked at. And "context" includes intrinsic and extrinsic aids to construction.

The word "context", therefore, would include both intrinsic and extrinsic aids to construction and will therefore include not only the 1991 Act but also the provisions of the constitution and the provisions of the 1974 Rules. Keeping in view the provisions of Article 234 of the Constitution and Rule 10 of the 1974 Rules incorporating the scheme of reservation in favour of the Scheduled Castes and the Scheduled Tribes of the Government of India in the Tripura Judicial Service, there is no escape from conclusion that the vacancies in the posts in the Tripura Judicial Service would not be covered by Sections 4 and 5 of the 1991 Act relating to reservation for the Scheduled Castes and the Scheduled Tribes in matters of direct recruit and promotion.

28. I, however, find that a proposal has already been initiated by the Government of Tripura for amending Rule 10 of the 1974 Rules to bring it in accord with the 1991 Act, and by a letter dated 7th November, 1994, the Secretary to the Government of Tripura, Appointment and Services Department, has sent to the Registrar of Gauhati High Court, Agartala Bench, a proposal to substitute Rule 10 of the 1974 Rules by the following Draft Rule 10:

Appointment to the Service made by direct recruitment and the promotion shall be subject to the provisions of the Tripura Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Services and Posts) Act, 1991 and Rules, 1992 made thereunder.

Since the Registrar of the Gauhati High Court has not filed any counter-affidavit either in this writ appeal or in the Civil Rule out of which this appeal arises, I am not in a position to know what decision has been taken by the Gauhati High Court on the aforesaid proposed amendment to Rule 10 of the 1974 Rules. Learned Advocate General, in course of his submission, has indicated in a written note that at present out of 74 No. of Judicial Officers in the State of Tripura only two officers belong to the Scheduled Tribes and one officer belongs to the Scheduled Caste. If this statement is correct, the rule-making authorities should consider the question of increasing the representation of the Scheduled Castes

and the Scheduled Tribes in the Tripura Judicial Service considering the fact that the percentage of Scheduled Castes" and Scheduled Tribes" population in Tripura is 12.33% and 28.99 respectively according to the 1971 Census. Article 335 of the Constitution, on which reliance was placed by the learned Counsel, Mr. B.B. Deb and Mr. B. Das, however, provides that the claims of the members of the Scheduled Castes and the Scheduled Tribes in making appointments to services and posts in connection with the affairs of the Union or of a State, have to be taken into consideration "Consistently with the maintenance of efficiency of administration". It is not for the Court, but for the rule-making authority to consider the claims of the members of the Scheduled Castes and the Scheduled Tribes for representation in the Tripura Judicial Service consistently with the maintenance of efficiency of the judicial administration. Similarly, Clause (4A) of Article 16 of the Constitution enables the State to make provision for reservation in matters of promotion of any class or classes of posts in the services under the State in favour of Scheduled Castes and the Scheduled Tribes which, in the opinion of the State are not adequately represented in the services under the state. Again, it is not for the Court, but for the rule-making authority to decide the class or classes of posts in the Tripura Judicial Service in respect of which reservation in favour of the Scheduled Castes and the Scheduled Tribes should be made in matters of promotion in case the rule-making authority is of the opinion that they are not adequately represented in the Tripura Judicial Service. It may be mentioned here that in the case of *B.S. Yadav v. State of Haryana* (supra), on which much reliance was placed by the learned Counsel, Mr. S. Deb and Mr. K.N. Bhattacharjee, the Supreme Court observed:

...And though that is not the requirement of the proviso to Article 309 of the Constitution, we hope that whatever amendments are going to be made hereafter to the Rules will be made in consultation with the High Court. Nothing will be lost thereby and there is so much to gain; Goodwill, expert advice and the benefit of the experience of a body which has to administer the Rules since the control over the Subordinate Courts is vested in it by Article 235. It is said that the promotees and direct recruits have to dissipate their time and energy in litigation which they can ill-afford and which arises largely because of the lack of co-ordination between the High Court and the State Governments. It is time enough now to turn a new leaf.

Since a grievance has been made before us that while in other services in the State of Tripura, representation of the Scheduled Castes and the Scheduled Tribes has been increased both in matters of direct recruitment and of promotion to 15% and 29% in favour of the Scheduled Castes and the Scheduled Tribes respectively, I am of the opinion that the State of Tripura and the Gauhati High Court should be directed to consider and take a decision as early as possible on the proposed amendment to Rule 10 of the 1974 Rules contained in the letter dated 7th November, 1994 of the Secretary to the Government of Tripura, Appointment and Services Department to the Registrar, Gauhati High Court, Agartala Bench, and quoted in paragraph 28 of this judgment.

29. For the reasons stated above, I am of the considered opinion that the impugned judgment and order of the learned Single Judge should be set aside and this appeal should be allowed subject to the aforesaid observations and directions.

D.N. Chowdhury, J.

30. I have had the advantage of reading in draft the judgment of my learned brother Hon"ble Mr. Justice Patnaik. The facts as well as the legal issues involved in this case are meticulously and methodically treated by my learned brother with all his grace - I do not think I can usefully add anything. I, however, regret to differ from the views and the conclusions of my learned brother. The division of opinion in this Court makes it desirable for me to express myself in my own words, albeit in less felicity than those used by the learned Judge Hon"ble Justice Patnaik. I am merely recording what I think it is.

31. The facts as well as law involved in this appeal is very sedulously and thoroughly dealt with by me learned brother and therefore, I need not add those facts and issues any more. The learned Single Judge while allowing the writ petition took into consideration the provisions of the Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Services and Posts) Act, 1991" (hereinafter referred to as the Act) which provides for reservation of Scheduled Castes and the Scheduled Tribes in the vacancies to be filled up by promotion, the decision of the Supreme Court in Indra Sawhney etc. etc Vs. Union of India and others, etc. etc., the effect of insertion of Clause 4A to Article 16 of the Constitution of India as well as the decision of the Supreme Court in Prem Prakash Vs. Union of India (UOI) and Others, and held that the Petitioner was entitled to be considered for promotion on the basis of the Notification dated 19.2.1977 and Section 5 of the 1991 Act. The Respondents were accordingly directed to consider the case of the Petitioner for promotion to the post of Grade-II Judicial Service with effect from the date of his eligibility for such consideration. The basic issue arising in this Writ Appeal is the extent and amplitude of the executive instruction dated 19.2.1977 as well as the reach and width of the 1991 Act and its application to the members of the Tripura Judicial Service.

32. The memorandum of the State Government pertaining to reservation of Scheduled Castes and Scheduled Tribes in services and posts under the Government of Tripura against promotion quota dated 19.2.1977 is undoubtedly an executive order which cannot be treated as an Act or rule. It is also equally true that in the absence of act or Rules, it is within the domain of the Executive Authority to issue executive orders to fill up the gaps by Executive instruction under Article 162 of the Constitution. And such executive order possesses equal efficacy like that of a legislative Act or rules made under the Article 309. However, in the garb of executive order the statutory Rule cannot be altered, amended or superseded nor such rules can be superimposed by anything inconsistent with the Rules. The issue therefore will centre around the legitimacy

and efficacy of the administrative instruction and the Act enumerated above.

33. Admittedly Tripura Judicial Service Rules, 1974 did not take care for special representation in the services of the State of the Scheduled Castes and the Scheduled Tribes in the matter of promotion. Rule 10 only contemplate about the appointment to the service made by direct recruitment which shall be subject to the order regarding special representation in services for the Scheduled Castes and Scheduled Tribes issued by the Government of India from time to time. The rule making authority however by way of residuary matter enjoins that in regard to matters not specifically covered by rule or by regulation or order issued thereunder or by special order, the members of the service shall be governed by the Rules, regulation and orders applicable to the corresponding officers serving in connection with the affairs of the State Government. The Tripura Legislature enacted the Tripura Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Services and Posts) Act, 1991 (hereinafter referred to as Act) to provide for reservation of vacancies in services and posts for the members of Scheduled Castes and Scheduled Tribes. Section 4 provided reservation for Scheduled Castes and Scheduled Tribes to be filled up by direct recruitment. Reservation for Scheduled Castes and Scheduled Tribes in vacancies to be filled up by promotion is regulated by Section 5 which obligated on the authority to fill in vacancies in services or posts by promotion in any establishment as per quota prescribed thereunder. As per the Act 15% and 29% of posts in any establishment are earmarked for the members of the Scheduled Castes and Scheduled Tribes respectively. The Act is mandatory in content and power of exemption of the statutory provision is reposed in the State Government. On formation of opinion that reservation for members of the Scheduled Castes or Scheduled Tribes shall not be applied to any specialised service or post in view of the specialised qualification or experience necessary and in absence of such qualified candidates from amongst the Scheduled Castes and the Scheduled Tribes. Such exemption may be made by the State Government on being satisfied by notification published in the official gazette, by exempting such service or posts from the operation of the Act. Section 7 prescribes penalties for contravention of the provision of the Sections 4 and 5 of the Act. In exercise of power u/s 12 of the Act, the State Government framed a set of rules named as Tripura Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Services and Posts) Rules, 1992 for carrying out the purpose of the Act. The Statutory instruction which is subsequently replaced by the Act is normally intended to be given effect to and cannot be disobeyed unless it can be said to be inapplicable to the members of the Tripura Judicial Service.

34. At the bar, the debate focussed on the constitutionality of the executive instruction vis-a-vis the Act in so far as its application to the judicial service is concerned. An argument is sought to be built up on the thesis that the judicial service is not a Government service and no Act or rules can be made defining condition of service without consulting the High Court under Article 234 of the Constitution of India. The real issue therefore relates to the extent and

competence of the State legislature as well as the Governor of a State in making any statutory provision, by enactment or by providing rules under the proviso to Article 309 of the Constitution of India armed with the legislative power conferred under Articles 245, 246 of the Constitution of India as well as the issuance of Executive orders. The argument is mainly based upon the special provision provided under Chapter VI of Part VI of the Constitution of India comprising six Articles including Article 233-A regarding the validation of appointments of, and judgments, decree etc. or orders delivered by certain judges to the judicial service in view of the Constitution (20th Amendment) Act, 1966 of the Constitution Article 237 provides for the application of chapter VI to Magistrates in the State as they apply in relation to persons appointed to the judicial service of the State subject to such exception." The meaning of "judicial service" is enacted in Clause (b) of Article 236 which means "a service consisting exclusively of persons intended to fill the post of district Judge and other civil judicial posts inferior to the post, of district judge".

35. Under Article 233, the appointments of persons to be, and the posting and promotion of, district Judges in any state shall be made by the Governor of the state in consultation with the High Court exercising jurisdiction in relation to such State. Article 234 provides for recruitment of persons other than district Judges to the judicial services of the State in accordance with rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State. Control over subordinate Courts is envisioned in Article 235 which reads as follows - "The control over district Courts and Courts subordinate thereto including the posting and promotion of, and the grant of leave to persons belonging to the judicial service of a State and holding any post inferior to the post of district judge shall be vested in the High Court, but nothing in this article shall be construed as taking away from any such person any right of appeal which he may under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law."

36. The above three Articles enumerated above takes care of the appointment of persons to be, and posting and promotion to the District judges and appointment of judges subordinate to District Judges and the control over district Court and the Courts subordinate thereto. Article 234 also provide for special rules to be made by the Governor of the state after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State. Article 235 provides for vesting of control over the District Court and the Courts subordinate thereto on the High Court for attaining independence of the judiciary. The control of the High Court is exclusive and comprehensive in content. But at the same time the Article retained the power of the executive authority in making law regulating the condition of service.

37. It is interesting to note that the above provisions find place in Chapter-VI of

Part-VI of the Constitution of India instead of Part IX of the Constitution of India which deal with the services under the Union and the States. It may be pointed out herein that under the Government of India Act, 1935 separate provisions were made in respect of judicial officers in chapter-II of Part X of the Act which dealt with Civil services under the Crown in India. The provision in respect of judicial officers were treated in Section 254 to 256 of the Govt. of India Act, 1935 which reads as follows:

...254 District Judges

(1) Appointments of persons to be, and the posting and promotion of, District Judges in any Province shall be made by the Governor of the province, exercising his individual judgment and the High Court shall be consulted before a recommendation as to the making of any such appointment is submitted to the Governor.

(2) A person not already in the service of His Majesty shall only be eligible to be appointed a District Judge if he has been for not less than five years a Barrister, a member of the Faculty of Advocates in Scotland, or a pleader and is recommended by the High Court for appointment.

(3) In this and the next succeeding section the expression "District Judge" includes Additional-District Judge, Joint District Judge, Assistant District Judge, Chief Judge of a Small cause Court, Chief Presidency Magistrate, Sessions Judge, Additional Sessions Judge and Assistant Sessions Judge.

255. Subordinate civil judicial service.

(1) The Governor of each province shall after consultation with the Provincial Public Service Commission and with the High Court, make rules defining the standard of qualifications to be attained by persons desirous of entering the subordinate civil judicial service of a province.

In this section, the expression "subordinate civil judicial service" means a service consisting exclusively of persons intended to fill civil judicial posts inferior to the post of District Judge.

(2) The provincial Public Service Commission for each Province, after holding such examination if any, as the Governor may think necessary, shall from time to time out of candidates for appointment to the subordinate civil judicial service of the province make a list or lists of persons whom they consider fit for appointment to that service, and appointments to that service shall be made by the Governor from the persons included in the list or lists in accordance with such regulations as may from time to time be made by him as to the number of persons in the said service who are to belong to the different communities in the province.

(3) The posting and promotion of, and the grant of leave to, persons belonging to the subordinate civil judicial service of a province and holding any post inferior to

the post of District Judge, shall be in the hands of the High Court, but nothing in this section shall be construed as taking away from any such person the right of appeal required to be given to him by the foregoing provisions of this chapter, or as authorising the High Court to deal with any such person otherwise than in accordance with the conditions of his service prescribed thereunder.

256. Subordinate criminal magistracy.

No recommendation shall be made for the grant of magisterial powers or of enhanced magisterial powers to, or the withdrawal of any magisterial powers from, any person save after consultation with the District Magistrate of the district in which he is working, or with the Chief Presidency Magistrate, as the case may be...

38. From the provisions cited above, it thus, appears that no attempt was made to put the subordinate criminal Magistracy under the High Court. The posting and promotion and grant of leave of persons to persons belonging to subordinate judicial service of a province was however placed under the control of the High Court though there was right of appeal to any authority mentioned in the rules and the High Courts were asked not to act except in accordance with the condition of service prescribed by rules. The posting and promotion of a District Judge was made by the Governor of a province exercising his individual judgment and the High Court was required for consultation before recommendation for making such appointment was submitted to the Governor. The Governor was also dismissing authority like that of a Civil servant. u/s 240 of the Govt. of India Act, 1935 a civil servant was not to be dismissed by the authority subordinate to that which appointed him. The Governor was also the dismissing authority. There was no specific provision in the 1935 Act regarding the control over the District Judge and the subordinate judicial services. The administrative control of the High Court u/s 244 of the Act enumerated about the administrative control of the High Court as well as superintendence over the subordinate Courts. The independence of the subordinate judiciary and the District Judges was sought to be maintained. The makers of the Constitution seemingly missed the advancement that was made by the 1935 Act. The draft Constitution did not recount any such provision. The initial reaction to the judicial provision of the draft constitution came from the Judges. The then Chief Justice of the Federal Court (the first Chief Justice of the Supreme Court of India Hon^{ble} Mr. Harilal J. Kania) addressed a letter to Jawaharlal Nehru which was circulated to the drafting committee on 30th December, 1947 ((Prasad papers) file I(2)-D/47 referred to by Granville Austin in Indian Constitution corner stone of a nation) Mr. Kania made no comments on the jurisdiction and powers of the Courts, and confined his letter entirely on the independence of the judiciary suggesting that the draft constitution should comprehend the co-relation of the executive with the judiciary so that Courts would be free from the shackles of executive control. These issues were further taken up at a meeting by the Judge of the Federal Court and the Chief Justices of the High Court a month after the

publication of the draft Constitution. The Judges deliberated on the subject and maintained that under the Raj the judiciary had in the main, been independent, but that certain tendencies to encroach upon its independence were becoming apparent. The Judges opined that "India must preserve the fearless functioning of an independent, incorruptible and efficient judiciary". The Judges committee made its own recommendation. The matter was deliberated upon. Finally the Articles 233 to 237 were incorporated in Chapter VI of Part VI immediately after Chapter V containing provisions relating to the High Court in the State. The provisions contained in Chapter VI are an improved version of the corresponding provisions contained in the Government of India Act. It vested the control of District Court and Court subordinate thereto in the High Court. As per the Scheme contained in chapter VI of Part VI of the Constitution of India, the subordinate judiciary was categorised into (a) District Judges and (b) the members of the Judicial service of the State. The expression "District Judges include Judge of a city civil Court, Additional District Judge, Joint District Judge, Assistant District Judge, Chief Judge of a small cause Court, Chief Presidency Magistrate, Additional Chief Presidency Judge and Assistant Sessions Judge".

39. Article 233 conferred on the High Court an effective way in the matter of appointment of District Judge under the Article. "Appointments of persons to be, and the posting and promotion of district judges" can only be made by the Governor in consultation with the High Court. In the matter of direct appointment also, the Governor is to act on the recommendation of the High Court. Consultation with the High Court means an effective consultation and not an empty formality. The word posting appearing in Article 233 in the context "appointment" and "promotion" means the first assignment of an appointee or promotee to a position of District Judge. Article 235 makes specific provisions regarding appointment to judicial services lower than the cadre of district Judges (a) regarding appointing authority (b) For procedure for framing recruitment rule. The authority empowered to make appointment to a subordinate judicial service other than the District Judge is the Governor like the case of the District Judges. Special provision is incorporated in Article 234 regarding appointment to the judicial services other than the District Judge. The qualification and method of recruitment is not prescribed in Article 234 as is prescribed in Article 233. This article only envisioned that the recruitment rule is to be framed in consultation with the High Court and the Public Service Commission. The power of legislation both under Article 309 and Article 245 is subject to the provision of the Constitution and the said power is specifically conferred on the Governor alone. Article 234 as indicated earlier relates to framing of rules by the Governor after the consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State. The Constitution makers desired for the collective wisdom of the Governor, the High Court and the Public Service Commission that should regulate the appointment to the judicial services. Consultation prescribed under Article 234 with the Public Service Commission is only with regard to framing of recruitment rules and not with

reference to actual recruitment. The power to enact statutory provision regulating the condition of service of persons appointment to the public service and posts in connection with the Union or any State is vested on the appropriate Legislature subject to the provisions of the Constitution . Under proviso to Article 309, the power to frame rules regulating the condition of service of persons appointed to public services and posts is vested on the Governor. Articles 233 and 234 however, do not envisage framing of rules regulating the condition of service. Article 235 is a pivot of the Scheme for ensuring judicial independence. It is designed to protect the subordinate judiciary from the executive interference with the object and aim for an independent subordinate judiciary. Though the power of making initial appointment of the persons in judicial service is vested on the Governor, in respect of all other matters such as promotion, transfer and posting, sanction of leave, disciplinary proceedings, imposition of penalties are exclusively conferred on the High Court. The members of the judicial service are accordingly insulated from the executive interference to enable them to be fearless and independent in discharging their duties. The High Court is made the sole custodian over the State judiciary. Control is not only confined to the power in arranging any day to day work in the Court, but it also envisaged disciplinary jurisdiction over the presiding judge of the Court - Rehearsing the decisions of the Supreme Court, the Supreme Court in Chief Justice of Andhra Pradesh and Anr. v. Dikshitulu and Ors. reported in AIR 1979 SC 198 made the following observations:

...Article 235 is the pivot around which the entire scheme of the chapter revolves. Under it, the control over district Courts and the Courts subordinate thereto including the posting and promotions of, and the grant of leave to persons belonging to the judicial service of a State" is vested in the High Court.

The interpretation of the scope of Article 235 has been the subject of the several decision of this Court. The position crystallised by those decisions is that the control over the subordinate judiciary vested in the High Court under Article 235 is exclusive in nature, comprehensive in extent and effective in operation. It comprehends a wide variety of matters. Among others, it includes:

Disciplinary jurisdiction and a complete control subject only to the power of the Governor in the matter of appointment, dismissal, removal, reduction in rank of District Judges, and initial posting and promotion to the cadre of District Judges. In the exercise of this control, the High Court can hold inquiries against a member of the subordinate judiciary, impose punishment other than dismissal or removal, subject, however, to the conditions of services and a right of appeal, if any, granted thereby and to the giving of an opportunity of showing cause as required by Article 311(2)...

In Article 235, the word "control" is accompanied by the word "vest" which shows that the High Court is made the sole custodian of the control over the judiciary. The control vested in the High Court being exclusive, and not dual, an inquiry into the conduct of a member of the judiciary into the conduct of the

member of the judiciary can be held by the High Court alone and no other authority (State of West Bengal v. Nripendra Nath Bagchi AIR 1966 SC 477 (supra) Samsher Singh Vs. State of Punjab and Another, : The High Court of Punjab and Haryana and Others Vs. The State of Haryana and Others,

(iii) Suspension from service of a member of the judiciary with a view to hold a disciplinary inquiry.

(b) Transfers, promotions and confirmation of such promotions, of persons holding posts in the judicial service inferior to that of District Judge State of Assam and Another Vs. S.N. Sen and Another, State of Assam and Another Vs. Kuseswar Saikia and Others,

(c) Transfers of District Judges State of Assam Vs. Ranga Mahammad and Others, : Chandramouleshwar Prasad Vs. The Patna High Court and Others, .

(d) Recall of District Judges posted on excadre posts or on deputation on administrative posts The State of Orissa Vs. Sudhansu Sekhar Misra and Others,

(e) Award of selection grade to the members of the judicial service, including District Judges, being their further promotion after their initial appointment to the cadre (State of Assam v. Kuseswar Saikia (supra)).

(f) Confirmation of District Judges, who have been on probation or are officiating, after their initial appointments or promotion by the Governor to the cadre of District Judges under Article 233, (Punjab and Haryana High Court v. State of Haryana (supra)).

(g) Premature or compulsory retirement of Judges of the District Courts and of subordinate Courts (State of U.P. v. Batuk Deo Pati Tripathi (1978) Lab IC 839 (SC) (supra)).

40. The inspiration behind the provision of placing the control over District Courts and Courts subordinate thereto on the High Court was to make those two wings of the judiciary independent from the executive. The Scheme of Chapter V and VI in part VI contained in Articles 229 and 235 of the Constitution of India is designed to ensure independence of the judiciary in both the High Court and the subordinate judiciary.

41. Independence of the judiciary, however, does not mean independence from law. The power to legislate including powers to make rules regulating condition of service of the judicial officers of the District Courts and the Courts subordinate thereto is however not conferred on the High Court. Articles 234, 235 do not confer power upon the High Court to regulate the condition of service of judicial officers attached to the District Court and the Courts subordinate thereto. Article 234 speaks only of rules and speaks of appointment of persons other than District Judges to the judicial service of the State to be made by the Governor of State in accordance with rule made by him on that behalf after consultation with the State Public Service Commission and the High Court. "Recruitment/

appointment" and "condition of service" are two separate incidence of service. The right to promotion is a condition of service. Once a person is appointed as a member of the service in a substantive capacity a person is to be appointed and appointment by the Governor is to be proceeded the condition of service will be applicable to such person on being appointed. The combined reading of Articles 235, 245, 246 and 309 of the constitution makes it apparent that the power of framing laws including rules regulating conditions of service including judicial service of the State is vested on the Governor and not on the High Court. The first part of Article 235 no doubt vests control over the District Court and the Courts subordinate to High Court. But the second part of the Article makes it clear that nothing in the Article shall be construed as taking away from any person belonging to the judicial service of a State a right of appeal which he may have under the law regulating the condition of service or as authorising the High Court to deal with him otherwise than in accordance with the condition of his service prescribed under such law (emphasis supplied) but in the name of control the High Court cannot deny the right conferred on him by law which regulates the condition of service. The High Court in exercise of its power of control cannot deviate from the service conditions prescribed by the statute." Article 309 of the Constitution of India read with Articles 245 and 246 is special provisions of this consideration. The Articles 245 and 309 of the Constitution are subject to the other provisions of the Constitution . The word subject is to be given a reasonable interpretation which would achieve the objective sought to be attained by the makers of the Constitution, which shall be in accordance with the constitutional norms and practice in such matters.

42. The Supreme Court in *The South India Corporation (P) Ltd. Vs. The Secretary, Board of Revenue Trivandrum and Another*, interpreting the words "subject to other provisions of the Constitution " observed that "if there is an irreconcilable conflict between the pre-existing law and the provision or provisions of the Constitution, the latter shall prevail to the extent of that inconsistency. Whatever it may be the inconsistency, it must be spelt out from the other provisions of the constitution and cannot be built up on the supposed political philosophy underlying the Constitution. It is settled law that a special provisions should be given effect to the extent of its scope, leaving the general provisions to control cases where the special provision does not apply. The expression "subject to" conveys the idea of a provision yielding place to Anr. provisions or other provisions to which it is made subject..."

43. As indicated earlier the High Court is not clothed with the power to pass laws to regulate the condition of service, though rules made by the High Court in the exercise of power conferred upon it on that behalf may have the force of law. There is a distinction between power to pass a law and the power to make rules. The term "law" mentioned in second part of Article 235 indicates only the law made by the legislature. The power of control vested in the High Court by virtue of Article 235 therefore, cannot deny the judicial officers of the rights conferred on him by the statutory provisions regulating his condition of service. The

Constitution Bench of the Supreme Court laid down the law on this subject in *B.S. Yadav and Others Vs. State of Haryana and Others*, which is still holding the field.

The relevant observations of the Supreme Court reads as follows:

42. Article 235 does not confer upon the High Courts the power to make rules relating to conditions of service of judicial officers attached to District Court and the Courts subordinate thereto. Whenever it was intended to confer on any authority the power to make any special provisions of rules, including rules relating to conditions of service the Constitution has stated so in express terms...

43. Having seen that the Constitution does not confer upon the High Court the power to make rules regulating the conditions of service of judicial Courts subordinate thereto, we must proceed to consider, who, then, possesses that power? Article 309 furnishes the answer. It provides that Acts of the appropriate legislature may regulate the recruitment and conditions of service of persons appointed to posts in connection with the affairs of the Union or of any state. Article 246(3), read with Entry 41 in List II of the Seventh Schedule, confers upon the State legislatures the power to pass laws with respect to "state public services" which must include the judicial services of the State. The power of control vested in the High Court by Article 235 is thus expressly, by the terms of that Article itself, made subject to the law which the State legislature may pass for regulating the recruitment and service condition of judicial officers of the State. The powers to pass such a law was evidently not considered by the Constitution makers as an encroachment on the "control jurisdiction" of the High Courts under the first part of the Article 235. The control over the district Courts and subordinate Courts is vested in the High Court in order to safeguard the independence of the judiciary. It is the High Court not executive, which possesses control over the State judiciary. But, what is important to bear in mind is that the Constitution which has taken the greatest care to preserve the independence of the judiciary did not regard the power of the State legislature to pass laws regulating the recruitment and conditions of service of judicial officers as an infringement of that independence. The mere power to pass such a law is not violative of the control vested in the High Court over the State judiciary.

It is in this context that the proviso to Article 309 assumes relevance and importance. The State legislature has the power to pass laws regulating the recruitment and conditions of service of judicial officers of the State. But it was necessary to make a suitable provision enabling the exercise of that power until the passing of the law by the legislature on that subject. The Constitution furnishes by its provisions ample evidence that it abhors a vacuum. It has therefore made provisions to deal with situations which arise on account of the ultimate repository of a power not exercising that power. The proviso to Article 309 provides, in so far as material, that until the State legislature passes a law on the particular subject, it shall be competent to the Governor of the State to make rules regulating the recruitment and the conditions of service of the judicial

officers of the State. The Governor thus steps in when the legislature does not act. The power exercised by the Governor under the proviso is thus a power which the legislature is competent to exercise but has in fact not yet exercised. It partakes of the characteristics of the legislative, not executive, power. It is legislative power.

...It is true that the power conferred by Article 309 is "subject to" the provisions of the Constitution . But it is fallacious for that reason to contend that the Governor cannot frame rules regulating the recruitment and conditions of service of the judicial officers of the State. In the first place, the power or control conferred upon High Courts by the first part of Article 235 is expressly made subject, by the second part of that Article, to laws regulating conditions of service of its judicial officers. The first part of Article 235 is as it were, subject to a proviso which carves out an exception from the area covered by it. Secondly the Governor, in terms equally express, is given the power by the proviso to Article 309 to frame rules on the subject. A combined reading of Articles 235 and 309 will yield the result that though the control over subordinate Courts is vested in the High Court, the appropriate legislature and until that legislature acts, the Governor of the State, has the power to make rules regulating the recruitment and the conditions of service of judicial officers of the State. The power of the legislature or of the Governor thus to legislature is subject to all other provisions of the Constitution like, for example, Articles 14 and 16. The question raised before us is primarily one of the location of the power, not of its extent. The second part of Article 235 recognises the legislative power to provide for recruitment and the conditions of service of judicial officers of the State. The substantive provisions of Article 309 including its proviso, fixes the location of the power. The opening words of Article 309 limit the amplitude of that power....

44. As pointed out earlier the 1974 Rules did not contemplate reservation in the matter of promotion. It is however embodied in the Rules that the executive instruction pertaining to reservation issued by the Central Govt. from time to time will be applicable in the matter of appointment made by direct recruitment. When the rules were made in 1974, Tripura had attained full Statehood and it ceased to be an Union Territory. However, from the rules it appears that rule making authority continued with the hang over of the regime. None the less, though the law was silent regarding reservation by Central Govt. as well as State Government regarding reservation of posts, executive instruction were issued by the authorities concerned in exercise of its executive power pertaining to the field of public services. It is not necessary that there must be law.

45. As indicated earlier the Indian Constitution as such, does not recognise the doctrine of separation of powers with its absolute rigidity. But functions of different branches of the Govt. have been sufficiently demarcated and differentiated. The legislative power, judicial powers are delineated in the Constitution. The residue of the Governmental function that remains after the legislative and judicial functions can be said to be executive power.

46. The Indian Constitution acknowledges and approves the doctrine of separation of power amongst the three Organ of the State viz. the Legislature, the Executive and the Judiciary. The Constitution adopted the Federal form of Government with peculiarities of its own. Federation depend on a distribution of power between the Federal Government and the States. Whereas Chapter I of Part XI of the Constitution demonstrate the distribution of Legislative powers as envisaged in Articles 245 to 255 of the Constitution. Articles 256-261 as contained in Chapter-II of Part XI of the Constitution has taken care of the distribution of administrative powers. The Supreme Court of India and High Courts are invested with the power of judicial review including the power to invalidate laws made by the parliament and the legislatures of the States.

47. Under the constitutional set up, none of the wings of the Government is superior to the other. All the three wings draw its strength from the Constitution . Each of the organs are to work and function in their respective fields within the limits laid down by the Constitution.

48. Under the constitutional set up, the Union parliament as well as the State legislature have within their constitutional limit plenary power of legislation like that of a sovereign legislature. Article 245 of the Constitution of begins with the word "subject to provision of the Constitution ". The word suggest that the object of Article 245(1) is to distribute the legislative powers between the Union and the State legislatures and not to exempt them from any limitation which are imposed by the other provisions of the Constitution upon the exercise of legislative powers and is subject to the fundamental right guaranteed by the Part-III of the Constitution and other constitutional limitations. In case of State legislation, there are other limitations namely its operation cannot extend beyond the territorial limit of the State in the absence of territorial nexus and its legislation must be for the purpose of the State. In construing the constitutionality of a Statute, the Court must presume that legislature in question know its limit. The enactment should therefore receive such interference that will make it operative and not to make it inoperative. The legislature derives its power to legislate under Articles 245 and 246 and other like Articles of the Constitution . The language of an entry is required to be given its widest meaning with a view fairly capable to meet the Governmental need enjoined by the Constitution. Its general words should extend to all ancillary and auxiliary matters which can adequately and reasonably be conceived within it. There is always a presumption in favour of its constitutionality. When their existence is in doubt or where there appears difficulty in ferreting out the limit of the legislative power it is to be resolved as far as practicable in favour of the legislature, assigning the most liberal construction on the legislative entry. Constricted and cramped interpretation is to be avoided and the construction to be adopted must be beneficial to cover the extent of the power. The gleam of catholicity and generosity should enliven those whose duty is to interpret the Constitution Power to legislate on a particular topic includes the power legislate on subjects which are ancillary to or incidental thereto or for purpose necessary to give full effect of the power conferred by the

entry. A strict interpretation which would lead to invalidation of a statute or to make the legislative mandate otiose is to be avoided. Lest all salubrious legislation would be muffled at birth. More care is to be given while interpreting the constitutional provision - "The Golden rule of interpretation is that words should be read in their ordinary, natural and grammatical meaning subject to the rider that in construing words in a Constitution conferring legislative powers, the most liberal construction should be put upon the words so that they may have effect in their widest amplitude - ""(H.M. Seervai Constitutional Law of India, Third Edition P. 74). On this occasion it is worthwhile to call to mind the observation of the Supreme Court in *Synthetic and Chemicals Ltd. and Others Vs. State of U.P. and Others*,

...It is well to remember that the meaning of the expressions used in the Constitution must be found from the language used. We should interpret the words of the Constitution on the same principle of interpretation as one applies to an ordinary law but these very principles of interpretation compel one to take into account the nature and scope of the Act which requires interpretation. A Constitution is the mechanism under which laws are to be made and not merely an Act which declares what the law is to be. It is also well settled that a Constitution must not be construed in any narrow or pendent sense and that construction which is most beneficial to the widest possible amplitude of its power, must be adopted. An exclusionary clause in any of the entries should be strictly and, therefore narrowly construed. No entry should, however, be so read as not to rob it of entire content. A broad and liberal spirit should, therefore, inspire those whose duty it is to interpret the Constitution and the Courts are not free to stretch or to prevent the language of an enactment in the interest of any legal or constitutional theory. Constitutional adjudication is not strengthened by such an attempt but it must seek to declare the law but it must not try to give meaning on the theory of what the law should be, but it must so look upon a Constitution that it is a living and organic thing and must adopt itself to the changing situations and pattern in which it has to be interpreted. It has also to be borne in mind that where division of powers and jurisdiction in a federal Constitution is the scheme, it is desirable to read the Constitution in harmonious way. It is also necessary that in deciding whether any particular enactment is within the purview of one legislature or of the other, it is the pith and substance of the legislation in question that has to be looked into. It is well-settled that the various entries in the three lists of the Indian Constitution are not powers but fields of legislation. The power to legislate is given by Article 246 and other Articles of the Constitution. Three lists of the 7th Schedule to the Constitution are legislative heads or fields of legislation. These demarcate the area over which the appropriate legislature can operate. It is well-settled that widest amplitude should be given to the language of the three entries but some of these entries in different lists or in the same list may override and sometimes may appear to be in direct conflict with each other, then and then comes the duty of the Court to find the true intent and purpose and to examine the particular legislation in

question. Each general word should be held to extent to all ancillary or subsidiary matters which can fairly and reasonably be comprehended in it. In interpreting an entry it would not be reasonable to import any limitation by comparing or contrasting that entry with any other in the same list. It has to be interpreted that the Constitution must be interpreted as an organic document in the light of the experience gathered.

49. The Indian Constitution passionately and devotedly extended the protective umbrella to the weaker sections of the society. The preamble of the Constitution contains the ideal and aspirations intended to be realised by the makers of the Constitution to secure to all its citizens justice, social, economical and political, liberty, equality of status and opportunity to promote fraternity assuring the dignity of the individual. It enjoined upon the State to provide protective measures for protection of the weaker section of the community removing inequality. Article 14 called upon the State not to deny to any person "equality before the law" or the equal protection of the law". Equality is a dynamic concept which has many facets. Article 46 aims at protecting the weaker sections from social injustice. Article 15 like that of Article 16 is a facet of right to equality. It is a right to be treated equally amongst equal. Unequal treatment of equals is forbidden like equal treatment of unequal. Article 15(4) and 16(4) is therefore as much the fundamental as any other fundamental right guaranteed by Part-III of the Constitution of India. Article 16(4) is not an exception to Clause (1) and (2) of Article 16. Article 16(4) provided an effective mechanism for reservations and seeks to attain equality of opportunity in matters of public employment Clause (4) of Article 16 is an affirmative disposition for securing equality in employment to the members of the backward classes of the citizen which is not adequately represented in the services of the State. Article 16(4) therefore is as much as a fundamental right as in other provisions of other Article. On a conjoint reading of the constitutional provisions and more particularly Articles 15 and 16 and Article 46 of the Constitution of India, the obligation of the State for extensive protective discrimination is explicit keeping in mind the constitutional commitment. The Supreme Court of India in *P and T Scheduled Caste/Tribe Employees' Welfare Association (Regd.) and Others Vs. Union of India (UOI) and Others*, directed the Government of India to pursue the same policy in reservation for SC and ST in the P & T Department as is pursued in other departments.

50. Admittedly, in the State of Tripura, executive instruction were issued from time to time laying down the policy of reservation in the matter of appointment and promotion to the offices under the State and subsequently to provide for reservation of vacancy in services and post to the members of SC and ST. Laws are enacted to be obeyed and not for contravention.

Enactment of law, but tolerating its infringement, is worse than not enacting a law at all. The continued infringement of law, over a period of time, is made possible by adoption of such means which are best known to the violators of law.

Continued tolerance of such violations of law not only renders legal provisions nugatory but such tolerance by the enforcement authorities encourages lawlessness and adoption of means which cannot, or ought not to, be tolerated in any civilized society. Law should not only be meant for the law abiding but is meant to be obeyed by all for whom it has been enacted. A law is usually enacted because the legislature feels that it is necessary.

The above observation was made by the Supreme Court of India in *Indian Council for Environment-Legal Action Vs. Union of India (UOI) and Others*, on a petition under Article 32 of the Constitution of India under PIL for enforcement and effective implementation of Notification issued under Clause (d) of Sub-rule (3) of Rule 5 of the Environment Protection Rules, 1986.

51. The 1991 Act was enacted to provide for reservations of vacancies in services and posts for the members of the Scheduled Caste and Scheduled Tribes. The recital of the Act itself speaks of the inadequate representation of the members of the Scheduled Castes and the Scheduled Tribes in the services and posts under the State of Tripura. It is needless to state that a remedial statute must receive a liberal construction and the Courts ought to give it "the widest operations which its language will permit". Such a statute should get a pragmatic construction so as to attain the objective of the Legislature. When the words of the Statute are clear, plain and unambiguous and admits only of one meaning, Courts are to act as per the legislative mandate irrespective of the Consequences. The law is to be interpreted meaningfully, more so, when one interprets a beneficial statute.

52. The other contention raised on behalf of the Appellants in the present Writ Appeal regarding the inapplicability of the Act to the members of the judicial services is untenable and cannot be accepted. My distinguished brother Hon^{ble} Justice Patnaik conceded that the "State" include the judiciary but since the definition clause embodied in Section 2(b) of the Act expressly defined "establishment" as "any office of the State Government, the offices of the subordinate judiciary cannot be held to be offices of the State Government. The learned Judge for that purpose took the aid of Section 3(60) of the General Clauses Act 1897, Section 2 of the Tripura General Clauses Act, 1966. In my view, the answer can be found from the letter and spirit of the 1991 Act itself. The title and preamble of an Act are part of the Act and is a permissible guide to construction - the relevant extract of the 1991 Act are quoted below:

...An Act to provide for reservation of vacancies in services and posts for the members of the Scheduled Castes and Scheduled Tribes.

Whereas the members of the Scheduled Castes and Scheduled Tribes who are backward classes of citizens are not adequately represented in the services and posts under the State of Tripura

(emphasis supplied)

AND WHEREAS it is expedient to provide for the reservation of vacancies in services and posts for them...

53. The preamble of an Act like the long title is a part and parcel of the statute and can be acted upon for construction of a statute.

54. "Ex Visceribus Actus" is a celebrated tool of interpretation which is followed in English law since the time of Edward Coke (1552-1634). In interpreting a statute, the reason and spirit of the law, the intention of the Legislatures as expressed in the Statute are to be viewed as a whole. A particular phrase of a Statute is not to be judged in isolation ignoring the context of the Statute. On this occasion, it would be pertinent to refer to the speech of Sir Roundell Palmer, who while intervening in the debate on the subject of appointment of Sir Robert Collier as a member of the judicial committee expounded the meaning of "Ex Visceribus actus" as follows:

... Nothing is better settled than that a Statute is to be expounded not according to the letter, but according to the meaning and spirit of it. What is within the true meaning and spirit of the Statute is as much law as what is within the very letter of it and that which is not within the meaning and spirit, though it seems to be within the letter, is not the law, and is not the Statute. That effect should be given to the object, spirit and meaning of (a) Statute is a rule of legal construction, but the object, spirit, and meaning must be collected from the words used in the Statute. It must be such an intention as the Legislature has used fit words to express.

(From 209 Hansard Parl. Deb (3rd Series) 685 quoted in Craies on Statute Law page 98 (Seventh Edition)....

55. The definition as contained in Section 2 of the Act, opens with the words - "In this Act, unless the context otherwise required". A statutory definition is to be read subject to the qualification. In interpreting a Statute, whenever possible, the words of the Act of the Legislature is to be construed "so as to give a sensible meaning to them. The words ought to be construed *Ut res magis Valeat quam pareat*" (Bowen L.J. in *Curtis v. Stovin* (1889) 22 QBD 513, 517.

56. Further it would be apt to refer to two other cases which supports my line of reasoning. In *Colquhoun v. Brooks* reported in (1889) 14 App. Cases. 493, 506 Lord Herschell said: "It is beyond dispute, too, that we are entitled, and indeed bound, when construing the terms of any provisions found in a statute, to consider any other parts of the Act which throw light on the intention of the legislature, and which may serve to show that the particular provision ought not to be construed as it would be alone and apart from the rest of the Act". In *Canada Sugar Refining Co. v. R.* reported in (1889) App. Cases 735, 741 Lord Davey said: "Every clause of a statute should be construed with references to the context and other clauses in the Act, so as, as far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject matter."

57. The principle of law as indicated above is also an accepted principle of law in India which has been followed by the Supreme Court of India in a catena of decisions, the latest in line been the judgment of the Supreme Court in *Sultana Begum Vs. Prem Chand Jain*, at 381, 382. On analysis of the 1991 Act in its entirety, the members of the Tripura Judicial Service in my view cannot be denied the benefit of the Act. Any other interpretation will only reduce the statute to a futility.

58. The Division Bench of the Orissa High Court (which has been relied upon by my learned brother) in *Manoj Kumar Panda v. State of Orissa* reported in 1982 Labour and Industrial Cases 1826 had the occasion to deal with a case pertaining to recruitment to the Orissa Judicial Service Class II under the Orissa Judicial Rules, 1964. In the above writ petition challenge was made to the fresh advertisement notifying that all the remaining eight posts were to be filled up by the candidates belonging to Scheduled Tribes and Scheduled Castes as per the provisions of Orissa Reservation of Vacancies in Posts and Services (For Scheduled Castes and Scheduled Tribes) Act, 1975 (Act 38 of 1975). The Act as well as the Rules contained the provisions for reservation through manner prescribed under the Rules were at variance with the Act. The Court rejected the contention that the definition of "State" as enjoined in Section 2(g) of the Act did not include judiciary. The Court held that: "It is too late in the day to contend that the judiciary is not included in the definition of "State" ... We are of the view that Judiciary though not named in the definition must by the very nature of things stand included within the definition of "State". The Court however held that in view of the specific provision in Article 234 authorising the Governor to make rules , the provisions of Orissa Act 38 of 1975 was not applicable to recruitment to Orissa Judicial Service. *B.S. Yadav (supra)* was considered but the same was distinguished mainly on the following grounds:

(a) The Supreme Court in the said case was concerned with the superior judicial service i.e. of the District Judge for which provisions were laid down in Article 233 of the Constitution -Article 233 does not contemplate any rule making power.

(b) Both in Articles 229 and 309 of the Constitution where rules by Executive Authority have been contemplated, such rules have been specifically made subject to laws made by the appropriate Legislature. However, Article 234 which authorises making of rules for appointment of persons to the subordinate judiciary (other than District Judges) does not make rule to be made by the Governor of State after consultation with the Commission and the High Court subject to legislation.

(c) A reference to the Rules clearly indicates that the Rules are essentially for appointment.

59. The above decision of the Orissa High Court left out of consideration the constitutional scheme laid down in Chapter VI of Part VI along with the arrangements in Part XI and Part XIV of the Constitution . The above decision

also did not take into account the post Thomas era State of Kerala and Another Vs. N.M. Thomas and Others, initiated in Akhil Bharatiya Soshit Karamchhari Sangh (Railway) represented by its Assistant General Secretary on behalf of the Association Vs. Union of India (UOI) and Others, which emphatically reiterated that Clause (4) of Article 16 is not an caption to Clauses (1) or (2) of that Article. After Indra Sawhney v. Union of India reported in (1992) Suppl. 3 SCC 215 it can now be legitimately said that sub-clause 4 of Article 16 is asmuch a fundamental right as Clauses (1) and (2) or any other provision of that Article - Once it is established that the members of the Scheduled Castes and Scheduled Tribes have fundamental rights under Articles 15(4) and 16(4) of the Constitution of India, those persons even have the right/remedy to enforce those rights by way of an application under Articles 32 and 226 of the Constitution of India. The decision in B.S. Yadav case (supra) was not confined to Article 235 alone. The judgment of the Orissa High Court in Manoj Panda's case however, is to be restricted to the facts since, the Court in that case was essentially concerned with appointment and not with the condition of service as is the case in the present Writ Appeal.

60. In this scenario, one can justiciably recall the observation of Justice P.N. Bhagawati (as he then was) in E.P. Royappa Vs. State of Tamil Nadu and Another,

Article 16 embodied the fundamental guarantee that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Though enacted as a distinct and independent fundamental right because of its great important as a principle ensuring equality of opportunity in public employment which is so vital to the building up of the new classless egalitarian society envisaged in the Constitution , Article 16 is only an instance of the application of the concept of equality enshrined in Article 14. In other words, Article 14 is the genus while Article 16 is a species. Article 16 gives effect to the doctrine of equality in all matters relating to public employment. The basic principle, which therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination. Now what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose J. "a way of life", if must not be subjected to a narrow pedantic or lexicographic approach. We all embracing scope and meaning, for to do so would be to violate its activist magnitude. Earlier is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabinet and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are swop enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly

situate and it must not be guided by any extraneous or irrelevant consideration because that would be denial of equality... (at para 85 pp. 583-584).

61. Law is a revelation of the principles of fairness, justice, equality and good conscience. The basic aim of rule of law is to establish an egalitarian society where every one can aspire to attain the optimum excellence in its field. Assendancy of one may result in degeneration of Anr. . It is the law which can aid ironing out the creases and ensure equality of protection. The trio, Justice, Equality and Fraternity are the vehicles for the attainment of a classless egalitarian society. Law crystalizes and channels social change. Every notable vicissitude in social behaviour has an impact on law. One can readily recall, the decision of the American Supreme Court in Brown v. Board of Education 347 US 483 (1954). The Court by an unanimous verdict declared segregation as illegal in the School which sent a massive shock wave to the American Society, Social justice forms the basis of a progressive society.

62. On overall consideration of the factual conspectus in the present Writ Appeal, there cannot be any justification for withholding the benefit of the statute from the members of the judicial services who are employed in the services and posts under the State of Tripura. The service rules as well as the Executive instructions issued from time to time cannot therefore, stand on the way of giving the benefit of reservation in the matter of promotion in the judicial services in the State of Tripura.

63. For the foregoing reasons, I do not find any merit in the Writ Appeal and accordingly, this Writ Appeal stands dismissed. The stay order stands vacated. The matter concerning the fundamental right lingered long enough over. It is now high time for giving effect to the judgment and direction of the Court. It is expected that the Respondents shall now act with utmost alacrity and despatch in carrying out the directives of the Court. With the aforesaid direction, the Appeal is rejected. There shall be, however, no order as to costs.