SUPREME COURT OF INDIA

Jitendra Kumar Singh

Vs.

State of U.P.

C.A.No.74 of 2010

(Tarun Chatterjee and Surinder Singh Nijjar JJ.)

08.01.2010

JUDGEMENT

Surinder Singh Nijjar, J.

1. Leave granted.

2. These Appeals are directed against the common Division Bench judgment of the High Court of Judicature at Allahabad dated 22.12.2006. By the aforesaid judgment, the High Court decided number of Appeals directed against the common judgment of the learned Single Judge in Writ Petition No.25328 of 2001 and a number of other connected writ petitions.

3. The appellants had assailed the judgment dated 22.5.2002 of the learned Single Judge to the extent that the Writ Petition Nos.25328, 26847, 36411, 28836, 26177, 34039, 4630, 32763, 27849, 27060, 29069 of 2001 and 47528 of 2002 had been dismissed whereby the petitioners-appellants were seeking a writ in the nature of mandamus directing the respondents to send them for 3 training to the post of Sub Inspectors. In some of the writ petitions, a prayer had also been made for quashing the entire select list which was also declined by the learned Single Judge. In Special Appeal No.592 of 2006, the appellant who was respondent had assailed the aforesaid judgment of the learned Single Judge only to the extent the Single Judge had issued a writ in the nature of mandamus to the respondent-appellants to fill up vacancies against 2% Sports Quota from the aforesaid selection itself. In Special Appeal No.1285 of 2002, the original petitioner had challenged the judgment dated 01.10.2002 passed by the learned Single Judge (R.K.Agarwal, J.) dismissing the writ petition no.47528 of 2002 following the judgment dated 22.5.2002 of Ashok Bhusan, J. in writ petition no.25328 of 2001 and other connected matters (supra).

> "In Special Appeal No.910 of 2005, the original petitioner had assailed the judgment dated 19.7.2005 of Sunil Ambwani, J. dismissing writ petition no.29383 of 2001 again following the judgment dated 22.5.2002 of Ashok Bhusan,J (supra)."

4. The dispute between the petitioners and the respondents revolves around the issue of reservation of posts for Backward 4 Classes, Scheduled Castes, Scheduled Tribes, Women Candidates and Sportspersons.

5. We may notice here the relevant facts before we advert to controversy in detail.

6. An advertisement was issued on 4.5.1999 for direct recruitment on the post of Sub Inspectors in Civil Police (hereinafter referred to as "SICP") and Platoon Commanders in PAC (hereinafter referred to as "PC"). According to the respondents, the break down of the posts was 1379 Posts for SICP and 255 posts for PC. Out of these posts, 2% posts were reserved for outstanding Sportspersons. The recruitments to these posts were to be made by a separate advertisement. Apart from above, 10% of the posts were reserved for women.

7. The procedure for selection included a Preliminary Written Test consisting of 300 marks. Candidates were required to secure at least 50% marks for being declared successful and entitled to participate in further test. This was followed by a Physical Test consisting of 100 marks. Again the candidate had to secure at least 50% or more marks. The marks obtained in the Preliminary Written Test and the Physical Test were, however, not to be included for 5 determination of final merit. Candidates who qualified in the Preliminary Written Test and the Physical Test were required to appear in the Main Written Test consisting of 600 marks, having two papers i.e. General Hindi, General Knowledge and Mental Aptitude Test. Here again a candidate who secured 40% or more marks could only be declared successful. The written test consisted of two papers- (i) Hindi language and Essay consisting of 200 marks and (ii) General Knowledge and Mental Aptitude Test consisting of 400 marks. Thereafter, the candidate was to appear for interview which consisted of 75 marks. There were, however, no qualifying marks for the interview.

8. It is common ground that in response to the advertisement, more than 50,000 candidates applied for the posts. The result for the Preliminary Written Test which was held on 6.2.2000, was declared on 22.9.2000. 7325 candidates were found successful.

> “Physical Test was held from 29.10.2000 to 6.11.2000 and 1454 candidates were found successful. The Main Written Test was held on 29.4.2001 wherein 1178 candidates were declared successful.
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> The final result of the interview was declared on 6.7.2001, wherein 1006 candidates were declared successful. The number of persons 6 who were selected in different categories finally and have been sent for Training is as under:-
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> 1. General (Male) for the post of Sub Inspectors 608
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> 2. General (Female) for the post of Sub 15 Inspectors (This included one dependent of freedom fighter) Note: 163 OBC, 19 Scheduled Castes and 1 Scheduled Tribes

candidates having secured more than the last general candidate, were selected against general vacancies.

3. OBC (male) for the post of Sub Inspectors 168

4. OBC (female) for the post of Sub Inspectors 9

5. SC (male) for the post of Sub Inspectors 25

6. SC (female) for the post of Sub Inspectors 1

7. ST (male) for the post of Sub Inspectors 3

8. General (male) Platoon Commander in PAC 125"

9. All the petitioners-appellants who applied pursuant to the aforesaid advertisement had participated in the entire selection process. However, the names did not figure in the merit list of the selected candidates.

10. The selection was challenged in a number of writ petitions by candidates who were not included in the select list. According to the High Court, the selection was challenged on the following grounds:-

> "1.The selection has been made by adopting pick and 7 choose method.
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> 2.More than 600 posts are still vacant yet the petitioners have not been declared successful.
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> 3.There was no guideline or criteria for interview.
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> 4.The number of candidates appeared for main examination and interview being less than the total number of vacancies, therefore, the petitioner- appellants could not have been unsuccessful.
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> 5.Several candidates having inferior educational record have been declared successful.
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> 6.Certain persons having Roll Nos.0492198, 520570, 0492263, 760146, 480612, 492353, 7706166, 790658, 790519 and 790035 did not find place in the result after main examination yet have been shown as selected finally in the final merit list which shows serious irregularities and bungling in the selection.
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> 7.Keeping large number of vacancies unfilled although successful candidates are available is a motive for extracting illegal demand."

11. The writ petitions were opposed by the State Government by filing a detailed counter-affidavit in Writ Petition No.26177 of 2001.

> "The aforesaid counter-affidavit was said to have been read on behalf of the State in all the cases. It was explained by the State 8 Government that in response to the advertisement, total 53780 application forms were received. It was further explained that 1178 candidates had qualified in the main written test who appeared in the interview which was held between 18.6.2001 to 1.7.2001. It was further explained that vide Government order dated 3.2.1999, 2956 posts of SICP were sanctioned, out of which 50% posts were to be filled by direct recruit and 50% posts by promotion.
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> Therefore, 1478 posts came to be filled in by direct recruit. Since 99 posts were filled under the Category of "Dying in Harness" Rules, only 1379 posts remained to be filled. Separate selection was to be held on the 2% vacancies reserved for Sportspersons through a separate advertisement. Therefore, as a matter of fact, actual recruitment was made i.e. only for 1350 posts of SICP and 255 posts of PC. The break-up of the posts was as indicated above."

12. Upon consideration of the entire matter, Ashok Bhusan, J. delivered common judgment dated 22.5.2002 in CMWP No.25328 of 2001 (Narendra Partap Singh vs. Director General of Police, UP and others). All the writ petitions were disposed of with the following observations:- 9 "In view of the foregoing discussions none of the contentions of the petitioner can be accepted except the contention regarding 2% reservation for sports men. Relief claimed by the petitioner cannot be granted except the direction to the respondents to recalculate the number of posts of general category candidates by applying 2% reservation for sports men horizontally and adding 2% posts of sports men also while calculating the total number of vacancies of general category candidates. If after applying 2% reservation horizontally any post in general category candidates quota remains vacant the same shall be filled up by the general category candidates next in merit. It is, however, made clear that by the said exercise the selection already made will not be affected in any manner.

All the writ petitions are disposed of with the aforesaid directions"

13. This judgment was subsequently followed in the separate judgments delivered by R.K.Agarwal, J. and Sunil Ambwani, J. All the three judgments were challenged in appeals before the Division Bench, which have been decided by the common judgment dated 22.12.2006.

14. The Division Bench noticed the submissions made by the learned counsel for the parties in detail and formulated seven issues which arose in the appeals. The issues were as under:- "1. What is the extent of selection of a reserve category candidate against unreserved 10 seats and in what circumstances he can be considered against unreserved vacancies besides reserve

seats. The relevant factors, shades and nuisances for such adjustment also need to be identified, if any.

> “2. Whether Section 3 (6) of Act of 1994 would apply where a candidate of reserve category though has availed relaxation meant for reserve category candidates namely fee and age but in all other respect, in the selection test, has completed with general category candidates and has secured more marks than the last selected general category candidate. In other words whether relaxation in age and fee would deprive and outsource him from competing against an unreserved seat in an open competition with general candidates.
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> 3. Whether selection of reserve category candidates against reserved and unreserved constituting more than 50% is unconstitutional or otherwise contrary to law.
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> 4. Whether reservation of seats for women is violative of Article 16(2) of the Constitution of India.
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> 5. Whether seats reserved for women can be carried forward in case suitable candidates are not available or the reservation being horizontal and applicable to all categories, the unfilled vacancies are to be filled by suitable male candidates.
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> 6. Whether keeping 2% sports quota separate from the selection in question is illegal.
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> 7. Whether selection in question is otherwise vitiated on account of any alleged irregularity or bungling.”

15. The Division Bench noticed the historical background in which the provisions with regard to reservation came to be incorporated in the Constitution of India. The Division Bench also noticed the entire history with regard to the various government orders making reservation for different categories. The Division Bench notices that the matter of reservation has been dealt in detail by this Court in numerous cases. Therefore, the Division Bench has confined itself to the problem as, faced and countered, in the State of U.P; particularly with reference to the category of the candidates belonging to `O.B.Cs.' The Division Bench also noticed the statutory provisions contained in the U.P. Public Services (Reservation for Scheduled Castes and Scheduled Tribes) Act, 1994 (hereinafter referred to as "the Act of 1994"). The High Court considered issues no.1, 2 and 3 together.

16. The Division Bench has concluded that the various Government orders and the Act of 1994 provide reservation in State services with the intent to achieve the goal of adequate representation of Backward Classes of Citizens in service. It notices that reservation under Article 16(4) has to be made keeping in view the provisions contained in Article 14, 16(1) and 335 of the Constitution of India. It is also held that there are various modes and methods of providing reservation. The extent and nature of reservation is a matter for the State to decide considering the facts and requirements of each case. In this case the Legislature has

empowered the State to extend concessions limited to fee and age to OBCs, besides keeping reservation of seats to the extent of 27%.

> "The prime objective, obviously, is to provide adequate representation to these classes, which in the opinion of the Legislature are not adequately represented in the services under the State. The Division Bench also concluded that the State Government has not conducted any indepth study to find out as to whether adequate representation has been given to any particular Backward Classes as a result of successive provisions for reservation. Therefore, a direction has been given to the State 13 Government of U.P. to undertake an indepth study to find out the representation of various Backward Citizens in Public service and to find out whether any Backward Class citizens have achieved the constitutional goal of adequate representation in service or not.
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> Thereafter, the Government is to review the policy in the light of facts, figures and information received pursuant to such study. The exercise is to be undertaken by the State Government within six months and a compliance report is to be submitted to the Court."

17. With regard to the manner, mechanism and inter-relationship of various concessions and reservations, the Division Bench observed that it is permissible for the State to provide concessions to achieve the goal under Article 16(4) without keeping the seats reserved for any backward class of citizens. When certain seats are reserved, it would not result in making unreserved seats compartmentalized for General Category candidates i.e. unreserved candidates. There is no reservation for General Category Candidates. It is also held that a reserved category candidate, in addition to the reserved seats, can always compete for unreserved seat. The Division Bench has further held that the reserved category candidate can also compete against the unreserved seats 14 under a criteria which is uniformly applicable to all the candidates.

> "In case the selection criteria is lowered for the reserved category candidate, then such difference in standard or criteria would disentitle the reserved category candidate to compete in the general category. After analyzing the law laid down by this Court in numerous judgments, the Division Bench has concluded that the conflicting claims of individuals under Article 16(1) and the preferential treatment given to a backward class under Article 16(4) of the Constitution has to be balanced, objectively. The Division Bench then considered as to whether the concession or relaxation in the matter of fee and age would deprive a reserved candidate of his right to be considered against an unreserved seat. Can it be said that such a candidate is not a person who has competed with the general category in an open competition. It is noticed that under GOs (Government Orders) dated 11.04.1991, 19.12.1991 and 16.04.1992 and the clarification dated 19th October, 1992, it was provided that a reserved category candidate cannot compete with the open category candidate(s) after availing preferences which result in lowering of the prescribed standards. Such a candidate

> would only be considered against seat/post for the reserved 15 category. However, after the promulgation of the 1994 Act and issuance of the Instructions dated 25th of March, 1994, the State Government has not treated relaxation in age and fee as relaxation in the standard of selection. Therefore, even if a candidate has availed concession in fee and or age limit, it cannot be treated to be a relaxation in standard of selection. Therefore, it would not deny a reserved category candidate selection in Open Competition with General Category candidates. Such concessions can be granted by the State under Section 8(1) of the Act. The Division Bench has also held that a relaxation in age and concession in fee are provisions pertaining to eligibility of a candidate to find out as to whether he can appear in a competitive test or not and by itself do not provide any indicia of open competition. The competition would start only at a stage when all the persons who fulfill all the requisite eligibility qualification, age etc. are short listed. The candidates in the zone of consideration entering the list on the basis of aforesaid qualifications would thereafter participate in competition and open competition would commence therefrom. Therefore, concession granted under Section 8 would not disentitle a reserved category candidate of the benefit under Section 3 sub-Section (6)."

18. In view of the above legal position, it has been held that if a reserved category candidate has secured marks more than the last General Category candidate, he is entitled to be selected against the unreserved seat without being adjusted against the reserved seat.

> "According to the Division Bench, merely because 183 candidates, belonging to the reserved category, have been successful against unreserved seats would not result in reverse discrimination, as apprehended by the petitioners. This is particularly so as selection of such reserved category candidate against the unreserved seats would not be material for the purpose of applying the principle of reservation being limited to a total of 50%."

19. The Division Bench has also held that the reservation in favour of women is constitutionally permissible and is valid. On issue No.5 it has been held that in view of the GO dated 26.02.1999 (para 4), the 52 vacancies of general category kept reserved for women candidates have been illegally carried forward for the next selection instead of filling in from the general category male candidates. However, since the posts remained vacant, the same had to be filled from the general category male candidates and could not be carried forward.

20. Reservation in favour of sportspersons quota (2%) has also been upheld. It was held that the aforesaid reservation has to operate horizontally, therefore, the 29 vacancies which remained unfilled could not have been carried forward. The observations made by the Single Judge on this issue have been approved. A direction has been issued as follows:- "We direct the respondent-authorities to fill in the unfilled vacancies reserved for women candidates and sportsmen from suitable candidates of respective category on the basis of merit list and send them for training and provide all other benefits, if any as per rules. However, we may add here, since the respondents did not hold recruitment for sports persons in the present

selection and we are informed that a separate selection was held, therefore, we provide that the vacancies remain unfilled from the separate selection held for sportsmen against 29 vacancies separated from the impugned selection, only those remaining vacancies shall be made available to the respective candidates of this selection."

21. The aforesaid findings of the Division Bench have been challenged in these appeals by the unsuccessful candidates as well as the State of U.P.

22. We have heard learned counsel for the parties.

23. Mr. L.N. Rao, learned Sr. Counsel appearing on behalf of the appellants submitted that the cardinal issue raised in these appeals is whether the reserved category candidates who had taken the benefit of age or fee relaxation, are entitled to be counted as general category candidates. According to the learned Sr.Counsel, the Division Bench has erred in law in concluding that relaxation in age and fee cannot be treated to be relaxation in standard of selection and shall not deny a reserved category candidate's selection in Open Competition with General Category candidate.

> "According to learned Sr. Counsel, the benefit of reservation under Article 16(4) of the Constitution of India is a group right whereas under Article 16 (1) of the Constitution of India, it is an individual right. It is emphasized that reservation under Article 16(4) of the Constitution of India will take into its fold concessions. Once a candidate falls within the reserved category, he/she can only exit the Group i.e. from the benefit of Article 16(4) of the Constitution of India to Article 16(1) of the Constitution of India on fulfillment of two circumstances, namely, (a) imposition of a creamy layer and (b) merit selection. That is where there is a level playing field in respect of the selection process, without any benefit under Article 16(4) of 19 the Constitution of India. According to the learned Sr. Counsel, a level playing field would be of candidates who have not availed of any concessions or relaxation. All things have to be equal for all the candidates."

24. According to learned Sr. Counsel, there is a distinction between relaxation and concession which pertain to a particular selection process and mere support mechanism (such as General Coaching) independent of a criteria for a particular selection.

25. According to the learned Sr. Counsel, selection process would include all stages. There can be no distinction that relaxation in age and fee can be treated as provisions pertaining to eligibility i.e. to bring a candidate within the zone of consideration. According to the learned Sr. Counsel, it is hair splitting to divide the selection process into further parts. Each undermines the concept of "level playing field". Learned Sr. Counsel further submitted that the Division Bench has misinterpreted Section 3 of the Act of 1994. It has to be read as a whole. Section 8 is in nature of exception to Section 3 (6), because it creates a non-level playing field.

26. In order to emphasize that reservation under Article 16 (4) of the Constitution of India is a group right, and includes preferences, 20 concessions and exemptions, Mr. L.N. Rao relied on certain observations of this Court made in the case of Indra Sawhney and others vs. Union of India and others, 1992 Supp (3) Supreme Court Cases 217. According to him, the fact that only age and fee relaxations were given does not take the reserved category candidates out of the group category. He has also relied on the judgment rendered in the case of *Post Graduate Institute of Medical Education & Research, Chandigarh and others vs. K.L.Narsimhan and another*[1] in support of the submission that once a candidate takes advantage of relaxation in the eligibility criteria, he/she has to be treated as a reserved category candidate.

27. With regard to the interpretation to be placed on the Act of 1994, Mr. L.N.Rao submitted that Section 3 preserves the definition of the group throughout. According to him, Sections 3 (6) and Section 8 are to be read together in the following way i.e. in Section 3(6), the term "gets selected on the basis of merit in an open competition" denotes a level playing field in Open Competition permitting exit from the group into the merit category. Section 8 lowers the level playing field "for any competitive examination" and 21 clubs three categories together- (a) fees, (b) interview and (c) age limit. According to the learned Sr. Counsel, the invocation of Section 8 wholly excludes the operation of Section 3 (6) to which Section 8 is an exception. He further submitted that relaxation and concessions may be of various kinds. Each is a part of Article 16 (4) of the Constitution of India and could have egalitarian consequences. In support of the submissions, reliance is placed on observations of this Court made in paragraph 743 in the case of Indra Sawhney (supra). According to the learned Sr. Counsel, there is a distinction between social support mechanisms prior to an examination, (which are also a part of Article 16 (4) of the Constitution of India) and the relaxations/concessions which relate to the selection process itself. According to the learned Sr. Counsel, supplemental and ancillary provisions to ensure full availment of provisions for reservation would be a part of reservation under Article 16 (4) of the Constitution of India. He submitted that the selection process has to be seen as a whole. It cannot be split up into different parts. Section 8 is an exception to Section 3(6). In view of the above, according to the learned Sr. Counsel, the Division Bench has erroneously held that in view of Section 8 of the Act of 22 1994, reserved category candidates can be permitted to compete with the General Category candidates. Learned Sr. Counsel has also submitted that the learned Single Judge has wrongly distinguished the judgment in the case of K.L.Narsimhan (supra) on the basis that it was over-ruled by a larger five Judges Bench in the case of Post Graduate Institute of Medical Education & Research, Chandigarh vs. Faculty Association and others, (1998) 4 SCC 1. The aforesaid judgment was over-ruled only on one particular point raised in the review application. The aforesaid judgment had decided three appeals in a common judgment. Review was filed only in one. Therefore, the judgment in other cases is not over-ruled. It has in fact been subsequently referred to in *Dr.Preeti Srivastava and Anr. V. State of M.P. and Ors*[2]., , *Bharati Vidyapeeth and Ors v. State of Maharashtra and Anr.*[3]*, and State of Madhya Pradesh and Ors. V. Gopal D.Tirpathi and Ors*[4].

> “Therefore, according to Mr. L.N.Rao, the reasoning given therein is still relevant. Learned Sr. Counsel then relied on the judgment in the case of *Union of India and*

> *another v. Satya Prakash and others*[5], in support of the submission that 23 only a candidate who has been selected without taking advantage of any relaxation/concession can be adjusted against a seat meant for General Category Candidate. Learned Sr. Counsel then submitted that the vacancies which are reserved for Women candidates remained unfilled, and therefore, ought to have been filled from the men candidates belonging to the General Category.
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> Even these vacancies have been illegally carried forward. The reservation in favour of women is referable to Article 15 (3) of the Constitution of India and not Article 16 (4) of the Constitution of India. Therefore, it is horizontal reservation in which carry forward rule would not be applicable. Even with the carry forward rule which is applicable only to vertical reservations, 50% cap as approved in Indra Sawhney case (supra) cannot be permitted to be breached."

28. In fact in the present case, the reserved category candidates have occupied one third of the posts meant for the General Category. If the argument of the State is accepted in addition to the quota of 50% (with carry forward), another 183 out of 1014 (18%) would be added. Learned Sr. Counsel reiterated that the purpose of reservation is not to distribute largesse, but to create 24 empowerment among the disadvantaged. The test is, therefore, "adequacy", not mechanical over-empowerment, which must be constantly maintained. Learned Sr. Counsel also emphasized that the provisions contained in Article 16 (4) (a) and (b) of the Constitution of India are all enabling provisions and subject to (a) creamy layer, (b) 50% cap (c) compelling reasons and (d) proportionality. In the present case, the State has failed to give any details with regard to adequacy of representation. Finally, learned Sr. Counsel submitted that reservation in favour of women is even otherwise violative of Article 16 (2) of the Constitution of India.

29. On the other hand, Mr. Dwivedi, learned Senior counsel appearing on behalf of the respondents submitted that in fact no cause of action has arisen in favour of the appellants. All of them are qualified candidates who did not make it to the final select list on the basis of comparative merit. He then submitted that in fact the selected candidates who are likely to be affected, have not been made parties. It has also been submitted that in any case, no relief can be granted to the appellants, at this stage as all the posts had already been filled. Therefore, the submissions made by the appellants are merely an academic exercise. According to him, the 25 Division Bench has correctly interpreted Section 3 of the Act of 1994. He further submits, by the suggested interpretation, the appellants seek to add the words from Section 8 to sub-section (6) of Section 3. There is no relaxation in the qualifications. The concession is only in the matter of fee and the age which pertains only to eligibility of a candidate to apply for the post. The criteria for selection for all the candidates is identical, which has not been lowered, by the concessions/relaxations in fee and age. Under Section 3(6), the candidate even though belonging to a reserved category is entitled to be treated as a General Category Candidate.

> "According to Mr. Dwivedi, the Division Bench has correctly observed that taking advantage of fee concession or age relaxation would not be a bar for the reserved category candidates to be treated as general category candidates. They can be taken out of General Category only as an exception i.e. if their standard is lowered. On the other hand, if by relaxation, the reserved category candidate gets no advantage, he cannot be compartmentalized. The judgment relied upon by the appellants in K.L.Narsimhan (supra) has been over-ruled in the subsequent judgment of this Court in the case of Faculty Association (supra). Once the judgment is over-ruled, it 26 cannot be argued that it is only partly over-ruled. Learned Senior counsel also submitted that the particular sentence relied upon by learned Sr. Counsel appearing on behalf of the appellants in the case of K.L.Narsimhan (supra) is a stray observation and cannot be treated as an authoritative pronouncement or a precedent. In any event, according to him, in the case of K.L.Narsimhan (supra), the issue of relaxation in age or fee was not considered. In the case of Satya Prakash (supra), it has been clearly held that candidates who have been recommended without resorting to the relaxed standard shall not be adjusted against the vacancies reserved for Scheduled Castes, Scheduled Tribes and Other Backward Classes. According to the learned Senior counsel, even Indra Sawhney case (supra) only lays down the meaning of "Reservation" in terms of Article 16 (4) of the Constitution of India."

30. SLP (C) Nos.14078-80 of 2008 have been filed by the State of U.P. challenging the common final judgment of the Division Bench dated 22.12.2006 and the final order dated 18.12.2007 declining to modify or recall the earlier judgment dated 22.12.2006. In support of the appeals, Mr. Dinesh Dwivedi, learned Sr. Counsel submitted that the learned Single Judge of the High Court had taken notice of 27 the fact that total posts of SICP were 1231 (male) + 148 (female). 2% posts were reserved for sports persons. Therefore, 29 posts of SICP and 5 posts of PC were earmarked for Sports Quota. Since 608 male candidates belonging to the General Category were selected, 67 posts of General category were available for women. However, only 15 candidates had been selected. Therefore, 52 posts were filled up on merit from male candidates in accordance with the Government Order dated 26.2.1999. Therefore, it was noticed by the learned Single Judge that no post in General Category was vacant. Having come to the aforesaid conclusion, the learned Single Judge had wrongly issued the directions in the final paragraph of the judgment to recalculate the number of posts of General Category candidates by applying 2% reservation for Sportsmen horizontally and adding 2% posts of sportsmen also while calculating the total number of vacancies of General Category candidates. This direction had been challenged by the State and the Director General of Police in Special Appeal Nos.910 of 2005 and 592 of 2006. In spite of the aforesaid categoric finding of the learned Single Judge, that there were no vacant posts, the Division Bench concluded that the vacancies which were left unfilled were 28 carried forward for next selection, instead of filling in from the General Category of male candidates. In fact Government Order dated 26.2.1999 was fully complied with. According to the learned Sr. Counsel, the direction issued by the Division Bench to fill up the unfilled vacancies reserved for women candidates and sportsmen from suitable candidates of respective categories has been issued without taking into account that all the

vacant posts have been filled, in accordance with the Government Order. The Division Bench has failed to appreciate that no unfilled posts reserved for women and the Sportsmen quota have been carried forward.

31. Dr. Rajeev Dhawan, learned Sr. Counsel reiterated the submissions made by Mr.L.N. Rao. According Dr.Dhawan the judgment in the case of K.L.Narsimhan (supra) has only been partly over-ruled in one case. The aforesaid judgement had decided three appeals by a common judgement, therefore, the reasoning of the judgment is still intact and would be applicable to the facts and circumstances of the present case. Since the reserved category candidates have been given relaxation in the age and the fee, the same would fall within the group right of reservation under Article 16 (4) of the Constitution of India. Learned Sr. Counsel reiterated 29 that once a candidate takes advantage of reservation/concessions under Article 16 (4) of the Constitution of India, he/she cannot be permitted to be appointed against the seat meant for the General Category. According to the learned Sr. counsel, all parts of Section 3 of the Act of 1994 talk of group rights. There cannot be an exit from reservation, once a benefit is taken. In other words, a candidate covered under Article 16 (4) of the Constitution of India cannot also be a candidate under Article 16 (1) of the Constitution of India.

32. We have considered the submissions made by the learned counsel for the parties.

33. The core issue in the writ petitions was with regard to filling up the General Category posts by candidates belonging to the reserved category candidates on their obtaining more marks than the last candidate in the General Category. The submissions made by the learned counsel for the appellants are all over-lapping.

> "Reference to case law is also common. In our opinion, it is not necessary to consider the larger issues raised by the learned counsel for the parties with regard to the nature and extent of reservation. These issues have been dilated upon by this Court in 30 numerous judgments. The Division Bench in the impugned judgment has traced the history of reservation at considerable length. It has also distinguished between vertical and horizontal reservations. It has also correctly concluded that in case of horizontal reservation, the carry forward rule would not be applicable. All these issues are no longer res integra, in view of the authoritative judgment rendered in the case of Indra Sawhney (supra). It can also be no longer disputed that reservation under Article 16 (4) of the Constitution of India aims at group backwardness. It provides for group right. Article 16 (1) of the Constitution of India guarantees equality of opportunity to all citizens in matters relating to employment. However, in implementing the reservation policy, the State has to strike a balance between the competing claims of the individual under Article 16(1) and the reserved categories falling within Article 16(4).
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> A Constitution Bench of this Court in the case of Indra Sawhney case (supra), this Court reiterated the need to balance the Fundamental Right of the individual under

> Article 16(1) against the interest and claim of the reserve category candidates under Article 16(4) of the Constitution.
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> 31 "It needs no emphasis to say that the principal aim of Article 14 and 16 is equality and equality of opportunity and that Clause (4) of Article 16 is but a means of achieving the very same objective. Clause (4) is a special provision - though not an exception to Clause (1). Both the provision have to be harmonized keeping in mind the fact that both are but the restatements of the principle of equality enshrined in Article
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> 14. The provision under Article 16(4) - conceived in the interest of certain sections of society - should be balanced against the guarantee of equality enshrined in Clause (1) of Article 16 which is a guarantee held out to every citizen and to the entire society. If is relevant to point out that Dr. Ambedkar himself contemplated reservation being "confined to a minority of seats" (see his speech in Constituent Assembly, set out in para 28). No. other member of the Constituent Assembly suggested otherwise. It is thus, clear that reservation of a majority of seats were never envisaged by the found Fathers. Nor are we satisfied that the present context requires us to depart from that concept."

34. In PGI MER vs. Faculty Association (supra in para 32 the same principle was reiterated as under:- "32. Article 14, 15 and 16 including Articles 16(4), 16(4-A) must be applied in such a manner so that the balance is struck in the matter of appointments by creating reasonable opportunities for the reserved classes and also for the other members of the community who do not belong to reserved classes. Such view has been indicated in the Constitution Bench decisions of this Court in Balaji case, 32 Devendasan case and Sabharwal case. Even in Indra Sawhney case the same view has been held by indicating that only a limited reservation not exceeding 50% is permissible. It is to be appreciated that Article 15(4) is an enabling provision like Article 16(4) and the reservation under either provision should not exceed legitimate limits. In making reservations for the backward classes, the State cannot ignore the fundamental rights of the rest of the citizens. The special provision under Article 15(4 [sic 16(4)] must therefore strike a balance between several relevant considerations and proceed objectively. In this connection reference may be made to the decisions of this Court in State of AP vs. USV Balram and A Rajendran v. Union of India, it has been indicated in Indra Sawhney case that Clause (4) of Article 16 is not in the nature of an exception to Clauses (1) and (2) of Article 16 but an instance of classification permitted by Clause (1). It has also been indicated in the said decision that Clause (4) of Article 16 does not cover the entire field covered by Clauses (1) and (2) of Article 16. In Indra Sawhney case this Court has also indicated that in the interests of the Backward clauses of citizens, the State cannot reserve all the appointments under the State or even a majority of them. The doctrine of equality of opportunity in Clause (1) of Article 16 is to be reconciled in favour of backward clauses under Clause (4) of Article 16 in such a manner that the latter while serving the cause of backward classes shall not unreasonably encroach upon the field of equality."

35. These observations make it abundantly clear that the reservations should not be so excessive as to render the 33 Fundamental Right under Article 16(1) of the Constitution meaningless. In Indra Sawhney (supra), this Court has observed as under:- "In our opinion, however, the result of application of carry-forward rule, in whatever manner it is operated, shall not result in breach of 50% rule."

36. Therefore, utmost care has to be taken that the 50% maximum limit placed on reservation in any particular year by this Court in Indra Sawhney case (supra) must be maintained. It must further be ensured that in making reservations for the members of the Scheduled Castes and Scheduled Tribes, the maintenance of the efficiency of administration is not impaired.

37. It is in this context, we have to examine the issue as to whether the relaxation in fee and upper age limit of five years in the category of OBC candidates would fall within the definition of "reservation" to exclude the candidates from open competition on the seats meant for the General Category Candidates. Taking note of the submissions, the Division Bench has concluded by considering questions 1, 2 and 3 that concession in respect of age, fee etc. are provisions pertaining to eligibility of a candidate to find 34 out as to whether he can appear in the competitive test or not and by itself do not provide any indicia of open competition. According to the Division Bench, the competition would start only at the stage when all the persons who fulfill the requisite eligibility conditions, namely, qualification, age etc. are short-listed. We are of the opinion that the conclusion reached by the Division Bench on the issue of concessions and relaxations cannot be said to be erroneous.

38. The selection procedure provided the minimum age for recruitment as 21 years and the maximum age of 25 years on the cut off date. Relaxation of age for various categories of candidates in accordance with the Government Orders issued from time to time was also admissible. This included five years' relaxation in age to Scheduled Caste, Scheduled Tribes, Other Backward Classes and dependents of Freedom Fighters. Relaxation of age was also provided in case of Ex-servicemen. The period of service rendered in Army would be reduced for computing the age of the Ex-Army personnel. After deducting the period of service they had rendered in the Army, they would be deemed eligible. These were mere eligibility conditions for being permitted to participate in the selection process. Thereafter, the candidates had to appear in a 35 Preliminary Written Test. This consisted of 300 maximum marks and the candidates were required to secure 50% or more marks to participate in the further selection process. Thereafter, the candidates had to undergo physical test consisting of 100 marks.

> “Again a candidate was required to secure at least 50% or more marks. It is not disputed before us that the standard of selection in the Preliminary Written Test and the Physical Test was common to all the candidates. In other words, the standard was not lowered in case of the candidates belonging to the reserved category. The Preliminary Written Test and the Physical Test were in the nature of qualifying examinations to appear in the Main Written Test. The marks obtained in the

> Preliminary Written Examination and the Physical Test were not to be included for determination of final merits. It was only candidates who qualified in the preliminary written test and the physical test that became eligible to appear in the main written test which consisted of 600 marks. As noticed earlier, this had two papers- General Hindi, General Knowledge and Mental Aptitude Test. A candidate who secured 40% or above would be declared successful in the written test. Thereafter, the candidates were to appear for interview of 75 marks. The final merit 36 list would be prepared on the basis of merit secured in the main written test and the interview. Candidates appearing in the merit list, so prepared, would be declared selected. It is common ground that more than 50000 candidates appeared in the preliminary written test. Upon declaration of the result on 22.9.2000, only 3,325 candidates were found successful. Thereafter, the physical test which was conducted from 29.10.2000 to 6.11.2000 reduced the successful candidates to 1454. It was these 1454 candidates who sat in the main written test held on 29.4.2001. Upon declaration of result, 1178 candidates were declared successful.
>
> The candidates who were successful in the written test were subjected to an interview between 18.6.2001 to 1.7.2001. The final result published on 6.7.2001 declared only 1006 candidates successful."

39. In view of the aforesaid facts, we are of the considered opinion that the submissions of the appellants that relaxation in fee or age would deprive the candidates belonging to the reserved category of an opportunity to compete against the General Category Candidates is without any foundation. It is to be noticed that the reserved category candidates have not been given any advantage in the selection process. All the candidates had to appear in the same written test and face the same interview. It is therefore quite apparent that the concession in fee and age relaxation only enabled 37 certain candidates belonging to the reserved category to fall within the zone of consideration. The concession in age did not in any manner tilt the balance in favour of the reserved category candidates, in the preparation of final merit/select list. It is permissible for the State in view of Articles 14, 15, 16 and 38 of the Constitution of India to make suitable provisions in law to eradicate the disadvantages of candidates belonging to socially and educationally backward classes. Reservations are a mode to achieve the equality of opportunity guaranteed under Article 16 (1) of the Constitution of India. Concessions and relaxations in fee or age provided to the reserved category candidates to enable them to compete and seek benefit of reservation, is merely an aid to reservation. The concessions and relaxations place the candidates at par with General Category candidates. It is only thereafter the merit of the candidates is to be determined without any further concessions in favour of the reserved category candidates. It has been recognized by this Court in the case of Indra Sawhney (supra) that larger concept of reservation would include incidental and ancillary provisions with a view to make the main provision of reservation effective. In the case of Indra Sawhney (supra), it has been observed as under:- "743. The question then arises whether clause (4) of Article 16 is exhaustive of the topic of reservations in favour of backward classes. Before we answer this question, it is well

to examine the meaning and content of the expression "reservation". Its meaning has to be ascertained having regard to the context in which it occurs.

> “The relevant words are "any provision for the reservation of appointments or posts". The question is whether the said words contemplate only one form of provision namely reservation simplicitor, or do they take in other forms of special provisions like preferences, concessions and exemptions. In our opinion, reservation is the highest form of special provision, while preference, concession and exemption are lesser forms. The constitutional scheme and context of Article 16 (4) induces us to take the view that larger concept of reservations takes within its sweep all supplemental and ancillary provisions and relaxations, consistent no doubt with the requirement of maintenance of efficiency of administration--the admonition of Article 335. The several concessions, exemptions and other measures issued by the Railway Administration and noticed in Karamchari Sangh are instances of supplementary, incidental and ancillary provisions made with a view to make the main provision of reservation effective i.e., to ensure that the members of the reserved class fully avail of the provision for reservation in their favour.....”

40. In our opinion, these observations are a complete answer to the submissions made by Mr. L.N. Rao and Dr. Rajiv Dhawan on behalf of the petitioners.

> 41. We are further of the considered opinion that the reliance placed by Mr.Rao and Dr.Dhawan on the case of K.L.Narsimhan (supra) is misplaced. Learned Sr. Counsel had relied on the following observations:- 39
>
> > "5......Only one who does get admission or appointment by virtue of relaxation of eligibility criteria should be treated as reserved candidate."

41. The aforesaid lines cannot be read divorced from the entire paragraph which is as under:- "5.It was decided that no relaxation in respect of qualifications or experience would be recommended by Scrutiny Committee for any of the applicants including candidates belonging to Dalits and Tribes. In furtherance thereof, the faculty posts would be reserved without mentioning the specialty; if the Dalit and Tribe candidates were available and found suitable, they would be treated as reserved candidates. If no Dalit and Tribe candidate was found available, the post would be filled from general candidates;

> “otherwise the reserved post would be carried forward to the next year/advertisement. It is settled law that if a Dalit or Tribe candidate gets selected for admission to a course or appointment to a post on the basis of merit as general candidate, he should not be treated as reserved candidate. Only one who does get admission or appointment by virtue of relaxation of eligibility criteria should be treated as reserved candidate."

42. These observations make it clear that if a reserved category candidate gets selected on the basis of merit, he cannot be treated as a reserved candidate. In the present case, the concessions 40 availed of by the reserved category candidates in age relaxation and fee concession had no relevance to the determination of the inter se merit on the basis of the final written test and interview. The ratio of the aforesaid judgment in fact permits reserved category candidates to be included in the General Category Candidates on the basis of merit.

43. Even otherwise, merely quoting the isolated observations in a judgment cannot be treated as a precedent de hors the facts and circumstances in which the aforesaid observation was made.

> “Considering a similar proposition in the case of *Union of India & Ors. vs. Dhanwanti Devi and others*[6] this Court observed as follows:-
>
>> "9......... It is not everything said by a Judge while giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in the judgment. It would, therefore, be not profitable to extract a sentence here and there from the judgment and to build upon it because the essence of the decision is its ratio 41 and not every observation found therein. It is only the principle laid down in the judgment that is binding law under Article 141 of the Constitution."

44. In the case of *State of Orissa & Ors. vs. Md. Illiyas reported*[7], the Supreme Court reiterates the law, as follows:-

> "12............ Reliance on the decision without looking into the factual background of the case before it, is clearly impermissible. A decision is a precedent on its own facts. Each case presents its own features. It is not everything said by a Judge while giving judgment that constitutes a precedent. A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment. The enunciation of the reason or principle on which a question before a court has been decided is alone binding as a precedent.
>
> A case is a precedent and binding for what it explicitly decides and no more. The words used by Judges in their judgments are not to be read as if they are words in an Act of Parliament."

45. We may now examine the ratio in Narasimhan case (supra) keeping in view the aforesaid principles. On 16.11.1990 an advertisement was issued by Post Graduate Institute of Medical

Education and Research (hereinafter referred to as `PGI') relating to 42 recruitment to the post of Assistant Professor; out of 12 posts, 8 was reserved for Scheduled Caste and 4 posts were reserved for Scheduled Tribes. Since all the available posts were sought to be filled on the basis of reservation, the same were challenged in two writ petitions in the Punjab and Haryana High Court, Chandigarh.

> "Both the writ petitions were allowed by the learned Single Judge. It was held that the post of Assistant Professor in various disciplines is a single post cadre; reservation for Scheduled Caste and Scheduled Tribes would amount to 100% reservation; accordingly, it is unconstitutional. The said writ petition pertained to admission to Doctoral courses and Ph.D. programme. This was also allowed by the learned Single Judge on the ground that admission to the aforesaid courses on the basis of reservation, undermines efficiency and is detrimental to excellence, rendering it unconstitutional.
>
> Appeals against the judgements of the learned Single Judge were dismissed by the High Court. Therefore, three appeals had been filed in this Court. Two issues involved therein were (a) whether reservation in appointment to the post of Assistant Professors in various disciplines in the PGI is violative of Article 14 and 16(1) of the Constitution of India; and (b) whether there could be reservation 43 in admission to the Doctoral courses and Ph.D. programmes. A number of posts of Assistant Professor in diverse disciplines had been advertised. It was not in dispute that the post of Assistant Professor in each Department was a single post cadre, but carried the same scale of pay and grade in all disciplines. It was also not disputed that the posts in different specialties/super-specialties prescribed distinct and different qualifications. The posts were also not transferable from one specialty to another, however, the PGI had clubbed all the posts of Assistant Professor for the purpose of reservation in view of the fact that they are in the same pay scale and have same designation. The High Court had allowed the writ petition by relying on judgement of this Court in *Chakradhar Paswan (Dr.) vs. State of Bihar*[8]. The ratio in the aforesaid judgement was distinguished on the basis of the judgement in Union of India vs. Madhav, (1997)2 SCC 332. The aforesaid judgement was reviewed by a larger Bench of five Judges of this Court in the case of *Post Graduate Institute of Medical Education and Research, Chandigarh vs. Faculty Association and others*[9]. On behalf of the review petitioners it was contended that judgement in Narasimhan case (supra) cannot 44 be supported as in Madhav case (supra) the ratio in the decision of *Arati Ray Chaudhary vs. Union of India*[10] was wrongly appreciated and the ratio was wrongly stated. On the other hand, it was submitted by the learned Solicitor General that the judgement in Madav case (supra) indicated the correct principle by giving very cogent reasons. Therefore, no interference is called for against the decision in Madhav case (supra) and the other decisions rendered by following the decision. Upon consideration of the rival submissions, it was observed as follows:-

"29. In Madhav case in support of the view that even in respect of single post cadre reservation can be made for the backward classes by rotation of roster, the Constitution Bench decision in Arati Ray Choudhury case has been relied on. We have already indicated that in Arati case the Constitution Bench did not lay down that in single post cadre, reservation is possible with the aid of roster point. The Court in Arati case considered the applicability of roster point in the context of plurality of posts and in that context the rotation of roster was upheld by the Constitution Bench. The Constitution Bench in Arati case had made it quite clear by relying on the earlier decisions of the Constitution Bench in Balaji case and Devadasan case that 100% reservation was not permissible and in no case reservation beyond 50% could be made. Even the circular on the basis of which appointment was made in Arati Ray Choudhury case was amended in accordance with the decision in Devadasan case. Therefore, the very 45 premise that the Constitution Bench in Arati case has upheld reservation in a single post cadre is erroneous and such erroneous assumption in Madhav case has been on account of misreading of the ratio in Arati Ray Choudhury case. It may be indicated that the latter decision of the Constitution Bench in R.K. Sabharwal case has also proceeded on the footing that reservation in roster can operate provided in the cadre there is plurality of post. It has also been indicated in Sabharwal decision that the post in a cadre is different from vacancies.

46. From the above it becomes evident that the very premise on the basis of which Madhav case was decided has been held to be erroneous. Thereafter it is further observed in paragraph 30 that "it also appears that the decision in Indra Sawhney case has also not been properly appreciated in Madhav decision." The conclusion of the judgement is given in paragraph 37 which is as under:-

"37. We, therefore, approve the view taken in Chakradhar Case that there cannot be any reservation in a single post cadre and we do not approve the reasonings in Madhav Case, Brij Lal Thakur case and Bageshwari Prasad case upholding reservation in a single post cadre either directly or by device of rotation of roster point. Accordingly, the impugned decision in the case of Post Graduate Institute of Medical Education & Research, Chandigarh is, therefore, allowed and the judgment dated 2.5.1997 passed in Civil Appeal No.3175 of 1997 is set aside."

47. Since the judgment and reasoning in Narasimhan case (supra) were based on the reasoning in Madhav case (supra), we are unable to accept the submissions of the learned counsel for the appellants that the reasoning in the aforesaid judgement is still intact, merely because review was filed only in one appeal out of three. The judgment in Narasimhan case (supra) having been set aside, we are unable to accept the submissions of the learned Senior counsel that the reasoning would still be binding as a precedent.

48. Mere reference to the judgement in the cases of Dr. Preeti Srivastava; Bharati Vidyapeet; and Gopal D. Tirthani and others (supra) would not re-validate the reasoning and ratio in Narasimhan case (supra) which has been specifically set aside by the larger Bench in Faculty

Association case (supra). We are, therefore, of the opinion that the reliance placed upon the observations in Narasimhan case (supra) is wholly misconceived.

49. In any event the entire issue in the present appeals need not be decided on the general principles of law laid down in various judgments as noticed above. In these matters, we are concerned with the interpretation of the 1994 Act, the instructions dated 47 25.03.1994 and the GO dated 26.2.1999. The controversy herein centres around the limited issue as to whether an OBC who has applied exercising his option as a reserved category candidate, thus, becoming eligible to be considered against a reserved vacancy, can also be considered against an unreserved vacancy if he/she secures more marks than the last candidate in the general category.

50. The State Legislature enacted the UP Public Service (Reservation for Scheduled Castes and Scheduled Tribes) Act, 1993 (hereinafter referred to as the `Act of 1993'). It was soon replaced by the UP Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Ordinance, 1994.

> “This was to provide a comprehensive enactment for Scheduled Castes, Scheduled Tribes and OBCs. The Ordinance was replaced by the Act of 1994 which came into force w.e.f. 11.12.1993.
>
> Section 2 (c) of this Act defines public service and posts as the service and post in connection with the affairs of the State and includes services and posts in local authority, cooperative societies, statutory bodies, government companies, educational institutions owned and controlled by the State Government. It also includes all posts in respect of which reservation was applicable by Government 48 Orders on the commencement of the Act. Section 3 of the Act of 1994 makes provisions with regard to the reservation in favour of Scheduled Castes, Scheduled Tribes and Other Backward Classes.
>
> Section 3 of the Act of 1994 provides as under:- "3.Reservation in favour of Scheduled Castes, Scheduled Tribes and Other Backward Classes- (1) In Public Services and Posts, there shall be reserved at the stage of direct recruitment, the following percentage of vacancies to which recruitments are to be made in accordance with the roster referred to in Sub-section (5) in favour of the persons belonging to Scheduled Castes, Scheduled Tribes and Other Backward Classes of citizens.
>
> (a) in the case of Scheduled Castes Twenty-one percent;
>
> (b) in the case of Scheduled Tribes Two per cent;
>
> (c) in the case of other backward Twenty Seven percent;

Classes of citizens Provided that the reservation under Clause (c) shall not apply to the category of other backward classes of citizens specified in Schedule II.

(2)If, even in respect of any year of recruitment, any vacancy reserved for any category of persons under Sub- section (1) remains unfilled, special recruitment shall be made for such number of times, not exceeding three, as 49 may be considered necessary to fill such vacancy from amongst the persons belonging to that category.

(3) If, in the third such recruitment, referred to in Sub- section (2), suitable candidates belonging to the Scheduled Tribes are not available to fill the vacancy reserved for them, such vacancy shall be filled by persons belonging to the Scheduled Castes.

(4)Where, due to non-availability of suitable candidates any of the vacancies reserved under Sub-section (1) remains unfilled even after special recruitment referred to in Sub-section (2), it may be carried over to the next year commencing from first of July, in which recruitment is to be made, subject to the condition that in that year total reservation of vacancies for all categories of persons mentioned in Sub-section (1) shall not exceed fifty one per cent of the total vacancies.

(5)The State Government shall, for applying the reservation under Sub-section (1), by a notified order, issue a roster which shall be continuously applied till it is exhausted.

50 (6)If a person belonging to any of the categories mentioned in Sub-section (1) gets selected on the basis of merit in an open competition with general candidates, he shall not be adjusted against the vacancies reserved for such category under Sub-section (1).

(7)If on the date of commencement of this Act, reservation was in force under Government Orders for appointment to posts to be filled by promotion, such Government Orders shall continue to be applicable till they are modified or revoked."

Section 8 of the Act of 1994 reads as under:- "8.Concession and relaxation- (1) The State Government may, in favour of the categories of persons mentioned in sub-section (1) of Section 3, by order, grant such concessions in respect of fees for any competitive examination or interview and relaxation in upper age limit, as it may consider necessary.

(2)The Government orders in force on the date of commencement of this Act, in respect of concessions and relaxations, including concession in fees for any 51 competitive examination or interview and relaxation in upper age limit and those relative to reservation in direct recruitment and promotion, in favour of categories of persons referred to in Sub-section (1), which are not inconsistent with the provisions of this Act, shall continue to be applicable till they are modified or revoked, as the case may be."

51. Schedule II gives a list of category of persons to whom reservation under Section 3 (1) would not be available, as they fall within the category of persons commonly known as "creamy layer".

> “A perusal of Section 3 (1) would show that it provides for reservation in favour of the categories mentioned therein at the stage of direct recruitment. The controversy between the parties in these appeals is limited to sub-section (6) of Section 3 and Section 8 of the 1994 Act. It was strenuously argued by Mr.Rao and Dr. Rajeev Dhawan that Section 3 (6) of the Act of 1994 does not permit the reserved category candidates to be adjusted against general category vacancies who had applied as reserved category candidate. In the alternative, learned counsel had submitted that at least such reserved category candidate who had appeared availing 52 relaxation of age available to reserved category candidates cannot be said to have competed at par in Open Competition with General category candidates, and therefore, cannot be adjusted against the vacancies meant for General Category Candidates. We are of the considered opinion that the concessions falling within Section 8 of the Act of 1994 cannot be said to be relaxations in the standard prescribed for qualifying in the written examination. Section 8 clearly provides that the State Government may provide for concessions in respect of fees in the competitive examination or interview and relaxation in upper age limit. Soon after the enforcement of the 1994 Act the Government issued instructions dated 25.03.1994 on the subject of reservation for Scheduled Caste, Scheduled Tribe and other backward groups in the Uttar Pradesh Public Services. These instructions, inter alia, provide as under:- "4. If any person belonging to reserved categories is selected on the basis of merits in open competition along with general candidates, then he will not be adjusted towards reserved category, that is, he shall be deemed to have been adjusted against the unreserved vacancies. It shall be immaterial that he has availed any facility or relaxation (like relaxation in age limit) available to reserved category.”

52. From the above it becomes quite apparent that the relaxation in age limit is merely to enable the reserved category candidate to compete with the general category candidate, all other things being equal. The State has not treated the relaxation in age and fee as relaxation in the standard for selection, based on the merit of the candidate in the selection test i.e. Main Written Test followed by Interview. Therefore, such relaxations cannot deprive a reserved category candidate of the right to be considered as a general category candidate on the basis of merit in the competitive examination. Sub-section (2) of Section 8 further provides that Government Orders in force on the commencement of the Act in respect of the concessions and relaxations including relaxation in upper age limit which are not inconsistent with the Act continue to be applicable till they are modified or revoked. Learned counsel for the appellants had submitted that in the present appeals, the issue is only with regard to age relaxation and not to any other concessions. The vires of Section 3 (6) or Section 8 have not been challenged before us. It was only submitted by the learned Sr. Counsel for the petitioners/appellants that age relaxation gives an undue advantage to the candidate

belonging to the reserved 54 category. They are more experienced and, therefore, steal a march over General Category candidates whose ages range from 21 to 25 years. It is not disputed before us that relaxation in age is not only given to members of the Scheduled Castes, Scheduled Tribes and OBCs, but also the dependents of Freedom Fighters. Such age relaxation is also given to Ex-servicemen to the extent of service rendered in the Army, plus three years. In fact, the educational qualifications in the case of Ex-servicemen is only intermediate or equivalent whereas for the General category candidates it is graduation. It is also accepted before us that Ex-servicemen compete not only in their own category, but also with the General category candidates. No grievance has been made by any of the appellants/petitioners with regard to the age relaxation granted to the Ex-servicemen. Similarly, the dependents of Freedom Fighters are also free to compete in the General category if they secure more marks than the last candidate in the General category. Therefore, we do not find much substance in the submission of the learned counsel for the appellants that relaxation in age "queers the pitch" in favour of the reserved category at the expense of the General category. In our opinion, the relaxation in age does not in any 55 manner upset the "level playing field". It is not possible to accept the submission of the learned counsel for the appellants that relaxation in age or the concession in fee would in any manner be infringement of Article 16 (1) of the Constitution of India. These concessions are provisions pertaining to the eligibility of a candidate to appear in the competitive examination. At the time when the concessions are availed, the open competition has not commenced. It commences when all the candidates who fulfill the eligibility conditions, namely, qualifications, age, preliminary written test and physical test are permitted to sit in the main written examination. With age relaxation and the fee concession, the reserved candidates are merely brought within the zone of consideration, so that they can participate in the open competition on merit. Once the candidate participates in the written examination, it is immaterial as to which category, the candidate belongs. All the candidates to be declared eligible had participated in the Preliminary Test as also in the Physical Test. It is only thereafter that successful candidates have been permitted to participate in the open competition.

53. Mr. Rao had suggested that Section 3 (6) ensures that there is a level playing field in open competition. However, Section 8 lowers the level playing field, by providing concessions in respect of fees for any competitive examination or interview and relaxation in upper age limit. We are unable to accept the aforesaid submission. Section 3 (6) is clear and unambiguous. It clearly provides that a reserved category candidate who gets selected on the basis of merit in open competition with general category candidates shall not be adjusted against the reserved vacancies. Section 3(1), 3(6) and Section 8 are inter-connected. Expression "open competition" in Section 3 (6) clearly provides that all eligible candidates have to be assessed on the same criteria. We have already noticed earlier that all the candidates irrespective of the category they belong to have been subjected to the uniform selection criteria. All of them have participated in the Preliminary Written Test and the Physical Test followed by the Main Written Test and the Interview. Such being the position, we are unable to accept the submissions of the learned counsel for the petitioners/appellants that the reserved category candidates having availed relaxation of age are disqualified to be

adjusted against the Open Category seats. It was perhaps to avoid 57 any further confusion that the State of UP issued directions on 25.3.1994 to ensure compliance of the various provisions of the Act.

> "Non-compliance by any Officer was in fact made punishable with imprisonment which may extend to period of three months."

54. In view of the above, the appeals filed by the General Category candidates are without any substance, and are, therefore, dismissed.

> Civil Appeal Nos..of 2010 (Arising out of SLP (C) NOS. 14078-80 of 2008 and 19100 of 2009) Leave granted.

55. In the appeal filed by the State of UP it was submitted that against the 67 posts of general category reserved for women only 15 qualified candidates were available. They were duly selected. 52 posts, which remained unfilled, were filled up from the male candidates in accordance with GO dated 26.02.1999. Therefore, there remained no unfilled vacancy in the general category.

> "Therefore, the Division Bench erred in coming to the conclusion that 52 vacancies have been carried forward contrary to the aforesaid GO. It was further submitted that the learned Single 58 Judge erred by directing the appellants to fill up the vacancy which were excluded from 2% sports quota from the aforesaid selection.
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> According to the appellants, the advertisement clearly mentioned that the vacancies under the sports quota shall be filled separately.
>
> Therefore, the learned Single Judge was not justified in directing for filling up of these vacancies from this very selection. According to Mr. Dwivedi, the entire factual position was placed before the learned Single Judge in the counter affidavit which was duly noticed by the learned Single Judge as follows:- "In the counter affidavit the respondents have given details pertaining to the candidates belonging to different categories who were finally selected and the percentage of reservation fixed according to number of posts. According to the respondents total posts for Sub Inspector Civil Police were 1231 (male) + 148 female (ten per cent posts were referred to be reserved for women). According to the respondents the advertisement for 1634 posts was published containing 1231 male + 148 (female) Sub Inspector Civil Police and 255 Platoon Commander. It was stated that according to the police of the State 2% posts were reserved for sports men hence against 1478 posts of Sub Inspector 2% i.e. 29 posts of Sub Inspector were earmarked for sports men and five posts of Platoon Commander in sports quota. It was thus stated that 1350 posts were for Sub Inspector civil police and 250 posts were to be filled up by Platoon Commanders. The percentage of reservation against the aforesaid posts have been

mentioned in 59 paragraph 4 of the supplementary counter-affidavit which is extracted below.

1-Posts 1350 for Sub Inspector, Civil Police Sl.No Caste/Class Percentage Male Female Total of 10% . reservation 1 General Caste 50% 608 67 675 (Unreserved) 2 8 Backward 27% 328 37 365 Class (reserved) 3 8 Scheduled 21% 255 28 283 Caste (reserved) 4 84 Scheduled 2% 24 03 027 Tribe 1005 1215 135 1350 5 Dependent of 2% 24 03 27 Freedom Fighters

6. Ex-servicemen 1% 12 01 13 (2) 250 Posts for Platoon Commander, PAC Sl.No Caste/Class Percentage Male of . reservation 1 General Caste 50% 125 (Unreserved) 2 Backward 27% 67 Class (reserved) 3 8 Scheduled 21% 53 Caste 60 4 84 Scheduled 2% 05 Tribe 100% 250 It has been stated in the supplementary counter affidavit that 608 male belonging to general category were selected, against 67 posts of general category for women only 15 women were available who were selected rest of 52 posts were filled up on merit from male candidates in accordance with the Government order dated 26.02.1999. It was stated that the total 675 posts in general category were filled up and no post of general category is vacant."

56. Mr. Dwivedi further submits that the learned Single Judge took note of the averments made in paragraph 4 of the supplementary counter affidavit, and yet issued a direction to recalculate the number of posts of general category candidates by applying 2% reservation for sportsmen horizontally and adding 2% posts of sportsmen also while calculating the number of vacancy of general category candidates. Mr. Dwivedi further submits that the learned Single Judge erred in holding that the Government order dated 26.02.1999 does not specifically provide that the post which are not filled up by women candidates are to be filled up from the male candidates. The Division Bench was, therefore, justified that the aforesaid view of the learned Single Judge was apparently erroneous and inconsistent to the specific provisions contained in 61 paragraph 4 of GO dated 26.02.1999. The Division Bench, however, committed a factual error in recording the following conclusion "we are constrained to hold that the authorities erred in law by leaving the vacancies kept for reserved women candidates unfilled instead of selecting and recommending suitable male candidates of respective category of the same selection".

57. Aggrieved against the aforesaid observations, the appellants sought review of the aforesaid judgement which has been erroneously dismissed by simply recording:- "We have head Sri G.S. Upadhyay, learned Standing counsel appearing for the applicant. It is submitted that this Court's observation at page 65 and 66 in respect of vacancies reserved for woman and sports quota which remain unfilled needs clarification.

We are of the view that our judgement is clear and it does not suffer from any ambiguity and thus does not require to be clarified or recalled."

58. As noticed earlier, Mr. L.N. Rao and Dr.Dhawan had submitted that the vacancies reserved for women and for the outstanding sportsperson had to be filled by applying "horizontal reservation". No carrying forward of the vacancies was permissible.

59. We have considered the submissions made by the learned counsel. It is accepted by all the learned counsel for the parties that these vacancies had to be filled by applying the principle of horizontal reservation. This was also accepted by the learned Single Judge as well as by the Division Bench. This in consonance with the law laid down by this Court in the case of Indra Sawhney case (supra):-

> "812. We are also of the opinion that this rule of 50% applies only to reservations in favour of backward classes made under Article 16(4). A little clarification is in order at this juncture; all reservations are not of the same nature. There are two types of reservations, which may, for the sake of convenience, be referred to as `vertical reservations' and horizontal reservations'. The reservations in favour of Scheduled Castes, Scheduled Tribes and other backward classes [under Article 16(4)] may be called vertical reservations whereas reservations in favour of physically handicapped [under clause (1) of Article 16] can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations - what is called interlocking reservations. To be more precise, suppose 3% of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relatable to clause (1) of Article 16. The persons selected against this quota will be placed in the appropriate category; if he belongs to SC category he will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (OC) category, he will be placed in that category by making necessary adjustments. Even 63 after providing for these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains - and should remain - the same. This is how these reservations are worked out in several States and there is no reason no to continue that procedure."

60. The aforesaid principle of law has been incorporated in the instructions dated 26.02.1999. Paragraphs 2 and 4 of the aforesaid instructions which are relevant are hereunder:-

> "2. The reservation will be horizontal in nature i.e. to say that category for which a women has been selected under the aforesaid reservation policy for posts for women in Public Services and on the posts meant for direct recruitment under State Government, shall be adjusted in the same category only;
>
> xxxx xxxx xxxx xxx
>
> 4. If a suitable women candidate is not available for the post reserved for women in Public Services and on the posts meant for direct recruitment under State Government, then such a post shall be filled up from amongst a suitable male candidate and such a post shall not be carried forward for future;"

61. The Learned Single Judge whilst interpreting the aforesaid, has observed that it does not specifically provide for posts which are not filled up by women candidates to be filled up from the male candidates. This view is contrary to the specific provision contained 64 in Paragraph 4. The aforesaid provision leaves no matter of doubt that any posts reserved for women which remain unfilled have to be filled up from amongst suitable male candidates. There is a specific prohibition that posts shall not be carried forward for future.

Therefore, the view expressed by the Learned Single Judge cannot be sustained.

62. We may also notice here that in view of the aforesaid provisions, the State has not carried forward any of the general category posts reserved for women and outstanding sportspersons.

> "Furthermore, all the posts remaining unfilled, in the category reserved for women have been filled up by suitable male candidates, therefore, clearly no post has been carried forward. Therefore the mandate in Indra Sawhney (supra) and the G.O. dated 26.2.1999, have been fully coupled with. We are also of the opinion that the conclusion recorded by the Division Bench is without any factual basis. The factual position was brought to the notice of Division Bench in the recall/modification application No.251407 of 2007.
>
> However, the recall/modification application was rejected. We are, therefore, of the opinion that the Division Bench erred in issuing the directions to the appellants to fill in the unfilled vacancies 65 reserved for women candidates from suitable male candidates. This exercise had already been completed by the appellant-State."

63. As noticed earlier, the learned Single Judge despite taking note of the averments made in the supplementary counter affidavit by the State, erroneously issued directions to recalculate the vacancies reserved for outstanding sportspersons. It was specifically pointed out that a separate advertisement had been published for recruitment on the post reserved for outstanding sportsperson. It was also pointed out that all the posts available in the category of sportsmen were filled up in the subsequent selection. No post remained unfilled. Therefore, the conclusion of the learned Single Judge that the (29 SICP) + (5 PC) i.e. 34 posts ought not to have been deducted from the available 1478 posts for the purposes of calculating the number of vacancies available to the general category, was factually erroneous. It is not disputed before us that the principle of horizontal reservation would also apply for filling up the post reserved for outstanding sportsperson. It is also not disputed before us that there could have been no carry forward of any of the post remaining unfilled in the category of outstanding sportsperson. As a matter of fact, there was no carry forward of the 66 vacancies. They were filled in accordance with the various instructions issued by the Government from time to time. In our opinion the Division Bench erred in law in concluding that since the advertisement did not mention that a separate selection will be held, for the post reserved for sportsmen, the same would not be permissible in law. The deduction of 34 posts for separate selection would not in any manner affect the overall ratio of reservation as provided by law.

Furthermore, there is no carry forward of any post. The separate selection is clearly part and parcel of the main selection. In view of the factual situation, we are of the opinion, that the conclusions recorded by the learned Single Judge and the Division Bench with regard to the 34 posts reserved for the outstanding sportsmen category i.e. (29 SICP) + (5 PC) also cannot be sustained.

64. Therefore, the aforesaid appeals filed by the State and the Director General of Police are allowed. The direction issued by the learned Single Judge in the final paragraph as well as the directions issued by the Division Bench in modification of the order of learned Single Judge are set aside.

[1] *1997 (6) SCC 283*
[2] *1999(7) SCC 120*
[3] *2004 (11) SCC 755*
[4] *2003 (7) SCC 83.*
[5] *JT 2006 (4) SC 524*
[6] *1996(6) SCC 44*
[7] *2006(1) SCC 275*
[8] *(1998) 2 SCC 214*
[9] *(1998) 4 SCC 1*
[10] *1974 (1) SCC 87*