A.F.R.

Court No. - 37

Case :- WRIT - A No. - 43260 of 2016

Petitioner :- Vivekanand Tiwari And Anr.
Respondent :- Union Of India And 5 Ors.
Counsel for Petitioner :- Vimlendu Tripathi
Counsel for Respondent :- A.S.G.I.,Ajeet Kumar Singh,Ashok Mehta,Rijwan Ali Akhtar,Shekhar Kr.Yadava,Vinay Kumar Pandey,Vinod Kumar Shukla

Hon'ble Vikram Nath,J.
Hon'ble Daya Shankar Tripathi,J.

(Delivered by Vikram Nath, J.)

Petitioners who claim to be eligible for appointment as Assistant Lecturers in Hindi and Physiotherapy have preferred this petition under Article 226 of the Constitution, impleading (i) Union of India through Secretary, Department of Higher Education Ministry of Human Resource Development, New Delhi, (ii) The University Grants Commission (UGC), through its Secretary, 35, Firoze Shah Road, New Delhi, (iii) The Joint Secretary, University Grants Commission (UGC), 35 Firoze Shah Road, New Delhi, (iv) The Banaras Hindu University, Varanasi through its Registrar, (v) The Vice Chancellor, Banaras Hindu University, Varanasi and (iv) The Registrar (Admin.), Recruitment and Assessment Cell, Banaras Hindu University, Varanasi as respondent nos.1 to 6 respectively for the following reliefs-

1. *A writ order or direction in the nature of Certiorari by calling the record to quash the Rolling Advertisement No.2 of 2016-2017 (Teaching and equivalent posts) dated 16.07.2016 (Annexure No.3 to the Writ Petition) issued by the respondent no.4 and the order dated 19.02.2008 issued by respondent no.2 through respondent no.3 (Annexure 10 to the Writ Petition);* ***and the impugned clause No.6(c) and clause No.8 (a)(v) of the UGC Guidelines dated 25.08.2006 issued by the respondent no.2.*** *(amendment made vide Court order dated 09.01.2017).*
2. *A writ order or direction in the nature of Mandamus to command the respondent nos.1 to 6 to issue a fresh advertisement for teaching posts in BHU by treating each discipline/subject/department of BHU as a separate "Unit" for the purpose of application of rules of reservation in the matter of recruitment of teaching staff and to proceed with the selection process in a time bound manner as may be stipulated by this*

Hon'ble Court.

3. *Any other writ order or direction, which this Hon'ble Court may deem fit and proper under the facts and circumstances of the present case.*

4. To award the cost of writ petition."

Banaras Hindu University (hereinafter referred to as BHU) a Central University constituted and established under a Central Act No. 16 of 1915 issued an advertisement being Rolling Advertisement No.02/2016-2017, inviting applications for various teaching and equivalent posts in different departments of the University (Annexure 3 to the writ petition). Petitioner no.1 claims to have applied for the post of Assistant Professor in respective discipline and petitioner no.2 claims to be fully eligible for the post of Assistant Professor in respective discipline but could not apply for the same. The petitioners noticed that the reservation applied by the University was by way of treating the University as a 'Unit' and the posts of the Professor, Associate Professor, Reader and Assistant Professor as single cadre at each level in the University. According to the petitioners the reservation for the Scheduled Castes, Scheduled Tribes and Other Backward Classes ought to have been applied by treating the posts of different levels in each subject/department as a 'Unit' and not the whole University as a 'Unit'. After advertisement was published the petitioners alongwith other applicants submitted a representation to the Vice-Chancellor requesting to apply the reservation, treating each department as a 'Unit'. This representation dated 25.07.2016 has been filed as Annexure 4 to the writ petition. The basis of such representation, according to the learned counsel for the petitioners, was the series of judgments delivered by the Supreme Court and the Allahabad High Court and accordingly they annexed copies of judgments alongwith their representations. The following judgments, according to the petitioners, clearly lay down that the reservation is to be applied in teaching positions department/subject-wise in the University.

(i) Dr. Suresh Chandra Verma & Others Vs. The Chancellor, Nagpur University & others reported in **AIR 1990 SC 2023.**

(ii) State of U.P. Vs. Dr. Dina Nath Shukla reported in **(1997) 9 SCC 662.**

(ii) State of U.P. Vs. M. C. Chatopadhyay & others reported in **(2004) 12 SCC 333.**

(iv)State of Karnataka & others Vs. K. Govindappa & another reported in **(2009) 1 SCC 1.**

(v) Pramod Madhukarrao Padole and another vs. Chancellor, Nagpur University and others, reported in **1991 Mh LJ 1487 (Full Bench-Bombay High Court).**

(vi)*Dr. Raj Kumar v. Gulbarga university (FB) 1990 Kant 320-Karnataka High Court.*

(vii) Dr. Ram Niwas Pandey Vs. State of U.P. & others *reported in* ***(1996) 3 UPLBEC 1869.***

(viii) Dr. Smt. Anupma Sharma Vs. State of U.P. & others *reported in* ***2009 (4) AWC 3967. Amitava Lala and Shishir Kumar, JJ.***

(ix)Dr. Vishwajeet Singh & others Vs. State of U.P. & others *reported in* ***2009 (3) AWC 2929.***

(x) Dr. Narendra Singh and others vs. State of U.P. and others, Writ-A-No.39334 of 2012 *decided on* ***18.02.2014 (Alld. HC).***

Copy of the judgment in the case of **Dr. Narendra Singh (supra)** is annexed with the petition as Annexure 6 and rest of the judgments have been provided to us during course of the arguments. Petitioners have also annexed a Government Order issued by the Principal Secretary, Higher Education, Government of U.P. dated 19.02.2016 (Annexure-5 to the writ petition) which is in compliance and consequence to the judgment delivered by this Court on the above issue, meaning to say that the State Government has accepted the view expressed in the aforesaid judgments and accordingly all State Universities were directed to apply reservation on teaching posts in the State Universities treating the department/subject as a 'Unit'. Petitioners have further annexed a communication dated 19.02.2008 issued by the Joint Secretary, University Grants Commission (hereinafter referred to as the UGC) addressed to the Registrar, Banaras Hindu University, Varanasi (Annexure 10 to the writ petition) communicating the recommendations of the Standing Committee and directing to implement the reservation cadre-wise/treating the University as a 'Unit' instead of department-wise/subject-wise. The contents of the said letter are reproduced below-

"The Registrar,
Banaras Hindu University,
Varanasi-221005
Uttar Pradesh

Sub: Implementation of Reservation Policy for SC/ST in Universities and Colleges-regarding.

Sir,

A meeting of the Sub committee of the Standing Committee on SC/ST was held in the UGC Office on 13th and 14th December 2006 and discussed the status of the implementation of the Reservation Policy of the SC/ST in Admission and appointment of the teaching and non-teaching posts. The Committee noted that most of the Universities are maintaining the Rosters department-wise or subject-wise instead of cadre-wise as per the UGC Policy of Reservation. The Committee advised that the University may be requested to prepare the revised Rosters in the light of the UGC guidelines already issued to the Universities.

Major decisions taken by the Standing Committee in the meeting are as under-

1. *Teaching posts. All teaching posts including Professors and Readers filled up and to be filled up depending upon the sanctioned strength should be entered in the 100 point Roster register separately for cadre of Professor and Reader as prescribed by the Government of India passed on the dates of joining of the incumbents in each cadre. All posts of lecturer, irrespective of the fact that some are promoted as Readers or Professors on personal basis shall be arranged in 100 point Roster according to seniority.* ***Roster register shall not be maintained in each discipline or Department-wise for the post of any cadre.***

2. *Non-teaching posts. Non-teaching posts of Group A,B,C & D shall be filled in separately in 100 point Roster. Also, all the posts of Group D shall form one cadre under the permissible rules of grouping posts.*

3. *After having followed above procedure, the posts required to be filled up by SC/ST and number of SC/ST personnel in position should be worked out and backing in reservation is to be filled up in time bound manner.*

4. *The backlog SC/ST vacancies for teaching & Non-teaching staff should be filled up before filling any general vacancy and those on ad-hoc basis.*

5. *The system of appointment on ad hoc basis should be forthwith done away with, when duly qualified candidates are available for appointment on regular basis.*

In view of the above recommendations of the Standing Committee, ***you are requested to implement the reservation cadre-wise instead of department-wise/subject-wise*** *to work out the balance of SC/ST vacancies to be filled up as backing vacancies, to initiate action for filling up the backlog vacancies immediately and report the matter to the SCT Section of UGC so that Standing Committee on SC/ST may be apprised of the position in the next meeting as and when convened by the UGC.*

You are also requested to inform all the colleges of your University accordingly for filling up of the backlog vacancies of SC/ST immediately."

The petitioners also claimed to have met the Vice-Chancellor and Registrar of the BHU claiming response to their request dated 25.07.2016 but when no heed was paid to their request and it appeared that the University would proceed with the selection and appointment as per the advertisement, they approached this Court by filing the present petition.

This Court while entertaining the Writ Petition on 12.09.2016 recorded that counsel for the University made a statement that the advertisement under challenge had been temporarily withdrawn till such time instructions are received from the UGC. The Court accordingly granted 10 days time to the counsel for the UGC to obtain instructions and fixed 28.09.2016 as the next date. Contents of the order dated 12.09.2016 are reproduced below-

> *"It is stated by Sri A.K. Upadhyay, learned Senior Counsel for the Banaras Hindu University that the advertisement under challenge has been temporarily withdrawn till such time as instructions are received from the University Grants Commission.*
>
> *Sri A.K. Upadhyay, learned Senior Counsel for the University and Sri V.K. Shukla, learned counsel appearing for University Grants Commission pray for and are granted ten days' time to seek instructions in the matter.*
>
> *Place this petition as fresh on 28 September 2016."*

The Court has thereafter granted further time to the UGC on 19.10.2016, 07.12.2016, 09.01.2017. Thereafter a short counter affidavit was filed by the UGC on 23.01.2016 to which a reply was filed by the petitioners. In the meantime the petitioners moved an amendment application which was allowed by order dated 12.01.2017 whereby the petitioners were permitted to assail the Clause Nos.6(c) and 8(a)(v) of the UGC Guidelines dated 25.08.2006.

As the UGC is under direct control of the Central Government, therefore, Union of India through Secretary, Department of Higher Education Ministry of Human Resource Development was impleaded as Respondent No.1. This Court granted time to the learned counsel

representing respondent 1 by orders dated 09.01.2017, 23.01.2017 and 21.02.2017 to obtain instructions in the matter with regard to its reservation policy. The instructions received from the Ministry of Human Resource Development have been placed on record in which it has been stated that the guidelines framed by the UGC in 2006 (to be specific 25.08.2006) need to be strictly followed.

Elaborate arguments have been heard in the matter on 01.03.2017, 02.03.2017, 06.03.2017, 07.03.2017, 08.03.2017, 20.03.2017 and 27.03.2017.

We have heard Sri Vimlendu Tripathi, learned counsel for the petitioners, Sri Ashok Mehta, learned Additional Solicitor General assisted by Sri Shekhar Kumar Yadav, learned Senior Panel Counsel for the Respondent No.1, Sri Rizwan Ali Akhtar, learned counsel representing respondent nos.2 & 3 and Sri V.K. Upadhyay, learned Senior Advocate assisted by Sri Ajit Kumar Singh, learned counsel representing respondent nos.4 to 6.

The core question to be determined in the present petition is whether the reservation in teaching posts in any University is to be applied treating the University as a 'Unit' or the department/subject as a 'Unit' for different levels of teachers. There are certain other ancillary and connected issues raised and deliberated during course of arguments on which we have also commented in our judgment for consideration of the Union of India and the UGC.

BRIEF HISTORY OF RESERVATION AS APPLICABLE TO TEACHING POSITIONS IN THE UNIVERSTIY.

Part III of the Constitution deals with fundamental rights. Article 14 of the Constitution mandates equality before law to all the citizens. It reads as follows:-

> *"**14. Equality before law.**- The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."*

Article 16 in Part III of the Constitution provides for equality of opportunities in the matters of public employment. It reads as follows-

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

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

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

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

(4A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State 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.

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

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

Sub Article (1) clearly mandates that there shall be equality of opportunity for all citizen in the matters relating to employment or appointment to any office of the State. Sub Article (2) mandates that there shall be no discrimination on the ground of religion, race, caste, sex, descent, place of birth, residence or any of them, in any employment or office under the State. Sub Article (3) gives liberty to the Parliament of

making any law in regard to a class or classes of employment or appointment to an office. Sub Article (4) gives liberty to the State to make any provision for the reservation in appointments or posts in favour of any backward class of citizens which, in the opinion of the State, are not adequately represented in the services under the State. The provision relevant for consideration is Sub Article (4) of Article 16 of the Constitution. A careful reading of Article 16 (4) gives the following analysis-

1. The State has the liberty to make provisions for reservation in appointment or posts.
2. It should be in favour of any backward class of citizen.
3. The State has to form an opinion that such class is not adequately represented in the service under the State.
4. It is not a mandate but a liberty given to the State. It is an enabling provision.

Although its Sub Article does not mention of making law for the said purpose but it has only used the word *'making any provision*'. At the same time once it provides that opinion is to be formed then in forming the opinion the State has to necessarily deliberate upon and carry out an exercise while making the provision for reservation justifying its decision. Since we are dealing with the application of the reservation in teaching positions at University level and that too of a Central University, the relevant authority would be the Ministry of Human Resource Development and the University Grants Commission which is a statutory body constituted to primarily maintain standards of education in higher studies.

We had asked Sri Mehta, learned Additional Solicitor General to provide us the relevant provisions, orders by which reservation was introduced for teaching posts in the Central Universities. We had also required the University Grants Commission's counsel Sri Akhtar to provide similar policy/guidelines framed by the UGC. Learned counsel appearing of the other parties also assisted the Court in providing the relevant

information as to when and on what basis the reservation was introduced in teaching posts in the University.

We have been provided a copy of Ministry of Home Affair O.M. No.39/40/74-(SCT)(I), dated 30th September, 1974, addressed to all Ministries/Departments, etc. providing for steps to be taken to apply reservation for SC and ST in the services of the autonomous bodies/institutions, receiving grant in aid from the Govt. of India by making suitable provision in the relevant statutes. The contents of this OM dated 30th September, 1974 reads as follows:-

"Ministry of Home Affairs O.M. No.39/40/74-(SCT)(I),
dated the 30th September, 1974, to all Ministries/Departments, etc.

Subject :- Reservation for Scheduled Castes and Scheduled Tribes in autonomous bodies/institutions

The undersigned is directed to say that a suggestion was received from the Commissioner for Scheduled Castes and Scheduled Tribes that autonomous bodies, including Municipal Corporations, Co-operative institutions, universities, etc. should be asked to make reservation for Scheduled Castes and Scheduled Tribes in the matter of employment in services under their control. He also suggested that if the word "State" occurring in Article 12 of the Constitution did not cover these bodies, the Constitution should be amended suitably.

2. The question was considered in consultation with the Ministry of Law and Justice with particular reference to the interpretation or the word "State" occurring in Article 12 of the Constitution. The opinion of the Ministry of Law that the word "State" in this article of the Constitution while covering the Municipal Corporations would not cover the other autonomous bodies. Co-operative Institutions Universities, etc. but it was not necessary to amend the Constitution as the purpose of making reservations for Scheduled Castes and Scheduled Tribes in such bodies could be achieved by suitable provision in the relevant statute or in the Article of Association etc.

3. It is, therefore, requested that suitable action may kindly be taken under advice to this Ministry to provide reservations for Scheduled Castes and Scheduled Tribes in the services of the autonomous bodies/institutions which are receiving grant-in-aid from the Government of India by making suitable provision in the relevant statutes or in the Article of the respective bodies."

The UGC in its short-counter affidavit has firstly referred to an office memorandum issued by the Ministry of Personnel, Public Grievances and

Pension (Department of the Personnel and Training), Government of India dated 2.7.1997 (Annexure-SCA-1). This office memorandum was issued in consequence to the judgment of the Supreme Court in the case of **R.K. Sabharwal and others vs. State of Punjab,** reported in **1995 (2) SCC p. 745.** It basically lays down as to how the roster is to be applied.

The next reference in the short-counter affidavit of the UGC is to an order issued by the Ministry of Human Resource Development (Department of Secondary & Higher Education) dated 6.12.2005 (part of Annexure SCA-2) whereby it directed the UGC to ensure effective implementation of the reservation policy in the Central Universities and Deemed Universities receiving grant-in-aid from the public funds.

Contents of this order reads as follows-

"F. No.6-30/2005U-5
Government of India
Ministry of Human Resource Development
(Depttt of Secondary & Higher Education
***
New Delhi dated the 6th December, 2005

O R D E R

"WHEREAS Article 46 of the Constitution states that, "The State shall promote, with special care, the education and economic interests of the weaker sections of the people and, in particular of the Scheduled Castes and Scheduled Tribes, and shall protect them from social injustice and all forms of social exploitation",

AND WHEREAS, the policy of the Central Government is that in the Central Universities and Institutions which are Deemed to be Universities receiving grants-in-aid from the public exchequer, the percentage of reservation in admissions and recruitments in teaching and non-teaching posts is to be 15% for Scheduled Casters and 7.5% to Scheduled Tribes;

AND WHEREAS, the University Grants Commission, New Delhi hereinafter referred to as UGC, is a statutory autonomous organization responsible for implementation of policy of the Central Government in the matter of admissions as well as recruitment to the teaching and non-teaching posts in the Central Universities and Institutions which are Deemed to be Universities;

AND WHEREAS, the UGC has failed to ensure effective implementation of the reservation policy in the Central Universities and grantee Institutions which are deemed to be Universities'

NOW, THEREFORE, in exercise of the powers vested under Section

20(1) of the University Grants Commission Act, 1956 the Government hereby directs the UGC to ensure effective implementation of the reservation policy in the Central Universities and those of Institutions Deemed to be Universities receiving aid from the public funds except in minority institutions under Article 30(1) of the Constitution."

(Anupama Bhatnagr)
Deputy Secretary to the Government of India
Tele. No.23388641."

The above order refers to Article 46 of the Constitution which talks about the promotion of education and economic interests of weaker sections. Article 46 of the Constitution reads as follows:-

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

The next document referred to in the short counter affidavit is the guidelines framed by the UGC for strict implementation of reservation policy of the Government in the Universities, Deemed Universities, Colleges and other grant-in-aid institutions and Centres and the same was circulated to all the aforesaid institutions vide covering letter dated 25.08.2006 (Annexure-SCA-3). These guidelines refer to the order dated 06.12.2005 issued by the Ministry of Human Resource and Development. The same has been reproduced above. In para 6(a) of the guidelines it has been provided that the reservation would be applicable to all teaching posts in all institutions referred to above. Clause 6(b) refers to reservation in admissions to Under Graduate, Post Graduate, M. Phil. and Ph. D. courses. Clause 6(c) of the guidelines provides the manner in which the grouping of the posts is to be done. This clause has been challenged by the petitioners as being arbitrary, unreasonable and contrary to the settled law on the point. Clause 6(c) is reproduced below-

"6 (c).In the cases of reservations referred to in clause (a) above, the Instructions issued by the Central Government for grouping of posts shall be resorted to wherever applicable, especially when

> *more than one University functions under a single Act, or several colleges function under one University grouping of posts are mandatory if the posts concerned are transferable on an inter-university or inter-college levels. The practice of creating department-wise cadres, which tends to create single posts or cadres with artificially reduced number of posts in order to avoid reservation, is strictly forbidden."*

The extent of reservation is provided in Clause 7 of the guidelines. Clause 8 provides the procedure to be followed in the matters of reservation. Clause 8(a)(v) refers to the applicability of Roster to be applied to the total number of posts in the cadre as per the judgment in the case of **R.K. Sabharwal vs. State of Punjab (supra)** and further that the cadre is best indicative of seniority list governing the members with the same pay-scales. This is other offending clause in the guidelines of which petitioners have prayed for quashing. Clause 8(a)(v) of the guidelines reads as follows-

> *"**8. Procedure to be followed in matters of reservation for teaching as well as non-teaching staff:***
>
> *(a).....*
>
> *(v)The Roster, 40-point or 100-point as the case may be, shall be applied to the total number of posts in cadre only, (R.K. Sabharwal v. State of Punjab, (AIR 1995 SC 1371); cadre is best indicated by seniority list governing the members with same pay-scales:*
>
> *(vi)......"*

The short counter affidavit further refers to letter of UGC dated 19.02.2008 (Annexure-SCA-4) addressed to all Universities requiring them to implement reservation cadre-wise instead of department-wise/subject-wise. The contents of this letter has already been reproduced.

The Ministry of Human Resource Development in its instructions dated 28.02.2017 has reiterated that the guidelines about reservation is to be followed as per the clarification issued by the UGC on 19.02.2008 which has been filed as Annexure 10 to the writ petition and also alongwith the short counter affidavit of the UGC as Annexure-SCA-4.

Sri Mehta, learned Additional Solicitor General has reiterated the stand taken by the UGC. He placed before the Court the instructions dated 28.02.2017 from the Ministry of HRD to the aforesaid effect. According to the instructions the Ministry of HRD has observed that the guidelines framed by UGC and the clarification letter of UGC dated 19.02.2008 be

followed. The instructions dated 28.02.2017 of the Ministry of HRD is reproduced below:-

"F. No.1-4/2017-CU.V
Government of India
Ministry of Human Resource Development
Department of Higher Education
Shastri Bhawan, New Delhi

Dated:28.02.2017.

To,

Shri Shekar Kumar Yadav,
Senior Panel Counsel,
Union of India, High Court of Allahabad,
Ch. No.41, Allahabad.

Subject: CMWP No.43260 of 2016 (Dr. Vivekanand Tewari Vs UOI & Ors)-reg.

Sir,

I am directed to refer to your letter dated 10.02.2017 seeking instruction of this Ministry in the matter of CMWP No.43260 of 2016 (Dr. Vivekanand Tewari Vs. UoI & Ors), which is coming up for hearing on 01.03.2017.

2. *In the above context, I am to inform that BHU is an autonomous organization under the purview of this Ministry which is governed by its Act, Statues and Ordinances framed thereunder, besides the guidelines of UGC issued from time to time.*

3. *The University is following reservation for SC/ST/OBC in the post of Asst. Professor, Associate Professor and Professor cadre-wise in terms of the prescribed guidelines of the UGC vide letter no.F.1-8/2008 (SCT) dated 19.02.2008 which has been approved for implementation by the Executive Council of the University vide ECR No.15 dated 16.10.2008. In view of contention of the petitioner, BHU has sought clarification of UGC on its letter dated 19.02.2008 regarding guidelines about the reservation.*

4. *This Ministry is of the view that BHU should proceed further in the mater as per the clarification of the UGC on its letter dated 19.02.2008 about the guidelines on reservation. MHRD has no further instruction to give in the matter of reservation.*

Yous faithfully,

(Surat Singh)
Deputy Secretary to the Government of India"

Sri V.K. Upadhyay, learned Senior Counsel appearing for the BHU submitted that the guidelines framed by the UGC and the clarification

communicated to the University by the UGC vide letter dated 19.02.2008 has since been adopted by the University and it is according to the said guidelines that the reservation is being applied in the teaching posts in the University. He further submitted that the BHU is bound by the decisions and the directions issued by the UGC and has to strictly follow the same. According to him, the BHU while applying the reservation to the teaching posts in the advertisement in question has strictly followed the UGC guidelines, therefore, no fault can be found with the same.

Before starting with the discussion on the points raised in this petition we may record some of the ancillary and connected issues that have been touched upon by us though they may not have been specifically pleaded by the petitioners. Nine Judges' Bench judgment of the Supreme Court in the case of **Indra Sawhney vs. Union of India and others, reported in AIR 1993 (SC) 477** and Constitution Bench of the Supreme Court judgment in the case of **M. Nagaraj & others vs. Union of India and others**, reported in **2006 (8) SCC 212** (supra) and a few other pronouncements have compelled us to make certain observations which we feel is the need of the hour and would be an honest attempt and bonafide effort to adhere to and carry forward the mandate laid down in the Constitution of India. We will first deal with the core question involved in this petition and thereafter will proceed to record our observations.

Learned counsel for the petitioners raised the following arguments-

(i) Rolling Advertisement No.2 of 2016-17 (Teaching and equivalent posts) has been issued by respondent no.4, 5 and 6 by treating the entire University (BHU) as a “Unit” for all the teaching vacancies of Assistant Professor and thereafter by applying 100 point roster on the vacant posts and by calculating the status of reservation on the vacant posts. Similar analogy has been adopted by the respondents for the post of Associate Professor / Professor.

(ii) The aforesaid methodology is against the dictum of Division Bench of this Hon'ble Court dated 18.02.2014 passed in Writ-A No.39334 of 2012 “Dr. Narendra Singh and others Vs. State of U.P.

and others" as well as other connected writ petitions, wherein a similar issue was raised, for which this Hon'ble Court held in unequivocal terms that University cannot be treated to be the unit for the purpose of application of reservation and reservation has to be applied department-wise / subject-wise.

(iii) There are number of judgments of Hon'ble Supreme Court as well as this Hon'ble Court regarding application of 100 point roster in Universities by treating the department / subject / discipline as a 'Unit'.

(iv) The grouping of teaching posts sanctioned in any university by treating University as a unit for the purpose of applying reservations is illegal, arbitrary and unjust and violates the position of law declared by Hon'ble Supreme Court as well as this Hon'ble Court.

(v) The UGC Guidelines dated 25.08.2006 contains clause no.6(c) and clause no.8 (a)(v), which are not only self-contradictory but are also in violation of settled position of law regarding application of 100 point roster by treating the department / subject /discipline as a 'Unit'.

(vi) The basic requirement for applying the rule of reservation for OBCs / SCs / STs on teaching posts is that there has to be plurality of posts in each discipline / subject / department and such posts should be interchangeable. Hence, in the present case as well as in the matter of recruitment of teaching staff in any university, the aforesaid basic requirement cannot be ignored and hence, separate disciplines / subjects / departments cannot be clubbed to make the whole university as a "Unit" for the post of Assistant Professor and like-wise. Hence, each discipline / subject / department of BHU makes out a separate "Unit" for the purpose of application of rules of reservation.

(vii) There cannot be any difference in Central University and State University, so far as the aforesaid principle of treating each discipline/subject/department of BHU as separate "Unit" for the

purpose of application of rules of reservation is concerned. The position of Law reiterated by the Hon'ble Supreme Court as well as this Hon'ble Court in its various case-laws is applicable in present case also and hence, the action on the part of respondents is unjustified and is not in consonance with the verdict of **"Indra Sawhney Vs. Union of India and others",** reported in **AIR 1993 SC 477**.

(viii) An incorrect application of reservation rules by not treating each discipline/subject/department of BHU as a separate "Unit" for the purpose of application of rules of reservation regarding recruitment on teaching posts substantially decreases the reasonable opportunity of selection of petitioners, who are prospective candidates and hence, their fundamental rights under Article 14, 16 and 21 are being violated.

(ix) The Impugned order dated 19.02.2008 as well as the impugned Clause No.6 (c) and Clause No.8 (a) (v) of the UGC Guidelines dated 25.08.2006 issued by the respondent no.2 and the advertisement dated 16.07.2016 issued by the respondent nos. 4, 5 and 6 violates the constitutional bar against 100% reservation as envisaged in Article 16 (1) of the Constitution as well as the same is not in consonance with the position of law as stated hereinabove.

In support of the above submissions made on behalf of petitioners, the relevant case-laws are as follows :-

1. **Dr. Suresh Chandra Verma & others vs. The Chancellor, Nagpur University & others** reported in **AIR 1990 SC 2023**

In this case, the employment notice for the posts of Lecturers in different subjects was issued by Nagpur University, wherein total number of reservation was mentioned category-wise but not subject-wise. The employment notice as well as the procedure followed in making appointments was under dispute, which was decided by the Chancellor with an order directing the Vice-Chancellor to terminate the service of all the appointees. The Vice-Chancellor passed order to terminate the service of all

the appointee and also passed order in exercise of his emergency powers appointing all such persons on temporary basis.

The dispute came up before Bombay High Court and was referred to the Full Bench with an issue as ***"Is non-reserving the posts of University teachers subjectwise in the employment notice a breach of letter and spirit of reservation policy contained in Section 77C read with Section 57 of the Act?"***. The Full Bench framed another issue as to ***"whether, notwithstanding the illegality of the general reservation, the services of the appellants were liable to be terminated"*** and finally decided these issues. On the first issue, the Full Bench held that general reservations were in breach of the provisions of the Act and against the reservation polity and, therefore, illegal. On the second issue, by majority the Full Bench held that since the appointments were not according to law from the beginning, the termination of the appellants' services was legal. Thereafter one of the appointee Dr. Suresh Chandra Verma came up before Supreme Court against the judgment passed by the Bombay High Court. One of the issues dealt with by Supreme Court was that ***"whether the employment notice ought to have indicated reservations post-wise (subject-wise)?".*** While dealing with said issue, the Supreme Court observed in following terms in Para no. 7 and 8:

> *"According to us, the word "post" used in the context has a relation to the faculty discipline, or the subject for which it is created. When, therefore, reservations are required to be made "in posts", the reservations have to be postwise, i.e., subjectwise. The mere announcement of the number of reserved posts is no better than inviting applications for posts without mentioning the subjects for which the posts are advertised."*

The Supreme Court also considered a Full Bench Judgment of Karnataka High Court in Dr. Raj Kumar v. Gulbarga University, ILR (1990) Kant 2125 and held as follows:

> *"On behalf of the appellants reliance was also sought to be placed on a Full Bench decision of the Karnataka High Court in Dr. Raj Kumar v. Gulbarga University, ILR (1990) Kant 2125. We do not see how the decision in question helps the appellants, for the Full*

Bench has observed there that generally reservation has to be cadre-wise and subject-wise. But an exception could possibly be made in cases like the one of professors in which post available in each of the subjects is only one while grouping all of them together for purposes of reservation so that at least in the subjects in which the candidates belonging to the reserved category are available, they could be accommodated. It is not necessary for us in this case to express our opinion on the correct course to be adopted when only one post is available in a particular subject at a given time. The course to be adopted would depend upon the unit of reservations, the period over which the backlog is to be carried, the number of appointments already made in the said posts, the availability of candidates from the reserved category etc. What is material from our point of view in this case is to point out that even the Karnataka Full Bench has taken the view that generally reservation has to be cadre-wise and subject-wise. It was also a case of the filling in of the vacancies in teaching posts in a University.

We are, therefore, in complete agreement with the view taken by the Full Bench that the employment notice dated July 27, 1984 was bad in law since it had failed to notify the reservations of the posts subject-wise and had mentioned only the total number of reserved posts without indicating the particular posts so reserved subject-wise."

The Supreme Court further held as follows:

"When, therefore, the services of the appellants are to be terminated in view of the change in the position of law and not-on account of the demerits or misdemeanour of individual candidates, it is not necessary to hear the individuals before their services are terminated. The rule of audi alterem partem does not apply in such cases and, therefore, there is no breach of the principles of natural justice. In the result, we are of the view that there is no merit in this case. The appeal, therefore, stands dismissed. In the circumstances of the case, however, there will be no order as to costs."

With aforesaid observation, the Supreme Court dismissed the appeal.

2. State of U. P. vs. Dr. Dina Nath Shukla reported in **(1997) 9 SCC 662**

In this case, an advertisement was issued by the University of Allahabad inviting applications for posts of Professors, Readers and Lecturers including the posts reserved for Scheduled Castes, Scheduled Tribes and Other Backward Classes, in respect of which a clarification was issued by the Government stating that for recruitment to the posts of Professors, Readers and Lecturers, University or College is treated as a unit and the recruitment would be made applying the rule of reservation for the

SCs, STs and OBCs in respect of all the posts. That came to be questioned before the Division Bench of this Court, which held that the said notification was bad in law, against which an appeal was preferred before Supreme Court.

The two judges division bench of Supreme Court relied upon *Dr. Suresh Chandra Verma's case (supra)* and held as follows:

> *"13. Thus, it could be seen that if the subject-wise recruitment is adopted in each service or post in each cadre in each faculty, discipline, specialty or super-specialty, it would not only be clear to the candidates who seek recruitment but also there would not be an over-lapping in application of the rule of reservation to the service or posts as specified and made applicable by Section 3 of the Act. On the other hand, if the total posts are advertised without subject-wise specifications, in every faculty, discipline, specialty or super-specialty, it would be difficult for the candidates to know as to which of the posts be available either to the general or reserved candidates or whether or not they fulfill or qualify the requirements so as to apply for a particular post and seek selection."*

However, the Supreme Court in addition to aforesaid conclusion, had further held that if there is any single post of Professor, Reader or Lecturer in each faculty, discipline, speciality or super-speciality which cannot be reserved for reserved candidates, it should be clubbed and roster applied and be made available for the reserved candidates in terms of Section 3(5) of the Act. Even if there exists any isolated post, rule of rotation by application of roster should be adopted for appointment. For achieving the said object, the Vice-Chancellor, who is responsible authority under Section 4 to enforce the Act, would ensure that the single posts in each category are clubbed since admittedly all the posts in each of the categories of Professors, Readers or Lecturers carry the same scale of pay. Therefore, their fusion is constitutional and permissible. The Vice-Chancellor should apply the rule of rotation and the roster as envisaged under sub-section (5) of Section 3.

In a subsequent decision of three judges division bench Supreme Court in **State of U. P. vs. M.C.Chatopadhyay & others** reported in **(2004) 12 SCC 333,** the aforesaid subsequent part of the judgment of Dr. Dina Nath

Shukla's case was held to be no longer good law in view of the Constitutional Bench Judgment of Post Graduate Institute of Medical Education and Research vs. Faculty Association reported in (1998) 4 SCC 1.

3. <u>State of U. P. vs. M.C. Chatopadhyay & others</u> <u>reported in **(2004) 12 SCC 333:**</u>

In this case, Allahabad High Court had held that there cannot be any reservation in respect of the post of Professor in the University and this conclusion was based upon one earlier judgment of Allahabad High Court in Ram Niwas Pandey (Dr.) vs. State of U. P. wherein it was held that the reservation has to be applied subject-wise and the Professors of the Departments cannot be clubbed together and treated as one cadre for the purpose of applying reservation. In appeal, the Supreme Court re-considered its earlier judgment in **<u>State of U. P. vs. Dr. Dina Nath Shukla</u>** (supra) and declared its one part to be no longer good law in view of the Constitutional Bench Judgment of Post Graduate Institute of Medical Education and Research vs. Faculty Association reported in (1998) 4 SCC 1. The Supreme Court held as follows:

> *"**2**. It has been unequivocally held in the aforesaid Constitutional Bench decision (Post Graduate Institute of Medical Education and Reserch vs. Faculty Asso., (1998) 1 SCC 1) that there cannot be any reservation in respect of an isolated post and the judgment of this court in Union of India v. Madhav, (1997) 2 SCC 332 has been overrulled on which judgment the court had relied upon in the case of Dr. Dina Nath Shukla, (1997) 9 SCC 662."*
>
> ***5**..... Mr. Dwivedi strenuously urged before us that there should not be a reservation on subject-wise basis particularly taking into account the defenition of "Cadre" in the Act and the Statute already referred to and it should be left to the discretion of the Vice-Chancellor to decide the question as to which one of the given posts at a given point of time could be reserved. We are unable to accept the said submission of the learned counsel as, in our opinion, that would lead to uncertainty and no candidate would be able to know as to which post is being reserved and under what consideration.*
>
> ***6**. While, therefore, we are of the considered opinion that there can be a reservation in respect of post of Professor and the Provisions of the Reservation Act would apply, but the same cannot be applied taking all the Professors as a cadre and it has to be made subject-wise, as has been earlier construed and held by this Court. We are also of the opinion that there cannot be a reservation for an isolated post."*

With such observations and conclusions, the Supreme Court disposed of the matter by observing that since the position of law has been indicated and explained, the Vice-Chancellor of the University would act accordingly.

4. State of Karnataka & others vs. K. Govindappa & another reported in **(2009) 1 SCC 1**

In this case, there was a single post of Lecturer of History subject in an aided private college. One K. Govindappa was appointed on the post but approval of his appointment was rejected by the State Government on the Ground that the appointment had been made in violation of the Roster Policy and that he had been appointed in a post which was reserved for a Scheduled Caste. Such decision was challenged before Karnataka High Court, whereupon the decision of State Government was set aside by holding that since the post of Lecturer in History was a single post, the reservation policy would not apply to the appointment made to the said post. The matter came up before Supreme Court, which affirmed such view of High Court and dismissed the appeal with following observations:

> *"18. We have carefully considered the submissions made on behalf of the respective parties and the decisions cited by learned counsel in support thereof. In dealing with the issue raised in this appeal, it has to be kept in mind that some of the earlier decisions in Madhavi's case (supra), in the case of Suresh Chandra as J.B. Agarwal [(1997) 5 SCC 363 and Post Graduate Institute of Medical Education & Research v. K.L. Narasimhan, [(1997) 6 SCC 283, in which reservation by rotation even in respect of a single post had been approved, was subsequently overruled in the Constitution Bench decision in the case of Post Graduate Institute of Medical Education & Research v. Faculty Association (supra) and it was held that in no case could reservation be made applicable in respect of a single post. The Constitution Bench approved the views expressed in Dr. Chakradhar Paswan's case (supra) following those expressed by the earlier Constitution Bench in Arati Roy Choudhary's case (supra). In view of the above, the only question which we are called upon to consider is whether the High Court was right in treating the post of Lecturer in History in the respondent No. 2 college as a single isolated post forming a separate cadre in itself and not part of the cadre of Lecturers comprising all the different disciplines taught in the college.*
>
> *19. In this regard, Mr. Hegde has explained the difference between "post" and "cadre" and that the two expressions could not be*

equated with each other. He has also explained that the expression "cadre" was not synonymous with "service" and that merely because there were single posts in the different disciplines taught in the college, it did not mean that each post constituted a separate cadre within the cadre of Lecturers. While there can be no difference of opinion that the expressions "cadre", "post" and "service" cannot be equated with each other, at the same time the submission that single and isolated posts in respect of different disciplines cannot exist as a separate cadre cannot be accepted. In order to apply the rule of reservation within a cadre, there has to be plurality of posts. Since there is no scope of inter-changeability of posts in the different disciplines, each single post in a particular discipline has to be treated as a single post for the purpose of reservation within the meaning of Article 16(4) of the Constitution. In the absence of duality of posts, if the rule of reservation is to be applied, it will offend the constitutional bar against 100% reservation as envisaged in Article 16(1) of the Constitution.

20. The decision in Dr. Chakradhar Paswan's case (supra), which has been subsequently approved by the Constitution Bench in the Post Graduate Institute of Medical Education & Research case (supra) makes it clear that isolated and separate posts can exist within a cadre and in case of such posts, if there was only one post, the same could not be set apart for a reserved candidate.

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

22. We, therefore, have no hesitation in upholding the decision of the Karnataka High Court, in the facts of this case. The appeal, therefore, must fail, and is dismissed without any order as to costs."

5. **Pramod Madhukarrao Padole and another Vs. Chancellor, Nagpur University & others** reported in **1991 Mh L J 1487 (Full Bench-Bombay High Court)**

According to the facts elaborated in this judgment, this case is in fact the second stage of controversy cropped up in ***Dr. Suresh Chandra Verma & others vs. The Chancellor, Nagpur University & others (supra)***, which travelled up to Supreme Court and thereafter three fresh employment notices were issued by the Nagpur University on the basis of 100 point roster by reserving 5 out of 18 posts of Professors for Schedule Casts, 3 out of 18 posts of Professors for Schedule Tribes and 1 out of 18 posts of Professors for Denotified Tribes/Nomadic Tribes and by applying reservation like-wise for the posts of Readers and Lecturers also. This employment notice was challenged before the Bombay High Court and on a difference of opinion between two learned Judges, who heard eleven writ petitions under Article 226 of the Constitution of India, the matter was referred to the third Judge, who was called upon to decide the following questions:

> *(1) Whether there can be reservation of posts in any of the three cadres of Professors, Readers and Lecturers, where there is a solitary post in a particular discipline.*
>
> *(2) Whether the reservation to be made must be only with reference to the posts in the cadres, available in a particular discipline, subject only to the availability of more than one post.*
>
> *(3) Whether grouping would be permissible only of the posts and appointments, if there be more than one in a particular discipline, or grouping can be done of the posts and appointment of a single post together with similar single posts in different disciplines.*

The learned Judge mainly relied upon the judgment of the Apex Court in the matter of Dr. Chakradhar Paswan, (cited supra). It was held that cadre or unit, which should be subjected to the application of the rule of reservation, at least so far as the University is concerned, should be the department, subject or discipline. It was observed:

> *"38. What, then, is a cadre? Judgments of the two learned Judges are replete with references to the dictionary meaning and judicial dicta as to the connotation of this expression. The expression 'cadre' need not mean the entire strength of service. It could also mean a part of service sanctioned as a separate unit (see the interpretatiion given by the Supreme Court to Fundamental Rule 9(4) in G. R. Luthra vs. Lt. Governor, Delhi and others, (1975) 3 SCC 258 at 262. Again in Dr. Chakradhar Paswan s case (supra), the Supreme Court observed:*

> *"... In service jurisprudence, the term 'cadre' has a definite legal connotation. In the legal sense, the word 'cadre' is not synonymous with 'service'. Fundamental R. 9(4) defines the word 'cadre' to mean the strength or a service or part of a service sanctioned as a separate unit."*
>
> *Interpreted in the light of the observations of the Supreme Court in Dr. Suresh Chandra Verma 's case,* ***the cadre or unit which should be subjected to the application of the rule of reservation, at least so far as the University is concerned, should be the department, subject or discipline****.*
>
> *39. If it is held that the posts of Professors, Lecturers and Readers in each department formed three distinct cadres, there would be no difficulty in applying the reservation policy. Both the learned Judges (Deshpande and Wahane, JJ.) are agreed in the view that special qualifications required for holding a particular post do not, per se, make the post an isolated post or take it out of the cadre, for the simple reason that, though several posts may require separate specializations, the qualification, responsibility and the pay-scales applicable to each of the specialized course would generally be the same, barring the specialization required. Therefore, the specialization, per se, would not take the post out of the cadre. I agree that it would not be proper to treat a specialized post as an isolated post on the ground that it requires a different specialization. All such posts would be part of a cadre and would be subject to reservation."*

The learned third Judge, after elaborated discussion over the Supreme Court decisions, answered the questions in the following manner:

> *46, (i) There cannot be reservation of posts in any of the three cadres of Professors, Readers and Lecturers, where there is a solitary post in a particular discipline.*
>
> *(ii) Reservation must be made only with reference to the posts in the cadres, available in a particular discipline, subject only to the availability of more than one post.*
>
> *(iii) Grouping would be permissible only of the posts and appointments, if there be more than one in a particular discipline. Grouping cannot be done of the posts and appointment of a single post together with similar single post in different disciplines.*

6. Dr. Raj Kumar & others vs. Gulbarga University & others reported in **AIR 1990 Kant 320 (Full Bench-Karnataka High Court)**

In this writ petition, the petitioners had questioned the legality of the notification issued by the Gulbarga University established under the provisions of the Karnataka State Universities Act, 1976 ('the Act' for short), inviting applications for selection for appointment to 35 teaching

posts on the establishment of the University on the ground that out of 35 posts as many as 33 are reserved in favour of persons belonging to backward classes and only two posts are made available for general merit and therefore the reservation was violative of Arts. 14and 16 of the Constitution of India.

The Full Bench of Karnataka High Court, while deciding the controversy has held as follows:

> *"31. The next question for consideration is, as to whether in respect of categories of Professors, Lecturers or Readers, as the case may be, if there is only one post, could there be reservation at all. As far as this aspect is concerned, the matter is no longer res integra. The question is concluded by the decision of the Supreme Court in the case of Chakradhar (1988) IILLJ 66 SC. The relevant paragraph 16 of the judgment reads :*
>
> > *"16. It is quite clear after the decision in Devadasan's case that no reservation could be made under Art. 16(4) so as to create a monopoly. Otherwise, it would render the guarantee of equal opportunity contained in Arts.16(1) and 16(2) wholly meaningless and illusory. These principles unmistakably lead us to the conclusion that if there is only one post in the cadre, there can be no reservation with reference to that post either for recruitment at the initial stage or for filling up a future vacancy in respect of that post. A reservation which would come under Article 16(4), pre-supposes the availability of at least more than one post in that cadre."*
>
> *In the above paragraph, the Supreme Court has ruled that in respect of cadres where there is only one post, it does not admit of any reservation at all.*
>
> *32. The next question for consideration is about the method which should be adopted in providing reservation for the cadres of Professors, Readers and Lecturers for, though these posts are in different subjects they any same designation and pay scale. Therefore the question is as to whether reservation has to be worked out in respect of such cadres separately. This question is also no longer res integra. This Court in the case of Dr. Krishna v. State of Karnataka ILR (1986) Kar 255 has held that in the case of teaching cadres though the designation and pay scale of the posts of Professors, Readers and Lecturers in different subjects are one and the same, still having regard to the fact that the posts of Professors, Readers and Lecturers in each of the subject is distinct and separate, each subject has to be treated as independent unit for the purpose of recruitment and reservation. The said view stands confirmed by the decision of the Supreme Court in the case of Chakradhar (1988) IILLJ 66 SC . In*

view of this position in law, the only reasonable method of giving effect to reservation in the cadres in which the number of posts available is smaller is by way of providing a reasonable roster. In fact, in view of the judgment of this Court in Krishna, the State Government by its order dated 28-1-1987 (Annexure-R1) prescribed a 100 point roster. The first 10 points prescribed are : (1) Scheduled Caste, (2) Scheduled Tribe, (3) General Merit, (4) Group-A of the backward classes, (5) Group-B of the Backward classes, (6) Scheduled Caste, (7) General Merit, (8) Group 'C' of the backward classes, (9) Group 'D' of the backward classes and (10) General Merit and the roster continues up to 100 points. As number of posts available in each of the departments in each of the cadres is generally less than ten, and once a person is appointed against a vacancy, normally he continues in service for several years, it appears to us that 100 point roster is Unwieldy because, for the completion of the roster it might take a few centuries. The validity of that order is not challenged in this petition. We should, however, observe that it would be reasonable to fix the roster for points as minimum as possible for cadres in which the posts avail-I able are only a few and therefore the roster requires to be reviewed and modified.

Whatever that may be, in view of the decision in the case of Chakradhar, if there is only one post in the cadre of Professor or Reader or Lecturer in any subject, there can be no reservation at all.

7. <u>Dr. Ram Niwas Pandey vs. State of U.P. & others</u> reported in **<u>(1996) 3 UPLBEC 1869</u>**

In this case, a batch of writ petitions came up for consideration before Division Bench of Allahabad High Court, wherein few questions were formulated, in which the question relevant for present controversy is being quoted herein below:

"(2) Whether all the posts of Professors in various departments can be clubbed together and treated as one cadre for the purposes of U.P. Act No. 494 providing for reservation?

Relying upon the decision of Supreme Court in *Dr. Suresh Chandra Verma's case (Supra) and one another judgment of Allahabad High Court*, the division bench of this court held as follows:

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

8. <u>Dr. Smt. Anupma Sharma vs. State of U.P. & others</u> reported in

2009 (4) AWC 3967

In this case, division bench of this court was dealing with the grievance of petitioner that the post of Reader in Political Science as notified in the advertisement cannot be said to be reserved category post being the single cadre post but the same was opposed by the respondents saying that the posts of Lecturer, Reader and Professor can be clubbed together and form a "cadre" for such purpose, hence, any of such posts within such cadre can be reserved.

The division bench of this court held as follows:

> *"We find that initially in [(1997) 9 SCC 662], State of U.P. vs. Dr. Dina Nath Shukla it was held that when such posts form a cadre subject wise then rule of reservation will be applicable but thereafter in [(2004) 12 SCC 333] State of U.P. & others vs. M.C.Chattopadhyaya and others three Judges' Bench of Supreme Court has held that the conclusions of Supreme Court in the case of Dr. Dina Nath Shukla (supra) is no longer good law in view of the Constitution Bench judgment reported in [(1998) 4 SCC 1] Post Graduate Institute of Medical Education & Research vs. Faculty Association and others and therefore, we have further checked up and ultimately found that the latest view on the point is similar. Following the ratio propounded by 5 Judges' Constitution Bench recently it has been held in [(2009) 1 SCC 1] State of Karnataka and others vs. K.Govindappa and another as follows:*
>
> > *"The expressions "cadre", "post" and "service" cannot be equated with each other, but at the same time the submission that single and isolated posts in respect of different disciplines cannot exist as a separate cadre cannot be accepted. In order to apply the rule of reservation within a cadre, there has to be plurality of posts. Since there is no scope of interchangeability of posts in the different disciplines, each single post in a particular discipline has to be treated as a single post for the purpose of reservation within the meaning of Article 16(4) of the Constitution. In the absence of duality of posts, if the rule of reservation is to be applied, it will offend the constitutional bar against 100% reservation as envisaged in Article 16 (1) of the Constitution."*
>
> *Therefore, in totality, we find that impugned advertisement cannot be sustained, hence, it is set aside to be issued afresh in future keeping eyes open with regard to the judgments of this Court as well as the apex Court. Accordingly, the writ petition is disposed of, however, without any order as to cost."*

9. Dr. Vishwajeet Singh & others vs. State of U. P. & others reported

in **2009 (3) AWC 2929**

In this case, a batch of writ petitions were decided by the division bench of this Court with leading petition of Dr. Vishwajeet Singh and others, wherein petitioners of the writ petition, who were four in numbers claimed to be duly qualified for appointment on the post of Lecturer in Graduate / Post Graduate Colleges in the State of U.P., had challenged the advertisement No. 37 dated 9.7.2003 published on 16.7.2003 and had also prayed for quashing of the relevant Government orders. By advertisement No. 37, the U.P. Higher Education Service Commission had advertised 838 posts of Lecturers in different subjects in various Post Graduates/Graduate Colleges in the State of U.P. by special recruitment to fill up the carry forward and backlog vacancies of reserved categories candidates. All the posts in different subjects were shown to be reserved for Scheduled Castes, Schedule Tribes and Other Backward Classes. The advertisement was mentioning number of vacancies in different subjects. The applications were called separately for different subjects. The advertisement was further mentioning that guidelines and list of the colleges shall be made available along with the application form. The Government order dated 3.7.2002 was issued for filling up the backlog vacancies of reserved category candidates referring to U.P. Public Services (Reservation of Scheduled Castes, Schedule Tribes and Other Backward Class Amendments) Ordinances 2003 (U.P. Ordinance No. 2 of 2002). The Government order was mentioning that calculation of reserved vacancies shall be made not on the basis of vacancies but on the cadre strength. Along with other grievances, petitioner's case in the writ petition was that the entire cadre cannot be taken as a unit for computing reservation for applicability of U.P. Public Services (Reservation of Scheduled Castes, Schedule Tribes and Other Backward Classes) Act, 1994 (hereinafter referred to as 1994 Act).

The division bench of this court framed few issues and it would be in fitness of things to reproduce the same which is as follows:

> *(i) Whether 467 vacancies, which were available because of retirement, resignation and death up to 30.6.2003, could have been*

included and reserved for Scheduled Castes, Schedule Tribes, Other Backward Classes only along with 371 carry forward vacancies in advertisement No. 37 of 2003 ?

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

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

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

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

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

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

The issue no.(iii) and (v) are relevant to the present controversy and as such, the determination of the division bench of this court on these issues was consolidated by dealing issue no. 3, 4 and 5 being inter-related, which is being reproduced hereinafter:

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

clubbing all the posts of lecturers together.

.....
.....

The apex Court by its pronouncements in the cases of Dr. Suresh Chandra Verma, Dr. Dina Nath Shukla and State of U.P. Vs. M.C. Chattopadhyaya (supra) has laid down that the posts of Lecturers in a University cannot be clubbed together for the purpose of applying reservation and roster and the reservation and roster in the post of Lecturers have to be applied subject-wise. Thus, each subject of study has been treated to be a unit for applying the rules of reservation. As noticed above, the petitioners have advocated for applying the same principle regarding reservation, which has been accepted in a University, whereas learned Advocate General appearing for the respondents have made two alternative submissions firstly; different posts in different colleges in each subject are to be clubbed together and thereafter reservation has to be applied in the manner as mentioned in the affidavit of Principal Secretary, Higher Education, quoted above and in alternative if a college is treated to be a unit, all the posts of Lecturers in a college have to be clubbed together and reservation has to be applied as is being applied in the Secondary institutions governed by the provisions of U.P. Secondary Education Services Selection Board Act, 1982. For coming to a correct conclusion, it has to be first found out as to whether concept of Faculty, department and subject is also present in Degree colleges or post graduate colleges as it exists in a University.

.....
.....

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

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As noticed above, the Lecturer in different subjects required to possess different qualifications as provided by the Statute of the University and the posts are not interchangeable. Different subjects in a college are in a different disciplines and post in a college is created subject-wise. Thus, it is held that neither all the posts of one subject in

> *different colleges can be clubbed together for applying the rules of reservation nor all the post of Lecturers in one college can be grouped together for applying the reservation. The reservation according to 1994 Act and roster thereunder, is to be applied college-wise and subject-wise."*

While coming to such conclusions, the Division Bench of this court considered and followed all the above noted judgments cited by petitioners in present case and allowed the writ petitions by quashing the advertisement and government orders.

10. <u>Writ Petition No. 39334 of 2012 "Dr. Narendra Singh & others vs. State of U. P. & others",</u> <u>Judgment dated **18.02.2014**</u>

In this case, two writ petitions were filed by the prospective candidates for the posts of Readers and Lecturers, subject matter of the advertisement No.1 of 2009 dated 25.07.2009 published by Dr. Bheem Rao Ambedkar University, Agra (hereinafter referred to as the Agra University) and the petitions raised common question of law in the matter of reservation to be applied against posts of Readers and Lecturers. In the impugned advertisement, the posts were clubbed together.

The division bench of this court recorded contention of petitioners in following terms:

> *"The case of the petitioners is that reservation on the posts of Lecturers and Readers, under the advertisement has been applied treating the entire University as one unit. Having regard to the percentage of the reservation provided under the U.P. Act No.4 of 1994 the Agra University has worked out the number of the posts to be reserved in various departments. This according to the petitioners is illegal inasmuch as a division Bench of this Court in the case of Dr. Dina Nath Shukla Vs. State of U.P. and another, ALR 1996 (28) page 323 has clearly explained that reservation in the matter of the appointment of faculty members in the University has to be applied treating the department and subject as the unit and not the University as a whole as the unit."*

After discussing various case-laws of this court and Apex Court, this court ultimately concluded in following terms:

> *"As on date the law declared by the Apex Court in the case of Dr. Dina Nath Shukla, M.C. Chattopadhyay (supra) and Mamta Verma holds the fields. So far as posts of Professors, Readers and Lecturers in the University are concerned, reservation has to be applied*

department-wise subject-wise. Therefore, the University cannot be treated to be the unit for the purpose of application of reservation."

It is clear from the above judgments that the proposition of law laid down consistently with regard to the application of reservation in teaching posts of the University is that reservation is to be applied department-wise or subject-wise treating it as a 'Unit' and not the University as a 'Unit'.

As already recorded above the reservation has been applied by way of Executive Instructions and not by way of any Legislation. The Executive Instructions and guidelines framed by the UGC are in direct conflict and in violation of the law laid down by the Apex Court and different High Courts consistently from 1990 till date. We also find that in all the cases referred to above, the Courts have quashed the advertisements issued and appointments made by the different Universities but in none of the cases the guidelines framed by the University Grants Commission in 2006 providing for reservation treating the University as a 'Unit' had been quashed. All Universities and Institutes of higher education and learning are governed by the policy / guidelines / directions / standards determined by the UGC. They could be State or Central Universities and Institutes. There is no distinction amongst them. The guidelines of UGC of 2006 impugned in this petition also apply to all Universities in the country, be it State or Central without any modification or variance. All the judgments delivered so far on the question as to how reservation is to be applied in Universities and Institutes relate to State Universities. However as the policy and guidelines issued by UGC are the same for the State and Central managed and funded Universities the judgments referred to above would apply with equal force to Central University and to BHU which is a Central University. The State of UP vide Notification No.6/2015-16/Sattar-1-2015-17(13)/1995 following various judgments has already directed all State Universities to apply reservation on different levels of teaching treating the department/subject as a 'Unit'.

From the guidelines framed by the UGC regarding application of reservation in teaching posts we find that the UGC has applied it in a

blanket manner. There is no consideration as to why non-interchangeable posts have been clubbed in for treating them as a cadre/unit. No exercise apparently has been carried out by the UGC. The direction contained in the order of the Ministry of HRD dated 06.12.2005 did not contain any direction to the UGC to make blanket reservation or to treat the University as a 'unit'. UGC being the Apex body to consider the matter relating to Universities and Institutes involved in imparting higher education ought to have considered and taken an overall conspectus.

We may also record here that in the teaching posts, the qualifications of teachers for each department/subject is different.

The qualification of the candidate must be possessing Master's Degree, Ph.D, Research Work and NET (being suitability test) for the subject for which the post is advertised. Thus for Assistant Professor of different subjects the qualification would be in different subjects. Similarly the qualification as per the UGC Guidelines for appointment as Reader/Associate Professor, Professor is also in addition to the educational qualifications the minimum prescribed period of teaching in the lower level be it Assistant Professor, Associate Professor in the relevant subject for which the post is available. An Assistant Professor in subject 'A' cannot be an applicant for direct appointment as Associate Professor or Professor in subject 'B', 'C' or 'D'. He can only apply for the post in the subject 'A'. The seniority for becoming Head of the Department would be of the teachers in the same subject. There is no interse competition between the teachers in the same level of different subjects as all posts of higher level from entry level are by way of selection. There is no such provision in the teaching cadre in the Universities of promotion being granted on the basis of seniority irrespective of the department or the subject. Their competition is with candidates of their subject/department and not of different subjects. Merely because Assistant Professor, Reader, Associate Professor and Professor of each subject or the department are placed in the same pay-scale but their services are neither transferable nor they are in competition with each other. It is for this reason also that clubbing of the posts for the same level treating the University as a 'Unit' would be completely unworkable

and impractical. It would be violative of Article 14 and 16 of the Constitution.

If the University is taken as a 'Unit' for every level of teaching and applying the roster it could result into some departments/subjects having all reserved candidates and some having only unreserved candidates. Such proposition again would be discriminatory and unreasonable. This again would be violative of Article 14 and 16 of the Constitution.

Thus for all the reasons recorded above we are of the firm view that Clause 6(c) and 8(a)(v) of the UGC Guidelines 2006 and the letter of the UGC dated 19.02.2008 can not be sustained and are liable to be quashed and consequently the impugned advertisement applying the reservation in tune with the guidelines and the letter dated 19.02.2008 also deserves to be quashed.

Sri V.K. Upadhyay, learned Senior Advocate appearing for the BHU informed the Court that some appointments have been made during the pendency of this petition. He submitted that such appointments may be saved as according to him, they would not affect in any manner the category for which such posts were earmarked even if the University issues a fresh advertisement as per the directions issued by us treating the department/subject as a 'Unit'.

We are not inclined to accept this request for two reasons. Firstly, the University itself made a statement before the Court on 12.09.2016 that it had temporarily withdrawn the Rolling Advertisement No.2 of 2016-2017 till such time instructions are received from the UGC. The order dated 12.09.2016 has already been quoted above. Although it is not recorded in the order, but apparently as the Senior Counsel for the BHU made a statement of temporarily withdrawing the advertisement the Court did not pass any restraint order. Subsequently BHU republished the same Advertisement No.02 of 2016-17 which was exactly the same as the advertisement in question except that it carried a 'Note' mentioned in the advertisement that any appointment made would be subject to final outcome of the present petition. This advertisement was published on 13.12.2016. Thereafter the University has proceeded to make the appointments.

We are of the view that the University ought not to have proceeded in such a manner as it would amount to overreaching and by-passing the Court proceedings. BHU did not take any permission from the Court nor did it inform the Court that it was proceeding in this manner. We therefore find ourselves unable to approve this conduct of the University.

The other reason is that the University has not placed any details of the department, the posts and the teachers appointed. No affidavit has been filed by the University placing such facts on record. We have no idea as to how many appointments have been made, on which posts and in which department. We, therefore, merely on the statement given cannot allow such appointments to continue. The appointments, in our opinion, made during the pendency of the writ petition have to necessarily go for the above reasons.

There is yet another reason why the request of University Counsel cannot be accepted. As we have held that the relevant clauses of the policy viz. 6(c) and 8(a)(v) of the UGC dated 25.08.2006 as also the letter of the UGC dated 19.02.2008 to be unsustainable the entire advertisement in question relating to teaching posts has to be quashed. Further as we have held that the advertisement published by the BHU was in violation of the settled law and it also being arbitrary, unreasonable, unworkable by applying the reservation on teaching posts treating the University as a 'Unit' for the different level of teachers and not the department/subject as a 'Unit we are of the view that the entire advertisement has to go. There can be no two yardstick to apply reservation in different departments. We are of the view that confining the relief only to the respective subjects/departments for which the petitioners are the applicants and allowing the posts in the remaining subjects/departments of the University to be filled up treating the University as a 'Unit' would create further complication and would not only be impracticable, unworkable but also unfair and unreasonable. We are also directing the University to apply the reservation policy afresh in the light of the settled law. The University has to carry out fresh exercise of calculating the reservation for each department/subject. The relief, in our opinion, cannot be confined only to the department/subject in which the petitioners

are the applicants.

Accordingly the writ petition succeeds and is allowed. The impugned Rolling Advertisement No.02/2016-2017, in so far as it relates to the teaching posts is quashed. Any appointment on teaching posts made pursuant to the said advertisement are also quashed. We also quash Clause 6(c) and 8(a)(v) of the Guidelines framed by the UGC and circulated vide covering letter dated 25.08.2006 and also its letter dated 19.02.2008.

Further we direct the respondent University to carry out the exercise of applying the reservation to the posts under advertisement treating the department/subject as a 'Unit' for all levels of teachers and thereafter publish the fresh advertisement and then proceed for selection and appointment.

There shall be no order as to costs.

Having gone through the judgments in the case of **Indra Sawhney (supra), M. Nagaraj (Supra)** and a couple of other judgments, before parting we would like to share a few thoughts which crossed our mind.

We now come to the larger question involved with regard to the reservation being applicable to teaching positions in higher education. It needs no elaboration that the Universities impart education and learning of higher level. It is only at the level of the higher education that the research work is also carried out and large number of projects are also undertaken which are sanctioned not only by the Ministry of Human Resource Development, UGC but also by the department of Science and Technology and other national council set up in the field of Science and Research. The Universities also have departments of electronics, atomic energy, advance medical science. The core issues in this regard are as follows-

1. Exercise, if any, undertaken by the Central Government as to whether reservation is a must in teaching posts of higher education, learning and research?
2. Whether there is any need to apply reservation in a blanket way without identifying the posts, departments and subjects?
3. Whether any exercise has been undertaken to review/revise the

impact and effect of the reservation having continued for decades together?.

4. Whether Executive Instructions should be treated to be adequate and sufficient compliance of the enabling provisions mentioned in Article 16(4) of the Constitution?

5. Whether the observations made by the nine Judges judgment in the case of **Indra Sawhney** and the Constitution Bench in the case of **M. Nagaraj and others** can be ignored by the State?

6. Whether the State has acted bonafide in not paying any heed to the observations in the aforesaid judgments for not undertaking any exercise as observed by the Supreme Court?.

Sri Ashok Mehta, learned Addl. Solicitor General, objected to our considering the matter any further beyond the pleadings on record. According to him there is neither any pleading, nor any foundation laid in the petition nor any relief claimed in this regard by the petitioners as such this Court may confine to the pleadings and material on record.

We are conscious of our powers and scope. We indicated that we are not issuing any mandamus or direction but only wish to remind the respondents. Despite the fact that there are no pleadings or relief claimed for this part of our consideration, we find ourselves unable to completely ignore this aspect of the matter. We leave it to the discretion and wisdom of the respondents to deal with this aspect of the matter as may be advised.

There can be no issue with regard to the powers of the State to make provisions for reservation to appointments or posts in favour of any backward class citizen as the same has been conferred by Article 16(4) of the Constitution. Merely because the word 'provision' has been used in Article 16(4) can it be said that the State is free to issue executive directions for applying reservation in a blanket manner to all the posts for service under the State.

There is no issue left for adjudication to hold whether Article 16(4) is mandatory provision or enabling provision. It has already been held in numerous cases that Article 16(4) is only enabling and not mandatory. On the other hand it has also been held that the provisions of Article 16(1) and

16(2) have mandatory force. If this is legal and settled position then is the State not required to carry out the exercise, deliberate upon and after due application of mind and for justifiable reasons apply reservation for backward class citizens in service where they are not adequately represented. The posts on which reservation is to be applied also needs to be identified, considering the relevant observation in various pronouncements.

In respect of present controversy, the relevant observation of Supreme Court in various case-laws in respect of reservation in connection of merit are as follows:

Indra Sawhney's case:

In realisation of the constitutional mandate for affirmative action enshrined in Articles 14, 15 (4), 16 (4), 338 (10) and 340 (1) and in the light of Article 46 of the Constitution of India, the Second Backward Classes Commission, commonly known as *"Mandal Commission"*, was set up in the year 1979 and its report was submitted on 31.12.1980, which was tabled and discussed in Parliament till 1990 and on 07.08.1990, the Central Government made announcement to accept the recommendation of Mandal Commission to provide reservation of 27 percent of the jobs in all Central Government offices and public institutions. Thereafter, two Office Memorandums dated 13.08.1990 and 02.09.1991 were issued by the Central Government. In the backdrop of widespread unrest among the public at large, especially among students, in every part of the country, the Supreme Court took up the task to settle the legal position on reservations in the case of ***Indra Sawhney etc. vs. Union of India and others, etc.*** reported in ***AIR 1993 (SC) 477 : 1992 (Supp. 3) SCC 217.*** A nine Judges Constitutional Bench ***(Comprising M. H. Kania. CJI, Kuldip Singh, P.B. Sawant, M.N. Venkatachaliah, A.M. Ahmadi, T.K. Thommen, S.R. Pandian, R.M. Sahai, B.P. Jeevan Reddy)*** delivered judgment dated 16.11.1992, wherein the Supreme Court settled the legal position on various aspects of reservation including the outer limit thereof. The office memorandums issued by the Central Government and various constitutional issues were under consideration before the Supreme Court.

With the majority view, ***Justice B. P. Jeevan Reddy*** *(for himself and the* ***Chief Justice M. H. Kania, Justice M. N. Venkatachaliah, Justice A. M. Ahmadi)*** delivered common judgment and *Justice P.B. Sawant* delivered concurring judgment and it was held that the first office memorandum is valid and enforceable, subject to the exclusion of the creamy layer from the notified socially and educationally backward classes as per clause (i) of the second office memorandum on preference to the proper sections and clause (ii) on 10 percent reservations for economically backward sections as invalid.

While the minority view, *Justice S. R. Pandian* held the first office memorandum as valid in toto and both clauses of the second office memorandum as invalid.

While the minority view, *Justice T.K. Thommen, Kuldip Singh and R.M. Sahai* held both the office memorandums as invalid for want of convincing proof of proper identification of the Other Backward Classes by recourse to relevant criteria.

While upholding reservation policy in the said judgment, the Constitutional Bench fixed the outer limit of reservation as 50 percent. The Constitutional Bench dealt with various aspects of reservation, one of such aspect is requirement to maintain the merit while applying reservation. The relevant excerpt of judgment of ***Indra Sawhney's case*** is quoted herein below:

Excerpt of Judgment delivered by P. B. Sawant J.:
(Concurring view)

> *"506. While deciding upon a particular percentage of reservations, what should further not be forgotten is that between the backward and the forward classes, there exists a sizeable section of the population, who being socially not backward are not qualified to be considered as backward. At the same time they have no capacity to compete with the forwards being educationally and economically not as advanced. Most of them have only the present generation acquaintance with education. They are, therefore, left at the mercy of chance-crumbs that may come their way. They have neither the benefit of the statutory nor of the traditional in-built reservations on account of the unequal social advantages. It is this section sandwiched between the two which is most affected by the reservation policy. The reservation-percentage*

has to be adjusted to meet their legitimate claims also.

507. In this connection, one more fact need to be considered from a realistic angle. A mechanical approach in keeping reservations in all fields and at all levels of administration and that too at a uniform percentage is unrealistic. There is no reason why the authorities concerned should not apply their mind and evolve a realistic policy in this behalf. There are fields and levels of administration where either there may be no candidates from backward classes available or may not be available in adequate number. In such cases, either no reservations should be kept or reservations kept should be at an appropriate percentage. On the other hand, in fields and at levels where the candidates from the backward classes are available in suitable number, the maximum permissible reservations can be kept. The adjustment of the reservations and their percentages, field and grade-wise as well as from time to time, as per the availability of the candidates from the backward classes, is not only implicit in the constitutional provisions but is also warranted for purposeful and effective implementation of the spirit of those provisions.

508. In this connection, it is worth serious consideration whether reservations in the form of preference instead of exclusive quota should not be resorted to in the teaching profession in the interests of the backward classes themselves. Education is the source of advancement of the individual in all walks of life. The teaching profession, therefore, holds a key position in societal life. It is the quality of education received that determines and shapes the equipment and the competitive capacity of the individual, and lays the foundation for his career in life. It is, therefore, in the interests of all sections of the society - socially backward and forward-and of the nation as a whole, that they aim at securing and ensuring the best of education. The student whether he belongs to the backward or forward class is also entitled to expect that he receives the best possible education that can be made available to him and correspondingly it is the duty and the obligation of the management of every educational institution to make sincere and diligent efforts to secure the services of the best available teaching talent. In the appointments of teachers, therefore, there should be no compromise on any ground. For as against the few who may get appointments as teachers from the reserved quota, there will be over the years thousands of students belonging to the backward classes receiving education whose competitive capacity needs to be brought to the level of the forward classes. What is more, incompetent teaching would also affect the quality of education received by the students from the other sections of the society. However, whereas those coming from the advanced sections of the society can make up their loss in the quality of education received, by education at home or outside through private tuitions and tutorial classes, those coming from the backward classes would have no means for making up the loss. The teachers themselves must further command respect which they will do more when they do not come through any reserved quota. The indiscipline in the educational campus is not a little due to the incompetence of the teachers from whatever section they may come, forward or backward . It is, therefore, necessary that there should be no exclusive quota kept in

the teaching occupation for any section at all. However, if the candidates belonging to both backward and forward classes are equal in merit, preference should be given to those belonging to the backward classes. For one thing, they must also have a "look into" the teaching profession as in other professions. Secondly, in this vital profession also, the talent, the social experience and the new approach and outlook of the members of the backward classes is very much necessary. That will enrich the profession and the national life. Thirdly, it will also help to meet the complaints of the alleged step-motherly treatment received by the students from the backward classes and of the lack of encouragement to them even when they are more meritorious. Hence in the teaching profession, it is preference rather than reservation, which should be resorted to under Article 16(4) of the Constitution. A precaution, however, has to be taken to see that the selection body has a representation from the backward classes.

509. It must, however, be added that in judging the merits of the individuals for the profession of teaching as for any other profession, it is not the traditional test of marks obtained in examinations, but a scientific test based, among other things, on the aptitude in teaching, the capacity to express and convey thoughts, the scholarship, the character of the person, his interest in teaching, his potentiality as a teacher judged on the considerations indicated generally at the outset, should be adopted.

510. What is stated that regard to the teaching profession above is only by way of an illustration as to how the policy of reservation if it is to subserve its larger purpose can be modulated and applied rationally to different fields instead of clamping it mechanically in all the fields or withholding it from some areas altogether. It is not meant to lay down any proposition of law in that behalf."

Extract of common Judgment delivered by Justice B. P. Jeevan Reddy *(for himself and the Chief Justice M. H. Kania, Justice M. N. Venkatachaliah, Justice A. M. Ahmadi):*
(Majority view)

"Question No. 8: Whether Reservations are anti -meritarian?

832. In Balaji (AIR 1963 SC 649) and other cases, it was assumed that reservations are necessarily anti-meritarian. For example, in Janaki Prasad Parimoo (AIR 1973 SC930) it was observed, "it is implicit in the idea of reservation that a less meritorious person be preferred to another who is more meritorious." To the same effect is the opinion of Khanna, J. in Thomas (AIR 1976 SC 490), though it is a minority opinion. Even Subba Rao, J. who did not agree with this view did recognise some force in it. In his dissenting opinion in Devadasan (AIR 1964 SC 179), while holding that there is no conflict between Article 16(4) and Article 335, he did say, " it is inevitable in the nature of reservation that there will be a lowering of standards to some extent", but, he said, on that account the provision cannot be said to be

bad, inasmuch as in that case, the State had, as a matter of fact, prescribed minimum qualifications, and only those possessing such minimum qualifications were appointed. This view was, however, not accepted by Krishna lyer, J. in Thomas. He said efficiency means, in terms of good Government, not marks in examinations only, but responsible and responsive service to the people. A chaotic genius is a grave danger to public administration. The inputs of efficiency rule include a sense of belonging and of accountability (not pejoratively used) if its composition takes in also the weaker segments of "We, the people of India". No other understanding can reconcile the claim of a radical present and the hangover of the unjust past."

833. A similar view was expressed in Vasant Kumar (AIR 1985 SC 1495) by Chinnappa Reddy, J. The learned Judge said "the mere securing of high marks at an examination may not necessarily mark out a good administrator. An efficient administrator, one takes it, must be one who possesses among other qualities the capacity to understand with sympathy and, therefore, to tackle bravely the problems of a large segment of population constituting the weaker sections of the people. And, who better than the ones belonging to those very sections? Why not ask ourselves why 35 years after Independence, the position of the Scheduled Castes etc. has not greatly improved? Is it not a legitimate question to ask whether things might have been different, had the district administrators and the State and Central Bureaucrats been drawn in larger numbers from these classes? Courts are not equipped to answer these questions, but the courts may not interfere with the honest endeavours of the Government to find answers and solutions. We do not mean to say that efficiency in the civil service is unnecessary or that it is a myth. All that we mean to say is that one need not make a fastidious fetish of it."

834. It is submitted by the learned counsel for petitioners that reservation necessarily means appointment of less meritorious persons, which in turn leads to lowering of efficiency of administration. The submission, therefore, is that reservation should be confined to a small minority of appointments/ posts, - in any event, to not more than 30%, the figure referred to in the speech of Dr. Ambedkar in the Constituent Assembly. The mandate of Article 335, it is argued, implies that reservations should be so operated as not to affect the efficiency of administration. Even Art. 16 and the directive of Art. 46, it is said, should be read subject to the aforesaid mandate of Art. 335.

835. The respondents, on the other hand, contend that the marks obtained at the examination/ test/ interview at the stage of entry into service is not an indicia of the inherent merit of a candidate. They rely upon the opinion of Douglas, J. in Defunis (1974 (40) Law Ed 2d 164) where the learned Judge illustrates the said aspect by giving example of a candidate coming from disadvantaged sections of society and yet obtaining reasonably good scores - thus manifesting his "promise and potential" - vis-a-vis a candidate from a higher strata obtaining higher scores. (His opinion is referred to in para 44). On account of the disadvantages suffered by them and the lack of opportunities, - the Respondents say - members of backward classes of citizens may not

score equally with the members of socially advanced classes at the inception but in course of time, they would. It would be fallacious to presume that nature has endowed intelligence only to the members of the forward classes. It is to be found everywhere. It only requires an opportunity to prove itself. The directive in Art. 46 must be understood and implemented keeping in view these aspects, say the Respondents.

836. We do not think it necessary to express ourselves at any length on the correctness or otherwise of the opposing points of view referred to above. (It is, however, necessary to point out that the mandate -- if it can be called that - of Article 335 is to take the claims of members of SC/ST into consideration, consistent with the maintenance of efficiency of administration. It would be a misreading of Article to say that the mandate is maintenance of efficiency of administration.) May be, efficiency, competence and merit are not synonymous concepts; May be, it is wrong to treat merit as synonymous with efficiency in administration and that merit is but a component of the efficiency of an administrator. Even so, the relevance and significance of merit at the stage of initial recruitment cannot be ignored. It cannot also be ignored that the very idea of reservation implies selection of a less meritorious person. At the same time, we recognise that this much cost has to be paid, if the, constitutional promise of social justice is to be redeemed. We also firmly believe that given an opportunity, members of these classes are bound to overcome their initial disadvantages and would compete with - and may, in some cases, excel - members of open competitor candidates. It is undeniable that nature has endowed merit upon members of backward classes as much as it has endowed upon members of other classes and that what is required is an opportunity to prove it. It may not, therefore, be said that reservations are anti-meritian. Merit there is even among the reserved candidates and the small difference, that may be allowed at the stage of initial recruitment is bound to disappear in course of time. These members too will compete with and improve their efficiency along with others.

837. Having said this we must append a note of clarification. In some cases arising under Art. 15, this court has upheld the removal of minimum qualifying marks, in the case of Scheduled Caste/Scheduled Tribe candidates, in the matter of admission to medical courses. For example, in State of M.P. v. Nivedita Jain (1982) 1 SCR 759: AIR 1981 SC 2045) admission to medical course was regulated by an entrance test (called PreMedical Test). For general candidates, the minimum qualifying marks were 50% in the aggregate and 33% in each subject. For Scheduled Caste/ Scheduled Tribe candidates, however, it was 40% and 30% respectively. On finding that Scheduled Caste Scheduled Tribe candidates equal to the number of the seats reserved for them did not qualify on the above standard, the Government did away with the said minimum standard altogether. The Government's action was challenged in this court but was upheld. Since it was a case under Art. 15, Art. 335 had no relevance and was not applied. But in the case of Art. 16, Art. 335 would be relevant and any order on the lines of the order of the Government of M.P. (in Nivedita Jain) could not be permissible, being inconsistent with the efficiency of administration. To

wit, in the matter of appointment of Medical Officers, the Government or the Public Service Commission cannot say that there shall be no minimum qualifying marks for Scheduled Caste/ Scheduled Tribe candidates, while prescribing a minimum for others. It may be permissible for the Government to prescribe a reasonably lower standard for Scheduled Castes/ Scheduled Tribes / Backward Classes - consistent with the requirements of efficiency of administration --- it would not be permissible not to prescribe any such minimum standard at all. While prescribing the lower minimum standard for reserved category, the nature of duties attached to the post and the interest of the general public should also be kept in mind.

838. While on Art. 335, we are of the opinion that there are certain services and positions where either on account of the nature of duties attached to them or the level (in the hierarchy) at which they obtain, merit as explained hereinabove, alone counts. In such situations, it may not be advisable to provide for reservations. For example, technical posts in research and development organisations/departments/Institutions, in specialities and super-specialities in medicine engineering and other such courses in physical sciences and mathematics, In defence services and in the establishments connected therewith. Similarly, in the case of posts at the higher echelons e.g., Professors (in Education), Pilots in Indian Airlines and Air India Scientists and Technicians in nuclear and space application, provision for reservation Would not be advisable.

839. As a matter of fact, the impugned Memorandum dated 13th August, 1990 applies the rule of reservation to "civil posts and services under the Government of India" only, which means that defence forces are excluded from the operation of the rule of reservation though it may yet apply to civil posts in defence services. Be that as it may we are of the opinion that in certain services and in respect of certain posts, application of the rule of' reservation may not be advisable for the reason indicated hereinbefore. Some of them are : (1) Defence Services including all technical posts therein but excluding civil posts. (2) All technical posts in establishments engaged in Research and Development including those connected with atomic energy and space and establishments engaged in production of defence equipment. (3) Teaching posts of Professors - and above, if any. (4) Posts in super-specialities in Medicine, engineering and other scientific and technical subjects. (5) Posts of pilots (and co-pilots) in Indian Airlines and Air India. The list given above is merely illustrative and not exhaustive. It is for the Government of India to consider and specify the service and posts to which the Rule of reservation shall not apply but on that account the implementation of the impugned Office Memorandum dated 13th August 1990 cannot be stayed or withheld.

840. We may point out that the services posts enumerated above, on account of their nature and duties attached, are such as call for highest level of intelligence, skill and excellence. Some of them are second level and third level posts in the ascending order. Hence, they form a category apart. Reservation therein may not be consistent with "efficiency of administration" contemplated by Art. 335."

Faculty Association of AIIMS vs. Union of India & Ors. reported in **2013 (10) JT 526 : 2013 (9) Scale 198 : 2013 (5) Supreme 360 :**

The issue of merit vis a-vis reservation came up for consideration before Supreme Court again in this judgment, for which 5 judges Constitutional Bench (*Altamas Kabir; CJI, Surinder Singh Nijjar J., Ranjan Gogoi J., M.Y.Eqbal J., Vikramajit Sen J.)* delve into the requirement of merit for speciality and super-speciality faculty posts in the All India Institute of Medical Sciences. The relevant excerpt of the judgment, which may throw light to the aspect being considered by this Court in present matter, is being quoted herein below:

> *"2. Although the matter is now before a Bench of five Judges, the terms of reference are not very clear. From what we have been able to gather from the pleadings and the judgment of the Division Bench of the High Court, the question to be considered is whether reservation was inapplicable to specialty and super-specialty faculty posts in the All India Institute of Medical Sciences, hereinafter referred to as "AIIMS". Faced with the decisions of this Court in the case of Indra Sawhney v. Union of India & Ors. [(1992) Supp. (3) SCC 215]; Jagdish Saran & Ors. v. Union of India & Ors. [(1980) 2 SCR 831]; and Dr. Pradeep Jain etc. v. Union of India & Ors. etc. [(1984) 3 SCR 942], wherein reservation in admission to specialty and super-specialty courses was disallowed, the Division Bench of the High Court confined itself to the limited issue, namely, whether reservation policy was inapplicable for making appointments to the entry level faculty post of Assistant Professor and to super specialty posts and also whether the resolutions adopted by AIIMS on 11.1.1983 and 27.5.1994 were liable to be struck down.*
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> *17. Although, the matter has been argued at some length, the main issue raised regarding reservation at the super-specialty level has already been considered in Indra Sawhney's case (supra) by a Nine-Judge Bench of this Court. Having regard to such decision, we are not inclined to take any view other than the view expressed by the Nine-Judge Bench on the issue. Apart from the decisions rendered by this Court in Dr. Jagadish Saran's case (supra) and Dr. Pradeep Jain's case (supra), the issue also fell for considerate in Preeti Srivastava's case (supra) which was also decided by a Bench of Five Judges. While in Dr. Jagadish Saran's case (supra) and in Dr. Pradeep Jain's case (supra) it was categorically held that there could be no compromise with merit at the super specialty stage, the same sentiments were also expressed in Preeti Srivastava's case (supra) as well. In Preeti Srivastava's case (supra), the Constitution Bench had an occasion to consider Regulation 27 of the Post Graduate Institute of Medical Education and Research, Chandigarh Regulations, 1967, whereby 20% of seats in every course of*

study in the Institute was to be reserved for candidates belonging to the Scheduled Castes, Scheduled Tribes or other categories of persons, in accordance with the general rules of the Central Government promulgated from time to time. The Constitution Bench came to the conclusion that Regulation 27 could not have any application at the highest level of super specialty as this would defeat the very object of imparting the best possible training to selected meritorious candidates, who could contribute to the advancement of knowledge in the field of medical research and its applications. Their Lordships ultimately went on to hold that there could not be any type of relaxation at the super specialty level.

18. In paragraph 836 of the judgment in Indra Sawhney's case (supra), it was observed that while the relevance and significance of merit at the stage of initial recruitment cannot be ignored, it cannot also be ignored that the same idea of reservation implies selection of a less meritorious person. It was also observed that at the same time such a price would have to be paid if the constitutional promise of social justice was to be redeemed. However, after making such suggestions, a note of caution was introduced in the very next paragraph in the light of Article 15 of the Constitution. A distinction was, however, made with regard to the provisions of Article 16 and it was held that Article 335 would be relevant and it would not be permissible not to prescribe any minimum standard at all. Of course, the said observation was made in the context of admission to medical colleges and reference was also made to the decision in State of M.P. v. Nivedita Jain [(1981) 4 SCC 296], where admission to medical courses was regulated by an entrance test. It was held that in the matter of appointment of medical officers, the Government or the Public Service Commission would not be entitled to say that there would not be minimum qualifying marks for Scheduled Castes/Scheduled Tribes candidates while prescribing a minimum for others. In the very next paragraph, the Nine-Judge Bench while discussing the provisions of Article 335 also observed that there were certain services and posts where either on account of the nature of duties attached to them or the level in the hierarchy at which they stood, merit alone counts. In such situations, it cannot be advised to provide for reservations. In the paragraph following, the position was made even more clear when Their Lordships observed that they were of the opinion that in certain services in respect of certain posts, application of rule of reservation may not be advisable in regard to various technical posts including posts in super specialty in medicine, engineering and other scientific and technical posts.

19. We cannot take a different view, even though it has been suggested that such an observation was not binding, being obiter in nature. We cannot ascribe to such a view since the very concept of reservation implies mediocrity and we will have to take note of the caution indicated in Indra Sawhney's case. While reiterating the views expressed by the Nine-Judge Bench in Indra Sawhney's case, we dispose of the two Civil Appeals in the light of the said views, which were also expressed in Dr. Jagadish Saran's case, Dr. Pradeep Jain's case, Dr. Preeti Srivastava's case. ***We impress upon the Central and State Governments to take appropriate steps in accordance with the views expressed in Indra Sawhney's case and in this case, as also the other decisions referred to above, keeping in mind the provisions of***

Article 335 of the Constitution.

M. Nagaraj & Others vs. Union of India & Others reported in **2006 (8) SCC 212 : AIR 2007 (SC) 71 :**

In this case, the Constitution (Eighty-Fifth Amendment] Act, 2001 inserting Article 16(4A) of the Constitution retrospectively from 17.6.1995 providing reservation in promotion with consequential seniority was challenged as being unconstitutional and violative of the basic structure. The ground in support of challenge was that by attaching consequential seniority to the accelerated promotion, the impugned amendment violates equality in Article 14 read with Article 16(1). Further contention of the petitioners in that case was that by providing reservation in the matter of promotion with consequential seniority, there is impairment of efficiency.

The Constitutional Bench ***(Comprising Y.K.Sabharwal; C.J.I, K.G.Balakrishnan J., S.H.Kapadia J., C.K.Thakker J., P.K.Balasubramanyan J.)*** upheld the said constitutional amendment and rejected the petition, however while doing so, following observations were made:

"ROLE OF ENABLING PROVISIONS IN THE CONTEXT OF ARTICLE 14:

109. The gravamen of Article 14 is equality of treatment. Article 14 confers a personal right by enacting a prohibition which is absolute. By judicial decisions, the doctrine of classification is read into Article 14. Equality of treatment under Article 14 is an objective test. It is not the test of intention. Therefore, the basic principle underlying Article 14 is that the law must operate equally on all persons under like circumstances. [Emphasis added]. Every discretionary power is not necessarily discriminatory. According to the Constitutional Law of India, by H.M. Seervai, 4th Edn. 546, equality is not violated by mere conferment of discretionary power. It is violated by arbitrary exercise by those on whom it is conferred. This is the theory of 'guided power'. This theory is based on the assumption that in the event of arbitrary exercise by those on whom the power is conferred would be corrected by the Courts. This is the basic principle behind the enabling provisions which are incorporated in Articles 16(4A) and 16(4B). Enabling provisions are permissive in nature. They are enacted to balance equality with positive discrimination. The constitutional law is the law of evolving concepts. Some of them are generic others have to be identified and valued. The enabling provisions deal with the concept, which has to be identified and valued as in the case of access vis-a-vis efficiency which depends on the fact- situation only and not abstract principle of equality in Article 14 as spelt out in detail in Articles 15 and 16. Equality before the law, guaranteed by the first part

of Article 14, is a negative concept while the second part is a positive concept which is enough to validate equalizing measures depending upon the fact-situation.

110. It is important to bear in mind the nature of constitutional amendments. They are curative by nature. Article 16(4) provides for reservation for backward classes in cases of inadequate representation in public employment. Article 16(4) is enacted as a remedy for the past historical discriminations against a social class. The object in enacting the enabling provisions like Articles 16(4), 16(4A) and 16(4B) is that the State is empowered to identify and recognize the compelling interests. If the State has quantifiable data to show backwardness and inadequacy then the State can make reservations in promotions keeping in mind maintenance of efficiency which is held to be a constitutional limitation on the discretion of the State in making reservation as indicated by Article 335. As stated above, the concepts of efficiency, backwardness, inadequacy of representation are required to be identified and measured. That exercise depends on availability of data. That exercise depends on numerous factors. It is for this reason that enabling provisions are required to be made because each competing claim seeks to achieve certain goals. How best one should optimize these conflicting claims can only be done by the administration in the context of local prevailing conditions in public employment. This is amply demonstrated by the various decisions of this Court discussed hereinabove. Therefore, there is a basic difference between 'equality in law' and 'equality in fact' (See: 'Affirmative Action' by William Darity). If Articles 16(4A) and 16(4B) flow from Article 16(4) and if Article 16(4) is an enabling provision then Articles 16(4A) and 16(4B) are also enabling provisions. As long as the boundaries mentioned in Article 16(4), namely, backwardness, inadequacy and efficiency of administration are retained in Articles 16(4A) and 16(4B) as controlling factors, we cannot attribute constitutional invalidity to these enabling provisions. However, when the State fails to identify and implement the controlling factors then excessiveness comes in, which is to be decided on the facts of each case. In a given case, where excessiveness results in reverse discrimination, this Court has to examine individual cases and decide the matter in accordance with law. This is the theory of 'guided power'. We may once again repeat that equality is not violated by mere conferment of power but it is breached by arbitrary exercise of the power conferred.

APPLICATION OF DOCTRINE OF "GUIDED POWER"- ARTICLE 335 :

111. Applying the above tests to the proviso to Article 335 inserted by the Constitution (Eighty-Second Amendment) Act, 2000, we find that the said proviso has a nexus with Articles 16(4A) and 16(4B). Efficiency in administration is held to be a constitutional limitation on the discretion vested in the State to provide for reservation in public employment. Under the proviso to Article 335, it is stated that nothing in Article 335 shall prevent the State to relax qualifying marks or standards of evaluation for reservation in promotion. This proviso is also confined only to members of SCs and STs. This proviso is also

> *conferring discretionary power on the State to relax qualifying marks or standards of evaluation. Therefore, the question before us is - whether the State could be empowered to relax qualifying marks or standards for reservation in matters of promotion. In our view, even after insertion of this proviso, the limitation of overall efficiency in Article 335 is not obliterated. Reason is that "efficiency" is variable factor. It is for the concerned State to decide in a given case, whether the overall efficiency of the system is affected by such relaxation. If the relaxation is so excessive that it ceases to be qualifying marks then certainly in a given case, as in the past, the State is free not to relax such standards. In other cases, the State may evolve a mechanism under which efficiency, equity and justice, all three variables, could be accommodated. Moreover, Article 335 is to be read with Article 46 which provides that the State shall promote with special care the educational and economic interests of the weaker sections of the people and in particular of the scheduled castes and scheduled tribes and shall protect them from social injustice. Therefore, where the State finds compelling interests of backwardness and inadequacy, it may relax the qualifying marks for SCs/STs. These compelling interests however have to be identified by weighty and comparable data.*
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> *112. In conclusion, we reiterate that the object behind the impugned Constitutional amendments is to confer discretion on the State to make reservations for SCs/STs in promotions subject to the circumstances and the constitutional limitations indicated above."*

It appears to us that the various directions and observations made by the Apex Court as noted above are yet to receive attention by the respondents.

We, therefore, by means of this judgment wish to remind and request the UGC which is a statutory body constituted under the University Grants Commission Act, 1956 to examine all aspects referred to in the above judgments of the Apex Court and submit its recommendations to the Ministry of Human Resource Development for its consideration and appropriate decision.

With the above request we rest our hands.

Dated:07.04.2017

RPS