Ashok Kumar Gupta and Another

Vs

State of U.P. and Others

Vidya Sagar Gupta and Others

Vs

State of U.P. and Others

Civil Appeal No. 2239 of 1997

(K. Ramaswamy, G. B. Pattanaik, S. Saghir Ahmed JJ)

21.03.1997

JUDGMENT

K. RAMASWAMY, J. –

1. Leave granted.

2. This appeal by special leave arises from the judgment dated 4-8-1983 of the Allahabad High Court, Lucknow Bench, in Writ Petition No. 3088 of 1993. The writ petition also arises from the same facts but is filed by different set of officers challenging the promotion of Respondents 2 to 10 (in the writ petition) the 2nd respondent (in the civil appeal) to the posts of Superintending Engineers (Civil), Chief Engineer, Level-II (Civil), Chief Engineer, Level-I and Engineer-in-Chief in Public Works Department of the Government of Uttar Pradesh. The petitioners seek a writ of mandamus to restrain the first respondent from giving effect to the promotions given to Respondents 2 to 10. They also seek a writ of certiorari to quash the orders dated 12-3-1981 appointing the second respondent as Superintending Engineer on ad hoc basis and on regular basis w.e.f. 10-4-1991 as temporary Chief Engineer by order dated 7-11-1994 and orders promoting Harbans Lal and others as Superintending Engineers.

3. The Governor exercising the power under proviso to Article 309 of the Constitution made the Uttar Pradesh Service of Engineers (Public Works Department) (Higher) Rules, 1990 effective from 15-10-1990 (for short "the Rules"). They came into force at once by operation of Rule 1(2). The services comprised there under are grouped as Group 'A' posts, consisting of various posts. Under sub-rule (1) of Rule 4 which speaks of "Cadre of the Service", the strength of the service and of each category of the posts shall be such as may be determined by the Government from time to time. Sub-rule (2) gives power to determine the strength of service and of each category of posts until they are ordered to be varied. The posts of Executive Engineer (Civil), Executive Engineer (Electrical and Mechanical), Superintending Engineer (Civil), Superintending Engineer (Electrical and Mechanical), Chief Engineer Level-II (Civil), Chief Engineer Level-II (Electrical and Mechanical), Chief Engineer Level-I (Civil), and Engineer-in-Chief have been specified under two categories, viz., the permanent and temporary cadre and strength in the respective cadres has been enumerated. In Part III, Rule 5 provides method of recruitment by way of promotion from the

substantive posts of Assistant Engineers to the post of Executive Engineers and recruitment by promotion from amongst substantive posts of Executive Engineers to the posts of Superintending Engineers; from the Executive to Superintending Engineer Level-II and from Chief Engineer Level-II to Chief Engineer Level-I and from Chief Engineer Level-I to Engineer-in-Chief respectively. Rule 6 prescribes reservation for the candidates belonging to Scheduled Castes (for short "Dalits") and Scheduled Tribes (for short "Tribes") and other categories in accordance with the orders of the Government in force at the time of recruitment. The qualifying service in the lower cadre for promotion to the higher cadre is also prescribed. The procedure for the determination of vacancies to be reserved under Rule 6 for Dalits, Tribes and other categories has been provided in Rule 7.

4. Rule 8 adumbrates that recruitment to the post of Executive Engineer (Civil) shall be made on the basis of seniority subject to rejection of the unfit and to the post of Superintending Engineer and above shall be made on the basis of merit through a Selection Committee to be constituted of officials specified thereunder. Recruitment to the post of Chief Engineer Level-II is by the process of screening and selection. The details thereof are not material, hence omitted. Rule 9 empowers the Government to appoint the selected candidates in the order of seniority. If more than one persons are recruited in one selection by a committee appointed in their behalf, a combined order indicating the names of persons has to be issued in the seniority order as it stood in the earlier cadre. The procedure has been prescribed in Rule 10 for declaration of the probation etc. Rule 11 empowers the Government to confirm the appointee at the end of the probation or the extended probation. Rule 12 prescribes procedure for determination of seniority. The other details are not material, hence are omitted. Rule 18 is a saving provision which provides that nothing in this rule shall affect reservations and other concessions required to be provided for Dalits, Tribes and other special categories of persons in accordance with the orders of the Government issued from time to time in that regard.

5. By proceedings dated 8-3-1973, the Government had provided percentage in reservation for Dalits and Tribes @ 18% and 2% respectively in all services or posts to be filled in by promotion though process of selection either by direct recruitment or by competitive examination or limited departmental examination. The said percentage has been increased to 21% for Dalits and retained 2% for the Tribes under the U.P. Service (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 (for short "the U.P. Act") that came into force with effect from 11-12-1993. It has provided for the first time reservation @ 27% to Other Backward Classes. The 1973 Rules provided that if sufficient number of suitable candidates belonging to Dalits and Tribes were not available against reserved vacancies at the time of selection and if the vacancies were required to be filled up in the public interest, general category employees could be appointed on an ad hoc basis. It had to be so mentioned in their orders of appointment that the promotion/appointments were ad hoc and conferred no rights and that the vacancies would be carried forward to the following year. Carried-forward vacancies could not exceed 45% of the total of such vacancies etc. Under Rule 3 of the 1973 Rules, for suitability purpose, Dalits and Tribes were treated to be same as the general candidates, i.e. the standard of suitability was same for all the candidates. The Dalits and Tribes who fulfilled the minimum required standard of merit would be selected up to the limit of reservation. Under Rule 4, when Dalits and Tribes were promoted substantively or temporarily to the above-reserved vacancies for the first time, their confirmation would be done under normal rules. The rule of the reservation was not applicable again for confirmation in their case.

6. Though the Government omitted under the 1973 Rules reservation in the posts pursuant to which required recruitment by promotion on the principle of seniority subject to rejection of unfit, by the

rules issued on 20-3-1974 the Government amended the same and restored recruitment by promotion to the posts on the prescribed percentage. The reservation was limited to those services only where direct recruitment was not more than 50%. The promotion thereafter was to be done according to rules and regulations under those provisions of reservation. The candidates who were eligible and suitable on the basis of seniority and were not found unfit, would be selected up to the reservation limit. Rule 2 of the 1974 Rules provides for promotion to the posts where merit was also the consideration. The selected candidates from amongst the Dalits and Tribes and the general candidates would be shown in separate eligibility lists to each category. The selected candidates were to be placed according to their inter se seniority of the original post. Afterwards, all the three lists were to be compiled according to the inter se seniority and promotions were to be given against the vacancies accordingly and common seniority list was to be maintained. By orders issued on 27-12-1974, it was further clarified that "after reconsideration, the Government has withdrawn the restriction, i.e., this reservation will be limited to those services only where direst recruitment is not more than 50%". The above-referred GO will be treated to be modified accordingly. Thus, the Dalits and Tribes were to get reservation in promotion on all posts/services. By proceedings dated 5-7-1984, it was further amplified, vis-a-vis that these orders referred to hereinbefore thus : "The Government after reconsideration feels it necessary to clarify the process of preparation of separate eligibility lists in this regard."

7. Rule 2 of the 1984 Order provided that :

> "The total vacancies for promotion on the basis of seniority subject to rejection of unfit arising in any department/office at any time shall be divided into general candidates and SC/ST candidates on the basis of GOs issued from time to time for reservation in promotions for these special categories. Each category shall be prepared separately in the order of their inter se seniority for available vacancies for each category and selections have been done from such eligibility list for each category on the basis of seniority subject to rejection of the unfit. A combined list shall be prepared after selection of candidates from each category according to their inter se seniority."

8. For ad hoc promotion also the above principle was made applicable. In this legal backdrop, it would, thus, be seen that preceding 1990, promotions in State Service were regulated by above instructions and from the 1990 Rules, they formed the statutory base. The rule of reservation in promotion at all levels has, thus, been provided for the Dalits and Tribes. Under the U.P. Act it was extended to the OBCs only in direst recruitment.

9. When Respondents 2 to 10 were considered an recruited as promotees from the cadre of Executive Engineer to that of Superintending Engineer and above cadres on the basis of merit, the appellants came to challenge their appointments. It was contended in the High Court and reiterated by the learned counsel, M/s. Parag P. Tripathi and Anil Kumar Gupta that in Indra Sawhney v. Union of India [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] known as Mandal case [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] eight of the nine Judges, per majority (Ahmadi, J. as he then was, having not participated in this issue) held that appointment by promotion under Articles 16(1) and 16(4) of the Constitution is unconstitutional. In particular, they placed strong reliance on the judgments of Jeevan Reddy, J. speaking for three Judges and Sawant, J. (for himself) in that behalf. They referred to Question No. 7 framed by the Bench and contented that the finding has been recorded in paras 859(7) and 860(8) by Jeevan Reddy, J., in paras 242-243(10) by Pandian, J., in paras 323 and 324-D by Thommen, J. and by

Kuldip Singh, J. in para 381, by Sawant, J. in paras 543-553 and by Sahai, J. in paras 623-625. On that premise, it was contended that the 1996 (sic 1990) Rules are ultra vires and the promotion of the respondents is unconstitutional. It is also contended that having declared the promotions under Articles 16(1) and 16(4) of the Constitution as unconstitutional, overruling the judgment of a Bench of five Judges of this Court in G.M., S. Rly. v. Rangachari [(1962) 2 SCR 586 : AIR 1962 SC 36] the same being not correct in law. Jeevan Reddy, J. with whom Kania, C.J. and Venkatachaliah, J., as he then was, had concurred, and Pandian, J. having also concurred, expressly overruled prospectively the applicability of the rule of reservation in promotion operative after a period of five years from 16-11-1992 i.e. the date of the judgment. The contention of the petitioners is that it is only a minority view. The ratio, therefore, is unconstitutional. Under Article 145(5) of the Constitution, it does not constitute majority judgment.

10. Having declared the reservation in promotion as unconstitutional, it is void ab initio under Article 13(2) of the Constitution. It bears, thereby, no legal or constitutional existence. The promotion made to Respondents 2 to 10 at all levels, therefore, is unconstitutional. The operation of the unconstitutional direction cannot be postponed by prospective overruling of Rangachari [(1962) 2 SCR 586 : AIR 1962 SC 36] ratio. The judgment of Jeevan Reddy, J. concurred by Pandian, J. being minority judgment, cannot operate prospectively. Even if it is assumed that it is a majority judgment, it is inconsistent with and contrary to the constitutional scheme of Articles 14 and 16 violating the fundamental rights of the appellants/petitioners and, therefore, the power under Article 142 of the Constitution cannot be exercised to curtail the fundamental rights guaranteed in Part III of the Constitution.

11. There is a distinction between the conclusions and directions. Justice Pandian and Justice Sawant expressed their concurrence on the conclusions and not with directions given by Jeevan Reddy, J. The direction for prospective overruling of Rangachari case [(1962) 2 SCR 586 : AIR 1962 SC 36] and for operation of Mandal [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] ratio after five years is only by a minority of four Judges. It being inconsistent with and contrary to the scheme of the Constitution in exercise of the power of judicial review, the Court cannot postpone the operation of the judgment to a future date, which violates their fundamental rights. In support thereof, they placed strong reliance on the judgment in A.R. Antulay v. R.S. Nayak [(1988) 2 SCC 602 : 1988 SCC (Cri) 372] (SCC para 15) and Delhi Judicial Service Assn. v. State of Gujarat [(1991) 4 SCC 406] (SCC para 37). Having declared by the reservation in promotions as void, the prospective overruling is illegal as it is no part of the doctrine of stare decisis. In support thereof, they placed reliance on Waman Rao v. Union of India [(1981) 2 SCC 362 : (1981) 2 SCR 1]. Postponement of operation of the judgment amounts to judicial legislation which is inconsistent with the power of judicial review which empower only to declare the law to be unconstitutional and not to make the law.

12. It is further contended that the exercise of Article 142 to postpone the operation of the judgment after five years amounts to perpetration of void action and is violative of the appellants' fundamental rights guaranteed under Articles 14 and 16(1) of the Constitution. The order under Article 142, being only a remedial measure to do complete justice, cannot operate as a substantive right. The direction to operate the scheme of reservation in promotion for five years is inconsistent with and in derogation of the substantive right to equality guaranteed under Articles 14 and 16(1). Therefore, the scheme is unconstitutional. Prospective operation of Mandal case [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] amounts to judicial legislation and amounts to temporary amendment to the Constitution or an addition in the form of a proviso to Article 16 (1) or 16(4) of the Constitution.

13. Shri Rakesh Dwivedi, learned Additional Advocate General, contended that the micro Lexicon surgery conducted by the counsel for the appellants/petitioners to make distinction between conclusions and directions requires no detailed examination. The end result is that five out of eight learned Judges, who opined in the negative on the issue of reservation in promotion directed that reservation, from that date, will continue for five years, while giving liberty to the appropriate Government to make suitable legislative amendments. In fact, the right to promotion is a facet of the right to recruitment to a post or an office under the State. No express provision is required in this behalf in Article 16(1) or 16(4) of the Constitution. After the judgment in Mandal case [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385], however, the Constitution (77th Amendment) Act was enacted by Parliament which has come into force w.e.f. 17-6-1995 from which date Article 16(4-A) was brought into the Constitution. It provides that "nothing in this article shall prevent the State from making any provision for reservation in matters of promotion of any class or classes of posts in the services under the State in favour of Scheduled Castes and Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State". Thereby, Parliament has remanifested its policy that the right to reservation in promotion is a part of the constitutional scheme or public policy in order to accord socio-economic empowerment and dignity of person and status to the Dalits and Tribes. The right to reservation in promotions would be available to Dalits and Tribes in any, class or classes, of posts in the services under the State which in the opinion of the State does not get adequate representation of Dalits and Tribes. This is due to the historical evidence that the Dalits and Tribes are socially, educationally and economically deprived, denied and disadvantaged sections of the society. To make their right to equality meaningful, they are equally entitled to the facilities and opportunities, by way of reservation in promotions, and the State in compliance of the mandate of the Preamble, Articles 14, 21, 38, 46 and 335 of the Constitution, has provided them with the right to equality of opportunity in all posts or classes of posts in the services under the State. Therefore, the majority sections of the society are required to reconcile to and accept the equal fundamental rights of Dalits and Tribes guaranteed under Articles 16 and 14 of the Constitution. The right to reservation in promotions is not an anathema to right to equality enshrined to other general candidates. The competing rights of both should coexist and consistently be given effect by balancing the abstract doctrine of equality and the distributive justice would fill in the gap. Only upholding of affirmative action of the State by pragmatic interpretation under rule of law would enable the State to harmonise competing rights of all sections of the society.

14. There is no dichotomy or distinction between conclusion and directions. Para 860(8) should be read with the conclusions of Sawant, J. in paras 552 and 555 and, therefore, the opinions of Kania, C.J., Venkatachaliah, Pandian, Sawant and Jeevan Reddy JJ., as the issue of reservation in promotion constitute majority of five Judges under Article 145(5) of the Constitution. The opinion expressed by Jeevan Reddy, J. postponing the operation of the judgment for five years, unless expressly dissented by other Judges, is law declared by majority under Article 145(5) of the Constitution. Prospective overruling is a part of constitutional policy. For its application, different perceptions would be considered and given effect while overruling the prior decision. Rangachari [(1962) 2 SCR 586 : AIR 1962 SC 36] ratio had operated as constitutional law for over three decades and rights were settled on that basis. Therefore, with a view to enable the appropriate Government to amend the law in that behalf, the operation of the judgment was postponed for five years. It is, therefore, not a judicial legislation but a part of the declaration granted by the Court. In pith and substance, it is a facet of suspending the operation of the judgment for five years so that the constitutional objective of providing reservation in promotions to Dalits and Tribes would operate without any hiatus. The decision in R.K. Sabharwal v. State of Punjab [(1995) 2 SCC 745 : 1995

SCC (L&S) 548 : (1995) 29 ATC 481] by a Constitution Bench reaffirms that the decision in Mandal case [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] on promotion was by a majority. Obviously Sabharwal [(1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481] ratio had upheld the principle of reservation in promotions and applied "running account theory" put forth by the State to give practical content to equality in results applying the roster points earmarked for the Dalits and Tribes, apart from equal opportunity to them to compete with the general candidates for general posts. The employees from general sections and Dalits and Tribes are integrated in the roster system to harmonise the competing interests. The Dalits and Tribes selected for promotion on merit in open competition are not to be treated as part of the reserved quota. That contemporaneous understanding of the operation of the law is in accordance with the law laid in para 860(8) of Mandal case [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385]. So, it is a valid direction.

15. The reservation in promotions in all the services or posts under the State of Uttar Pradesh was in vogue from March 1973. The legislature of Uttar Pradesh reiterated the need for continuance of the reservation not only in direct recruitment but also its continuance, as mentioned in the U.P. Act. The U.P. Act came into force w.e.f. 11-12-1993. The judgment in Mandal case [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] was delivered on 16-11-1992. All the promotions made prior to that date were held valid in Mandal case [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385]. The impugned judgment of the High Court was rendered on 4-8-1993 while the Constitution (77th Amendment) Act of 1995 came into force on 17-6-1995. The promotions of the respondents came to be made between 17-11-1992 and 11-12-1993, i.e., within five years of the directions in para 860(8) in Mandal case [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] and agreed to by other learned Judges. Therefore, it was contended that the promotions to and appointment of the private respondents is constitutional.

16. He further contended that right to promotion is not a fundamental right to general candidates while it is so in the case of Dalits and Tribes. It is subject to rules. The policy of the Government as per the constitutional objectives is that the Dalits and Tribes should be given adequate representation in all posts or classes of posts and services under the State. Reservation in promotion is one of the policies under the Constitution and the statutory share in the governance makes no discrimination nor offends Article 14 as the rights of general and reserved employees are to be mutually balanced. The law is always presumed to be constitutional until it is declared otherwise. The Rules and the Act are constitutionally valid. By operation of Article 13(1), pre-constitutional law, if declared void, is void only from the date of the Constitution, namely, from 26-1-1950 and though the post-constitutional law may be void from it inception. To adjust the competing rights of the general and Dalit and Tribe employees, there is no prohibition for this Court to postpone the operation of the judgment in Mandal case [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] or to so prospectively overrule Rangachari [(1962) 2 SCR 586 : AIR 1962 SC 36] ratio as to be operative from expiry of five years from the date of judgment. The intention behind the direction appears to be that the law in the transition, as per the constitutional scheme of reservation in promotions, would be smooth and operate as a continuous scheme. If the Government makes no amendment to the statute, after the expiry of five years, the operation of the scheme of reservation in promotion would come to a stop. By Constitution (77th Amendment) Act, 1995, the scheme of reservation in promotions is continued without any need to bring about amendment to the statutory rules since Article 16(4-A) itself provided constitutional operation of reservation in promotion obviating the necessity to amend all statutory rules.

17. The prospective operation of law for 5 years is consistent with the doctrine of stare decisis as the

declaratory law becomes operative thereafter. The ratio of Antulay case [(1988) 2 SCC 602 : 1988 SCC (Cri) 372] has no application. Therein, the appellant Antulay was meted out with a hostile discrimination denying him the normal trial and right of appeal and he was subjected to special trial by the High Court, depriving him of the statutory appeal violating his fundamental right to equality. Therefore, this Court had held that the direction given under Article 142 to constitute a separate tribunal presided over by a High Court Judge was inconsistent with the fundamental right to equality guaranteed by Article 14. From that perspective, it was held therein that the exercise of power under Article 142 should be consistent with the constitutional scheme. In I.C. Golak Nath v. State of Punjab [(1967) 2 SCR 762 : AIR 1967 SC 1643] (SCR at p. 808) it was held that the power of this Court under Article 142 is very wide and it cannot be controlled by any statutory prohibition. In Union Carbide Corpn. v. Union of India [(1991) 4 SCC 584] (SCC at p. 634 para 83) this Court held that the competing rights are required to be adjusted by balancing them. The Court in Mandal case [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385], being conscious of the consequences and pervasive effect of its declaration on the policy of reservation in promotions, by the arm of the judicial review, extended the time to enable the executive to suitably amend its law. This Court, therefore, set the time limit up to which existing law would remain in operation, as the selection procedure is a continuous process to fill up existing or anticipated vacancies each year. The gap between equality in law and equality in results was bridged by Article 16(4-A). It is not a case of hostile discrimination meted out to any section of the citizens but one of adjustment balancing the competing rights of two groups of the citizens of the country. The directions issued, in exercise of the power under Article 142, therefore, was not in violation of the fundamental rights of the employees belonging to the general category. The direction issued under Article 142 is, therefore, neither unconstitutional nor contrary to the law. In fact, the direction is to prevent injustice as is provided in Article 46 of the Constitution. In M. Venkateswarlu v. Govt. of A.P. [(1996) 5 SCC 167 : 1996 SCC (L&S) 1153], Union of India v. Madhav [(1997) 2 SCC 332 : 1997 SCC (L&S) 503 : JT (1996) 9 SC 320], G.S.I.C. Karmachari Union v. Gujarat Small Industries Corpn. [(1997) 2 SCC 339 : 1997 SCC (L&S) 509 : JT (1997) 1 SC 384] and S. Sathyapriya v. State of A.P. [(1996) 9 SCC 466], this Court held that the Constitution (77 the Amendment) Act, 1995 has given effect to the law laid down in Rangachari case [(1962) 2 SCR 586 : AIR 1962 SC 36] as enshrined in Articles 14 and 16(1) of the Constitution.

18. Shri Raju Ramachandran, learned Senior Counsel appearing for private respondents, while adopting the arguments of Shri Rakesh Dwivedi, argued that the prospective overruling of Rangachari [(1962) 2 SCR 586 : AIR 1962 SC 36] ratio, the distinction of stare decisis and the constitutional invalidation of a legislative enactment may be kept in view. The ratio in Rangachari case [(1962) 2 SCR 586 : AIR 1962 SC 36] having prevailed the field for over three decades, majority in Mandal case [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] opined that the ratio in Rangachari case [(1962) 2 SCR 586 : AIR 1962 SC 36] would remain operative for a further period of five years. Exercise of the power of judicial review and power under Article 142 are the judicial tools given to this Court to prevent injustice. By judicial craftsmanship, the directions came to be issued to elongate the constitutional and public policy of reservation in promotion until appropriate amendments are brought on statute within five years. He cited instances of staying the operation of the judgments by the High Court pending grant of leave under Article 136. The decision to postpone the effect of Mandal case [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] is a legal policy as a part of the inherent power preserved in this Court by Article 142. This Court, by prospective operation of a statute or operation of a judgment has not sanctioned any unconstitutional scheme but intended to postpone the operation of the declaration of law to a future date. In S.P. Sampath Kumar v. Union of India

[(1987) 1 SCC 124 : (1987) 2 ATC 82] this Court, with a view to avoid constitutional crisis in dispensation of service dispute between public servants and the appropriate Government or instrumentality, by the administrative tribunals constituted under the Administrative Tribunals Act, instead of declaring the Act ultra vires, issued mandamus to make suitable amendments to the Tribunals Act so as to be consistent with the constitutional scheme. The judicial creativity, therefore, cannot be cribbed or cabined by any set proposition or standard formulation. They are required to be modulated depending upon the fact-situation in a given case on hand and the consequences of the judgment under consideration. Rangachari [(1962) 2 SCR 586 : AIR 1962 SC 36] ratio having held the field for three decades, the conclusions and the directions which are integral part of para 860(8) of Mandal judgment [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385], are part of ratio decidendi and are intended to be operative after a period of five years from the date of judgment unless, by then, suitable amendments are brought out.

19. Dr. M.P. Raju, learned counsel appearing for the intervener, contended that the Dalits and the Tribes have equal constitutional rights. The Constitution has provided in their favour protective and positive discrimination by providing for reservation in promotions as part of equality of opportunity, status, social and economic justice, dignity of person which were given effect to by the Constitution (77th Amendment) Act, 1995. Reservation in promotion itself is a fundamental right to the Dalits and Tribes. They claim equality of opportunity at all levels of promotions to the respective cadres/grade/categories of posts. The right to reservation in promotion is required to be balanced with competing right to equality of general employees. Article 16(4-A) gives effect to that balancing competing right. In St. Stephen's College v. University of Delhi [(1992) 1 SCC 558] (SCC para 102) this Court worked out the competing claims by a scheme directing minority institutions to fill up 50% of admissions by the general candidates while ensuring to the minorities their constitutional right under Article 30(1) to admit the students belonging to minority community with balance 50% seats. Such declaration is consistent not only with the scheme of the Constitution but also special protection of the rights of the minorities. Reservation in promotions in Article 16(4-A) also requires same interpretation. If so viewed, there would be no violation of Article 14 or unconstitutionality of the scheme of reservation in promotion or voidity under Article 13(2). The prospective overruling of Rangachari [(1962) 2 SCR 586 : AIR 1962 SC 36] ratio in Mandal case [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] is constitutional and fulfils competing equality between sections of the society.

20. Shri Parag Tripathi, in reply, contended that Article 145(5) requires that for a judgment to be a majority judgment, concurrence of the majority learned Judges constituting the Bench is necessary. There was no need for four other learned Judges to express their concurrence with Jeevan Reddy, J. as they felt that the reservation in promotion is void from the inception, by operation of Article 13(2). Unless they agreed to the view express by Jeevan Reddy, J., it could not be a majority judgment. The separate judgments of the learned Judges are self-operative from the date of the judgment in the absence of their express concurrence for prospective overruling of Rangachari [(1962) 2 SCR 586 : AIR 1962 SC 36] ratio. The prospective overruling evolved under Article 142 is inconsistent with the ratio in Waman Rao case [(1981) 2 SCC 362 : (1981) 2 SCR 1] which had held that an amendment to the Constitution violating the fundamental right, unless the Act receives protective umbrella of Schedule IX, is void from the inception. The ratio in Mandal case [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] laid by Jeevan Reddy, J. and agreed to by other three Judges does not amount to a statutory law nor it receives any protective umbrella under Schedule IX but it one declared under Article 141. Therefore, Mandal [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] ratio of prospective overruling of Rangachari case [(1962) 2 SCR 586 : AIR 1962 SC 36] is unconstitutional and void ab initio.

Article 142, therefore, does not save its voidity; nor can the void order be given effect to or saved by Article 142.

21. In State of J&K v. Triloki Khosa [(1974) 1 SCC 19 : 1974 SCC (L $ S) 19 : AIR 1974 SC 1] a Constitution Bench had held that the code of equality and equal opportunity is a charter for equals; equality of opportunity in matters of promotion means an equal promotional opportunity for persons who fall substantially within the same class. A classification of employees can, therefore, be made for first identifying and then distinguishing members of one class from those of another. Classification on the basis of educational qualifications made with a view to achieving administrative efficiency was upheld.

22. In service jurisprudence, a distinction between right and interest has always been maintained. Seniority is a facet of interest. When the rules prescribed the method selection/recruitment, seniority is governed by the ranking given and governed by such rules as was held by a Bench of three Judges in A.K. Bhatnagar v. Union of India [(1991) 1 SCC 544 : 1991 SCC (L&S) 601 : (1991) 16 ATC 501]. In Indian Administrative Service (S.C.S.) Assn., U.P. v. Union of India [1993 Supp (1) SCC 730 : 1993 SCC (L&S) 252 : (1993) 23 ATC 788] (SCC paras 14 and 15) another Bench of three Judges had held that no one has a vested right to promotion or seniority but an officer has an interest to seniority acquired by working out the rules. In Akhil Bhartiya Soshit Karmachari Sangh v. Union of India [(1996) 6 SCC 65 : 1996 SCC (L&S) 1346 : JT (1996) 8 SC 274] a Bench to which two of us, K. Ramaswamy and G.B. Pattanaik, JJ., were members, following the above ratio, held that no one has a "vested right to promotion or seniority but an officer has an interest to seniority acquired by working out the rules". It could be taken away only by operation of valid law. In Mohd. Shujat Ali v. Union of India [(1975) 3 SCC 76 : 1974 SCC (L&S) 454 : (1975) 1 SCR 449] a Constitution Bench had held that Rule 18 of the Andhra Pradesh Engineering Service Rules which confers a right of actual promotion or a right to be considered for promotion is a rule prescribing conditions of service. In Mohd. Bhakar v. Y. Krishna Reddy [1970 SLR 768 (SC)] another Bench of three Judges had held that any rule which affects the promotion of a person relates to conditions of service. In State of Mysore v. G.N. Purohit [1967 SLR 753 (SC)] a Bench of two Judges had held that the rule which merely affects chances of promotion cannot be regarded as varying a condition of service. Chances of promotion are not condition of service. In Ramchandra Shankar Deodhar v. State of Maharashtra [(1974) 1 SCC 317 : 1974 SCC (L&S) 137] a Constitution Bench had held that a rule which merely affects the chances of promotion does not amount to change in the conditions of service. In Syed Khalid Rizvi v. Union of India a Bench of three Judges following the above ratio, with approval, had held at p. 602, para 321, that no employee has a right to promotion but he has only the right to be considered for promotion according to rules. Chances of promotion are not conditions of service and are defeasible in accordance with the law.

23. In the light of this normal run of service jurisprudence, the question emerges, whether the right to promotion is a fundamental right and the direction of prospective operation of the decision in Mandal judgment [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385], after five years, violates equality enshrined in Articles 14 and 16(1) and is void under Article 13(2) of the Constitution ? Right to reservation itself is a fundamental right under Article 16(1) as was laid in State of Kerala v. N.M. Thomas [(1976) 2 SCC 310 : 1976 SCC (L&S) 227] which was reiterated in Mandal case [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385]. The permanent bureaucracy in Part XIV of the Constitution is an integral scheme of the Constitution to aid and assist the political executive in the governance of the country. Abraham Lincoln, one of the greatest Presidents of the United States of America, a noble soul, who laid his life in giving right to equality to the Blacks, a living truth enshrined in 14the Amendment, had stated that democracy, is

by the people, of the people and for the people. Democracy governed by rule of law brings about change in the social order only through rule of law. Every citizen or group of people has right to a share in the governance of the State. The Dalits and Tribes equally being citizens have a right to a share in the governance of the State, and in the permanent democracy service conditions are assured under Articles 309 to 312-A of the Constitution subject to the pleasure of the President under Article 310 and also the express exclusion of its applicability to the specified services in Articles 33 and 34. The right to seek equality of opportunity to an office or a post under the State is a guaranteed fundamental right to all citizens alike under Article 16(1), the specie of Article 14, the genus. In State of Maharashtra v. Chandrabhan Tale [(1983) 3 SCC 387 : 1983 SCC (L&S) 391 : 1983 SCC (Cri) 667] it was held that public employment opportunity is a national wealth and all citizens are equally entitled to share it. In Delhi Transport Corpn. v. D.T.C. Mazdoor Congress [1991 Supp (1) SCC 600 : 1991 SCC (L&S) 1213] (SCC at p. 737, para 271) it was held that law is a social engineering to remove the existing imbalance and to further the progress, serving the needs of the Socialist Democratic Bharat under the rule the law. The prevailing social conditions and actualities of life are to be taken into account in adjudging whether or not the impugned legislation would subserve the purpose of the society.

24. That the historical evidence of disabilities worked against the Dalits and the Tribes received acknowledgment in Article 17 which provides for abolition of the practice of untouchability; Article 15(2) which provides prohibition of access to public places and Article 29(2) which provides for prohibition of denial of admission into educational institutions. So social, educational and economic protection is provided to them under Article 46 of the Constitution. Article 335 which is part of the scheme of equality of opportunity in governance of the State in Chapter XVI, by a special provision, enjoins the State that the claims of the members of the Dalits and the Tribes shall be taken into consideration consistently with the efficiency of administration in the making the appointment to service and post in connection with the affairs of the Union or of a State. In Comptroller & Auditor General of India v. K.S. Jagannathan [(1986) 2 SCC 679 : 1986 SCC (L&S) 345 : (1986) 1 ATC 1 : AIR 1987 SC 537] (AIR paras 21 and 23 : SCC pp. 693 and 694, paras 21 and 23) a Bench of three Judges had held that Article 335 is to be read with Article 46 which enjoins that the State shall promote with special care the educational and economic interests of the weaker sections, in particular, the Dalits and the Tribes and shall protect them from social injustice. Article 38 of the Constitution enjoins the State to secure and protect a social order in which justice, social, economic and political shall inform all the institutions of the national life. The State shall, in particular, strive to minimise the inequalities in income, "facilities" and "opportunities", not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations and endeavour to eliminate inequalities in status. The Preamble of the Constitution assures to every citizen justice, social, economic and political and "equality of status" and opportunity assuring dignity of the individual to integrate all sections of the society in an integrated Bharat.

25. In Consumer Education & Research Centre v. Union of India [(1995) 3 SCC 42 : 1995 SCC (L&S) 604] and Air India Statutory Corpn. v. United Labour Union [(1997) 9 SCC 377 : (1996) 9 Scale 70] and Dalmia Cement (Bharat) Ltd. v. Union of India [(1996) 10 SCC 104 : JT (1996) 4 SC 555] social justice was held by the three-Judge Benches to be a fundamental right approving the view taken in C.E.S.C. Ltd. v. Subhash Chandra Bose [(1992) 1 SCC 441 : 1992 SCC (L&S) 313]. In Murlidhar Dayandeo Kesekar v. Vishwanath Pandu Barde [1995 Supp (2) SCC 549]; R. Chandevarappa v. State of Karnataka [(1995) 6 SCC 309] and Papaiah v. State of Karnataka [(1996) 10 SCC 533] right to economic empowerment was held by the two-Judge Benches of this Court to be a fundamental right.

26. It is now settled legal position that social justice is a fundamental right and equally economic empowerment is a fundamental right to the disadvantaged. Article 51-A(j) enjoins that it shall be the duty of every citizen to strive towards excellence in all spheres of individual and collective activities so that the nation constantly rises to higher levels of endeavour and achievement. Equality of status and dignity of the individual will be secured when the employees belonging to Dalits and Tribes are given an opportunity of appointment by promotion in higher echelons of service so that they will have opportunity to strive towards excellence individually and collectively with other employees in improving the efficiency of administration. Equally they get the opportunity to improve their efficiency and opportunity to hold offices of responsibility at hierarchical levels.

27. In A.K. Gopalan v. State of Madras [1950 SCR 88 : AIR 1950 SC 27], per majority, the Constitution Bench had held that the operation of each article of the Constitution and its effect on the protection of fundamental rights is required to be measured independently and not in conjoint consideration of all the relevant provisions. The above ratio was overruled by a Bench of 11 Judges in Rustom Cavasjee Cooper v. Union of India [(1970) 1 SCC 248]. This Court had held that all the provisions of the Constitution conjointly be read on the effect and operation of fundamental right of the citizens when the State action infringes the right of the individual. In D.T.C. case [1991 Supp (1) SCC 600 : 1991 SCC (L&S) 1213] (SCC at pp. 750-51, paras 297 and 298) it was held that :

> "It is well-settled constitutional law that different articles in the chapter on Fundamental Rights and the Directive Principles in Part IV of the Constitution must be read as an integral and incorporeal whole with possible overlapping with the subject-matter of what is to be protected by its various provisions particularly the Fundamental Rights.
>
> ... The nature and content of the protection of the fundamental rights is measured not by the operation of the State action upon the rights of the individual but by its objects. The validity of the State action must be adjudged in the light of its operation upon the rights of the individuals or groups of individuals in all their dimensions. It is not the object of the authority making the law impairing the right of the citizen nor the form of action taken that determines the protection he can claim; it is the effect of the law and of the action upon the right which attract the jurisdiction of the court to grant relief. In Minerva Mills Ltd. v. Union of India [(1980) 3 SCC 625] the fundamental rights and directive principles are held to be the conscience of the Constitution and disregard of either would upset the equibalance built up therein. In Maneka Gandhi case [Maneka Gandhi v. Union of India, (1978) 1 SCC 248 : AIR 1978 SC 597] it was held that different articles in the chapter of fundamental rights of the Constitution must be read as an integral whole, with possible overlapping of the subject-matter of what is sought to be protected by its various provisions particularly by articles relating to fundamental rights contained in Part III of the Constitution do not represent entirely separate streams of rights which do not mingle at many points. They are all parts of an integrated scheme in the Constitution. Their waters must mix to constitute that grand flow of unimpeded and impartial justice; social, economic and political, and of equality of status and opportunity which imply absence of unreasonable or unfair discrimination between individuals or groups or classes. The fundamental rights protected by Part III of the Constitution, out of which Articles 14, 19 and 21 are the most frequently invoked to test the validity of executive as well as legislative actions when these actions are subjected to judicial scrutiny. Fundamental rights are necessary means to develop one's own personality

> and to carve out one's own life in the manner one likes best, subject to reasonable restrictions imposed in the paramount interest of the society and to a just, fair and reasonable procedure. The effect of restriction or deprivation and not of the form adopted to deprive the right is the conclusive test. It is already seen that the right to a public employment is a constitutional right under Article 16(1). All matters relating to employment included the right to continue in service till the employee reaches superannuation or his service is duly terminated in accordance with just, fair and reasonable procedure prescribed under the provisions of the Constitution or the rules made under proviso to Article 309 of the Constitution or the statutory provision or the rules, regulations or instructions having statutory favour made thereunder. But the relevant provisions must be conformable to the rights guaranteed in Parts III and IV of the Constitution. Article 21 guarantees the right to live which includes right to livelihood, to a many the assured tenure of service is the source, the deprivation thereof must be in accordance with the procedure prescribed by law conformable to the mandates of Articles 14 and 21 as be fair, just and reasonable but not fanciful, oppressive or at vagary. The need for the fairness, justness or reasonableness of the procedure was elaborately considered in Maneka Gandhi case [Maneka Gandhi v. Union of India, (1978) 1 SCC 248 : AIR 1978 SC 597] and it hardly needs reiteration."

28. It would, therefore, be necessary to consider the effect of reservation in promotion to the Dalits and the Tribes vis-a-vis the employees belonging to the general categories; it is a balancing right to equality in results and adjusting the competing rights of all sections. In Ahmedabad St. Xavier's College Society v. State of Gujarat [(1974) 1 SCC 717 : (1975) 1 SCR 173] (SCR at p. 252 : SCC at pp. 798-99) through a Bench of nine Judges, this Court pointed out that to establish equality, it would require absolute identical treatment of both the minority and majority. That would result only in equality in law but inequality in fact. The distinction need not be elaborated. 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. To give adequate representation to the Dalits and Tribes in all posts or classes of posts or services, a reality and truism, facilities and opportunities, as enjoined in Article 38 are required to be provided to them to achieve the equality of representation in real content. In Pradeep Jain (Dr.) v. Union of India [(1984) 3 SCC 654] a three-Judge Bench of this Court considered the concept of equality under Articles 14 and 15(1) of the Constitution and had held in para 13 at p. 676 thus :

> "... 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 hierarchical society with an indelible feudal stamp and incurable actual inequality, it is absurd to suggested that progressive measures to eliminate group disabilities and promote collective equality are antagonistic to equality on the ground that 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 the 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 William Blake said graphically is very true,

> namely, 'One law for the Lion and the Ox is oppression'. Those who are unequal, in fact, cannot be treated by identical standards; that may be equality in law but it would certainly not be real equality. 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 on 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 sections so that each member of the community, whatever is his birth, occupation or social position may enjoy equal opportunity of using to the full his natural endowments of physique, of character and of intelligence."

29. In Marri Chandra Shekhar Rao v. Dean, Seth G.S. Medical College [(1990) 3 SCC 130 : (1990) 14 ATC 671] (SCC at p. 138) a Constitution Bench to which one of us, K. Ramaswamy, J., was a member, had held in para 8 thus :

> "... Therefore, reservation in favour of Scheduled Tribes or Scheduled Castes for the purpose of advancement of socially or educationally backward citizens to make them equal with other segments of community in educational or job facilities is the mandate of the Constitution. Equality is the dictate of our Constitution. Article 14 ensures equality in its fullness to all our citizens. State is enjoined not to deny to any persons equality before law and equal protection of the law within the territory of India. Where it is necessary, however, for the purpose of bringing about real equality of opportunity between those who are unequals, certain reservations are necessary and these should be ensured. Equality under the Constitution is a dynamic concept which must cover every process of equalisation. Equality must become a living reality for the large masses of the people. Those who are unequal, in fact, cannot be treated by identical standards; that may be equality in law but it would certainly not be real equality. Existence of equality of opportunity depends not merely on the absence of disabilities but on presence of abilities. It is not simply a matter of legal equality. De jure equality must ultimately find its raison d'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, equals in specified areas. It is necessary to take into account de facto inequalities which exist in the society and to take affirmative action by way of giving preference and reservation to the socially and economically disadvantaged persons or inflicting handicaps on those more advantageously placed, in order to bring about real equality. Such affirmative action though apparently discriminatory is calculated to produce equality on 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 sections so that each member of the community, whatsoever is his birth, occupation or social position may enjoy equal opportunity of using to the full his natural endowments of physique, of character and of intelligence."

30. By abstract application of equality under Article 14, every citizen is treated alike without there being any discrimination. Thereby, the equality in fact subsists. Equality prohibits the State from

making discrimination among citizens on any ground. However, inequality in fact without differential treatment between the advantaged and disadvantaged subsists. In order to bridge the gap between inequality in results and equality in fact, protective discrimination provides equality of opportunity. Those who are unequals cannot be treated by identical standards. Equality in law certainly would not be real equality. In the circumstances, equality of opportunity depends not merely on the absence of disparities but on the presence of abilities and opportunities. De jure equality must ultimately find its raison d'etre in de facto equality. The State must, therefore, resort to protective discrimination for the purpose of making people, who are factually unequal, equal in specific areas. It would, therefore, be necessary to take into account de facto inequality which exists in the society and to take affirmative action by giving preferences and making reservation in promotions in favour of the Dalits and Tribes or by "inflicting handicaps on those more advantageously placed", in order to bring about equality. Such affirmative action, though apparently discriminatory, is calculated to produce equality on a broader basis by eliminating de facto inequality and placing Dalits and Tribes on the footing of equality with non-tribal employees so as to enable them to enjoy equal opportunity and to unfold their full potentiality. Protective discrimination envisaged in Articles 16(4) and 16(4-A) is the armour to establish the said equilibrium between equality in law and equality in results as a fact to the disadvantaged. The principle of reservation in promotion provides equality in results.

31. From this backdrop, the socio-economic justice assured by Article 46, the Preamble and Article 39 would get practical content and effect so that the dignity of person and equality of status assured to them would become meaningful and real. Harmonious interpretation of all these provisions should, therefore, pave way for the target/goals. So they need to be conjointly read so that every provision/clause/concept in different articles of the Constitution is given full play and effect, and flesh and blood are infused in their dry bones.

32. In Mandal case [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] admittedly, the two Government Memorandums provided for reservation to OBCs in initial direct recruitment in Central services. The question of reservation in promotion was a non-issue as conceded in that case itself and across the bar; but the learned Judges, with all due respect and deference to their learned views, decide a non-issue, though objected to on the ground that counsel appearing for the parties had put their heads together and framed the issue and reference was made to a larger Bench so that the issue was decided on that premise. Though it is settled constitutional law that constitutional issues cannot be decided unless the issue directly arises for decision, with due respect, the Bench decided a non-issue on a constitutional law affecting 22% of the national population and held that Article 16(1) read with Article 16(4) provides right to reservation in initial recruitment. The framers of the Constitution did not intend to provide for reservation in promotion. Since Article 335 speaks of efficiency of administration, reservation in promotion to the Dalits and Tribes, without competition with non-reserved employees would affect efficiency in service and is unconstitutional. It is an admitted case that as there was no issue, nor was any evidence adduced to prove whether efficiency of administration was deteriorated due to reservation in promotion; nor was it pointed out from the facts of any case.

33. In Maharashtra State Board of Secondary and Higher Secondary Education v. K.S. Gandhi [(1991) 2 SCC 716] (SCC at p. 748, para 37) a Bench of two Judges had held that to prove a fact, inference must be drawn on the basis of the evidence and circumstances. They must be carefully distinguished from conjectures or speculation.

> "The mind is prone to take pleasure to adapt circumstances to one another and even

> in straining them a little to force them to form parts of one connected whole. There must be evidence direct or circumstantial to deduce necessary inferences in proof of the facts in issue. There can be no inferences unless there are objective facts, direct or circumstantial from which to infer the other fact which is sought to be established. In some cases the other facts can be inferred, as much as is practical, as if they had been actually observed. In other cases the inferences do not go beyond reasonable probability. If there are no positive proved facts, oral, documentary or circumstantial from which the inferences can be made, the method of inference fails and what is left is mere speculation or conjecture. Therefore, when an inference of proof that a fact in dispute has been held established, there must be some material facts or circumstances on record from which such an inference could be drawn."

In the absence of any issue and facts and proof thereof, the inference that reservation in promotion deteriorates the efficiency of administration remains only a conjecture or an opinion based on no evidence. As seen, it is constitutional mandate of the State under Article 335 that to render socio-economic justice and to prevent injustice to the Dalits and Tribes, facilities and opportunities of reservation in promotion should be provided consistently with the efficiency of administration.

34. The question then is : What is the meaning of the phrase "efficiency of administration" ? In D.T.C. case [1991 Supp (1) SCC 600 : 1991 SCC (L&S) 1213] it was observed in SCC p. 741, para 275 that :

> "... The term efficiency is an elusive and relative one to the adept capable to be applied in diverse circumstances. If a superior officer develops liking towards sycophant, though corrupt, he would tolerate him and find him to be efficient and pay encomiums and corruption in such cases stand no impediment. When he finds a sincere, devoted and honest officer to be inconvenient, it is easy to cast him/her off by writing confidential reports with delightfully vague language imputing to be 'not up to the mark', 'wanting public relations' etc. At times they may be termed to be 'security risk' (to their activities). Thus they spoil the career of the hones, sincere and devoted officers. Instances either way are galore in this regard. Therefore, one would be circumspect, pragmatic and realistic to these actualities of life while angulating constitutional validity of wide, arbitrary, uncanalised and unbridled discretionary power of dismissal...."

35. V.T. Rajshekar in his "Merit, My Foot" (A reply to Anti-Reservation Racists), 1996 published by Dalit Sahitya Academy, Bangalore, has stated that :

> "Nowhere in the world 'merit and efficiency' are given so much importance as in India which is now pushed to the 120th position - virtually the last among different countries in the world. Upper caste rulers of India keep the country's vast original inhabitants - the Untouchables, Tribals, Backward Castes and 'religious minorities' - permanently as slaves with the help of this 'merit' mantra. By 'merit and efficiency', they mean the birth. Merit goes with the highborn - the blue blood. This is pure and simple racism. That birth and skin-colour have nothing to do with 'merit and efficiency' (brain) is a scientifically proved fact. ... But the ruling class nowhere in the world is concerned with science because science stands for progress. And those interested in progress will have to be human. That is not so in India. If one has to see man's inhumanity to man in its most naked form he must come to India, the original

> home of racism and inequality. So the 'merit theory' beautifully suits its ruling class or caste."

At p. 10, he states that

> "scientists have identified two forces which are perpetually and constantly at work to influence the character, growth and development of the features of every living being in the universe including animals and plaints : (1) heredity and (2) environment. Each species produces only its own species. Biology is founded on the cell theory. Cells live and die."

At p. 11, he states that :

> "'Merit and efficiency' are not inherited. They are an acquired quality that has not reached the germ plasma. So, to say that a Brahmin's son alone is a Brahmin and hence has the 'merit' to become a temple priest (archaka) has no scientific basis. Some other influence acts in combination with heredity and that is environment. With the right environment - food, education, free atmosphere - Untouchables can prove better than Brahmins."

At p. 12, he states that genetic factors only provide the potential for human development whereas it is the environment factors that translate this inherent potential into the full flowering of the personality. Experiments through selective breeding and studies on identical twins have established to a large extent the influence of genetics on behaviours. But what ultimately determines the personality is the interactional influences of heredity and environment. At p. 15, he states that heredity is fixed by parentage but it is not an ideal environment. Opportunity is necessary on merit and efficiency. A genius is only 10% inspiration and 90% perspiration. There is nothing like a born genius. Ramanujan, Indian prodigy on mathematics was given opportunity by the British to prove his genius and was provided with the right environment. Though he was born genius without opportunities, he could not have got recognition. Rajshekar states that "all ruling classes built a theory suited to their needs and try to give a 'scientific' backing to it. Merit and efficiency is a pure Aryan invention, aimed at maintaining their monopoly". He states that "human rights are due to blending of the forces of heredity and the more important environment. The White meritocrats made us believe that the 'Black Negro' is a backward race".

36. Justice O. Chinnappa Reddy, in K.C. Vasanth Kumar v. State of Karnataka [1985 Supp SCC 714] (SCC at pp. 738-740, para 36) had stated thus :

> "Efficiency is very much on the lips of the privileged whenever reservation is mentioned. Efficiency, it seems, will be impaired if the total reservation exceeds 50%; efficiency, it seems, will suffer if the 'carry-forward' rule is adopted; efficiency, it seems, will be injured if the rule of reservation is extended to promotional posts. From, the protests against reservation exceeding 50% or extending to promotional posts and against the carry-forward rule, one would think that the civil service is a Heavenly Paradise into which only the archangels, the chosen of the elite, the very best may enter and may be allowed to go higher up the ladder. But the truth is otherwise. The truth is that the civil service is no paradise and the upper echelons belonging to the chosen classes are not necessarily models of efficiency. The underlying assumption that those belonging to the upper castes and classes, who are

appointed to the non-reserved posts will, because of their presumed merit, 'naturally' perform better than those who have been appointed to the reserved posts and that the clear stream of efficiency will be polluted by the infiltration of the latter into the sacred precincts is a vicious assumption, typical of the superior approach of the elitist classes. There is neither statistical basis nor expert evidence to support these assumptions that efficiency will necessarily be impaired if reservation exceeds 50%, if reservation is carried forward or if reservation is extended to promotional posts. Arguments are advanced and opinions are expressed entirely on an ad hoc presumptive basis. The agelong contempt with which the 'superior' or 'forward' castes have treated the 'inferior' or backward' castes is now transforming and crystallising itself into an unfair prejudice, conscious and subconscious, ever since the 'inferior' castes and classes started claiming their legitimate share of the cake, which naturally means, for the 'superior' castes, parting with a bit of it. Although in actual practice their virtual monopoly on elite occupations and posts is hardly threatened, the forward castes are nevertheless increasingly afraid that they might lose this monopoly in the higher ranks of government service and the profession. It is so difficult for the 'superior' castes to understand and rise above their prejudice and it is so difficult for the inferior castes and classes to overcome the bitter prejudice and opposition which they are forced to face at every stage. Always one hears the word 'efficiency' as if it is sacrosanct and the sanctorum has to be fiercely guarded. 'Efficiency' is not a Mantra which is whispered by the Guru in the Shishya's ear. The mere securing of high marks at an examination may not necessarily mark out a good administrator. An efficient administrator, one takes it, must be one who possesses among other qualities the capacity to understand with sympathy and, therefore, to tackle bravely the problems of a large segment of population constituting the weaker sections of the people. And, who better than the ones belonging to those very sections ? Why not ask ourselves why 35 years after independence, the position of the Scheduled Castes, etc. has not greatly improved ? Is it not a legitimate question to ask whether things might have been different, had the District Administrators and the State and Central Bureaucrats been drawn in larger numbers from these classes ? Courts are not equipped to answer these questions, but the courts may not interfere with the honest endeavours of the Government to find answers and solutions. We do not mean to say that efficiency in the civil service is unnecessary or that it is a myth. All that we mean to say is that one need not make a fastidious fetish of it. It may be that for certain posts, only the best may be appointed and for certain courses of study only the best may be admitted. If so, rules may provide for reservation for appointment to such posts and for admission to such courses. The rules may provide for no appropriate method of selection. It may be that certain posts require a very high degree of skill of efficiency and certain courses of study require a high degree of industry and intelligence. If so, the rules may prescribe a high minimum qualifying standard and an appropriate method of selection. Different minimum standards and different modes of selection may be prescribed for different posts and for admission to different courses of study having regard to the requirements of the posts and the courses of study. No one will suggest that the degree of efficiency required to a cardiac or a neurosurgeon is the same as the degree of efficiency required of a general medical practitioner. Similarly, no one will suggest that the degree of industry and intelligence expected of a candidate seeking admission to a research degree course need be the same as that of a candidate seeking admission to

> an ordinary arts degree course. We do not, therefore, mean to say that efficiency is to be altogether discounted. All that we mean to say is that it cannot be permitted to be used as a camouflage to let the upper classes take advantage of the backward classes in its name and to monopolise the services, particularly the higher posts and the professional institutions. We are afraid we have to rid our minds of many cobwebs before we arrive at the core of the problem. The quest for equality is self-elusive, we must lose our illusions, though not our faith. It is the dignity of man to pursue the quest for equality. It will be advantageous to quote at this juncture R.H. Tawney in his classic work 'Equality' where he says,
>
> 'The truth is that it is absurd and degrading for men to make much of their intellectual and moral superiority to each other and still more of their superiority in the arts which bring wealth and power, because, judged by their place in any universal scheme, they are infinitely great or infinitely small.... The equality which all these thinkers emphasise as desirable is not equality of capacity or attainment but of circumstances, and institutions, and manner of life. The inequality which they deplore is not the inequality of personal gifts, but of the social and economic environment..... Their views, in short, is that, because men are men, social institutions - property rights, and the organisation of industry, and the system of public health and education - should be planned, as far as is possible to emphasise and strengthen, not the class differences which divide but the common humanity which unites them.....'"

37. Pandit Jawaharlal Nehru, the first Prime Minister of India in his "Independence and After That" (Collection of Speeches 1946-49) Publication Division, Government of India [1949 Edn.] at p. 28, has stated that "social equality in the widest sense and equality of opportunity for everyone, every man and woman must have the opportunity to develop to the best of his or her ability. However, merit must come from ability and hard work and not because of caste or birth or riches". This was followed in Air India Statutory Corpn. case [(1997) 9 SCC 377 : (1996) 9 Scale 70] in para 53 (SCC p. 428, para 53) where it was held that :

> "Social equality would develop the sense of fraternity among the members of a social group where each would consider the other as his equal, not higher or lower. A society, which does not treat each of its members as equals, forfeits its right of being called a democracy. All are equal partners in the freedom. Everyone of our ninety-four hundred million people must have equal right to opportunities and blessings that freedom of India has to offer. To bring freedom in a comprehensive sense to the common man, material resources and opportunity for appointment be made available to secure socio-economic empowerment which would ensure justice and fullness of life to workmen, i.e., every man and woman."

In para 43 (SCC p. 419, para 43), it was held that :

> "In a developing society like ours, steeped with unbridgeable and ever-widening gaps of inequality in status and of opportunity, law is a catalyst, rubicon to the poor etc. to reach the ladder of social justice. What is due cannot be ascertained by an absolute standard which keeps changing, depending upon the time, place and circumstance. The constitutional concern of social justice as an elastic continuous process is to accord justice to all sections of the society by providing facilities and opportunities to

> remove handicaps and disabilities with which the poor, the workmen etc. are languishing and to secure dignity of their person. The Constitution, therefore, mandates the State to accord justice to all members of the society in all facets of human activity. The concept of social justice embeds equality to flavour and enlivens the practical content of life. Social justice and equality are complementary to each other so that both should maintain their vitality. Rule of law, therefore, is a potent instrument of social justice to bring about equality in results."

38. Efficiency in service attracts the well-known parable that insanity cannot be cured until married and marriage cannot be celebrated till insanity is cured. Unless one is given opportunity and facility by promotion to hold an office or a post with responsibilities, there would be no opportunity to prove efficiency in the performance or discharge of the duties. Without efficiency one cannot be promoted. How to synthesise both and give effect to the constitutional animation to effectuate the principle of adequacy of representation in all posts or classes of posts in all cadres, service or grade is the nagging question. From that perspective, one is required to examine whether reservation in promotion is constitutionally valid. It is seen that the rules provide promotion from Assistant Engineer to Executive Engineer on the principle of "seniority subject of rejection of the unfit" and from Superintending Engineers onwards, 'merit' is the consideration. In other words, the promotion is based on the aforesaid principles. Even employees from Dalits or Tribes get promoted only on satisfying the above test. Appointment by promotion is a facet of recruitment to a service or cadre/grade/class or classes of posts. In fairness on the part of the appellants/petitioners and their learned counsel, none impugned nor alleged that the private respondents are not meritorious or inefficient. No such evidence is placed on record.

39. The fundamental requisites to all employees are honesty, integrity and character, apart from hard work, dedication and willingness to apply themselves assiduously to the responsibilities attached to the office or post and also inclination to achieve improved excellence. What Dalit and Tribe employees need is an opportunity and fair chance of promotion to higher posts and offices earmarked for them in the roster where they are not adequately represented. In a clash of competing claims between general category employees on the one hand and Dalits and Tribes on the other, what the authorities need to take into consideration is the aforesaid factors and their service record with an objective and dispassionate assessment. When the authorities have a power coupled with the constitutional duty, the doctrine of full faith and credit under Article 261 gets due acceptance when done truly and sincerely with an honest, objective and dispassionate assessment by the appropriate authority. There claims need to be considered in that perspective; they should be given promotion, if found eligible, to the posts or classes of posts in the higher cadre, grade, class, or category etc. The selecting officer/officers need to eschew narrow, sectarian, caste, religion or regional consideration or prejudices which are deleterious to fraternity, unity and integrity and integration of the nation as unified Bharat. What needs to be achieved by the Dalit and Tribal officers so promoted is that they should, on a par with others assiduously devote themselves with character, integrity and honesty in the discharge of the duties of the posts they hold with added willingness and dedication to improve excellence. Thereby the efficiency of administration would automatically get improved and the nation constantly rise to higher levels of achievement. Therefore, it cannot be held that reservation in promotion is bad in law or unconstitutional.

40. As stated earlier, Article 16(4-A) has come into force w.e.f. 17-6-1995. The appellants/petitioners have sought amendment of the pleadings challenging the vires of Article 16(4-A) of the Constitution and in fairness on the part of the learned counsel, they did not press for consideration thereof obviously for the reason that its objects are mentioned in the Statement of

Objects and Reasons as under :

> "The Scheduled Castes and the Scheduled Tribes have been enjoying the facility of reservation in promotion since 1955. The Supreme Court in its judgment dated 16th November, 1992 in the case of Indra Sawhney v. Union of India [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385], however, observed that reservation of appointments or posts under Article 16(4) of the Constitution is confined to initial appointment and cannot extend to reservation in the matter of promotion. This ruling of the Supreme Court will adversely affect the interests of the Scheduled Castes and the Scheduled Tribes. Since the representation of the Scheduled Castes and the Scheduled Tribes in services in the States have not reached the required level, it is necessary to continue the existing dispensation of providing reservation in promotion in the case of the Scheduled Castes and the Scheduled Tribes. In view of the commitment of the Government to protect the interests of the Scheduled Castes and the Scheduled Tribes, the Government have decided to continue the existing policy of reservation in promotion for the Scheduled Castes and the Scheduled Tribes. To carry out this, it is necessary to amend Article 16 of the Constitution by inserting a new clause (4-A) in the said article to provide for reservation in promotion for the Scheduled Castes and the Scheduled Tribes."

41. Lord Macnaughten in Vacher & Sons Ltd. v. London Society of Compositors [1913 AC 107 : (1911-13) All ER Rep 241] (AC at p. 118) has laid that a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the Court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. The above principle was followed by this Court in Bengal Immunity Co. Ltd. v. State of Bihar [(1955) 2 SCR 603 : AIR 1955 SC 661 : (1995) 6 STC 446].

42. This Court in Shri Sitaram Sugar Co. Ltd. v. Union of India [(1990) 3 SCC 223 : (1990) 1 SCR 909] (SCR at pp. 936 and 942 : SCC pp. 245 and 250) through a Constitution Bench, had held that legislative policy is beyond the pale of assailment on the anvil of violation of the fundamental rights. In S. Azeez Basha v. Union of India [(1968) 1 SCR 833 : AIR 1968 SC 662] (SCR 833 at p. 845) another Constitution Bench had held that it is not the function of the Court to consider the policy underlying the amendment made to the Act nor the Court proposed to go into the merits of the amendment made by that Act [the constitutionality of the underlying policy of the Aligarh Muslim University (Amendment) Act of 1965 was questioned but the Court did not go into the underlying policy except the constitutionality of the Act itself which was upheld by this Court]. Though the doctrine of original intent was given effect to in Gopalan case [1950 SCR 88 : AIR 1950 SC 27], this Court had not accepted the same in R.C. Cooper case [(1970) 1 SCC 248] and the latter was followed in Maneka Gandhi v. Union of India [Maneka Gandhi v. Union of Indian, (1978) 1 SCC 248 : AIR 1978 SC 597] etc. Therefore, though the doctrine of original intent of reservation in promotion does not expressly find place in the speech of Dr. Ambedkar, as supported in Mandal case [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385], it found place in statutory policy engrafted in the rules issued under proviso to Article 309 of the Constitution, which is legislative in character, adopted and explained in the Statement of Objects and Reasons of the Constitution (77th Amendment) Act, 1995, which was declared as constitutional in Rangachari case [(1962) 2 SCR 586 : AIR 1962 SC 36]. After Mandal case [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] Parliament has given effect to the legislative policy of reservation in promotion as a constitutional scheme. This Court in Commr. of Commercial Taxes,

A.P. v. G. Sethumadhava Rao [(1996) 7 SCC 512 : 1996 SCC (L&S) 630 : (1996) 33 ATC 320] through a three-Judge Bench, has held that the intention behind introduction of Article 16(4-A) was to remove the defect as pointed out by this Court in Mandal case [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385]. By legislative judgment, Parliament upheld the ratio in Rangachari case [(1962) 2 SCR 586 : AIR 1962 SC 36], Thomas case [(1976) 2 SCC 310 : 1976 SCC (L&S) 227] and Akhil Bharatiya Soshit Karmachari Sangh (Rly.) v. Union of India [(1981) 1 SCC 246 : 1981 SCC (L&S) 50] upholding the rule of reservation in promotion. The interpretation put up therein was given acceptance by legislative amendment. It was, therefore, held that Article 16 (4-A) would establish that the interpretation put up in Rangachari case [(1962) 2 SCR 586 : AIR 1962 SC 36] etc. received Parliament's approval. It would thus be clear that the principle of rule of reservation is applicable not only to initial recruitment but also in promotions where the State is of the opinion that the Dalits and Tribes are not adequately represented in promotional posts in a class or classes of services under the State. In G.S.I.C. Karmachari Union v. Gujarat Small Industries Corpn. [(1997) 2 SCC 339 : 1997 SCC (L&S) 509 : JT (1997) 1 SC 384] another Bench of the three Judges has held that : (SCC p. 341, para 4)

> "... the question of retrospectivity of the policy does not arise; what is being done is to give effect to the constitutional policy of providing adequate representation to the members of the Scheduled Castes and the Scheduled Tribes in all classes of service or posts where they are not adequately represented. Therefore, the arbitrariness does not arise since it is part of the scheme of the Constitution. Unless adequate representation is given to the employees belonging to Scheduled Castes and Scheduled Tribes in promotions also, the adequacy of representation in all classes and grades of service, where there is no element of direct recruitment, cannot be achieved. Obviously, therefore, Article 16(4-A) was brought in the Constitution by Constitution (77th Amendment) Act, after the majority judgment of this Court by a Bench of nine Judges in Indra Sawhney v. Union of India [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385]."

So, the policy of reservation is part of socio-economic justice enshrined in the Preamble of the Constitution, the fundamental rights under Articles 14, 15(1), 15(4), 16(1), 16(4), 16(4-A), 46 and 335 and the other related articles to give effect to the above constitutional objectives. In Union of India v. Madhav [(1997) 2 SCC 332 : 1997 SCC (L&S) 503 : JT (1996) 9 SC 320] a three-Judge Bench, to which two of us, K. Ramaswamy and G. B. Pattanaik, JJ. were members, also considered the same question and held in para 6 that : (SCC pp. 335-36)

> "... Government evolved reservation in posts or offices under the State as one of the modes to socio-economic justice to Dalits and Scheduled Tribes. Appointment to an office or post in a service under the State is one of the means to render socio-economic justice. The constitution (77th Amendment) Act, 1995 has resuscitated the above objective to enable the Dalit and Scheduled Tribe employees to improve excellence in higher echelons of service and a source of equality of opportunity in the matter of social and economic status guaranteed by the Preamble to the Constitution. As a consequence, Parliament has removed the lacuna pointed out by this Court in Mandal case [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385]. Thus, it would be seen that the legal position held by this Court in Rangachari case [(1962) 2 SCR 586 : AIR 1962 SC 36] and followed in other cases has been restored and reservation of appointment by promotion would be available to the members of the Scheduled Castes and the Scheduled Tribes as per 50% quota as is

maintained by this Court in Indra Sawhney case [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385]."

43. It would thus be clear that right to promotion is a statutory right. It is not a fundamental right. The right to promotion to a post or a class of posts depends upon the operation of the conditions of service. Article 16(4-A) read with Articles 16(1) and 14 guarantees a right to promotion to Dalits and Tribes as fundamental right where they do not have adequate representation consistently with the efficiency in administration. The Mandal case [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] has prospectively overruled the ratio in Rangachari case [(1962) 2 SCR 586 : AIR 1962 SC 36], i.e., directed the decision to be operative after 5 years from the date of the judgment; however, before expiry thereof, Article 16(4-A) has come into force from 17-6-1995. Therefore, the right to promotion continues as a constitutionally guaranteed fundamental right. In adjusting the competing rights of the Dalits and Tribes on the one hand and the employees belonging to the general category on the other, the balance is required to be struck by applying the egalitarian protective discrimination in favour of the Dalits and Tribes to give effect to the constitutional goals, policy and objectives referred to hereinbefore.

44. In R.K. Sabharwal v. State of Punjab [(1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481] the Constitution Bench was called upon to consider whether the reservation in promotion as per the roster was correct in law and, therefore, constitutional and whether the employees belonging to Scheduled Castes have right to be considered for promotion on their own merit, if so, how they are required to be adjusted in the roster prescribed by the Government. The Constitution Bench has pointed out that when the percentage of reservation is fixed in respect of a particular cadre and the roster indicates the reserved points, it has to be taken that the posts shown at the reserved points are to be filled from amongst the members of the reserved categories. The candidates belonging to the general category are not entitled to be considered for the reserved posts. On the other hand, the reserved category candidates can compete for the non-reserved posts. In the event of their appointment to the said posts, their number cannot be added and taken into consideration for working out the percentage of reservation. When the State Government after doing the necessary exercise makes reservation and provides the extent of percentage of posts to be reserved for the said backward class, then the percentage has to be followed strictly. The prescribed percentage cannot be varied or changed simply because some of the members of the backward classes have already been appointed or promoted against the general seats. The fact that considerable number of members of the backward classes have been appointed/promoted against the general seats in the State may be a relevant factor for the State Government to review the question of continuing reservation for the said class but so long as the instructions/rules providing certain percentage of reservations for the backward classes are operative, the same have to be followed. It was further held that the reserved vacancies were required to be filled according to the roster like a running account. When the reserved quota is full in the cadre then application of rule of reservation would be stopped until vacancies as per the roster arise and operate. It was also held following Mandal case [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] that the judgment therein could be operative prospectively from that date, viz., 10-2-1995 and all the promotions which became settled rights due to reservation in promotion could not be unsettled. As seen earlier, "right to equality", "equality of status and opportunity", duty to "improve excellence", "opportunities and facilities to remove inequality in status" and "social justice", all should be given their due and full play under the rule of law to bring about equality in results to establish an egalitarian social order. It would, therefore, be clear that reservation in promotion is constitutionally valid; the posts earmarked for Dalits and Tribes shall be filled up and adjusted with them. The Dalits and Tribes selected in open competition for posts in general quota should be considered appointees

to the general posts in the roster as general candidates. The promotions given in excess of the quota prior to the judgment in Sabharwal case [(1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481] should not be disturbed.

45. The further question is whether the judgment in Mandal case [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] in para 860(8) by Jeevan Reddy, J. prospectively overruling the ratio in Rangachari case [(1962) 2 SCR 586 : AIR 1962 SC 36] is a majority judgment. In this connection, we may, at the outset, refer to Article 145(5) of the Constitution. It postulates that :

> "No judgment and no such opinion shall be delivered by the Supreme Court, save with the concurrence of a majority of the Judges present at the hearing of the case, but nothing in this clause shall be deemed to prevent a Judge who does not concur from delivering a dissenting judgment or opinion."

It would, therefore, be manifest that unless majority Judges comprised in the Bench concur on the opinion or the decision, it would not be a judgment and no such opinion shall be delivered by the Supreme Court. In Mandal case [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] on the question of reservation in promotion, eight of the nine Judges participated in the opinion. Of them, Jeevan Reddy, J. spoke for himself, Kania, CJI and Venkatachaliah, J. as he then was. Pandian and Sawant, JJ. also agreed with them. There is a considerable debate on micro lexicon surgery conducted by the learned counsel for the appellants/petitioners drawing a distinction between conclusions and directions contained in para 860(8) and the language used in the concurrent opinions of Pandian and Sawant, JJ. In support thereof, they have placed strong reliance on the wording used by Sawant, J. in paras 552 and 555 on the conclusions and the absence of concurrence with directions. Pandian, J. has expressly agreed in his conclusions and directions. Equally, there was absences of concurrence by other learned Judges. They have also drawn our attention to the dictionary meaning of those words. Having given due consideration, we are of the view that the micro lexicon surgery of the distinction between conclusions and directions leads us nowhere to reach satisfactory solution. One needs to adopt a pragmatic approach to understand the conclusions reached and the directions given as part of the judgment in that behalf. Even if the rule of strict interpretation is to be applied, as is sought by the learned counsel, Sawant, J. in para 555 has indicated his concurrence with the conclusions of Jeevan Reddy, J. in para 860(8) which includes directions contained therein. We have, to our benefit, the contemporaneous understanding that directions in para 860(8) given by Jeevan Reddy, J. is a majority judgment and its gets reinforced from the approval thereof, as followed by the Constitution Bench, in R.K. Sabharwal case [(1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481]. The presiding Judge therein, viz., Kuldip Singh, J., who was one of the nine Judges in Mandal case [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] participated in the majority opinion on the issue of reservation in promotion. However, no opinion was expressed on the conclusions and directions of Jeevan Reddy, J. in para 860, the Constitution Bench having upheld the rule of reservation in promotion, proceeded to apply the law and worked out the rights of the Dalits in promotions in R.K. Sabharwal case [(1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481]. The same do support our conclusion that the Constitution Bench equally understood that the directions contained in para 860(8) constituted majority judgment. Otherwise, the Constitution Bench in R.K. Sabharwal case [(1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481] would not have proceeded to consider the right to promotion of the Dalits and question of giving effect to the roster system and the question of percentage of reservation provided in promotions would not have been given effect. The Constitution Bench in that case would have declared that in the light of the majority judgment

the reservation in promotions were void ab initio under Article 13(2) and that, therefore, the question of application of the roster would not have arisen. It is true that there is no positive indication or a finding to that effect in Sabharwal case [(1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481] but the fact that the presiding Judge therein was one of the members of the nine-Judge Bench in Mandal case [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] and that the Constitution Bench considered and upheld the right to reservation in promotion to the Dalits and Backward Classes and applied the roster points to such promotions, itself goes to point out and reassure us that prospective overruling of Rangachari case [(1962) 2 SCR 586 : AIR 1962 SC 36] by Jeevan Reddy, J. is a majority opinion. In that view of the matter, the micro lexicon surgery fails.

46. The next questions are whether the prospective overruling of Rangachari case [(1962) 2 SCR 586 : AIR 1962 SC 36] to be operative after five years from the date of Mandal case [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] amounts to judicial legislation. Is it void ab initio under Article 13(2) of the Constitution ? Whether it is violative of the fundamental rights of the appellant/petitioners and whether the exercise of the power by this Court under Articles 32(4) and 142 of the Constitution is inconsistent with and derogatory to the fundamental rights of the appellants/petitioners and, if so, what would be the consequence ? It is settled constitutional principle that to make the right to equality to the disadvantaged Dalits and Tribes meaningful, practical contents of results would be secured only when principles of distributive justice and protective discrimination are applied, as a facet of right to equality enshrined under Article 14 of the Constitution. Otherwise, right to equality will be a teasing illusion. Right to promotion is a method of recruitment from one cadre to another higher cadre or class or category or grade of posts or classes of posts or offices, as the case may be. Reservation in promotion has been evolved as a facet of equality where the appropriate Government is of the opinion that the Dalits and Tribes are not adequately represented in the class or classes of posts in diverse cadres, grade, category of posts or classes of posts. The discrimination, therefore, by operation of protective discrimination and distributive justice is inherent in the principle of reservation and equality too by way of promotion but the same was evolved as a part of social and economic justice assured in the Preamble and Articles 38, 46, 14, 16(1), 16(4) and 16(4-A) of the Constitution. The right to equality, dignity of person and equality of status and of opportunity are fundamental rights to bring the Dalits and the Tribes into the mainstream of the national life. It would, therefore, be imperative to evolve such principle to adjust the competing rights, balancing the claims, rights and interest of the deprived and disadvantaged Dalits and Tribes on the one hand and the general section of the society on the other.

47. The Constitution, unlike other Acts, is intended to provide an enduring paramount law and a basic design of the structure and power of the State and rights and duties of the citizens to serve the society through a long lapse of ages. It is not only designed to meet the needs of the day when it is enacted but also the needs of the altering conditions of the future. It contains a framework of mechanism for resolution of constitutional disputes. It also embeds its ideals of establishing an egalitarian social order to accord socio-economic and political justice to all sections of the society assuring dignity of person and to integrate a united social order assuring every citizen fundamental rights assured in Part III and the directives in Part IV of the Constitution. In the interpretation of the Constitution, words of width are both a framework of concepts and means to achieve the goals in the Preamble. Concepts may keep changing to expend and elongate the rights. Constitutional issues are not solved by mere appeal to the meaning of the words without an acceptance of the line of their growth. The intention of the Constitution is, rather, to outline principles than to engrave details. In State of Karnataka v. Appa Balu Ingale [1995 Supp (4) SCC 469 : 1994 SCC (Cri) 1762] (SCC at pp. 485, para 34) a two-Judge Bench of this Court, to which one of us, K. Ramaswamy, J. was a

member, while interpreting Articles 17 and 15(2) and the Civil Rights Protection Act, held that :

> "Judiciary acts as a bastion of the freedom and of the rights of the people. Jawaharlal Nehru, the architect of Modern India as early as in 1944 stated that the sprite of the age is in favour of equality though the practice denies it almost everywhere, yet the spirit of the age triumphs. The Judge must be attune with the spirit of his/her times. Power of judicial review, a constituent power has, therefore, been conferred upon the judiciary which constitutes one of the most important and potent weapons to protect the citizens against violation of social, legal or constitutional rights. The Judges are participants in the living stream of national life, steering the law between the dangers of rigidity on the one hand and formlessness on the other hand in the seamless web of life. The great tides and currents which engulf the rest of the men do not turn aside in their course and pass the Judges idly by. Law should subserve social purpose. Judge must be a jurist endowed with the legislator's wisdom, historian's search for truth, prophet's vision, capacity to respond to the needs of the present, resilience to cope with the demands of the future and to decide objectively disengaging himself/herself from every personal influence or predilections. Therefore, the Judges should adopt purposive interpretation of the dynamic concepts of the Constitution and the Act with its interpretative armoury to articulate the felt necessities of the time. The Judge must also bear in mind that social legislation is not a document for fastidious dialects but a means of ordering the life of the people. To construe law one must enter into its spirit; its setting and history. Law should be capable of expanding freedoms of the people and the legal order can, weighted with utmost equal care, be made to provide the underpinning of the highly inequitable social order. The power of judicial review must, therefore, be exercised with insight into social values to supplement the changing social needs. The existing social inequalities or imbalances are to be removed and social order readjusted through rule of law, lest the force of violent cult gain ugly triumph. Judges are summoned to the duty of shaping the progress of the law to consolidate society and grant access to the Dalits and Tribes to public means or places dedicated to public use or places of amenities open to public etc. The law which is the resultant product is not found but made. Public policy of law, as determined by new conditions, would enable the courts to recast the changing conceptions of social values of yesteryears yielding place to the changed conditions and environment to the common good. The courts are to search for light from among the social elements of every kind that are the living forces behind the factors they deal with. By judicial review, the glorious contents and the trite realisation in the constitutional words of width must be made vocal and audible giving them continuity of life, expression and force when they might otherwise be forgotten or ignored in the heat of the moment or under sway of passions or emotions remain aroused, that the rational faculties get befogged and the people are addicted to take immediate for eternal, the transitory for the permanent and the ephemeral for the timeless. It is in such surging situation the presence and consciousness and the retraining external force by judicial review ensures stability and progress of the society. Judiciary does not forsake the ideals enshrined in the Constitution, but makes them meaningful and makes the people realise and enjoy the rights."

48. The Judges, therefore, should respond to the human situations to meet the felt necessities of the time and social needs; make meaningful the right to life and give effect to the Constitution and the will of the legislature. This Court as the vehicle of transforming the nation's life should respond to

the nation's needs, interpret the law with pragmatism to further public welfare to make the constitutional animations a reality and interpret the Constitution broadly and liberally enabling the citizens to enjoy the rights.

49. In Sakal Papers (P) Ltd. v. Union of India [(1962) 3 SCR 842 : AIR 1962 SC 305] (SCR at p. 857) it was held by another Constitution Bench thus :

> "It must be borne in mind that the Constitution must be interpreted in a broad way and not in a narrow and pedantic sense. Certain rights have been enshrined in our Constitution as fundamental and, therefore, while considering the nature and content of those rights the Court must not be too astute to interpret the language of the Constitution in so literal a sense as to whittle them down. On the other hand, the Court must interpret the Constitution in a manner which would enable the citizen to enjoy the rights guaranteed by it in the fullest measure subject, of course, to permissible restrictions."

50. Common sense has always served in the Court's ceaseless striving as a voice of reason to maintain the blend of change and continuity of order which is sine qua non for stability in the process of change in a parliamentary democracy.

51. Therefore, it is but the duty of the Court to supply vitality, blood and flesh, to balance the competing rights by interpreting the principles, to the language or the words contained in the living and organic Constitution, broadly and liberally. The judicial function of the Court, thereby, is to build up, by judicial statesmanship and judicial review, smooth social change under rule of law with a continuity of the past to meet the dominant needs and aspirations of the present. This Court, as sentinel on the qui vive, has been invested with more freedom, in the interpretation of the Constitution than in the interpretation of other laws. This Court, therefore, is not bound to accept an interpretation which retards the progress or impedes social integration; it adopts such interpretation which would bring about the ideals set down in the Preamble of the Constitution aided by Part III and Part IV - a truism meaningful and a living reality to all sections of the society as a whole by making available the rights to social justice and economic empowerment to the weaker sections, and by preventing injustice to them. Protective discrimination is an armour to realise distributive justice. Keeping the above perspective in the backdrop of our consideration, let us broach whether the rights of the employees belonging to the general (sic reserved) category are violative of Article 14; inconsistent with and derogatory to the right to equality and are void ab initio.

52. In Union of India v. Raghubir Singh [(1989) 2 SCC 754] (SCC at p. 766) a Constitution Bench had held that like all principles evolved by man for the regulation of the social order, the doctrine of binding precedent is circumscribed in its governance by perceptible limitations, limitations arising by reference to the need for readjustment in a changing society, a readjustment of legal norms demanded by a changed social context. This need for adopting the law to new urges in society brings home that truth that the life of the law has not been logic, but it has been experience. The law is forever adopting new principles from life at one end and "sloughing off" old ones at the other. The choice is between competing legal propositions rather than by the operation of logic upon existing legal propositions that the growth of law tends to be determined. Interpretation of the Constitution is a continuous process. The concepts engraved therein keep changing with the demands of changing needs and time.

53. The doctrine of stare decisis is ordinarily a wise rule of action, because in most matters, it is

more important that the applicable rule of law be a settled right. The rule of stare decisis, though one tending to keep consistency and uniformity of decisions, is not an inflexible rule. Whether it shall be followed or departed from is a question entirely within the discretion of the Court and it does not deter the Court to depart from it. Stare decisis is not, like the rule of res judicata, a universal, inexorable command. Whether it would be desirable to continue the decision in constitutional questions is one of the choice between competing rights. In Bengal Immunity Co. Ltd. case [(1955) 2 SCR 603 : AIR 1955 SC 661 : (1955) 6 STC 446], considering the question whether the decision of a Constitution Bench referred in the State of Bombay v. United Motors (India) Ltd. [1953 SCR 1069 : AIR 1953 SC 252 : (1953) 4 STC 133], a majority of seven Judges following the dissenting judgment of Stone, C.J. in United States of America v. South-Eastern Underwriters' Assn. [88 L Ed 1440 : 322 US 533 (1943)] had held that the Court has never committed itself to any rule or policy that it will not bow to the lessons of experience and the force of better reasoning by overruling a mistaken precedent. The doctrine of stare decisis should not be rigidly applied to the constitutional as well as to other laws. In the case of private import, the chief desideratum is that the law remained certain, and therefore, where a rule has been judicially declared and private rights created thereunder, the courts will not, expect in the clearest cases of error, depart from the doctrine of stare decisis. When, however, public interests are involved, and especially, when the question is one of constitutional construction, the matter is otherwise. Accordingly the Bench overruled the majority decision. It would, thus, be settled law that in the interpretation of the Constitution or the concepts embodied therein, the application of the doctrine of stare decisis is not an inexorable or a rigid rule. It requires modulation or adherence based upon the need of the constitutional command and social imperatives. It would, therefore, be entirely within the discretion of the Court when it is called upon to consider its application to the given set of circumstances.

54. It is settled principle right from Golak Nath [(1967) 2 SCR 762 : AIR 1967 SC 1643] ratio that prospective overruling is a part of the principles of constitutional cannon of interpretation. Though Golak Nath [(1967) 2 SCR 762 : AIR 1967 SC 1643] ratio of unamendability of fundamental rights under Article 368 of the Constitution was overruled in Kesavananda Bharati case [Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225 : 1973 Supp SCR 1] the doctrine of prospective overruling was upheld and followed in several decisions. This Court negatived the contention in Golak Nath case [(1967) 2 SCR 762 : AIR 1967 SC 1643] that prospective overruling amounts to judicial legislation. Explaining the Blackstonian theory of law, i.e., Judge discovers law and does not make law, and the efficacy of prospective overruling at p. 808 placitum D to H, this Court by a Bench of eleven Judges had held that the doctrine of prospective overruling is a modern doctrine and is suitable for a fast-moving society. It does not do away with the doctrine of stare decisis but confines it to past transactions. While in strict theory, it may be said that the doctrine involves the making of law, what a court really does is to declare the law but refuses to give retrospectivity to it. It is really a pragmatic solution reconciling the two conflicting doctrines, namely, that a court finds law and that it does make the law. It finds the law but restricts its operation to the future. It enables the courts to bring about a smooth transition by correcting the errors without disturbing the impact of those errors on past transactions. By implication of this doctrine, the past may be preserved and the future protected. The Constitution does not expressly or by necessary implication speak against the doctrine of prospective overruling. Articles 32(4) and 142 are designed with words of width to enable this Court to declare the law and to give such direction or pass such orders as are necessary to do complete justice. Declaration of law under Article 141 is wider than words found or made. The law declared by this Court is the law of the land. So, there is no acceptable reason as to why the Court in dealing with the law in supersession of the law declared by it earlier could not restrict the operation of law, as declared, to the future and save the transactions, whether statutory or otherwise,

that were effected on the basis of the earlier law. This Court is, therefore, not impotent to adjust the competing rights of parties by prospective overruling of the previous decision in Rangachari [(1962) 2 SCR 586 : AIR 1962 SC 36] ratio. The decision in Mandal case [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] postponing the operation for five years from the date of the judgment is an instance of, and an extension to the principle of prospective overruling following the principle evolved in Golak Nath case [(1967) 2 SCR 762 : AIR 1967 SC 1643]. In Managing Director, ECIL v. B. Karunakar [(1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704] a Constitution Bench of this Court, while overruling (sic affirming) Union of India v. Mohd. Ramzan Khan [(1991) 1 SCC 588 : 1991 SCC (L&S) 612 : (1991) 16 ATC 505] had held that the benefit of decisions would be given only to the parties to the cases pending before the authorities from the date of the judgment but not to the actions already taken by the date of that judgment. In that behalf in separate but party dissenting judgment to a limited extent, on the issue of the need to give benefit to the party that approaches the Court in that case, one of us, K. Ramaswamy, J., had held that as a matter of constitutional law retrospective operation of an overruling decision is neither required nor prohibited by the Constitution; it is a matter of judicial attitude depending on the facts and circumstance in each case; the nature and purpose the particular overruling decision seeks to serves are required to be taken into consideration. The Court would look into the justifiable reliance on the overruled case by the administration. All the factors, viz., ability to effectuate the new rule adopted in the overruling case, without doing injustice and whether the likelihood of its operation substantially burdens the administration or retards the purpose, are to be taken into account, while overruling the earlier decision or laying down a new principle. Equally, no distinction could be made between claims involving constitutional rights, statutory right or common law right. The Court is required to adjust the competing rights taking into consideration the prior history of the rule in question, its purpose and effects and to find out whether retrospective operation will accelerate or retard its operation. Therefore, evolving of the appropriate rule to give effect to the decision of the Court overruling its previous precedent, is one of judicial craftsmanship with pragmatism and judicial statesmanship as a useful outline to bring about smooth transition of the operation of law without unduly affecting the rights of the people who acted upon the law operated prior to the date of the judgment overruling the previous law.

55. The question, therefore, is whether such a decision is void when it offends the fundamental rights under Article 13(2) of the Constitution. The doctrine of voidity was dealt with in Administrative Law by Wade (7th Edn.) at p. 342, and it is stated that "the truth of the matter is that the court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances". The terms "void ab initio" or "nullity" or "voidable" are descriptive of the status of the legislation or subordinate legislation alleged to be ultra vires for patent or for latent defects before its validity has been pronounced by a court of competent jurisdiction. It would, therefore, be of necessity to consider in each case, the effect of the declaration granted by the court before labelling it as void, nullity or voidable, as the case may be.

56. It is seen that Article 13(2) envisages a situation where the State action, be it legislative or executive, violates the fundamental rights in Part III of the Constitution; such law is declared as void but when the previous overruled decision and the new rule laid down by the Court as a stare decisis operates prospectively from a given date, namely, either the date of the judgment or extended date. Judgment or order is not a legislative Act which is void under Article 13(2) but a judicial tool by which the effect of the judgment was given. Therefore, the judgment of the Court in Mandal case [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] declaring that Rangachari [(1962) 2 SCR 586 : AIR 1962 SC 36] ratio did not correctly interpret Article 141 of the Constitution. It is true that Article 13(1) deals with pre-constitutional law and if it is

inconsistent with fundamental rights, it becomes void from 26-1-1950, the date on which the Constitution of India came into force and if a post-constitutional law governed by Article 13(2) violates fundamental rights, it becomes void from its inception. Either case deals with statute law and not the law declared by this court under Article 141 and directions/orders under Article 142.

57. The question then is whether such a declaration is inconsistent with the Constitution or in derogation of the fundamental rights. As held earlier, both the disadvantaged and advantaged sections of the society have equal competing fundamental rights in Part III, i.e., Chapter of Fundamental Rights. The Court in Mandal case [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] had obviously recognised the need the to adjust the competing rights of both sections of citizens and, therefore, it postponed the operation of that judgment for five years from that date giving an option to the executive to have the law amended appropriately.

58. In Union Carbide Corpn. v. Union of India [(1991) 4 SCC 584] a Constitution Bench was to consider the scope, ambit and limitation of the exercise of the power under Article 142. Therein, the contention, raised was that the direction issued was contrary to the statutory provision violating Article 21 of the Constitution and that, therefore, the power under Article 142 could not be exercised in that backdrop, This Court explaining the interplay of inference of prohibition or limitation on the constitutional power and as to when need to exercise the same under Article 142 arises, had pointed out in para 83 thus : (SCC pp. 634-35)

> "It is necessary to set at rest certain misconceptions in the arguments touching the scope of the powers of this Court under Article 142(1) of the Constitution. These issues are matters of serious public importance. The proposition that a provision in any ordinary law irrespective of the importance of the public policy on which it is founded, operates to limit the powers of the Aped Court under Article 142(1) is unsound and erroneous. In both Garg [Prem Chand Garg v. Excise Commr., U.P., 1963 Supp (1) SCR 885 : AIR 1963 SC 996] as well as Antulay [(1998) 2 SCC 602 : 1988 SCC (Cri) 372] cases the point was one of violation of constitutional provisions and constitutional rights. The observations as to the effect of inconsistency with statutory provisions were really unnecessary in those cases as the decisions in the ultimate analysis turned on the breach of constitutional rights. We agree with Shri Nariman that the power of the Court under Article 142 insofar as quashing of criminal proceedings are concerned is not exhausted by Section 320 or 321 or 482 CrPC or all of them put together. The power under Article 142 is at an entirely different level and of a different quality. Prohibitions or limitations or provisions contained in ordinary laws cannot, ipso facto, act as prohibitions or limitations on the constitutional powers under Article 142. Such prohibitions or limitations in the statutes might embody and reflect the scheme of a particular law, taking into account the nature and status of the authority or the court on which conferment of powers - limited in some appropriate way - is contemplated. The limitations may not necessarily reflect or be based on any fundamental considerations of public policy. Shri Sorabjee, learned Attorney General, referring to Garg case [Prem Chand Garg v. Excise Commr., U.P., 1963 Supp (1) SCR 885 : AIR 1963 SC 996] said that limitation on the powers under Article 142 arising from 'inconsistency with express statutory provisions of substantive law' must really mean and be understood as some express prohibition contained in any substantive statutory law. He suggested that if the expression 'prohibition' is read in place of 'provision that would perhaps convey the appropriate idea. But we think that such prohibition should also be shown to be

> based on some underlying fundamental and general issues of public policy and not merely incidental to a particular statutory scheme or pattern. It will again be wholly incorrect to say that powers under Article 142 are subject to such express statutory prohibitions. That would convey the idea that statutory provisions override a constitutional provision. Perhaps, the proper way of expressing the idea is that in exercising powers under Article 142 and in assessing the needs of 'complete justice' of a cause or matter, the Apex Court will take note of the express prohibitions in any substantive statutory provision based on some fundamental principles of public policy and regulate the exercise of its power and discretion accordingly. The proposition does not relate to the powers of the Court under Article 142, but only to what is or is not 'complete' justice of a cause or matter and in the ultimate analysis of the propriety of the exercise of the power. No question of lack of jurisdiction or of nullity can arise."

59. In Delhi Judicial Service Assn. v. State of Gujarat [(1991) 4 SCC 406] and Vinay Chandra Mishra Re [(1995) 2 SCC 584] this Court considered its paramount power and duty to protect the limbs of administration of justice from those whose actions created interference with or obstruction to the course of justice. It was held that the failure to exercise the power in such situations, when it is invested specifically for the purpose, is a failure to discharge the duty. The first case deals with a case when the judicial officer in Gujarat was assaulted by the police and in the latter when a practising advocate assaulted a Judge of the High Court, this Court took suo motu action and passed appropriate orders, in spite of absence of specific power to deal with or despite the disciplinary power available under the Advocates Act. In Delhi Development Authority v. Skipper Construction Co. (P) Ltd. [(1996) 4 SCC 622] a Bench of two Judges exercised the power under Articles 129 and 142 of the Constitution and not only punished the defrauding party but also directed restoration of the benefits illegally derived to the persons defrauded. The imposition of the punishment, it was held, does not denude the power of the Court; it could issue directions to remedy the wrong done by the contemner including directions to refund the amounts wrongfully derived by the contemner to the rightful persons.

60. It would be seen that there is no limitation under Article 142(1) on the exercise of the power by this Court. The necessity to exercise the power is to do "complete justice in the cause or matter". The inconsistency with statute law made by Parliament arises when this Court exercises power under Article 142(2) for the matters enumerated therein. Inconsistency in express statutory provisions of substantive law would mean and be understood as some express prohibition contained in any substantive statutory law. The power under Article 142 is a constituent power transcendental to statutory prohibition. Before exercise of the power under Article 142(2), the Court would take that prohibition (sic provision) into consideration before taking steps under Article 142(2) and we find no limiting words to mould the relief or when this Court takes appropriate decision to mete out justice or to remove injustice. The phrase "complete justice" engrafted in Article 142(1) is the word of width couched with elasticity to meet myriad situations created by human ingenuity or cause or result of operation of statute law or law declared under Articles 32, 136 and 141 of the Constitution and cannot be cribbed or cabined within any limitations or phraseology. Each case needs examination in the light of its backdrop and the indelible effect of the decision. In the ultimate analysis, it is for this Court to exercise its power to do complete justice or prevent injustice arising from the exigencies of the cause or matter before it. The question of lack of jurisdiction or nullity of the order of this Court does not arise. As held earlier, the power under Article 142 is a constituent power within the jurisdiction of this Court. So, the question of a law being void ab initio or nullity or voidable does not arise.

61. Admittedly, the Constitution has entrusted this salutary duty to this Court with power to remove injustice or to do complete justice in any cause or matter before this court. The Rangachari [(1962) 2 SCR 586 : AIR 1962 SC 36] ratio was in operation for well over three decades under which reservation in promotions were given to several persons in several services, grades or cadres of the Union of India or the respective State Governments. This Court, with a view to see that there would not be any hiatus in the operation of that law and, as held earlier, to bring about smooth transition of the operation of law of reservation in promotions, by a judicial creativity extended the principle of prospective overruling applied in Golak Nath case [(1967) 2 SCR 762 : AIR 1967 SC 1643] in the case of statutory law and of the judicial precedent in Karunakar case [(1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704] and further elongated the principle postponing the operation of the judgment in Mandal case [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] for five years from the date of the judgment. This judicial creativity is not anathema to constitutional principle but an accepted doctrine as an extended facet of stare decisis. It would not be labelled as proviso to Article 16(4) as contended for.

62. In S.P. Sampath Kumar v. Union of India [(1987) 1 SCC 124 : (1987) 2 ATC 82], while noticing that the Administrative Tribunals Act suffered from constitutional invalidity, instead of declaring the Act as invalid, declared that its invalidity would be removed by making necessary suggested amendments thereto so that the law will become consistent with the Constitution. In St. Stephen's College case [(1992) 1 SCC 558] while holding that the orders issued by Delhi University were violative of Article 30(1) of the Constitution, this Court declared that admission by the minority institutions in the ratio of 50 : 50 between minority students and the general students was constitutional which is another facet of judicial creativity. In Pannalal Bansilal Pitti v. State of A.P. [(1996) 2 SCC 498] this Court, instead of declaring that abolition of hereditary trusteeship of the founder of the temple to manage a temple was unconstitutional, declared the law reading it down that the institutions would be managed by a committee of the non-hereditary and hereditary trustee presided over by the hereditary trustee so as to be conducive to proper and efficient management of the endowment or institutions. At the same time, this Court upheld the power to remove hereditary trustees who mismanaged the endowment or committee for acts of misfeasance or malfeasance, as valid. It is settled legal principle of reading down the provisions of a statute by so interpreting them as to make the Act consistent with the constitutional principles. Instances, therefore, are many under which this Court has evolved the appropriate principle to sustain the legislative or executive actions consistent with the constitutional philosophy or principles. Mahendra Lal Jaini v. State of U.P. [1963 Supp (1) SCR 912 : AIR 1963 SC 1019] relied on by the petitioners, is of no assistance to the facts of this case. Therein, the distinction between the post-constitutional and pre-constitutional law which violated the fundamental rights and the effect thereof under Articles 13(1) and 13(2) was considered. The doctrine of eclipse was pressed into service and explaining the circumstances in which the voidity of the pre-constitutional law and the validity of the post-constitutional law was declared, this Court held that the post-constitutional law violating the fundamental rights was stillborn and that, therefore, was void from its inception, while the pre-constitutional law is effective from inception but its voidity supervened when the Constitution came into force. Therefore, it would be void only from 26-1-1950 and the previous operation of the law remained unaffected. The ratio therein, therefore, has no application to the facts in this case. Similarly, the ratio in Atam Prakash v. State of Haryana [(1986) 2 SCC 249] is equally inapplicable to the facts of this case. Therein, it was declared that the justification of the right of pre-emption to different classes enumerated in Section 15 of the Punjab Promotion Act was declared ultra vires and inconsistent with the modern concept of equality. Therefore, it was held that the law was not valid. Equally, the ratio in Waman Rao case [(1981) 2 SCC 362 : (1981) 2 SCR 1] is equally inapplicable. Therein, it

was held that a law violating the fundamental rights was void but it remained valid under the protective umbrella of Schedule IX of the Constitution and, therefore, though it was void, it cannot be declared to be void and remained to be a valid law. But a post-constitutional Kesavananda Bharati [Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225 : 1973 Supp SCR 1] law which did not receive the protective umbrella of Schedule IX is void from its inception. We are not concerned, as stated supra, with statute law in this case. Under those circumstances, the ratio therein is inapplicable to the facts in this case. A.R. Antulay case [(1988) 2 SCC 602 : 1988 SCC (Cri) 372] is inapplicable to the facts in this case. Therein, though this Court had directed under Article 142 trial of the appellant by a High Court Judge, it was held that such direction was inconsistent with fundamental rights of equality under Article 21 read with Article 14 with the trial of other similarly circumstanced offenders by a properly constituted court with a right of appeal while the order passed under Article 142 denied him of the equality of trial process. This Court accepted that contention and held that the direction issued on earlier occasion was invalid in law. In that context, the observations came to be made in para 50. The ratio therein is also inapplicable to the facts in this case. In Delhi Judicial Service Assn. v. State of Gujarat [(1991) 4 SCC 406] (SCC at p. 452, para 37), it was held that the powers under article 32, 136, 141 and 142 are basic structures of the Constitution and cannot be curtailed by statute law. Equally, the same position was reiterated in para 51 therein. The ratio also is inapplicable to the facts in this case as we have already held that the direction in Mandal case [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] postponing the operation of the judgment of reservation in promotions for a period of five years is a part of the scheme of judicial review being an innovative device to mete out justice to the Dalits and Tribes giving breathing time to the executive to bring about suitable legislative measures, if they so desired and if no action was taken by amending the law, on expiry of five years, the judgment in Mandal case [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] would become operative. Thereafter reservation in promotion would be unconstitutional which invalidity was remedied. As held earlier, this being one of the tools of judicial craftsmanship adopted by exercising the power under Article 142, which is available only to this Court, the directions given are not violative of rights under Article 14 read with Article 16(1), nor ultra vires the power nor void, nor incompatible or inconsistent with the doctrine of equality enshrined under Article 14 read with Article 16(1) of the Constitution. On the other hand, the power was exercised by this Court under Article 142 read with Article 32 and the direction postponing the operation of the decision for a period of five years is a law of the land under Article 141.

63. It is already seen that the rule of reservation in promotions was in vogue in the State of Uttar Pradesh right from 1973 and the promotions came to be made from 1981 onwards to Respondents 2 to 10. The U.P. Act saves the existing policy of reservation in promotions. The judgment in Mandal case [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] saves the promotions already made. In Sabharwal case [(1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481] also a Constitution Bench has upheld the validity of the promotions given in excess of the roster; otherwise also those promoted on their own merit were held to be validly promoted. Even excess promotions remained undisturbed and the law become operative only from the date of the judgment. This Court upheld the previous promotions, though in excess of the roster system, as constitutional and valid. Therefore, we hold that the promotions of the respondents are legal and valid and they do not become void or unconstitutional as contended.

64. Both, the appeal and the writ petition, are accordingly dismissed with no order as to costs.