AFR

Court No.-58
Case :- WRIT - A No. - 11039 of 2018
Petitioner :- Vipin Kumar Maurya And 4 ors.
Respondent :- State Of U.P. And 3 Ors.
Counsel for Petitioner :- Agnihotri Kumar Tripathi,Anil Kumar Singh Bishen
Counsel for Respondent :- C.S.C.,Kailash Singh Kushwaha

Connected with
Case :- WRIT - A No. - 28355 of 2017
Petitioner :- Varsha Saini And 9 Others
Respondent :- State Of U.P. And 3 Others
Counsel for Petitioner :- Arvind Kumar Mishra,A.N. Tripathi,Raghwendra Prasad Mishra
Counsel for Respondent :- C.S.C.,Kailash Singh Kushwaha
And
Case :- WRIT - A No. - 45551 of 2017
Petitioner :- Mini Thapa
Respondent :- State Of U.P. And 2 Others
Counsel for Petitioner :- Hanuman Upadhya
Counsel for Respondent :- C.S.C.,Jai Bahadur Singh,Kailash Singh Kushwaha
And
Case :- WRIT - A No. - 11393 of 2018
Petitioner :- Swati Kumari
Respondent :- State Of U.P. And 8 Others
Counsel for Petitioner :- Zia Naz Zaidi
Counsel for Respondent :- C.S.C.,Kailash Singh Kushwaha
And
Case :- WRIT - A No. - 13033 of 2018
Petitioner :- Sandhya
Respondent :- State Of U.P. And 9 Others
Counsel for Petitioner :- Zia Naz Zaidi
Counsel for Respondent :- C.S.C.,Kailash Singh Kushwaha
And
Case :- WRIT - A No. - 45518 of 2017
Petitioner :- Renu Adhikari
Respondent :- State Of U.P. And 2 Others
Counsel for Petitioner :- Hanuman Upadhya
Counsel for Respondent :- C.S.C.,Jai Bahadur Singh,Kailash Singh Kushwaha
And
Case :- WRIT - A No. - 45548 of 2017
Petitioner :- Dipti Kumari
Respondent :- State Of U.P. And 2 Others
Counsel for Petitioner :- Hanuman Upadhya
Counsel for Respondent :- C.S.C.,Jai Bahadur Singh,Kailash Singh Kushwaha

Hon'ble Ashwani Kumar Mishra,J.

1. U.P. Subordinate Service Selection Commission (hereinafter referred to as, 'the Commission') has been established by the State of Uttar Pradesh for recruitment etc. to subordinate services in different departments of the State, pursuant to The U.P. Subordinate Service Selection Commission Act, 2014 (hereinafter referred to as, 'the Act of 2014'), vide Act No. 20 of 2014. A notification, thereafter, was issued on 15.12.2014, exercising powers conferred under section 2 of the Act of 2014; whereby, all appointments in the grade pay between Rs. 1900–Rs. 4600 in different departments of the State were brought within the purview of the Commission. The Commission, consequently, issued Advertisement No. 14 of 2015, initiating recruitment for 1,377 posts of Junior Engineer and other technical posts for various State Departments. Last date for submitting application was notified as 14.10.2015. Procedure for making appointment, qualification and eligibility alongwith reservation for different categories were specified in the advertisement itself. The prospective candidates were required to apply online, by specifying their credentials as well as the category etc.

2. Clause 11 of the advertisement specified that reservation would be admissible to Scheduled Castes, Scheduled Tribes and Other Backward category candidates in accordance with the provisions of the U.P. Public Services (Reservation for Scheduled Caste, Scheduled Tribes and Other Backward Classes) Act, 1994 (hereinafter referred to as 'the Reservation Act of 1994') and the applicable executive instructions. Similarly, horizontal reservation was also provided for specified categories in accordance with the provisions of The U.P. Public Services (Reservation For Physically Handicapped, Dependents of Freedom Fighters and Ex-Servicemen) Act, 1993 (hereinafter referred to as 'the Reservation Act of 1993'). Horizontal reservation for women, with which we are concerned herein, stands specified at 20% in the respective vertical category. Such horizontal reservation has been provided pursuant to a Government Order dated 26.2.1999 as modified vide subsequent Govt. Orders dated 30.8.1999 and

9.1.2007.

3. Horizontal reservation has been restricted to the dependents of freedom fighter/disabled person (only against specified post)/ex-serviceman, and women who are original residents of the State of Uttar Pradesh alone. Clause 14 of the advertisement contains general instructions. Sub-clause (3) thereof provides that candidates, who are not the original residents of the State of Uttar Pradesh, will not be entitled to vertical and horizontal reservations. Clause 14(3) of the advertisement reads as under:

> "14(3) अनुसूचित जति, अनुसूचित जन जाति, अन्य पिछड़ा वर्ग, स्वतंत्रता संग्राम सेनानी के आश्रित/भूतपूर्व सैनिक, विकलांगजन तथा महिला अभ्यर्थियों को, जो उ0प्र0 राज्य के मूल निवासी नहीं है, उन्हें आरक्षण का लाभ अनुमन्य नहीं है। ऐसे अभ्यर्थी सामान्य श्रेणी के माने जाएंगे। महिला अभ्यर्थियों के मामले में पिता पक्ष से निर्गत प्रमाण पत्र ही मान्य होगा।"

4. Sub-clause (14) of clause 14 of the advertisement also reiterates the above stipulation while clarifying that in case of women candidate, the certificate of original resident of State would be acceptable from paternal side. Sub-clause(14) of clause 14 of the advertisement is reproduced herein below:

> "14(14): अनुसूचित जाति, अनुसूचित जनजाति, अन्य पिछड़ा वर्ग, स्वतंत्रता संग्राम सेनानी के आश्रित, महिला अभ्यर्थियों, भूतपूर्व सैनिकों तथा विकलांगजन, को जो उत्तर प्रदेश के मूल निवासी नहीं है, उन्हें आरक्षण का लाभ अनुमन्य नहीं है, ऐसे अभ्यर्थी अनारक्षित (सामान्य) श्रेणी के माने जायेंगे। महिला अभ्यर्थिनियों के मामले में पिता पक्ष से निर्गत प्रमाण–पत्र ही मान्य होगा।"

5. The advertisement further provides that applicants would be allowed to appear in the written examination provisionally, on the basis of information feeded in the online application form and if it is found, at the time of scrutiny, that applicant was not eligible in terms of the advertisement for appointment to the post, then his/her candidature would be rejected and where recommendation has already been made to the Department concerned for grant of appointment to the candidate concerned, the same shall be withdrawn. Clause 15(9) of the advertisement which provides the above is thus reproduced hereinunder:-

> "15(9): आयोग अभ्यर्थियों को उनके द्वारा दी गयी सूचनाओं के आधार पर लिखित परीक्षा में औपबंधिक प्रवेश देगा, किन्तु बाद में किसी भी स्तर पर यह पाये जाने पर कि अभ्यर्थी अर्ह नहीं था अथवा उसका आवेदन प्रारम्भिक स्तर पर स्वीकार किए जाने योग्य नहीं था, उक्त स्थिति में अभ्यर्थन निरस्त कर दिया जाएगा और यदि नियुक्ति हेतु संस्तुति भी कर दिया गया हो तो आयोग की संस्तुति वापस ले ली जाएगी।"

6. The Commission proceeded with making of recruitment to the advertised posts and ultimately, a select list was published on 25.05.2016. Orders of appointment were also issued to the selected candidates by the Irrigation Department of the State of U.P. on 19.08.2016 and the selected candidates were allowed to join as Junior Engineers in different regions/circles/offices. Appointment order, issued under the signatures of the Chief Engineer (Project and Employee) of the Irrigation Department dated 19.08.2016, is on record.

7. It transpires that certain complaints were received by the Commission regarding inaccurate compliance of horizontal reservation in the recruitment in question, and when no decision was taken, the matter was taken to the Lucknow Bench of this Court vide Writ Petition (SS) No. 29001 of 2017. Discrepancies were alleged to have been caused in the recruitment, while applying reservation inasmuch as ineligible candidates were appointed against posts earmarked for women reservation. The writ petition came to be disposed of in view of the statement made by the learned counsel for the Commission that as soon as the Commission is constituted (at the relevant point of time the Chairman and four members of the Commission had already resigned), a decision would be taken in respect of grievance raised, by passing a reasoned and speaking order, within six weeks. It is pursuant to such undertaking given that the Commission has proceeded to modify the result previously published on 25.05.2016, whereby 107 candidates, who had been earlier selected, were removed from the select list and 107 new candidates figured in the select list published on 28.04.2018. It is this modified select list, published on 28.04.2018, which is under challenge in this petition. Petitioners are those candidates who had already been appointed under the earlier select list but are out of the select list now in the revised result so

published. Prayer is made for issuing a direction to the respondents to allow them to work pursuant to the appointment already offered to them and to quash the revised select list.

8. The modified select list is challenged, primarily, on the ground that no notice or opportunity has been offered to the affected persons; that none of the selected candidates were made a party to the litigation before the Lucknow Bench, and therefore, the observation of this Court for the Commission to revisit the issue ought not to be implemented to the detriment of selected candidate; petitioners have not indulged in any misrepresentation or fraud and therefore appointments already offered to them could not be revoked; the decision taken by the Commission to revise its result after nearly two years, in the facts and circumstances, is wholly arbitrary. Challenge to select list is also made on the ground that benefit of women reservation cannot be confined only to such female candidates who are the original residents of the State of Uttar Pradesh.

9. A counter affidavit has been filed on behalf of the Commission and its officials contending that it had received requisition from eight different Departments for appointment against 1,377 different posts. Out of these 1,377 posts, about 757 posts were of Junior Engineer (Civil), 18 posts were of Junior Engineer (Mechanical and Electrical), 59 posts were of Tracer and 543 technical posts were in the Transport Department. The requisition of Transport Department was subsequently withdrawn and therefore, recruitment was finalized against 834 posts only. Out of these 834 posts, 757 posts were of Junior Engineer and appointments were made by applying vertical and horizontal reservation. The posts were appropriated to different categories i.e. 131 appointments were to be made from Scheduled Castes candidates, 63 from Scheduled Tribes candidates, 155 from OBC candidates and 408 were from unreserved category. 20% horizontal reservation provided to women required recruitment of 151 women candidate, while, 21 posts were earmarked for physically handicapped persons; 37 for ex-servicemen and 15 posts for dependants of freedom fighters.

10. According to the Commission, due to inadvertent error, the requisite posts meant for female candidates under the horizontal reservation quota, were left unfilled and erroneously filled with the appointment of male candidates. The Commission, therefore, decided to rectify its result. Against 151 posts, reserved for women candidates in horizontal reservation category, only 75 candidates were recommended for appointment and that, 79 posts meant for women reservation were still left vacant. The Commission, although realized these discrepancies, but as the Chairman as well as 4 out of 5 Members were not available having resigned, the Commission could not take a decision. It was only on 22.01.2018 that the Chairman and Members were appointed and the Commission became functional. That a meeting was convened on 21.01.2018, wherein a decision was taken to withdraw the recommendation for appointment made in favour of male candidates, who were appointed against the posts reserved for women under the horizontal reservation and to appoint women candidates who were entitled to such appointment in law.

11. These writ petitions thus question the implementation of horizontal reservation in the recruitment. Details of all such connected petitions have been given in paragraph no.3(h) of the counter affidavit filed by the Commission in the leading writ petition no.11039 of 2018.

12. Another facet of challenge in these petitions relate to legality and *virus* of clause (v) of the Government Order dated 09.01.2007, which restricts benefit of horizontal reservation to only those women candidates who are original residents of the State of Uttar Pradesh. The challenge to the aforesaid condition in the Government Order is laid by relying upon Article 16(2) of the Constitution of India, which makes it impermissible to deny public appointments on the ground of place of birth and residence, or any of them. It is also contended that in the constitutional scheme, any law, relating to grant of reservation on account of residence could be made only by the Parliament by virtue of Article 16(3) of the Constitution of India and that Clause (4) of the Govt. Order dated 9.1.2007 is

wholly without jurisdiction.

13. 107 previously selected candidates, who have gone out of select list, on account of impugned revised list, can thus be placed in two categories,i.e.,

(i) Women candidates who, although were granted benefit of women reservation in the previously selected list, but, as they were not the original residents of the State of Uttar Pradesh, have been denied consideration in the revised list in the horizontal reservation meant for women; and

(ii) Those male candidates who came to be appointed against the vacancies earmarked, otherwise, for women candidates in the horizontal reservation quota.

14. It is these two categories of persons who are before this Court in the present bunch of petitions, questioning the revised select list published by the Commission on 28.04.2018.

15. On the basis of the pleadings, exchanged between the parties, following issues arise for consideration in the present bunch of petitions:-

(i) Whether clause (4) of the Government Order dated 9.1.2007 is *ultra vires* Articles 16(2) & (3) of the Constitution of India?

(ii) Whether women candidates selected under horizontal reservation for women from other States, having applied pursuant to the advertisement, which clearly specifies requirement of women candidate to be the original residents of State of Uttar Pradesh for grant of benefit of horizontal reservation, could now be permitted to assail the policy contained in Government Order dated 09.01.2007 as well as the conditions contained in the

advertisement, in that regard?

(iii) Whether the Commission could issue a revised select list, excluding previously selected candidates, after expiry of nearly two years, particularly when there is no allegation of misrepresentation or fraud attributed to them?

16. Reservation for women was introduced in the State of Uttar Pradesh pursuant to a Government Order issued on 26.2.1999. The Government Order conveyed the decision taken by the State of Uttar Pradesh to grant 20% reservation to women in public employment by direct recruitment. This reservation was to be in the category of horizontal reservation and the selected women would be adjusted to the category to which she otherwise belongs. In the absence of requisite women candidates available, the post could otherwise be filled by a male candidate. The Government Order dated 26.2.1999 is reproduced hereinafter:-

"विषय– राज्याधीन लोक सेवाओं और पदों पर सीधी भर्ती के प्रक्रम पर महिलाओं के लिए आरक्षण।"

महोदय,

मुझे यह कहने का निदेश हुआ है कि निम्नलिखित शर्तों एवं उपबन्धों के अधीन राज्याधीन लोक सेवाओं और पदों पर सीधी भर्ती के प्रक्रम पर महिलाओं के लिए 20 प्रतिशत आरक्षण प्रदान करने का शासन द्वारा निर्णय लिया गया है :–

1– आरक्षण राज्याधीन लोक सेवाओं और पदों पर केवल सीधी भर्ती के प्रक्रम पर होगा। पदोन्नति के पदों पर नहीं होगा।

2– आरक्षण हारजेन्टल प्रकृति का होगा अर्थात किसी राज्याधीन लोक सेवा और पद पर महिला आरक्षण के अधीन चयनित महिला जिस श्रेणी की होगी उसे उस श्रेणी के प्रति समायोजित किया जायेगा।

3– यदि कोई महिला, किसी राज्याधीन लोक सेवा और पद पर मेरिट के आधार पर चयनित होती है तो उसकी गणना उस पद पर महिलाओं के लिए आरक्षित रिक्ति के प्रति की जावेगी।

4– राज्याधीन लोक सेवाओं पर पदों में सीधी भर्ती के लिए किसी चयन में महिलाओं के लिए आरक्षित पद यदि महिला अभ्यर्थियों के उपलब्ध न होने के कारण नहीं भरा जा सके तो वह पद उपयुक्त पुरुष अभ्यर्थियों से भरा जावेगा व भविष्य के लिए अग्रेनीत नहीं किया जावेगा।

5– राज्याधीन लोक सेवाओं और पदों पर सीधी भर्ती के लिए महिलाओं के

सम्बन्ध में वांछित सभी अर्हतायें, पद सम्बन्धी सुसंगत सेवा नियमावली में उल्लिखित पूर्ववत अर्हताओं के अनुरूप रहेगी व उनमें इस शासनादेश से कोई परिवर्तन नहीं होगा।

6– यह आदेश तत्काल प्रभाव से लागू होंगे लेकिन जिन रिक्तियों को भरने के लिए विज्ञापन जारी किये जा चुके है या जिन रिक्तियों के लिए चयन की प्रक्रिया प्रारम्भ हो चुकी हो, उन पर यह आदेश लागू नहीं होंगे। चयन की प्रक्रिया प्रारम्भ होने का आशय भर्ती का आधार केवल लिखित परीक्षा या साक्षात्कार होने की स्थिति में ऐसी परीक्षा/साक्षात्कार प्रारम्भ हो जाने से है। जिन पदों पर भर्ती का आधार लिखित परीक्षा और साक्षात्कार दोनों है उनके सम्बन्ध में चयन प्रक्रिया प्रारम्भ होने का आशय लिखित परीक्षा प्रारम्भ हो जाने से है।

7– लोक सेवाओं एवं पदों का तात्पर्य उ0 प्र0 लोक सेवा (अनुसूचित जातियों, अनुसूचित जनजातियों और अन्य पिछड़े वर्ग के लिए आरक्षण) अधिनियम, 1994 में परिभाषित ''लोक सेवाओं और पदों'' से है।

कृपया शासन के उपरोक्त आदेशों का अनुपालन सुनिश्चित करने का कष्ट करें। यह भी अनुरोध है कि शासनादेश से अपने अधीनस्थ सभी अधिकारियों को भी अवगत करा देवें।''

17. The Government Order dated 26.2.1999 has been amended vide subsequent Government Orders dated 30.8.1999 and 9.1.2007. Clause 4 of the Govt. Order dated 9.1.2007 provided that reservation to women would be restricted to the original residents of the State of Uttar Pradesh. The Govt. Order dated 9.1.2007 is also reproduced hereinafter:-

"विषय– राज्याधीन लोक सवाओं और पदों पर सीधी भर्ती के प्रक्रम पर महिलाओं के लिए आरक्षण"

महोदय,

उपर्युक्त विषयक समसंख्यक शासनादेश दिनांक 26 फरवरी, 1999 तथा 30 अगस्त 1999 का कृपया संदर्भ ग्रहण करें।

2. उपर्युक्त परिप्रेक्ष्य में मुझे आपसे यह कहने का निदेश हुआ है कि उक्त शासनादेशों द्वारा राज्याधीन लोक सेवाओं और पदों पर सीधी भर्ती के प्रक्रम पर महिलाओं के लिए 20 प्रतिशत आरक्षण प्रदान किये जाने के संबंध में निम्नलिखित निर्देश प्रसारित किये गये थे–

(1) आरक्षण राज्याधीन लोक सेवाओं और पदों पर केवल सीधी भर्ती के प्रक्रम पर होगा। पदोन्नति के पदों पर नहीं होगा।

(2) आरक्षण हारिजेन्टल प्रकृति का होगा, अर्थात् किसी राज्याधीन लोक सेवा और पद पर महिला आरक्षण के अधीन चयनित महिला जिस श्रेणी की होगी उसे उसी श्रेणी के प्रति समायोजित किया जायेगा।

(3) यदि कोई महिला, किसी राज्याधीन लोक सेवा और पद पर मेरिट के आधार पर चयनित होती है तो उसकी गणना उस पद पर महिलाओं के लिए

आरक्षित रिक्ति के प्रति की जायेगी।

(4) राज्याधीन लोक सेवाओं पर पदों में सीधी भर्ती के लिए किसी चयन में महिलाओं के लिए आरक्षित पद यदि महिला अभ्यर्थियों के उपलब्ध न होने के कारण नहीं भरा जा सके तो वह पद उपयुक्त पुरुष अभ्यर्थियों से भरा जायेगा व भविष्य के लिए अग्रनीत नही किया जायेगा।

(5) राज्याधीन लोक सेवाओं और पदों पर सीधी भर्ती के लिए महिलाओं के सम्बन्ध में वांछित सभी अर्हतायें पद सम्बन्धी सुसंगत नियमावली में उल्लिखित पूर्ववत् अर्हताओं के अनुरूप रहेगी व उनमें इस शासनादेश से कोई परिवर्तन नहीं होगा।

(6) यह आदेश तत्काल प्रभाव से लागू होंगे, लेकिन जिन रिक्तियों को भरने के लिए विज्ञापन जारी किये जा चुके है, या जिन रिक्तियों के लिए चयन की प्रक्रिया प्रारम्भ हो चुकी हो, उन पर यह आदेश लागू नहीं होंगे। चयन की प्रक्रिया प्रारम्भ होने का आशय भर्ती का आधार केवल लिखित परीक्षा या साक्षात्कार होने की स्थिति में ऐसी परीक्षा/साक्षात्कार प्रारम्भ हो जाने से है। जिन पदों पर भर्ती का आधार लिखित परीक्षा और साक्षात्कार दोनों है उनके सम्बन्ध में चयन प्रक्रिया प्रारम्भ होने का आशय लिखित परीक्षा प्रारम्भ हो जाने से है।

(7) लोक सेवाओं एवं पदों का तात्पर्य उ0प्र0 लोक सेवा (अनुसूचित जातियों, अनुसूचित जनजातियों और अन्य पिछड़े वर्ग के लिए आरक्षण) अधिनियम, 1994 में परिभाषित ''लोक सेवाओं और पदों'' से है।

3. शासन के संज्ञान में यह तथ्य आया है कि उपर्युक्त निर्देशों का समुचित अनुपालन नहीं किया जा रहा है। अतः आपस अनुरोध है कि कृपया उक्त शासनादेशों की व्यवस्था का सभी स्तरों पर कड़ाई से अनुपालन सुनिश्चित कराने का कष्ट करें।

4. यह भी स्पष्ट किया जाता है कि राज्याधीन लोक सेवाओं और पदों पर सीधी भर्ती के प्रक्रम पर महिलाओं को अनुमन्य उपरोक्त आरक्षण केवल उत्तर प्रदेश की मूल निवासी महिलाओं को ही अनुमन्य है।''

18. During the course of hearing, an argument was raised by Sri Ashok Khare, learned Senior Counsel for the petitioners that the decision contained in the Govt. Order dated 9.1.2007 is actually not backed by any decision of the State Government in that regard inasmuch as the Cabinet has not taken any such decision. Having noticed such argument, a direction was issued on 27.7.2018 requiring the Additional Advocate General of the State to produce original records relating to issuance of Govt. Order dated 9.1.2007. The original records have been produced and have been examined. A decision has infact been taken at the competent level, which is duly signed by the then Chief Minister of the State, and only thereafter the Govt. Order dated 9.1.2007 has been issued. Learned Senior Counsel for the petitioner was also allowed to peruse the records and the

argument, that the Govt. Order is not based upon any decision taken at competent level, has not been pressed any further. While noticing the events in that regard and the fact that issue has not been pressed after the records have been produced, the plea is consigned.

19. The Government Order dated 9.1.2007 providing 20% horizontal reservation to women derives its origin from Article 15(3) of the Constitution of India. Article 15 of the Constitution of India is consequently reproduced hereinafter:-

> "15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth
>
> (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them
>
> (2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to
>
> (a) access to shops, public restaurants, hotels and palaces of public entertainment; or
>
> (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public
>
> (3) Nothing in this article shall prevent the State from making any special provision for women and children
>
> (4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."

20. The issue as to whether reservation for women in public employment would be valid in our constitutional scheme has been examined by the Apex Court in Govt. of A.P. vs. P. B. Vijaykumar, (1995) 4 SCC 520. Para 5 to 9 & 11 of the judgment throw light on the issue in hand and are reproduced hereinafter:-

> "5. The respondent before us has submitted that if Article 16(2) is read with Article 16(4) it is clear that 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 is expressly

permitted. But there is no such express provision in relation to reservation of appointments or posts in favour of women under Article 16. Therefore, the respondent contends that the State cannot make any reservation in favour of women in relation to appointments or posts under the State. According to the respondent this would amount to discrimination on the ground of sex in public employment to posts under the State and would violate Article 16(2).

6. This argument ignores Article 15(3). The interrelation between Articles 14, 15 and 16 has been considered in a number of cases by this Court. Article 15 deals with every kind of State action in relation to the citizens of this country. Every sphere of activity of the State is controlled by Article 15(1). There is, therefore, no reason to exclude from the ambit of Article 15(1) employment under the State. At the same time Article 15(3) permits special provisions for women. Both Articles 15(1) and 15(3) go together. In addition to Article 15(1), Article 16(1), however, places certain additional prohibitions in respect of a specific area of State activity viz. employment under the State. These are in addition to the grounds of prohibition enumerated under Article 15(1) which are also included under Article 16(2). There are, however, certain specific provisions in connection with employment under the State under Article 16. Article 16(3) permits the State to prescribe a requirement of residence within the State or Union Territory by parliamentary legislation; while Article 16(4) permits reservation of posts in favour of backward classes. Article 16(5) permits a law which may require a person to profess a particular religion or may require him to belong to a particular religious denomination, if he is the incumbent of an office in connection with the affairs of the religious or denominational institution. Therefore, the prohibition against discrimination on the grounds set out in Article 16(2) in respect of any employment or office under the State is qualified by clauses (3), (4) and (5) of Article 16. Therefore, in dealing with employment under the State, it has to bear in mind both Articles 15 and 16 — the former being a more general provision and the latter, a more specific provision. Since Article 16 does not touch upon any special provision for women being made by the State, it cannot in any manner derogate from the power conferred upon the State in this connection under Article 15(3). This power conferred by Article 15(3) is wide enough to cover the entire range of State activity including employment under the State.

7. The insertion of clause (3) of Article 15 in relation to women is a recognition of the fact that for centuries, women of this country have been socially and economically handicapped. As a result, they are unable to participate in the socio-economic activities of the nation on a footing of equality. It is in order to eliminate this socio-economic backwardness of women and to empower them in a manner that would bring about effective

equality between men and women that Article 15(3) is placed in Article 15. Its object is to strengthen and improve the status of women. An important limb of this concept of gender equality is creating job opportunities for women. To say that under Article 15(3), job opportunities for women cannot be created would be to cut at the very root of the underlying inspiration behind this article. Making special provisions for women in respect of employment or posts under the State is an integral part of Article 15(3). This power conferred under Article 15(3), is not whittled down in any manner by Article 16.

8. What then is meant by "any special provision for women" in Article 15(3)? This "special provision", which the State may make to improve women's participation in all activities under the supervision and control of the State can be in the form of either affirmative action or reservation. It is interesting to note that the same phraseology finds a place in Article 15(4) which deals with any special provision for the advancement of any socially or educationally backward class of citizens or Scheduled Castes or Scheduled Tribes. Article 15 as originally enacted did not contain Article 15(4). It was inserted by the Constitution First Amendment Act, 1951 as a result of the decision in the case of State of Madras v.Champakam Dorairajan [AIR 1951 SC 226 : 1951 SCR 525] setting aside reservation of seats in educational institutions on the basis of caste and community. This Court observed that the Government's order was violative of Article 15 or Article 29(2). It said:

"Seeing, however, that clause (4) was inserted in Article 16, the omission of such an express provision from Article 29 cannot but be regarded as significant."

The object of the First Amendment was to bring Articles 15 and 29 in line with Article 16(4). After the introduction of Article 15(4), reservation of seats in educational institutions has been upheld in the case of M.R. Balaji v. State of Mysore[1963 Supp 1 SCR 439 : AIR 1963 SC 649] and a number of other cases which need not be referred to here. Under Article 15(4) orders reserving seats for Scheduled Castes, Scheduled Tribes and Backward Classes in Engineering, Medical and other technical colleges, have been upheld. Under Article 15(4), therefore, reservations are permissible for the advancement of any backward class of citizens or of Scheduled Castes or Scheduled Tribes. Since Article 15(3) contains an identical special provision for women, Article 15(3) would also include the power to make reservations for women. In fact, in the case of Indra Sawhney v. Union of India [1992 Supp (3) SCC 217] this Court (in para 846) rejected the contention that Article 15(4) which deals with a special provision, envisages programmes of positive action while Article 16(4) is a provision warranting programmes of positive discrimination. This Court observed: (SCC pp. 755-56)

"We are afraid we may not be able to fit these provisions into this kind of compartmentalisation in the context and scheme of our constitutional provisions. By now, it is well settled that reservations in educational institutions and other walks of life can be provided under Article 15(4) just as reservations can be provided in services under Article 16(4). If so, it would not be correct to confine Article 15(4) to programmes of positive action alone. Article 15(4) is wider than Article 16(4) inasmuch as several kinds of positive action programmes can also be evolved and implemented thereunder (in addition to reservations) to improve the conditions of SEBCs, Scheduled Castes and Scheduled Tribes, whereas Article 16(4) speaks only of one type of remedial measure, namely, reservation of appointments/posts."

This Court has, therefore, clearly considered the scope of Article 15(4) as wider than Article 16(4) covering within it several kinds of positive action programmes in addition to reservations. It has, however, added a word of caution by reiterating M.R. Balaji [1963 Supp 1 SCR 439 : AIR 1963 SC 649] to the effect that a special provision contemplated by Article 15(4) like reservation of posts and appointments contemplated by Article 16(4), must be within reasonable limits. These limits of reservation have been broadly fixed at 50% at the maximum. The same reasoning would apply to Article 15(3) which is worded similarly.

9. In the light of these constitutional provisions, if we look at Rule 22-A(2) it is apparent that the rule does make certain special provisions for women as contemplated under Article 15(3). Rule 22-A(2) provides for preference being given to women to the extent of 30% of the posts, other things being equal. This is clearly not a reservation for women in the normal sense of the term. Reservation normally implies a separate quota which is reserved for a special category of persons. Within that category appointments to the reserved posts may be made in the order of merit. Nevertheless, the category for whose benefit a reservation is provided, is not required to compete on equal terms with the open category. Their selection and appointment to reserved posts is independently on their inter se merit and not as compared with the merit of candidates in the open category. The very purpose of reservation is to protect this weak category against competition from the open category candidates. In the case of Indra Sawhney [1992 Supp (3) SCC 217] while dealing with reservations, this Court has observed: (SCC p. 751, para 836)

"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."

These remarks are qualified by observing that efficiency,

> competence and merit are not synonymous and that it is undeniable that nature has endowed merit upon members of backward classes as much as it has endowed upon members of other classes. What is required is an opportunity to prove it. It is precisely a lack of opportunity which has led to social backwardness, not merely amongst what are commonly considered as the backward classes, but also amongst women. Reservation, therefore, is one of the constitutionally recognised methods of overcoming this type of backwardness. Such reservation is permissible under Article 15(3).
>
> 11. We do not, however, find any reason to hold that this rule is not within the ambit of Article 15(3), nor do we find it in any manner violative of Article 16(2) or 16(4) which have to be read harmoniously with Articles 15(1) and 15(3). Both reservation and affirmative action are permissible under Article 15(3) in connection with employment or posts under the State. Both Articles 15 and 16 are designed for the same purpose of creating an egalitarian society. As Thommen, J. has observed in Indra Sawhney case [1992 Supp (3) SCC 217] (although his judgment is a minority judgment), "Equality is one of the magnificent cornerstones of Indian democracy". We have, however, yet to turn that corner. For that purpose it is necessary that Article 15(3) be read harmoniously with Article 16 to achieve the purpose for which these articles have been framed."

Subsequently in Union of India and others vs. K. P. Prabhakaran, (1997) 11 SCC 638, the Apex Court has endorsed the earlier view taken in P. B. Vijay Kumar's case (supra) in para 2 of the judgment, which is reproduced hereinafter:-

> "2. The learned counsel for the appellants has invited our attention to the recent decision of this Court in Govt. of A.P. v.P.B. Vijayakumar [(1995) 4 SCC 520 : 1995 SCC (L&S) 1056 : (1995) 30 ATC 576] . In that case the question regarding validity of Rule 22-A(2) of the A.P. State Subordinate Service Rules came up for consideration. The said provision provided for reservation to the extent of 30 per cent for women in the matter of direct recruitment to the posts governed by the said rules. The Andhra Pradesh High Court had declared the said rule to be invalid on the view that Article 15(3) was not applicable and the rule was violative of Articles 14 and 16 of the Constitution. The said view of the High Court has been reversed by this Court. It has been held that Article 15 deals with every kind of State action in relation to the citizens of this country and that every sphere of activity of the State is controlled by Article 15(1) and, therefore, there was no reason to exclude from the ambit of Article 15(1) employment under the State. Since Articles 15(1) and 15(3) go together, the protection of Article 15(3) would be applicable to employment

> under the State falling under Articles 16(1) and (2) of the Constitution. In view of the above-referred judgment of this Court in Govt. of A.P. v. P.B. Vijayakumar [(1995) 4 SCC 520 : 1995 SCC (L&S) 1056 : (1995) 30 ATC 576] the impugned judgment of the High Court holding that Article 15(3) has no application in matters relating to employment under the State falling under Articles 16(1) and (2) cannot be upheld and has to be set aside."

In Vijay Laxmi vs. Punjab University and others, (2003) 8 SCC 440 also the classification between male and female for certain posts has been found to be valid.

21. While emphasizing that State is empowered to take affirmative action and make special laws in favour of women, the Apex Court has observed that Article 15(3) must be interpreted liberally and given its full play. Reservation for women in matters of public employment has been reiterated in para 180 in Independent Thought vs. Union of India and others, (2017) 10 SCC 800. In view of the authoritative pronouncement of law by the Apex Court, as noted hereinabove, there can be no issue on the proposition that State has the right to make law providing reservation for women in public employment and the Govt. Order, in that regard, would be valid. The policy statement contained in the Govt. Orders dated 26.2.1999 and 9.1.2007 would otherwise qualify to be law in terms of Article 13 of the Constitution of India. The issue, however, that arises for consideration in the facts and circumstances of the present case is whether the State of U.P. is empowered to make a law providing reservation for such women candidates who are original residents of the State of U.P., alone?

22. Article 16 of the Constitution of India provides for equality of opportunity in matters of public employment and is reproduced hereinafter:-

> "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 or, 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 favor of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State
>
> (5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination."

23. Sri A. N. Tripathi and Ashok Khare, learned Senior Counsels for the petitioners in this bunch of writ petitions have essentially contended that restriction on account of place of birth, residence, or any of them, in the matter relating to employment or appointment to any office under the State would be hit by Article 16(2) of the Constitution of India and would otherwise be beyond the legislative competence of the State of Uttar Pradesh by virtue of Article 16(3) of the Constitution which confers such jurisdiction only upon the Parliament. The argument is that the condition in the Govt. Order as also in the advertisement for grant of reservation to women who are the original residents of the State of Uttar Pradesh would be covered in the express "place of birth, residence, or any of them" and would be unconstitutional. Clause 4 of the Govt. Order dated 9.1.2007, which introduces such a construction, would equally be unconstitutional. A declaration, therefore, has been sought that clause 4 of the Govt. Order dated 9.1.2007 be declared *ultra vires*. Reliance has been placed upon the judgment of the Apex Court in Kailash Chand Sharma vs. State of Rajasthan, AIR 2002 (SC) 2877.

24. The argument is countered by Sri Manish Goel, learned Additional

Advocate General for the State by contending that requirement of original resident of State is akin to the concept of domicile, which is separate and distinct from the concept of place of birth, residence or any of them, occurring in Article 16 of the Constitution of India. Learned counsel further submits that the requirement of domicile of a particular State as being essential for grant of reservation in educational institutions has been affirmed by the Apex Court in D. P. Joshi vs. State of Madhya Bharat, AIR 1955 SC 334 and reiterated by the Constitution Bench in Saurabh Chaudri and others vs. Union of India, AIR 2004 SC 361 and thus the concept approved of while interpreting Article 15 of the Constitution of India cannot be treated as being inconsistent with the provisions contained in Article 16 of the Constitution of India. It is also argued that in view of the subsequent decision of Larger Benches, including Constitution Benches, the law laid down in Kailash Chand Sharma (supra) would have to be treated as not laying down a good law on the subject. Reliance is placed upon a decision of the Apex Court in Jai Kaur v. Sher Singh, AIR 1960 SC 1118, wherein following observations have been made:-

> ".....It is true that they did not say in so many words that these cases were wrongly decided; but when a Full Bench decides a question in a particular way every previous decision which had answered the same question in a different way cannot but be held to have been wrongly decided. ....."

25. Sri Goel also relies upon the averments contained in para 6 of the counter affidavit filed in Writ Petition No.28355 of 2017 to contend that women are grossly under represented in public employment in State of Uttar Pradesh and their rate of literacy is also extremely low. Justification is sought to be derived for restricting reservation for women to original residents of the State of Uttar Pradesh, on the basis of statistics disclosed in para 6, which is extracted hereinafter:-

> "6. That according to 1991 Census the total population of State of U.P. was 13.91 crores, out of which 53.2 percent was male population and 46.8 percent female population. Out of the total population, 29.31 percent were employed. Among the employed persons 49.31 percent were of male category and only 7.45 percent were of female category. Similarly, literacy rate of

> State of U.P. was 41.60 percent out of which 55.73 percent of men were literate and only 25.31 percent of women were literate. In this manner the literacy rate among the women was very low; and similarly, the percentage of employed women was also very low vis-a-vis their population."

26. Before proceeding to deal with respective submissions advanced at the bar on the subject, it would be of necessity to refer to the previous judgments on the relevant subject. The judgment in Kailash Chand Sharma (supra) arose out of a Full Bench judgment of the Rajasthan High Court in Kailash Chand Sharma vs. State of Rajasthan and others. The Full Bench of Rajasthan High Court had followed the previous Full Bench judgment in Deepak Kumar Suthar vs. State of Rajasthan reported in (1999) 2 RAJLR 692. The judgment of the Rajasthan High Court was with reference to a circular issued by the Department of Rural Development and Panchayati Raj dated 10.6.1998, which provided for the procedure to be followed for appointment to the vacant post of teachers during the year 1998-99 by way of direct recruitment. The circular provided for grant of 10 bonus marks to candidates who were domiciles of Rajasthan; 10 marks for residents of the same district; and 5 marks for the residents of rural area of the district. These marks were over and above the weightage to be provided for secondary examination, senior secondary examination and training qualification. Source of power for issuing such circular was traced to rule 273 of the Rajasthan Panchayati Raj Rules, 1996. The circular was assailed on the ground that awarding of bonus marks for the residents of the district concerned is constitutionally invalid on the touchstone of Article 14 read with Article 16 of the Constitution of India. The Full Bench of Rajasthan High Court in Deepak Kumar Surthar and others Vs. State of Rajasthan and others, 2000 (2) SCT171(RH), examined the issue with reference to earlier judgment of the High Court and also the Apex Court. Reference to paragraphs 19 to 25 of the judgment would be relevant for the present controversy and, therefore the same are extracted hereinafter:-

> "19. The Constitution Bench of the Hon'ble Supreme Court in B. Venkataramana v. State of Madras, MANU/SC/0080/1951MANU /SC/0080/1951 : AIR 1951 SC

229, struck down the part of the Government Order for making reservation of posts not only for scheduled castes and scheduled tribes candidates but also for other communities, viz., Muslims, Christians and Non-Hindus holding that such a reservation was repugnant to the provisions of Article 16 of the Constitution. The Hon'ble Apex Court held that it would discriminate against the communities other than those for whom reservation had been provided and no citizen could be held ineligible or surpassed on such ground.

20. A Constitution Bench of the Hon'ble Supreme Court in General Manager, Southern Railway v. Rangachari, MANU/SC/0388/ 1961MANU/SC/0388/1961 : AIR 1962 SC 36, examined the provisions of Article 16 of the Constitution and held that the equal treatment, as provided under Clauses (1) and (2) is mandatory in every case except those covered by Clause (4) or other provisions of the Constitution as Clause (1) or (2) of Article 16 does not prohibit the prescription of reasonable rules for selection to any employment or appointment to any office. The only requirement is that it should provide for equal treatment to all the citizens and must be consistent with the doctrine of equality of opportunity.

21. Again, a Constitution Bench of the Hon'ble Supreme Court in Triloki Nath v. State of J & K, MANU/SC/0420/ 1968MANU/SC/0420/1968 : AIR 1969 SC 1, has categorically held that the expression "backward classes" is not used as synonymous with backward communities. The expression "Class" in its ordinary connotation, may mean a homogeneous section of people grouped together because of certain likeness or common trades (traits ?) or who are identifiable by some common attribute such as status, rank, occupation, residence in a locality, race, religion or alike. But to meet the requirement of Clause (4) of Article 16 in determining whether a section forms a class, a test solely based on caste or place of birth or residence cannot be adopted for the reason that it would directly offend the Constitution. The Court observed as under at page 3:-

"The members of the entire caste or community may, in a social, economic and educational scale of values at a given time, be backward and may on that account be treated as a backward class, but that is not because they are members of a caste or community but because they form a class."

22. The Hon'ble Apex Court further held that a policy decision must be based on certain data or material and a mere injunction to the authority concerned to make appointment to a public post, keeping in view the policy of "adequate representation of such elements as were not adequately represented in the service" is not a provision making reference of appointment or post in favour of backward class and, thus, is impermissible as such preference may be made only in favour of backwardness of certain classes. The Court further held as under:-

"When the State proceeds not to make reservation in favour of any backward class but distributes the total number of posts or appointments or the basis of community or place of residence, no reservation permitted by Clause (4) of Article 16 can be said to have been made. In fact, the State Policy.... was a policy not of reservation of some appointments or posts: it was a scheme of distribution of all the post community-wise. Distribution of appointment or promotions made in implementation of that State Policy is contrary to the Constitutional guarantee under Article 16(1) and (2) and is not saved by Clause (4)".

23. An identical question, as is involved in the instant case, was considered by the Hon'ble Supreme Court in State of Maharashtra v. Raj Kumar, MANU/SC/0235/1982MANU/SC/0235/1982 : AIR 1982 SC 1301: 1982 Lab IC 1597, wherein the Government Order providing for giving preference/weightage to the persons having aptitude to work in rural areas and the provision that the candidates coming from rural areas and who passed S.S.C Examination from rural areas, would deem to be rural candidates and given weightage, was held to be invalid. The Hon'ble Supreme Court observed as under at page 1598, of Lab IC:-

"This rule, however, when translated into action, does not seem to fulfil or carry out the object sought to be achieved because as the Rules stand, any person who may not have lived in a village at all, can appear in S.S.C. Examination from a village and yet becomes eligible for selection in the competitive examination. Thus, there is no nexus between the classification made, assuming for the purpose of this case that such a classification is unreasonable and the object which is sought to be achieved as a result of which the rule is clearly violative of Articles 14 and 16 of the Constitution of India."

24. The Court further held that a rule placing a rural candidate in advantageous position by a sheer incident of his passing the S.S.C. Examination from the rural area, or being a candidate from rural area, and as it prefers an advantage over all others by arbitrary addition of 10% of marks, which has no rational nexus or connection with the object of getting the best candidate suitably adapted to the rural area and such a rule cannot be held to be valid.

25. The said judgment was considered, approved and followed by the Hon'ble Supreme Court in V.N. Sunanda Reddy v. State of Andhra Pradesh, MANU/SC/0174/1995MANU/SC/0174/1995 : AIR 1995 SC 914: 1995 Lab IC 415: (SC) 1995(2) SCT 579. wherein the Hon'ble Apex Court struck down the Government Order providing for 5% weightage to the candidates who had passed the examination in Telugu language for the public employment, being arbitrary and unconstitutional for the reason that the rule did not have any rational nexus to the object

> sought to be achieved, and providing any weightage on such a consideration was found to be violative of Clauses (1) and (2) of Article 16 of the Constitution. All the candidates possessing the minimum requisite educational qualification and otherwise eligible, who applied in response to an advertisement, had to be assessed on the basis of their relative merit and providing for such a weightage on the consideration of medium of examination would change the criteria of selection and relative merit would stand frustrated and would become otiose. A candidate by gaining weightage on the ground of medium of examination, cannot be permitted to steal a march over other meritorious candidates standing higher up in the merit. The Apex Court also referred to the judgment of Nine Judges' Bench of the Hon'ble Supreme Court in Indra Sawhney v. Union of India (Mandal Commission), MANU/SC/ 0104/1993MANU/SC/0104/1993 : AIR 1993 SC 477: 1993 Lab IC 129: (SC) 1993(1) SCT 448 wherein it was held that it has to be borne in mind that "weightage may be given only as per the Constitutional Sanction and not beyond it.""

27. Reliance was placed upon the judgment of Apex Court in Dr. Pradeep Jain Vs. Union of India, AIR 1984 SC 1420 and following observation of the Apex Court at page 1424 has been relied upon:-

> "The entire country is taken as one nation with one citizenship and every effort of the Constitution makers is directed towards emphasizing, maintaining and preserving the unity and integrity of the nation. Now if India is one nation and there is only one citizenship, namely, citizen of India, and every citizen has a right to move freely, throughout the territory of India and to reside and settle in any part of India, irrespective of the place where he is born or the language which he speaks or the religion which he professes and he is guaranteed freedom of trade, commerce and intercourse throughout the territory of India and is entitled to equality before the law and equal protection of law with other citizens in every part of the territory of India, it is difficult to see how a citizen having his permanent home in Tamil Nadu or speaking Tamil language can be regarded as an outsider in Uttar Pradesh or a citizen having his permanent home in Maharashtra or speaking Marathi language be regarded as an outsider in Karnataka. He must be held entitled to the same rights as a citizen having his permanent home in Uttar Pradesh or Karnataka, as the case may be. To regard him as an outsider would be to deny him his constitutional rights and to derecognise the essential unity and integrity of the country by treating it is if it were a mere conglomeration of independent States.
>
> Article 15, Clauses (1) and (2) bar discrimination on grounds not only of religion, caste or sex but also of place of birth. Article

> 16(2) goes further and provides that 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. ***Therefore, it would appear that residential requirement would be unconstitutional as a condition of eligibility for employment or appointment to an office under the State which also covers an office under any local or other authority within the State or any corporation, such as, a public sector corporation which is an instrumentality or agency of the State.***"
>
> (emphasis supplied)

28. The Full Bench of Rajasthan High Court in Deepak Kumar Surthar (supra) went on to hold as under in paragraphs 27 to 29:-

> "27. Thus, it was clearly held that the requirement of residence in a particular place, would be unconstitutional as a condition of eligibility or for giving any weightage for employment under the State.
>
> 28. In the State of U.P. v. Pradip Tandon, MANU/SC/0086/1974MANU/SC/0086/1974 : AIR 1975 SC 563, the Hon'ble Apex Court held that educational backwardness is ascertained with reference to various factors where people have traditional apathy for education on account of social and environmental conditions or occupational handicaps. Backwardness is also judged on economic basis as each region has its own miserable possibility for the maintenance of human members, standards of living and fixed property. The Court further observed as under at page 568:-
>
> "80% of the population of the State of Uttar Pradesh in rural areas cannot be said to be a homogeneous class by itself. They are not of the same kind. Their occupation is different. Their standards are different. Their lives are different. Population cannot be a class by itself. Rural element does not make it a class. To suggest that the rural areas are socially and economically backward is to have reservation for the majority of the State..... Special need for medical-men in rural area will not make the people in rural area socially and educationally backward classes of citizens..... The reservation for rural area cannot be sustained on the ground that the rural area represents socially and educationally backward classes of citizens. This reservation appears to have been made for the majority population of the State. 80% of the population of the State cannot be a homogeneous class. Poverty in rural areas cannot be the basis of classification to support reservation for rural areas....."
>
> 29. The Apex Court held that no reservation can be made on the basis of place of birth or residence."

After examining various other judgments, the Full Bench answered the reference in following terms:-

“39. Thus, in view of the above, we are of the considered opinion that the rural masses, which form 80% of the total population of this country, do not constitute homogeneous class in itself, nor can they be treated as a class. Any classification on the ground of being 'rural' or 'urban' is not permissible in our Constitutional Scheme. The object to be achieved by the Circular that it would attract the rural people to get education or after giving employment, to serve the rural population, cannot be achieved by giving those candidates any weightage. In public employment, every applicant knows that transfer is an incident of service and if he joins the service, he can be asked to serve in rural area and if he joins it voluntarily and willingly, he cannot refuse to serve in rural area, as in case of non-compliance of transfer/posting order, he would expose himself to the disciplinary proceedings under the relevant Statutory Rules. (Vide Gujarat Electricity Board. v. Atmaram Sungomal Poshani, MANU/SC/0200/1989MANU/SC/0200/1989 : AIR 1989 SC 1433: 1989 Lab IC 1374: 1989(2) R.C.R.(Criminal) 210). Even to give any bonus marks to urban candidate, has no nexus to the object to be achieved. There can be no ground of preference/weightage/ advantage by any means on the ground of place of birth or residence as it would be violative of Articles 14, 15 and 16 of the Constitution and, thus, void.

40. In the instant case, it could not be pointed out by the learned counsel for the parties as under what authority of law the said Circular has been issued, or what was the data or material, on the basis of which the Government had taken a policy decision and what were the contents of the public policy. Thus, even in a limited jurisdiction of judicial review of a public policy, we have no constraints to hold that such a policy cannot successfully stand the test of reasonableness or doctrine of equality and, therefore, is bad. In Ram Ganesh Tripathi v. State of U.P., MANU/SC/0341/1997MANU/SC/0341/1997 : AIR 1997 SC 1446: 1997 Lab IC 301: (SC) 1997(1) SCT 494 the Hon'ble Apex Court held that any order which is not consistent with the statutory rules, deserves to be quashed being ultra vires.

41. The criteria laid down as per the policy decision provided for 10% weightage to the candidates of the district for which the posts are advertised and a further weightage of 5% for an agristic. The merit list has to be prepared according to the marks obtained by him throughout his academic career. A candidate who secured throughout First Division, if could secure 65% marks in selection he would be superseded by a candidate belonging to rural area even if latter secured only 50% marks by getting 15% bonus marks, and even by a candidate belonging to urban area, who could secure 55% marks in selection. The merit of the candidate is converted into demerit merely by an incident that he is not a resident of the district for which the posts have been advertised or an agristic. Unfortunately merit of the suitable candidate is being ignored on unconstitutional and

> relevant consideration, which may lead to total subservience and further to a large deep malaise in the efficiency of the administration. It also leaves meritorious candidates frustrated and demoralised. Mutilation of the country on such irrelevant consideration is not permissible as it would run counter to the principle of equality which clearly provides that no person can have any weightage/preference on the ground of place of birth or residence. The doctrine of equality enshrined under Article 16 of the Constitution provides for a dynamic concept and it cannot be let loose on considerations not permissible under the Constitutional provisions. In public employment, there has to be an effort to select most meritorious excellent candidates. The only limitation which this criteria can be subjected to is the reservations provided under the Constitution. The State has already protected the interests of not only of the candidates belonging to scheduled castes, scheduled tribes and other backward classes but also of women. This kind of weightage would lead to a complete go-bye to the merit of the candidates and would seriously affect the efficiency of administration/teaching. The concept of equality cannot be permitted to be converted into an empty slogans, nor the State can be permitted to render the said doctrine nugatory on any unconstitutional criteria.
>
> 42. In view of the above, we answer the reference holding that any kind of weightage/advantage in public employment in any State Service is not permissible on the ground of place of birth or residence and the Clause in the Circular providing for bonus marks on the ground of being resident of the same district, for which the posts are advertised, or on the ground of being a resident of urban area or rural area, is void ab initio. Instead of sending the matter to the appropriate Bench, we think it proper to dispose of this petition with a direction that no relief can be granted to the petitioners as they could not succeed to get the place in the merit list even by getting 10 bonus marks being residents of urban area, for which they are certainly not entitled. Moreso, the petitioners have not impleaded any person from the select list, not even the last selected candidate. Thus, no relief can be granted to them inspite of the fact that the appointments made in conformity of the impugned Circular have not been in consonance with law. However, we clarify that any appointment made earlier shall not be affected by this judgment and it would have prospective application."

29. The aforesaid Full Bench judgment in Deepak Kumar Surthar (supra) was followed by a subsequent Full Bench judgment of Rajasthan High Court in Kailash Chand Sharma vs. State of Rajasthan and others. The Full Bench judgment of Rajasthan High Court in Kailash Chand Sharma (supra) was examined by the Apex Court. The Apex Court in para 14 to 17 of the judgment in Kailash Chand

Sharma (supra) held as under:-

> “14. Before proceeding further we should steer clear of a misconception that surfaced in the course of arguments advanced on behalf of the State and some of the parties. Based on the decisions which countenanced geographical classification for certain weighty reasons such as socio- economic backwardness of the area for the purpose of admissions to professional colleges, it has been suggested that residence within a district or rural areas of that district could be a valid basis for classification for the purpose of public employment as well. We have no doubt that such a sweeping argument which has the overtones of parochialism is liable to be rejected on the plain terms of Article 16(2) and in the light of Article 16(3). An argument of this nature flies in the face of the peremptory language of Article 16(2) and runs counter to our constitutional ethos founded on unity and integrity of the nation. Attempts to prefer candidates of a local area in the State were nipped in the bud by this Court since long past.
>
> We would like to reiterate that residence by itself - be it be within a State region, district or lesser area within a district cannot be a ground to accord preferential treatment or reservation, save as provided in Article 16(3). It is not possible to compartmentalize the State into Districts with a view to offer employment to the residents of that District on a preferential basis. At this juncture it is appropriate to undertake a brief analysis of Article 16.
>
> 15. Article 16 which under Clause (1) guarantees equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State reinforces that guarantee by prohibiting under Clause (2) discrimination on the grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them. Be it noted that in the allied Article 14 Article 15, the word 'residence' is omitted from the opening clause prohibiting discrimination on specified grounds. Clauses (3) and (4) of Article 16 dilutes the rigour of Clause (2) by (i) conferring an enabling power on the Parliament to make a law prescribing the residential requirement within the State in regard to a class or classes of employment or appointment to an office under the State and (ii) by enabling the State to make a provision for the reservation of appointments or posts in favour of any backward class of citizens which is not adequately represented in the services under the State. The newly introduced Clauses (4-A) and (4-B), apart from Clause (5) of Article 16 are the other provisions by which the embargo laid down in Article 16(2) in somewhat absolute terms is lifted to meet certain specific situations with a view to promote the overall objective underlying the Article. Here, we should make note of two things: firstly, discrimination only on the ground of residence (or place of birth) in so far as public employment is

concerned is prohibited, secondly, Parliament is empowered to make the law prescribing residential requirement within a State or Union Territory,a s the case may be, in relation to a class or classes of employment. That means, in the absence of parliamentary law, even the prescription of requirement as to residence within the State is a taboo. Coming to the first aspect, it must be noticed that the prohibitory mandate under Article 16(2) is not attracted if the alleged discrimination is on grounds not merely related to residence, but the factum of residence is only taken into account in addition to other relevant factors. This, in effect, is the import of the expression 'only'.

16. Let us now turn our attention to some of the decided cases As far back as in 1969 a Constitution Bench of this Court in A.V.S. Narasimha Rao v. State of A.P. declared that the law enacted by the Parliament in pursuance of Clause (3) of Article 16 making a special provision for domicile within the Telegana region of the State of Andhra Pradesh for the purpose of public employment within that region and the rules made thereunder as ultra vires the Constitution. Pursuant to the enabling power conferred under Section 3 of the Public Employment (Requirement as to Residence) Act, Rules were made making a person ineligible for appointment to a post within the Telengana area under the State Government of A.P. or to a post under a local authority in the said area unless he has been continuously residing within the said area for a period of not less than 15 years immediately proceeding the prescribed date.

The Government issued an order relieving all non-domicile the persons appointed on or after 1.11.1956 to certain categories of posts reserved for domiciles of Telecngana under the A.P. public employment (Requirement as to Residence) Rules. Such incumbent of post was to be employed in the Andhra region by creating a supernumerary post, if necessary. This legislative and executive action was struck down by this Court. After referring to Article 16, the Court observed :

"The intention here is to make every office or employment open and available to every citizen, and inter alia to make offices or employment in one part of India open to citizens in all other parts of India. The third clause then makes an exception.....

The legislative power to create residential qualification for employment is thus exclusively conferred on Parliament. Parliament can make any law, which prescribes any requirement as to residence within the State or Union territory prior to employment or appointment to an office in that State or Union territory. Two questions arise here, firstly, whether Parliament, while prescribing the requirement, may prescribe the requirement of residence in a particular part of the State and, secondly, whether Parliament can delegate this function by making a declaration and leaving the details to be filled in by the rule making power of the Central and State Governments."

> 17. The argument that a sweeping power was given to the Parliament to make any law as regards residential requirement was replied thus :
>
> "By the first clause equality of opportunity in employment or appointment to an office is guaranteed. By the second clause there can be no discrimination, among other things, on the ground of residence. Realising, however, that sometimes local sentiments may have to be respected or sometimes an inroad from more advanced States into less developed States may have to be prevented, and a residential qualification may, therefore, have to be prescribed, the exception in Clause (3) was made. Even so, that clause spoke of residence within the State. The claim of Mr. Setalvad that Parliament can make a provision regarding residence in any particular part of a State would render the general prohibition lose all its meaning. The words 'any requirement' cannot be read to warrant something which could have been said more specifically. These words bear upon the kind of residence or its duration rather than its location within the State. We accept the argument of Mr. Gupte that the Constitution, as it stands, speaks of a whole State as the venue for residential qualification and it is impossible to think that the Constituent Assembly was thinking of residence in Districts, Taluqas, cities, towns or villages. The fact that this clause is an exception and came as na amendment must dictate that a narrow construction upon the exception should be placed as indeed the debates in the Constituent Assembly also seem to indicate.""

30. The argument advanced on behalf of the State of Uttar Pradesh relying upon Article 15 of the Constitution of India and the judgments of Apex Court in Pradeep Jain vs. Union of India, AIR 1984 SC 1420 and D. P. Joshi's case (supra) was also considered in following words:-

> "In Pradeep Jain v. Union of India though the Court was concerned with the question whether residential requirement or institutional preference in admissions to technical and medical colleges can be constitutionally permissible in the light of Article 15(1) and 15(4) Bhagwati, J. speaking for the Court expressed his prima facie opinion thus as regards residential acquirement in the field of public employment :
>
> "We may point out at this stage that though Article 15(2) bars discrimination on grounds, not only of religion, race, caste or sex but also on place of birth, Article 16(2) goes further and provides that 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 State employment. So far as employment under the State or any local or other

> authority is concerned, no citizen can be given preference nor can any discrimination be practised against him on the ground only of residence. It would thus appear that residential requirement would be unconstitutional as a condition of eligibility for employment or appointment to an office under the State.....But, Article 16(3) provides an exception to this rule by laying down that Parliament may make a 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 in, a State or Union Territory, any requirement as to residence within that State or Union territory prior to such employment or appointment." Parliament alone is given the right to enact an exception to the ban on discrimination based on residence and that too only with respect to positions within the employment of a State Government. But even so, without any parliamentary enactment permitting them to do so many of the State Governments have been pursuing policies of localism since long and these policies are now quite widespread. Parliament has in fact exercised little control over these policies formulated by the States. The only action, which Parliament has taken under Article 16(3) giving if the right to set a residence requirement has been the enactment of the Public Employment (requirement as to Residence) Act, 1957.....
>
> *There is therefore, at present no parliamentary enactment permitting preferential policies based on residence requirement except in the case of Andhra Pradesh, Manupur, Tripura and Himachal Pradesh where the Central government has been given the right to issue directions setting residence requirements in the subordinate services. Yet, in the face of Article 16(2) some of the States are adopting 'sons of the soil' policies prescribing reservation or preference based on domicile or residence requirement for employment or appointment to an office under the Government of a State or any local or other authority or public sector corporation or any other corporation which is an instrumentality or agency of the State. Prima facie this would seem to be constitutionally impermissible though we do not wish to express any definite opinion upon it, since it does not directly arise for consideration in these writ petitions and civil appeal*."”
>
> (Emphasis supplied)

31. Distinction on account of lack of expression “residence” in Article 15(2) of the Constitution vis-a-vis Article 16(2) was specifically noticed in Kailash Chand Sharma (supra), in following words:-

> “However, in so far as admissions to educational institutions such as medical colleges are concerned, it was pointed out that Article 16(2) has no application and residential

requirement cannot per se be condemned as unconstitutional. It was observed that the only provision of the Constitution on the touchstone of which such residence requirement can be tested is Article 14. On a conspectus of earlier decisions of this Court, the learned Judge summarised the position thus in so far as admissions to professional education colleges are concerned.

"It will be noticed from the above discussion that though inter-State discrimination between persons resident in different districts or regions of a state has by and large been frowned upon by the Court and struck down as invalid as in Minor P. Rajendran's case (supra) and Perukaruppan's case (supra), the Court has in D.N. Chanchala's case and other similar cases upheld institutional reservation effected through university wise distribution of seats for admission to medical colleges. The Court has also by its decisions in D.P. Joshi's case and N. Vasundhara's case (supra) sustained the constitutional validity of reservation based on residence requirement within a State for the purpose of admission to medical colleges. These decisions which all relate to admission to MBBS course are binding upon us and it is therefore not possible for us to hold, in the face of these decisions that residence requirement in a State for admission to MBBS course is irrational and irrelevant and cannot be introduced as a condition for admission without violating the mandate of equality of opportunity contained in Article 14. We must proceed on the basis that at least so far as admission to MBBS course is concerned, residence requirement in a State can be introduced as a condition for admission to the MBBS course."

21. Bhagwati, J. under second the need for evolving a policy of ensuring admissions to the MBBS course on all India basis "based as it is on the postulate that India is one nation and every citizen of India is entitled to have equal opportunity for education and advancement." But, it was observed that the realization of such ideal may into be realistically possible in the present circumstance. It was then concluded :

"We are therefore of the view that a certain percentage of reservation on the basis of residence requirement amy legitimately be made in order to equalize opportunities for medical admission on a broader basis and to bring about real and not formal, actual and not merely legal, equality. The percentage of reservation made on this count may also include institutional reservation for students passing the PUC or pre-medical examination of the same university or clearing the qualifying examination from the school system of the educational hinterland of the medical colleges in the State."

22. It is not necessary for us to refer is extenso to various other decisions of this Court dealing with the scope of Article 15(1) and 15(4) vis a vis reservations based on residence within a University or other local area for the purpose of admissions to

> professional colleges. A summary of those decisions has been given by Bhagwati, J. in the passage extracted (supra). The requirement of residence and education within the university area for allocation of seats in medical colleges affiliated to that university was upheld on special considerations noticed in that judgment."

32. Sri Manish Goel appearing for the State has laid much emphasis on the true import of expression 'domicile', and its distinct nature, to submit that prohibition contained in Article 16 with regard to 'place of birth' and 'residence' would not be offended by insisting upon a candidate to be the domicile of State for grant of horizontal reservation. In Black's Law Dictionary (Sixth Edition) the term 'Residence' is defined and a distinction is drawn with the expression 'domicile' in following terms:-

> "**Residence.** .....
>
> Residence implies something more than mere physical presence and something less than domicile. Petition of Castrinakis, D.C. Md., 179 F.Supp. 444, 445. The terms "resident" and "residence" have no precise legal meaning; sometimes they mean domicile; and sometimes they mean something less than domicile. Willenbrock v. Rogers, C.A. Pa., 255 F.2d 236, 237. See also Abode; Domicile; Legal residence; Principal residence.
>
> "Domicile" compared and distinguished. As "domicile" and "residence" are usually in the same place, they are frequently used as if they had the same meaning, but they are not identical terms, for a person may have two places of residence, as in the city and country, but only one domicile. Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile. Fuller v. Hofferbert, C.A. Ohio, 204 F.2d 592, 597. "Residence" is not synonymous with "Domicile," though the two terms are closely related; a person may have only one legal domicile at one time, but he may have more than one residence. Fielding v. Casualty Reciprocal Exchange, La. App., 331 So.2d 186, 188.
>
> ....."

33. Reliance is also placed upon the Words and Phrases (Volume 13) as per which domicile could broadly be of three types i.e. 'domicile of origin' i.e. domicile of a person's parents at the time of his birth; 'domicile of choice' i.e. the place

which a person has elected and chosen for himself to displace his previous domicile and; 'domicile by operation of law' which is the domicile attributed to a person by law independent of his own intention or residence. The place of one's birth is his 'domicile of origin' and he would be without power to change it during minority, though it could be changed by his parents, guardian or anyone else having legal custody of him but after attaining majority the power to change domicile and obtain 'domicile of choice' can always be exercised.

34. The condition in the Govt. Order dated 9.1.2007 requiring the women to be the original resident of the State for grant of reservation for women is attempted to be saved from the clutches of Article 16 by referring to the concept of domicile contained in various dictionaries.

35. This Court would not like to dwell upon the subject purely with an academic pursuit. The issue has otherwise been a subject matter of examination by two Constitution Bench Judgments and therefore it would be safe for this Court to draw its conclusions from what has already been observed by the Apex Court. In D.P. Joshi (supra) a circular issued by the State Government, which exempted bona fide residents of Madhya Bharat from payment of capitation fee, was challenged on the ground of discrimination. Reliance was placed upon Article 15(1) of the Constitution of India to contend that 'place of birth' since cannot be a ground to discriminate as such the distinction drawn on account of residence would be unconstitutional. The argument was repelled by drawing distinction between 'place of birth' and 'residence' in following words:-

> "Now the contention of Mr. N. C. Chatterjee for the (1) I.L.R. 1953 Madhya Bharat 87, 99, petitioner is that this rule is in contravention of articles 14 and 15(1), and must therefore be struck down as unconstitutional and void. Article 15(1) enacts: "The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them".
>
> The argument of the petitioner is that the rule under challenge in so far as it imposes a capitation fee on students who do not belong to Madhya Bharat while providing an exemption therefrom to students of Madhya Bharat, makes a discrimination based on the place of birth, and that it offends article 15 (1).

> Whatever force there might have been in this contention if the question had arisen with reference to the rule as it stood when the State took over the administration, the rule was modified in 1952, and that is what we are concerned with in this petition. The rule as modified is clearly not open to attack as infringing article 15(1). The ground for exemption from payment of capitation fee as laid down therein is bona fide residence in the State of Madhya Bharat. Residence and place of birth are two distinct conceptions with different connotations both in law and in fact, and when article 15(1) prohibits discrimination based on the place of birth, it cannot be read as prohibiting discrimination based on residence. This is not seriously disputed."

36. Attempt made on behalf of the petitioners to submit, as a proposition of law, that exemption based on domicile was in effect an exemption based on place of birth was specifically repelled. While noticing the distinction between 'domicile of origin' and 'domicile of birth' the Court observed that although the connotations are not synonymous, yet it would not be covered within the expression 'place of birth' and thereby would not offend Article 15(1).

37. The further argument advanced that Constitution of India admits of one citizenship the concept of domicile of State would run counter to the notion embedded in it was also rejected by observing that citizenship and domicile represent two different concepts, inasmuch as citizenship has reference to the political status of a person while domicile refers to his civil rights. Their Lordships, accordingly, went on to observe as under in para 10 of the judgment:-

> "Under the Constitution, the power to legislate on succession, marriage and minority has been conferred under Entry 5 in the Concurrent List on both the Union and the State Legislatures, and it is therefore quite conceivable that until the Centre intervenes and enacts a uniform code for the whole of India, each State might have its own laws on those subjects, and thus there could be different domiciles for different States. We do not, therefore, see any force in the contention that there cannot be a domicile of Madhya Bharat under the Constitution."

38. The definition of term 'bona fide residence' given in Corpus Juris Secundum was taken note of as per which it means residence with domiciliary intent. The Court, therefore, held that the circular providing for exemption of bona fide resident

of Madhya Bharat from payment of capitation fee was not repugnant to Article 15(1) of the Constitution of India.

39. In the matter of grant of reservation in admission to medical students to domicile of concerned State has consistently been upheld in all subsequent judgments of the Apex Court. In Dr. Pradeep Jain Vs. Union of India and others, AIR 1984 SC 1420, the issue was again examined at length. The term 'domicile' in the context of Article 5 of the Constitution of India was examined with reference to the law laid down in D.P. Joshi's case in following words in para 8 of the judgment:-

> "Now it is clear on a reading of the Constitution that it recognises only one domicile namely, domicile in India. Article 5 of the Constitution is clear and explicit on this point and it refers only to one domicile, namely, "domicile in the territory of India." Moreover, it must be remembered that India is not a federal state in the traditional sense of that term. It is not a compact of sovereign states which have come together to form a federation by ceding a part of their sovereignty to the federal states. It has undoubtedly certain federal features but it is still not a federal state and it has only one citizenship, namely, the citizenship of India. It has also one single unified legal system which extends throughout the country. It is not possible to say that a distinct and separate system of law prevails in each State forming part of the Union of India. The legal system which prevails through-out the territory of India is one single indivisible system with a single unified justicing system having the Supreme Court of India at the apex of the hierarchy, which lays down the law for the entire country. It is true that with respect to subjects set out in List II of the Seventh Schedule to the Constitution, the States have the power to make laws and subject to the over-riding power of Parliament, the States can also make laws with respect to subjects enumerated in List III of the Seventh Schedule to the Constitution, but the legal system under the rubric of which such laws are made by the States is a single legal system which may truly be described as the Indian Legal system. It would be absurd to suggest that the legal system varies from State to State or that the legal system of a State is different from the legal system of the Union of India; merely because with respect to the subjects within their legislative competence, the States have power to make laws. The concept of `domicile' has no relevance to the applicability of municipal laws, whether made by the Union of India or by the States. It would not, therefore, in our opinion be right to say that a citizen of India is domiciled in one state or another

> forming part of the Union of India. The domicile which he has is only one domicile, namely, domicile in the territory of India. When a person who is permanently resident in one State goes to another State with intention to reside there permanently or indefinitely, his domicile does not undergo any change: he does not acquire a new domicile of choice. His domicile remains the same, namely, Indian domicile. We think it highly deterimental to the concept of unity and integrity of India to think in terms of State domicile. It is true and there we agree with the argument advanced on behalf of the State Governments, that the word `domicile' in the Rules of some of the State Governments prescribing domicilary requirement for admission to medical colleges situate within their territories, is used not in its technical legal sense but in a popular sense as meaning residence and is intended to convey the idea of intention to reside permanently or indefinitely. That is, in fact the sense in which the word 'domicile' was understood by a five Judge Bench of this Court in D. P. Joshi's case (supra) while construing a Rule prescribing capitation fee for admission to a medical college in the State of Madhya Bharat and it was in the same sense that word 'domicile' was understood in Rule 3 of the Selection Rules made by the State of Mysore in Vasundra v. State of Mysore. We would also, therefore, interpret the word 'domicile' used in the Rules regulating admissions to medical colleges framed by some of the States in the same loose sense of permanent residence and not in the technical sense in which it is used in private international law. But even so we wish to warm against the use of the word 'domicile' with reference to States forming part of the Union of India, because it is a word which is likely to conjure up the notion of an independent State and encourage in a subtle and insidious manner the dormant sovereign impulses of different regions. We think it is dangerous to use a legal concept for conveying a sense different from that which is ordinarily associated with it as a result of legal usage over the years. When we use a word which has come to represent a concept or idea, for conveying a different concept or idea it is easy for the mind to slide into an assumption that the verbal identity is accompanied in all its sequences by identity of meaning. The concept of domicile if used for a purpose other than its legitimate purpose may give rise to lethal radiations which may in the long run tend to break up the unity and integrity of the country. We would, therefore, strongly urge upon the State Governments to exercise this wrong use of the expression 'domicile' from the rules regulating admissions to their educational institutions and particularly medical colleges and to desist from introducing and maintaining domiciliary requirement as a condition of eligibility for such admissions."

40. Having said so, the Apex Court in Dr. Pradeep Jain (supra) approved of compensatory State action in protecting those who are placed in disadvantageous

position in the matter of grant of admission and thereby relax the principle of selection based on merits. The observations contained in para 13 and 14 of the judgment is reproduced hereinafter:-

> "We may now proceed to consider what are the circumstances in which departure may justifiably be made from the principle of selection based on merit. Obviously, such departure can be justified only on equality-oriented grounds, for whatever be the principle of selection followed for making admissions to medical colleges, it must satisfy the test of equality. Now the concept of equality under the Constitution is a dynamic concept. It takes within its sweep every process of equalisation and protective discrimination. Equality must not remain mere idle incantation but it must become a living reality for the large masses of people. In a hierachical society with an indelible feudal stamp and incurable actual inequality, it is absurd to suggest that progressive measures to eliminate group disabilities and promote collective equality are antagonistic to equality on the ground the every individual is entitled to equality of opportunity based purely on merit judged by the marks obtained by him. We cannot countenance such a suggestion, for to do so would make that equality clause sterile and perpetuate existing inequalities. Equality of opportunity is not simply a matter of legal equality. Its existence depends not merely on the absence of disabilities but on the presence of abilities. Where, therefore, there is inequality, in fact, legal equality always tends to accentuate it. What the famous poet Willian Blanks said graphically is very true, namely, "One law for the Lion and the Ox is oppression," Those who are unequal. in fact. cannot treated by identical standards; that may be equality in law but it would certainly not be real equality. It is, therefore, necessary to take into account de facto inequalities which exist in the society and to take affirmative action by way of giving preference to the socially and economically disadvantaged persons or inflicting handicaps on those more advantageously placed, in order to bring about real equality Such affirmative action though apparently discriminatory is calculated to produce equality an a broader basis by eliminating de facto inequalities and placing the weaker sections of the community on a footing of equality with the stronger and more powerful section, so that each member of the community, whatever is his births occupation or social position may enjoy equal opportunity of using to the full his natural endowments of physique, of character and of intelligence. We may in this connection usefully quote what Mathew, J. said in Ahmedabad St. Xavier's College Society and Anr. v. State of Gujarat.
>
> "It is obvious that "equality in law precludes discrimination of any kind; whereas equality, in fact, may involve the necessity of differential treatment in order to attain a result which

establishes an equilibrium between different situations."

We cannot, therefore, have arid equality which does not take into account the social and economic disabilities and inequalities from which large masses of people suffer in the country. Equality in law must produce real equality; de jure equality must ultimately find its raison d'etre in de facto equality. The State must, therefore, resort to compensatory State action for the purpose of making people who are factually unequal in their wealth, education or social environment, equal in specified areas. The State must, to use again the words of Krishna Iyer. J. in Jagdish Saran's case (supra) weave those special facilities into the web of equality which, in an equitable setting provide for the weak and promote their levelling up so that, in the long run, the community at large may enjoy a general measure of real equal opportunity equality is not negated or neglected where special provisions are geared to the large goal of the disabled getting over their disablement consistently with the general good and individual merit." The scheme of admission to medical colleges may, therefore, depart from the principle of selection based on merit, where it is necessary to do so for the purpose of bringing about real equality of opportunity between those who are unequals.

There are. in the application of this principle, two considerations which appear to have weighed with the Court in justifying departure from the principle of selection based on merit. One is what may be called State interest and the other is what may be described as a region's claim of backwardness. The legitimacy of claim of State interest was recognised explicitly in one of the early decisions of this Court in D.P. Joshi's case (supra) The Rule impugned in this case was a Rule made by the State of Madhya Bharat for admission to the Mahatma Gandhi Memorial Medical College, Indore providing that no capitation fee should be charged for students who are bona fide residents of Madhya Bharat but for other non-Madhya Bharat students, there should be a capitation fee of Rs. 1300 for nominees and Rs. 1500 for others. The expression bona fide resident' was defined for the purpose of this Rule to mean inter alia a citizen whose original domicile was in Madhya Bharat provided he had not acquired a domicile elsewhere or a citizen whose original domicile was not in Madhya Bharat but who had acquired a domicile in Madhya Bharat and had resided there for not less than five years at the date of the application for admission. The constitutional validity of this Rule was challenged on the ground that it discriminated between students who were bona fide residents of Madhya Bharat and students who were not and since this discrimination was based on residence in the State of Madhya Bharat, it was violative of Article 14 of the Constitution. The Court by a majority of four against one held that the Rule was not discriminatory as being in contravention of Article 14, because the classification between students who were bona fide residents

of Madhya Bharat and those who were not was based on an intelligible differentia having rational relation to the object of the Rule. Venkatarama Ayyar, J. speaking on behalf of the majority observed:

"The object of the classification underlying the impugned rule was clearly to help to some extent students who are residents of Madhya Bharat in the prosecution of their studies, and it cannot be disputed that it is quite a legitimate and laudable objective for a State to encourage education within its borders Education is a State subject, and one of the directive principles declared in Part IV of the Constitution is that the State should make effective provisions for education within the limits of its economy. (Vide Article 41). The State has to contribute for the up keep and the running of its educational institutions. We are in this petition concerned with a Medical College, and it is well known that it requires considerable finance to maintain such an institution. If the State has to spend money on it, is it unreasonable that it should so order the educational system that the advantage of it would to some extent at least enure for the benefit of the State ? A concession given to the residents of the State in the matter of fees is obviously calculated to serve that end, as presumably some of them might, after passing out of the College, settle down as doctors and serve the needs of the locality. The classification is thus based on a ground which has a reasonable relation to the subject-matter of the legislation, and is in consequence not open to attack. It has been held in The State of Punjab v. Ajab Singh and Anr. that a classification might validly be made on a geographical basis. Such a classification would be eminently just and reasonable, where it relates to education which is the concern, primarily of the State. The contention, therefore, that the rule imposing capitation fee is in contravention of Article 14 must be rejected."

(emphasis supplied)

It may be noted that here discrimination was based on residence within the State of Madhya Bharat and yet it was held justified on the ground that the object of the State in making the Rules was to encourage students who were residents of Madhya Bharat to take up the medical course so that "some of them might, after passing out from the college, settle down as doctors and serve the needs of the locality" and the classification made by the Rule had rational relation to this object. This justification of the discrimination based on residence obviously rest on the assumption that those who were bona fide residents of Madhya Bharat would after becoming doctors settle down and serve the needs of the people in the State. We are not sure whether any facts were pleaded in the affidavits justifying this assumption but the judgment of Venkatarama Ayyar, J. show that the decision of the majority Judges proceeded on this assumption

> and that was regarded as a valid ground justifying the discrimination made by the impugned Rule."

41. The Apex Court, having taken note of earlier judgments rendered by the Court on the issue, proceeded to observe that requirement of residence in a State can be introduced as a condition for admission in MBBS Course without violating the mandate of equality of opportunity contained in Article 14 of the Constitution of India. However, requirement of residence in a State for admission to postgraduate courses such as M.S., M.D. was disapproved.

42. It is urged on behalf of the respondents that requirement of residence made applicable in the grant of admission to medical courses has been stretched in the field of public employment as well and that it would not violate Article 16 of the Constitution of India provided the classification is valid and has reasonable nexus with the object sought to be achieved. The facts pleaded in the counter affidavit have been relied upon to contend that women residing within the State of Uttar Pradesh constitute a homogeneous class and providing reservation to them would serve the purpose of ameliorating condition of women in the State. Reliance is placed upon the subsequent Constitution Bench judgment of the Apex Court in Saurabh Chaudri and others Vs. Union of India and others, AIR 2004 SC 361, to contend that the previous judgment of the Apex Court in Kailash Chand Sharma (supra) stands impliedly overruled.

43. Sheet anchor of Sri Goel's argument is an observation made in para 39 of the judgment in Saurabh Chaudri (supra), which is reproduced, in order to facilitate appreciation of the submission raised in that regard:-

> "Ideal situation, although it might have been to see that only meritorious students irrespective of caste, creed, sex, place of birth, domicile/residence are treated equally but history is replete with situations to show that India is not ready therefore. Sociological condition prevailing in India compelled the makers of the Constitution to bring in Articles 15 and 16 in the Constitution. The said Articles for all intent and purport are species of Article 14 which is the genies in a sense that they provide for exception to the equality clause also. Preference to a

> class of persons whether based on caste, creed, religion, place of birth, domicile or residence is embedded in- cur constitutional scheme. Whereas larger interest of the country must be perceived, the law makers cannot shut their eyes to the local needs also. Such local needs must receive due consideration keeping in view the duties of the State contained in Articles 41 and 47 of the Constitution of India. (Emphasis mine)"

44. The argument proceeds on complete ignorance of the issue that was being examined by the Court. The ratio has to be culled out from what is being decided by the Court and not what can be deduced from a stray observation made in the judgment. In Saurabh Chaudri (supra) the issue was as to whether institutional preference in the matter of grant of admission to postgraduate medical courses would be *ultra virus* Article 14 and 15 of the Constitution of India. A larger issue was raised at the bar as to whether any reservation i.e. be on residence or institutional preference is constitutionally permissible? The Court formulated a question as to whether reservation on the basis of domicile is impermissible in terms of Clause (1) of Article 15 of the Constitution and observed as under in para 29 of the judgment:-

> "The first question that arises for consideration is, whether the reservation on the basis of domicile is impermissible in terms of Clause (1) of Article 15 of the Constitution of India ? The term 'place of birth' occurs in Clause (1) of Article 15 but not 'domicile'. If a comparison is made between Article 15(1) and Article 16(2) of the Constitution of India, it would appear that whereas the former refers to 'place of birth' alone, the latter refers to both 'domicile' and 'residence' apart from place of birth. A distinction, therefore, has been made by the makers of the Constitution themselves to the effect that the expression 'place of birth' is not synonymous to the expression "domicile" and they reflect two different concepts. It may be true, as has been pointed out by Shri Salve and pursued by Mr. Nariman, that both the expressions appeared to be synonymous to some of the members of the Constituent Assembly but the same, in our opinion, cannot be a guiding factor. In D.P. Joshi's case (supra), a Constitution Bench held so in no uncertain terms.
>
> This Bench is bound by the said decision."

45. The quoted text conveys in unequivocal terms that 'domicile' is not included within the expression 'place of birth', occurring in Article 15 of the Constitution of

India, but the same would not be the case in Article 16(2) where a different expression is used i.e. 'place of birth, residence or any of them'. Domicile of State whether would be permissible even under Article 16 has neither been discussed nor has been commented upon by the Constitution Bench. The consideration rests with Article 15 alone.

46. The second question framed in Saurabh Chaudri (supra) was whether institutional preference comes within suspected classification warranting strict scrutiny test? The Court declined to apply strict scrutiny test and upheld institutional preference by invoking the principle of presumption of constitutionality of State action. It was then that the issue relating to validity of institutional preference was taken up. The observation in para 39, relied upon by the State was then made by the Apex Court.

47. The observation in para 39 of Saurabh Chaudri (supra), already extracted above, is in the nature of comment on the conditions prevailing in India and that Article 15 and 16 are species of Article 14 of the Constitution. Obligation on part of the law makers to address local needs have been acknowledged with reference to the duties of State enshrined in Article 41 and 47 of the Constitution of India. There is, however, no observation/law laid down that the express prohibition contained in Article 16(2) against discrimination on the ground of residence would stand waived or that the State would get jurisdiction to make a law providing for residence in public employment notwithstanding exclusive power conferred upon the Parliament in that regard.

48. It would be worth noticing that in the constitutional scheme requirement with regard to residence could be prescribed but such prescription must come from the Parliament and by making law in that regard. After noticing various previous judgments delivered on the issue the Apex Court held as under:-

> "The sole question, therefore, is as to whether reservation by way of institutional preference is ultra vires Article 14 of the Constitution of India. We think not. Article 14, it will bear

> repetition to state, forbids class legislation but does not forbid reasonable classification, which means - (1) must be based on reasonable and intelligible differentia; and (2) such differentia must be on rational basis."

49. From what has been observed by the Apex Court in Saurabh Chaudri (supra) it cannot be said that the proposition laid down by the Apex Court in Kailash Chand Sharma (supra) has been whittled down or that it stands impliedly overruled. In view of the conclusion drawn on the issue, it would not be necessary to refer to the judgments of the Apex Court on the aspect of implied overruling of judgments. The judgment of Apex Court in Kailash Chand Sharma (supra) continues to hold the field.

50. Even otherwise, the policy of State to restrict horizontal reservation for women to those, who are the original residents of the State, cannot be sustained on the basis of facts pleaded by the State in para 6 of the counter affidavit filed in Writ Petition No.28355 of 2017. What is stated in para 6 of the counter affidavit is the figure as per 1991 Census of the total population of State; percentage of male and female population; percentage of persons employed and its appropriation amongst male and female category. The rate of literacy for the State's population is also specified. The details provided in para 6 would not justify reasonable classification of women who are residents of State of U.P. or restricting of female reservation in the State to them alone.

51. A specific direction was issued to the State to place all relevant materials in support of the State's decision to restrict horizontal reservation for women to the original residents of the State. The order dated 23.10.2018 passed in the leading Writ Petition No. 11039 of 2018 is reproduced:

> "1. Hearing in this bunch of petitions was concluded and judgment was reserved on 3.8.2018. While preparing the judgment, need is felt by the Court to seek clarification from the State on following aspects:-
>
> (i). Whether the employment of women specified at 7.45% of the State population as per 1991 Census, disclosed in para 6 of the counter affidavit filed in Writ Petition No.28355 of 2017,

> represents employment or office under the State alone, or it includes employment of women as a whole in the State, including private and unorganized sector as well?
>
> (ii). It would also be clarified as to whether such figure representing employment of women in State of Uttar Pradesh consists of women, who are the original residents of State/domiciles of State, or it depicts population and employment of women in general?
>
> (iii). It would be clarified as to how the figure of 7.45% employment for women has been arrived at when the employment of male members is shown at 49.31% only.
>
> (iv). The total cadre strength of Junior Engineers in the Irrigation Department of State, as also the number of posts lying vacant in the cadre as on date. It shall also be specified as to what would be the number of posts likely to fall vacant in the current recruitment year? It shall further be disclosed as to whether any process of recruitment has been initiated for the posts lying vacant in the cadre, or are to fall vacant in the current year of recruitment.
>
> 2. Put up on 15th of November, 2018, at 2:00 P.M."

Stand of learned Additional Advocate General, Sri Manish Goyal, in response to the specific questions formulated in the order dated 23.10.2018 has been noticed in the order dated 15.11.2018 which too is extracted hereinafter:

> "Shri Manish Goyal, learned Additional Advocate General has been heard on the first three issues crystallized in the last order passed on 23rd of October, 2018. Learned State Counsel submits that the only material, which existed on the record of the State is reflected in the cabinet note, copy of which has been passed on to the Court. It is also argued that 1991 Census is the basis of State's decision and figures of population literacy, as also employment are the only material available on record of the State.
>
> Census report of 1991 pertaining to State of Uttar Pradesh has been passed on to the Court.
>
> So far as the last issue is concerned, a prayer is made to grant two weeks' additional time to the State to respond in the matter.
>
> As prayed, put up in the additional cause list once again on 3rd of December, 2018.
>
> Learned State Counsel shall also provide the Census Report of 1991 for the entire country so that the national average on relevant para meters could also be examined."

An affidavit of Special Secretary has also been filed on 18th of December 2018 alongwith which the relevant portion of 1991 Census Handbook has been

annexed. Table 1 contains the percentage of workers in Uttar Pradesh. It is this table which has been relied upon by the State. Before analysing it, certain terms used in the Census Handbook, as defined in the 'explanatory notes on the terms used' would have to be taken note of. Clause 5, 12 and 13 defines 'households', 'work participation rate' and 'primary, secondary and tertiary sectors' and are reproduced:-

> "**5. Households:** Household is defined as a group of persons who commonly live together and take their meals from a common kitchen, unless the exigencies of work prevented any of them from doing so. A household may comprise of persons related by blood or unrelated persons or a mix of both. Examples of households of unrelated persons are hostels, residential hotels, rescue homes, Jails, ashrams etc. These are called "Institutional Households."
>
> **12. Work participation rate:** Census classifies every person as a main worker, marginal worker or non-worker. If a person had worked for major part (i.e. more than 183 days) of the year preceding the date of census enumeration, he/she was considered as a main worker. If a person had worked for some time but not for the major part of the last year, he/she was termed as a marginal worker. All others were classified as non workers. Work participation rate is the proportion of main workers plus marginal workers to the total population.
>
> **13. Primary, Secondary and Tertiary Sectors:** Based on the nature of economic activity in which a person was engaged, all main workers have been classified into nine industrial categories as under:
>
> I) Cultivators;
> II) Agricultural labourers;
> III) Workers in livestock, forestry, fishing, hunting and plantations, orchards and allied activities;
> IV) Workers in mining and quarrying;
> V) Workers in manufacturing, processing, servicing and repairs
> (a) in household Industry
> (b) in other than household Industry;
> VI) Workers in construction;
> VII) Workers in trade and commerce;
> VIII) Workers in transport, storage and communications; and
> IX) Workers in other services
>
> The workers in the above industrial categories have been grouped under Primary, Secondary and Tertiary sectors. Primary sector consists of Industrial categories I, II, III, & IV. Secondary sector consists of Industrial categories V(a), V(b) & VI i.e. manufacturing, processing, servicing and repairs and construction. Tertiary sector consists of Industrial categories VII, VIII & IX i.e. trade and commerce; transport; storage and communications and other services. The proportions presented are main workers in primary

sector, secondary sector and tertiary sector to total main workers."

As per the figures disclosed in Table 1, 49.31% of total male population constitute 'main workers' while 7.45% of total female population constitute 'main workers'. Main workers are those persons who have worked for a major part of the year that is more than 183 days in the year preceding the date of census enumeration. Such work could be performed in any of the three specified sectors i.e. primary, secondary and tertiary sectors as defined in the explanatory notes on terms used.

The only material relied upon for justifying the decision contained in Government Order dated 9.1.2007 is the cabinet note dated 14.2.1999 on the basis of which the Government Order dated 26.2.1999 was issued. The Cabinet note dated 14.2.1999, copy of which has been placed before the Court is also reproduced:-

"**सरकारी सेवाओं में महिलाओं को आरक्षण प्रदान किया जाना।**

02 फरवरी, 1999 को सम्पन्न हुई मंत्रि–परिषद की बैठक में निम्न निर्णय लिया गया है:–

''सरकारी सेवाओं में महिलाओं को 20 प्रतिशत आरक्षण दिए जाने पर सैद्धन्तिक सहमति व्यक्त करते हुए निर्देशित किया गया कि इससे सम्बन्धित सभी पहलुओं पर न्याय विभाग द्वारा परीक्षण कर लिया जाय।''

2– 1991 की जनगणना के अनुसार उत्तर प्रदेश की कुल जनसंख्या लगभग 13. 91 करोड़ है जिसमें पुरूषों की संख्या लगभग 7.40 करोड़ (53.2 प्रतिशत) तथा महिलाओं की संख्या लगभग 6.51 करोड (46.8 प्रतिशत) है। लिंग के आधार पर पुरूषों एवं महिलाओं का अनुपात 1000:879 है। प्रदेश की कुल जनसंख्या में कर्मकर जनसंख्या का प्रतिशत 29.31 है। लिंग के आधार पर गणना करने पर कर्मकर पुरूषों की संख्या पुरूषों की कुल जनसंख्या का 49.31 प्रतिशत तथा कर्मकर महिलाओं का प्रतिशत कुल महिलाओं की जनसंख्या का 7.45 प्रतिशत है। 1991 की जनगणना के अनुसार कुल साक्षरता का प्रतिशत 41.60 है। पुरूषों में साक्षरता का प्रतिशत 55.73 है जबकि महिलाओं में साक्षरता का प्रतिशत केवल 25.31 है। इस प्रकार महिलाओं में साक्षरता का प्रतिशत बहुत कम है साथ ही कर्मकारों में महिलाओं का प्रतिशत आवादी में उनके अनुपात से बहुत कम है।

3– भारत के संविधान के भाग–3 में मूल अधिकार इंगित किए गए हैं। संविधान का अनुच्छेद–15 धर्म, मूल वंश, जाति, लिंग अथवा जन्मस्थान के आधार पर विभेद का प्रतिषेध करता है परन्तु इसके अनच्छेद–15(3) में उल्लेख है कि इस अनुच्छेद की कोई बात राज्य को स्त्रियों और बालकों के लिए कोई विशेष उपबन्ध करने से निवारित नहीं करेगा, संविधान के अनुच्छेद –15(4) में उल्लेख है कि अनुच्छेद –15 की कोई बात राज्य को सामाजिक और शैक्षिक दृष्टि से पिछड़े हुए नागरिकों के किन्हीं वर्गो की उन्नति के लिए कोई विशेष उपबन्ध करने से निवारित नहीं करेगा। इस प्रकार यदि महिलाओं की उन्नति के लिए कोई सकारात्मक व्यवस्था

की जाती है तो वह संविधान की भावनाओं के अनुरूप ही होगी।

4– यद्यपि महिलाओं के सर्वांगीण विकास के लिए कार्यक्रम प्रचलित है परन्तु लोक सेवाओं एवं पदों में उनका यथेष्ट प्रतिनिधित्व सुनिश्चित करने व तदनुसार उनका सामाजिक उत्थान सुनिश्चित करने के लिए उन्हें राज्य के कार्य–कलाप से सम्बन्धित लोक सेवाओं और पदों पर रिक्तियों का कुछ प्रतिशत आरक्षण प्रदान करने का पूर्ण औचित्य बनता है।

5– उत्तर प्रदेश लोक सेवा में (अनुसूचित जातियों, अनुसूचित जनजातियों और अन्य पिछड़े वर्गो के लिए आरक्षण) अधिनियम 1994 द्वारा लोक सेवाओं और पदों में सीधी भर्ती के प्रक्रम पर अनुसूचित जातियों के मामले में 21 प्रतिशत, अनुसूचित जनजातियों के मामले में 2 प्रतिशत तथा नागरिकों के अन्य पिछड़े वर्गो, के मामले में 27 प्रतिशत (कुल 50 प्रतिशत) आरक्षण की व्यवस्था की गई है। यह आरक्षण वर्टिकल प्रकृति का है।

6– उत्तर प्रदेश लोक सेवा (शारीरिक रूप से विकलांग, स्वतंत्रता संग्राम सेनानियों के आश्रित और भूतपूर्व सैनिकों के लिए आरक्षण) अधिनियम 1993 द्वारा राज्य के कार्य– कलाप से सम्बन्धित लोक सेवाओं और पदों के लिए सीधी भर्ती के प्रक्रम पर रिक्तियों का 6 प्रतिशत आरक्षित किया गया है, यह आरक्षण हारिजेन्टल प्रकृति का है।

7– इन्दिरा साहनी बनाम यूनियन आफ इण्डिया, 1992 मामले में मा0 सर्वोच्च न्यायालय यह सिद्धान्त प्रतिपादित कर चुके हैं कि सामाजिक रूप से पिछड़े वर्गों के लिए लोक सेवाओं और पदों पर 50 प्रतिशत से अधिक आरक्षण प्रदान नही किया जावेगा, इस प्रकार वर्टिकल आरक्षण 50 प्रतिशत से अधिक नहीं हो सकता। अतः महिलाओं को हारिजेन्टल आरक्षण देने पर ही विचार हो सकता है।

8– उक्त के परिप्रेक्ष्य में यदि लोक सेवाओं और पदों में महिलाओं को आरक्षण करने का निर्णय लिया जाता है तो निम्न बिन्दुओं पर भी निर्णय लेना होगाः–

(अ) पंचायतीराज संस्थाओं में व्यवस्था है कि महिलाओं के लिए कुल सदस्यों की संख्या के कम से कम 1/3 पद आरक्षित हों, संसद एवं विधान सभा में महिलाओं के लिए 33–1/3 प्रतिशत आरक्षण प्रस्तावित है। मंत्रि–परिषद के निर्णय के अनुरूप प्रस्तावित है कि लोक सेवाओं और पदों में महिलाओं को 20 प्रतिशत आरक्षण प्रदान किया जाए।

(ब) जो रिक्तियों वर्तमान में विज्ञापित हो चुकी हैं या जिनमें वर्तमान में चयन की कार्यवाही प्रारम्भ हो चुकी है, उनमें आरक्षण नहीं होगा।

(स) आरक्षण केवल सीधी भर्ती के प्रक्रम पर दिया जाए या पदोन्नति के पदों पर भी, यह भी विचारणीय है। वर्तमान में केवल अनुसूचित जातियों और अनुसूचित जनजातियों के व्यक्तियों को ही लोक सेवाओं एवं पदों में पदोन्नति में आरक्षण प्राप्त है अन्य पिछड़े वर्ग के लिए पदोन्नति में आरक्षण की व्यवस्था लागू नहीं है। अनूसूचित जातियों और अनुसूचित जनजातियों को पदोन्नति में प्राप्त आरक्षण का प्रश्न मा0 सर्वोच्च न्यायालय की संविधान पीठ के समक्ष विचाराधीन है। अतः केवल सीधी भर्ती के प्रक्रम पर आरक्षण देना उचित होगा।

(द) यदि कोई महिला किसी पद पर उनके लिए आरक्षित रिक्तियों से अलग रिक्ति के विपरीत चयनित होती है तो उसे महिलाओं के लिए आरक्षित रिक्तियों के विपरीत समायोजित माना जावेगा या नहीं, यह भी विचारणीय है। महिलाओं के लिए लोक सेवाओं एवं पदों में आरक्षण की व्यवस्था करने का उद्देश्य महिलाओं का संर्वांगीण विकास सुनिश्चित करना है। क्योंकि महिलाओं के लिए हरिजेन्टल आरक्षण दिया जा रहा है, अतः जो महिला सामान्य रूप से मेरिट से चुनी जाती है उन्हें भी आरक्षित रिक्तियों के विरूद्ध गिना जाना उचित होगा।

9– इस टिप्पणी पर न्याय विभाग की सहमति प्राप्त कर ली गई है।

10– इस टिप्पणी को माननीय मुख्य मंत्री जी द्वारा अनुमोदित कर दिया गया है।''

Under representation of women in different sectors viz-a-viz male counter parts, as per 1991 Census Report is not in question. The decision of State to provide 20% reservation to women is also not questioned.

The scope of enquiry, in this bunch of petitions, is as to whether the State was justified in restricting benefit of horizontal reservation for women to the women who are original residents of State of Uttar Pradesh alone.

The Census Report of 1991 does not contain any specific detail with regard to women employed by the State of U.P. in State Sector. The figures contained in Table 1, relied upon by State, contains details of women as main worker which includes all sectors. Details of men and women employed in State/Government Services was not included as an item/head in the 1991 Census Report. There was, moreover, no item in the survey specifying the women employed in State Sector who were original residents of the State of Uttar Pradesh.

52. There is no empirical data or material placed on record before the Court to justify the decision of State to restrict women reservation for original residents of State alone. The figures placed on record before the Court firstly relates to women in State as a whole and not the women who are original residents of the State. The data furnished apparently includes all women main worker in primary, secondary and tertiary sectors in State of U.P. in 1991 including women who may be original residents of other States of the country. Women who are original residents of State of Uttar Pradesh may also be employed in State Sector in other States.

53. There is also no comparative assessment of employment of women who are residents of State of U.P. vis-a-vis the employment of women in other States, or their representation in public employment compared to the national average.

54. It is otherwise settled that in order to withstand the test of judicial scrutiny the State would be required to produce relevant data procured in a scientifically

collected manner to justify reasonable classification of women who are original residents of State of Uttar Pradesh and then to satisfy that such classification has a reasonable nexus with the object sought to be achieved. The data furnished by the State fails to qualify the test.

55. It may also be interesting to note that some of the selected women candidates belong to the newly carved out State of Uttarakhand from erstwhile State of Uttar Pradesh. They were actually born in the undivided State of Uttar Pradesh and can legitimately claim to be included in the category of original residents of erstwhile State of Uttar Pradesh. These aspects, however, do not appear to have been examined.

56. Even in the original records of State, on the basis of which the decision was taken on 9.1.2007 to restrict horizontal reservation in employment for women to original residents of State there is no reference or consideration of under representation of women who are the original residents of the State of Uttar Pradesh. The decision appears to have been taken on the basis of certain queries raised by the Public Service Commission in view of the fact that reservation in other categories under the Reservation Act of 1994 was restricted to the residents of the State of Uttar Pradesh alone. Parity in case of women was also claimed with such category of reservation.

57. Reservation under the Act of 1994 would have to be restricted to the residents of State, inasmuch as grant of declaration of a particular caste as Scheduled Caste, Scheduled Tribe and Other Backward Caste itself is restricted to the castes declared under the relevant presidential order of 1950 or the Act of 1994 for the particular State only. Such reservation is otherwise protected by Article 16 (4) itself. This distinction does not appear to have been noticed nor the restriction contained under Article 16(2) and (3) have been taken note of.

58. In our constitutional scheme women of this country are otherwise a homogeneous lot and they cannot be differentiated unless reasons and materials

exists for their further classification. Classification based only on residence would otherwise be permitted only by law made by the Parliament, which is not the case here. In such circumstances and for the reasons disclosed, it is held that Clause (4) of the Government Order dated 9.1.2007 restricting grant of horizontal reservation only to the women who are original residents of Uttar Pradesh as also specific stipulations in that regard, contained in Advertisement No. 14 of 2015 would be contrary to Articles 16(2) and 16(3) of the Constitution of India.

59. Sri K.S. Kushwaha, learned counsel appearing for the Commission also raised a plea with regard to entertainablity of questions urged at the instance of present petitioners on the ground that having applied for appointment, pursuant to advertisement, which contains clear stipulation that only original residents of State would be entitled to claim horizontal reservation for women, the present petitioners would be estopped from challenging the Government Order dated 9.1.2007 or the respective clause contained in the advertisement itself, as per which only an original resident of State could claim reservation for women.

60. The objection is countered on behalf of the petitioners by submitting that the plea of acquiescence or estoppel cannot be pressed when the act complained of is itself unconstitutional.

61. While examining the first issue framed for consideration in this writ petition, it has already been found that the Government Order dated 9.1.2007 providing for female reservation only to the original resident of State of Uttar Pradesh, is unconstitutional, being contrary to Article 14 and 16 of the Constitution of India. That being so, it needs examination as to whether acquiescence would come in the way of petitioners in challenging the impugned action on account of having applied pursuant to the advertisement which contains the impugned stipulation, without any challenge to the same before participation.

62. Acquiescence, as a concept, denotes acceptance of an act by the person aggrieved, without raising any challenge to it, even though the challenge may

succeed at the instance of the person concerned. Ordinarily, it would refer to an act which in law would be voidable. However, where the act complained of is found to be unconstitutional, it would have to be treated as void-ab-initio. Neither any right could be claimed on its basis nor a plea of waiver or acquiescence could be pressed into service. The effect of an act being unconstitutional was considered by the Constitution Bench of the Apex Court in the case of Behram Khurshed Pesikaka vs. The State Of Bombay, AIR 1955 SC 123, wherein the following was observed in para 12 to 16:-

> "12. The effect of the declaration of a statue as unconstitutional has been thus set out by Cooley on Constitutional Limitations, Vol. I, page 382 :-
>
> "Where a Statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it and no one can be punished for having refused obedience to it before the decision was made. And what is true of an Act void in toto is true also as to any part of an Act which is found to be unconstitutional and which consequently has to be regarded as having never at any time been possessed of any legal force....."
>
> 13. See also the dictum of Field J. in Norton v. Shelby County (118 U.S. 425 : 30 L.Ed. 178) :
>
> "An unconstitutional Act is not law, it confers no rights, it imposes no duties, it affords no protection, it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."
>
> 14. To the same effect are the passages from Rottschaefer on Constitutional Law, at page 34 :
>
> "The legal status of a legislative provision in so far as its application involves violation of constitutional provisions, must however be determined in the light of the theory on which Courts ignore it as law in the decision of cases in which its application produces unconstitutional result. That theory implies that the legislative provision never had legal force as applied to cases within that class."
>
> 15. Willoughby on Constitution of the United States, Second Edition, Vol. I, page 10 :-
>
> "The Court does not annual or repeal the statute if it finds it in conflict with the Constitution. It simply refuses to recognise it, and determines the rights of the parties just as such statute had no application. The Court may give its reasons for ignoring or

> disregarding the statute, but the decision affects the parties only, and there is no judgment against the statute. The opinion or reasons of the Court may operate as a precedent for the determination of other similar cases, but it does not strike the statute from the statute book; it does repeal..... the statute. The parties to that suit are concluded by the judgment, but no one else is bound. A new litigant may bring a new suit, based on the very same statute, and the former decision can be relied on only as a precedent,....."
>
> "It simply refuses to recognise it and determines the rights of the parties just as if such state had no application....."
>
> 16. And Willis on Constitutional Law, at page 89 :-
>
> "A judicial declaration of the unconstitutionality of a statute neither annuls nor repeals the statute but has the effect of ignoring or disregarding it so fact as the determination of the rights of private parties is concerned. The courts generally say that the effect of an unconstitutional statute is nothing. It is as though it had never been passed.....". ”

63. The Government Order dated 9.1.2007 would amount to a law in terms of Clause 3 of Article 13 of the Constitution of India. Once it is held that Clause (4) of the aforesaid Government Order is unconstitutional, then it automatically results in a void piece of law by virtue of Clause 2 of Article 13 itself. As such when Clause (4) of the Government Order dated 9.1.2007 has been specifically challenged on the ground of it being unconstitutional and the Court upon examination of the said issue has concluded that it is unconstitutional the objection raised by the respondents on the basis of the plea of estoppel and acquiescence cannot be accepted and is hereby rejected.

64. In view of the conclusions drawn on specific issues framed for consideration in this bunch of writ petitions, the petitions filed by women candidates who are not the original residents of the State of Uttar Pradesh is liable to succeed and their appointment would be protected.

65. Some of the petitioners are male candidates who have been appointed, due to inadvertence on part of the commission, against posts which were earmarked for female candidates. In case such posts were filled from women candidates, by correctly applying horizontal reservation, such male candidates

would not be selected in view of their merit. However, they have been appointed in the year 2016 and have been continuing as such for the last about three years without any complaint to their working. They allege that there was no misrepresentation on their part and having been selected and appointed it would be unduly harsh to allow the respondents to remove them from service, in facts and circumstances of the present case. It is also contended that large extent of vacancies otherwise exists in the concerned department and no prejudice would be caused to anyone, in case they are allowed to continue in employment. Various other aspects of equity have been pressed at their instance. Reliance is placed upon a recent judgment of Apex Court in Ran Vijay Singh and others Vs. State of Uttar Pradesh; (2018) 2 SCC 357. Sri Agnihotri Kumar Tripathi, Advocate, appearing for some of the petitioners has also relied upon judgments of the Apex Court in Tridip Kumar Dingal Vs. State of West Bengal, 2009 (1) SCC 768; Rajesh Kumar Daria Vs. Rajasthan Public Service Commission, 2007(8) SCC 785; Rajesh Kumar and others Vs. State of Bihar and others, 2013(4) SCC 690; Vikas Pratap Singh and others Vs. State of Chhattisgarh and others, 2013 (14) SCC 494 and judgment of this Court in Ram Naresh Singh and others Vs. State of U.P. and others, 2018(1) ESC 592, in support of petitioners contention that their appointment is not liable to be interfered with.

66. Submissions, aforesaid, is opposed on behalf of the State and the Commission by contending that merely due to an act of inadvertence if petitioners are selected and appointed then no equity could be claimed by them in view of clear stipulation in the advertisement that eligibility/right to be appointed could be examined by the Commission, even later.

67. In order to examine the respective contentions advanced, on this aspect, this Court had directed the State on 23.10.2018 to specify the total cadre strength of Junior Engineers as also the number of posts lying vacant or which are likely to fall vacant in the current recruitment year.

68. The Special Secretary, Department of Personnel of the State of Uttar Pradesh has filed an affidavit which contains reply on the aforesaid aspect in Annexure 2. As per the information furnished by Chief Engineer (Personnel) Irrigation and Water Resources U.P. there are 4217 sanctioned posts of Junior Engineer in the cadre. 2822 of such sanctioned posts are lying vacant as on 30.6.2018. 91 vacancies are likely to arise further in the current recruitment year due to promotion and retirement. It is also informed that a requisition for filling up 2100 vacancies against 2822 vacant posts for different post of the year 2008-09 to 2015-16 has already been sent to U.P. Public Service Commission, Allahabad while 722 posts of years 2014-15 to 2017-18 has been sent to the Commission.

69. From the affidavit of the Special Secretary, State of U.P. it is clear that large number of posts are lying vacant for the last several years and absence of posts cannot be pleaded as a ground to non-suit the petitioners.

70. Although, it is not in issue that male petitioners would not have been selected on the strength of their merit if reservation was correctly applied but that itself would not be the determinative criteria.

71. Admittedly, these petitioners have applied for appointment to the posts of Junior Engineer (Civil) pursuant to the advertisement no. 14 of 2015 and they possess requisite qualification/eligibility for appointment to the post in question. They have been selected and appointed and are continuing as such for the last about three years. There is no allegation of misrepresentation on their part in securing appointment in question.

72. Aspects of equity, in consideration of claim of appointment in similar exigencies has been taken note of by the Apex Court in some of the decisions relied upon by the petitioners, which requires reference at this stage. The Apex Court in Ran Vijay Singh and others (supra) observed as under:-

> "37. As a result of our discussion and taking into consideration all the possibilities that might arise, we issue the following

directions:

(1) The results prepared by the Board consequent upon the decision dated 2nd November, 2015 of the High Court should be declared by the Board within two weeks from today.

(2) Candidates appointed and working as Trained Graduate Teachers pursuant to the declaration of results on the earlier occasions, if found unsuccessful on the third declaration of results, should not be removed from service but should be allowed to continue.

(3) Candidates now selected for appointment as Trained Graduate Teachers (after the third declaration of results) should be appointed by the State by creating supernumerary posts. However, these newly appointed Trained Graduate Teachers will not be entitled to any consequential benefits."

In Tridip Kumar Dingal (supra), Apex Court observed as under:-

"47. In Munindra Kumar & Ors. v. Rajiv Govil & Ors., (1991) 3 SCC 368, the selection comprised of written test, group discussion and oral interview. The relevant rule fixed 40 per cent of total marks for group discussion and oral interview (20 per cent each). Though this Court held fixation of marks as arbitrary being on higher side, it refused to set aside selection made on that basis since selection had already been made, persons were selected, appointed and were in service.

48. In Gujarat State Deputy Executive Engineers' Association v. State of Gujarat & Ors., 1994 Supp (2) SCC 591, this Court recorded a finding that appointments given under the `wait list' was not in accordance with law. It, however, refused to set aside such appointments in view of length of service (five years and more).

49. In Buddhi Nath Cahudhary & Ors. v. Akhil Kumar & Ors., (2001) 3 SCC 328, appointments were held to be improper. But this Court did not disturb the appointments on the ground that the incumbents had worked for several years and had gained good experience. "We have extended equitable considerations to such selected candidates who have worked on the posts for a long period", said the Court.

50. In M.S. Mudhol (Dr.) & Anr. V. S.D. Halegkar & Ors., (1993) 3 SCC 591, the petitioner sought a writ of quo warranto and prayed for removal of a principal of a school on the ground that he did not possess the requisite qualification and was wrongly selected by the Selection Committee. Keeping in view the fact, however, that the incumbent was occupying the office of Principal since more than ten years, this Court refused to disturb him at that stage.

51. In our considered opinion, the law laid down by this Court in aforesaid and other cases applies to the present situation also.

> We are of the considered view that it would be inequitable if we set aside appointments of candidates selected, appointed and are working since 1998-99. We, therefore, hold that the Tribunal and the High Court were right in not setting aside their appointments."

In Rajesh Kumar Daria (supra), the Supreme Court held as under:-

> "11. The appellants' grievance that the selection process adopted by RPSC was contrary to the reservations policy contained in Rule 9(3) is justified. But the question is whether the entire selection should be set aside and whether all appellants should be granted relief. On completion of the selection process, 97 candidates were appointed in the year 2002 and have been serving as Judicial Officers for more than five years. There has also been a subsequent selection and appointments in the year 2005. Further all the selected candidates are not impleaded as parties. Even from among the original ten writ petitioners, only seven are before us. On the facts and circumstances, we do not propose to disturb the selection list dated 30.12.2001 or interfere with the appointments already made in pursuance of it. We will only consider whether the appellants before us are entitled to relief. We find that even if the selection list had been prepared by applying horizontal reservation properly, only the appellant (Rajesh Kumar Daria) in this appeal, and appellant Nos.3 and 6 in the connected appeal (Mohan Lal Soni and Sunil Kumar Gupta) will get selected. The other appellants were not eligible to be selected.
>
> 12. In view of the above and in view of available vacancies, we deem it just and proper to accommodate those three candidates without disturbing the selections and appointments already made, to do complete justice, in the following manner :
>
> 12.1) Sunil Kumar Gupta (general category candidate with 184 marks) and Mohan Lal Soni (OBC candidate with 169 marks), who ought to have been selected in the 2001 selection list, and who were denied appointment in view of excess selection of women candidates, shall be deemed to have been selected by RPSC. As a consequence, necessary letters of appointment shall be issued to them. Their seniority for all purposes will however be counted only from the date of actual appointment.
>
> 12.2) Rajesh Kumar Daria (OBC candidate with 171 marks) was also not selected because of the selection of excess women candidates. He ought to have been selected and appointed in the 2001 selection. We are told that Rajesh Kumar Daria got selected in the subsequent 2005 examination and was appointed in the Rajasthan Judicial Service on 12.2.2005. Considering the above fact, we direct that he should be given his position in the 2001 selection list. Interests of justice would be served if he is placed as the last candidate in the 2001 selection list. As he worked from 12.2.2005, we make it clear that such retrospective seniority will not entitle him to any monetary benefits, but will

only be counted for promotions and pensionary benefits."

In Rajesh Kumar (supra), the Apex Court observed as under:-

> "19. In the result, we allow these appeals, set aside the order passed by the High Court and direct that -
>
> 1) answer scripts of candidates appearing in 'A' series of competition examination held pursuant to advertisement No. 1406 of 2006 shall be got re-evaluated on the basis of a correct key prepared on the basis of the report of Dr. (Prof.) CN Sinha and Prof. KSP Singh and the observations made in the body of this order and a fresh merit list drawn up on that basis.
>
> 2) Candidates who figure in the merit list but have not been appointed shall be offered appointments in their favour. Such candidates would earn their seniority from the date the appellants were first appointed in accordance with their merit position but without any back wages or other benefit whatsoever.
>
> 3) In case writ petitioners-respondent nos. 6 to 18 also figure in the merit list after re-evaluation of the answer scripts, their appointments shall relate back to the date when the appellants were first appointed with continuity of service to them for purpose of seniority but without any back wages or other incidental benefits.
>
> 4) Such of the appellants as do not make the grade after re-evaluation shall not be ousted from service, but shall figure at the bottom of the list of selected candidates based on the first selection in terms of advertisement No.1406 of 2006 and the second selection held pursuant to advertisement No.1906 of 2006.
>
> 5) Needful shall be done by the respondents – State and the Staff Selection Commission expeditiously but not later than three months from the date a copy of this order is made available to them."

The Apex Court in Vikas Pratap Singh (supra) observed as under:-

> "25. Admittedly, in the instant case the error committed by the respondent-Board in the matter of evaluation of the answer scripts could not be attributed to the appellants as they have neither been found to have committed any fraud or misrepresentation in being appointed qua the first merit list nor has the preparation of the erroneous model answer key or the specious result contributed to them. Had the contrary been the case, it would have justified their ouster upon re-evaluation and deprived them of any sympathy from this Court irrespective of their length of service.
>
> 26. In our considered view, the appellants have successfully undergone training and are efficiently serving the respondent-State for more than three years and undoubtedly their termination would not only impinge upon the economic security of the appellants and their dependants but also adversely affect

> their careers. This would be highly unjust and grossly unfair to the appellants who are innocent appointees of an erroneous evaluation of the answer scripts. However, their continuation in service should neither give any unfair advantage to the appellants nor cause undue prejudice to the candidates selected qua the revised merit list.
>
> 27. Accordingly, we direct the respondent-State to appoint the appellants in the revised merit list placing them at the bottom of the said list. The candidates who have crossed the minimum statutory age for appointment shall be accommodated with suitable age relaxation."

In Ram Naresh Singh (supra), this Court has held as under:-

> "95. Such candidates, who could not make a grade after reevaluation, i.e. candidates like the petitioners herein should not be ousted from service, but should figure at the bottom of the list of the selected candidates based on the first selection in terms of the advertisement issued, and also all such selected candidates, whose results had been announced after the second selection pursuant to a later advertisement.
>
> 97. The writ petitioners therefore cannot be ousted from service altogether and shall be kept at the bottom of the rectified Select List issued for Advertisement No. 1 of 2010, and also any other Select List on the basis of any later advertisement issued by the Selection Board, selection on the basis of which has been completed and recommendations made for appointment. The petitioners shall be offered fresh appointments on the posts of Hindi Teachers L.T. Grade in Institution, which have determined such vacancies in direct recruitment quota and intimated them to the District Inspector of School concerned and further notified to the Selection Board, but on which vacancies selection has not been advertised or finalized by the Selection Board till date."

73. In view of the law laid down by the Apex Court and by this Court, the petitioners claim for protection of their appointment, in the peculiar facts of the present case needs to be examined. Admittedly, petitioners have been selected and appointed pursuant to the advertisement in question. Their eligibility for the post is also not in issue. Vacant posts are otherwise available. There is no misrepresentation or fraud on their part. Having continued satisfactorily, for about three years, it would be unjust to allow the respondents to eliminate their candidature by throwing them out of employment, in view of the law laid down by the Apex Court in similar circumstances.

74. It is therefore provided that none of selected petitioners would be removed

from service on account of publication of revised select list and their appointments would stand protected. Such petitioners, however, would be placed at the bottom of the seniority list drawn of the candidates selected pursuant to the advertisement no. 14 of 2015. They shall be adjusted against available vacant positions which have not been advertised so far or on which any right has not yet accrued in favour of any person.

75. Subject to the observations, aforesaid, the modified/revised select list dated 28.4.2018 stands affirmed. The candidates selected vide modified select list dated 28.4.2018 shall be placed as per their merit in the seniority list and their candidature for the purposes of seniority as per the revised select list would not be adversely affected by the grant of protection to the male petitioners who were inadvertently included in the select list and their appointment is protected by this judgment. Clasue (4) of the Government Order dated 9.1.2007 is declared *ultra vires* the Articles 16 (2) & 16(3) of the Constitution of India, in so far as it restricts the grant of horizontal reservation to women who are original residents of the State of Uttar Pradesh. Consequently, the female petitioners who have been ousted on account of the denial of benefit of horizontal reservation to them due to the fact that they are original residents of other parts of the country, cannot be sustained and the impugned action to that extent is set aside. All such female petitioners would continue in employment as per original select list published and the modified select list to that extent is directed to be amended.

76. In light of the observations made in this judgment, this bunch of writ petitions stands disposed of finally. There shall be, however, no order as to costs.

Order Date :- 16.1.2019
Amit Mishra/Anil/Ashok Kr./Ranjeet Sahu

(Ashwani Kumar Mishra, J.)