

Post Graduate Institute Ofmedical ... vs K.L.Narasimhan & Anr. Etc on 2 May, 1997

Author: K.Ramaswamy

Bench: K. Ramaswamy, S. Saghir Ahmad

PETITIONER:

POST GRADUATE INSTITUTE OFMEDICAL EDUCATION & RESEARCH ETC.

Vs.

RESPONDENT:

K.L.NARASIMHAN & ANR. ETC.

DATE OF JUDGMENT: 02/05/1997

BENCH:

K. RAMASWAMY, S. SAGHIR AHMAD

ACT:

HEADNOTE:

JUDGMENT:

THE 2ND DAY OF MAY, 1997 PRESENT:

Hon'ble Mr. Justice K.Ramaswamy Hon'ble Mr. Justice S.Saghir Ahmad Hon'ble Mr. Justice G.B.Pattanaik M.S.Usgaonkar, Additional Solicitor General, D.S.Nehra, G.L.Sanghi, R.K.Jain, N.N.Goswamy, P.P.Rao, Sr. Advs., and S.K. Mehta, Dhruv Mehta, Fazlin Anam, Suresh C.Gupta, S.C. Paul, Jitender Chauhan, Ms.Asha Jain Madan, Ms. Manjula Gupta, Wasim Qatri, A.D.N.Rao, S.K.Jain, Raj kumar Gupta, H.V.P.Sharma, Rajesh, Advs. with them for the appearing parties.

J U D G M E N T S / O R D E R The following judgments/Order of the Court were delivered:

WITH CIVIL APPEAL NOS. 3175,3177 &3176 OF 1997 (Arising out of SLP(C) Nos.17366/92, 420 and 3028/93) AND WRIT PETITION (C) NO. 781 OF 1995 J U D

G M E N T K.RAMASWAMY, J.

Leave granted.

These appeals and the writ petition arise out of the common cause relating to recruitment to the post of Assistant professors in various faculties in the appellant post Graduate Institute, Chandigarh and admission into specialities and super-specialities. Advertisement No.6/90 dated November 16,1990 relates to recruitment to the post of Assistant Professor; out of 12 posts, 8 posts were reserved for Scheduled Castes (for short, 'Dalits') and 4 posts were reserved for Scheduled Tribes (for short, 'tribes'), in the pay scale of Rs.3500-4500/-. Essential qualifications were prescribed for the said posts; there being no dispute, vis- a-vis qualifications, it is not necessary to elaborate them except to state that these are backlog vacancies. Through advertisement No. 15/90 dated November 25,1990, the appellants had called for applications for appointment to the said posts and admission to Doctoral Courses and Ph.D. programme for the academic session starting from 1.1.1991 in which posts were reserved for the Dalits and Tribes. The contesting respondents in these appeals (for short, the 'General Candidates') and the Faculty Association challenged the advertisement for recruitment to the post of Assistant Professor and admission to Doctoral Courses and Ph.d. Programme. Two learned single judges in different judgments held that the post of Assistant professor in various disciplines is single post cadre; reservation for the Dalits and Tribes would amount to 100% reservation; accordingly, it is unconstitutional.

In respect of admission to the post of Doctoral Courses and Ph.d.. Programme,, another learned single judge held that the reservation in recruitment to the post of Doctoral Courses and Ph.D. Programme undermines efficiency detrimental to excellence for which purpose the appellant is established and thereby it is unconstitutional. On appeal, the Division Bench in LPA Nos.787/92,7827/92 and batch dismissed the appeals. Thus, these appeals by special leave.

It is not in dispute that the post of Assistant Professor in Diverse disciplines, is single post cadre but carries the same scale of pay and grade in all disciplines. The Institute is of national importance and is established with the object to develop patterns of teaching in undergraduate and postgraduate medical education in all its branches so as to demonstrate a high standard of medical educational facilities of the highest order, for the training of personnel in all important branches of health activity; to teach under graduate and postgraduate sciences, including physical and biological sciences and to provide facilities for research in the various branches of such sciences etc. Section 32 of the post-Graduate Institute of Medical Education & research, Chandigarh, Act 1966 (55 of 1966) (for short, the 'Act') provides for grant of (i) the degree, diploma and other academic distinctions and titles by the institute; (ii) the professorships, readerships, lectureship and other posts which may be instituted and persons who may be appointed to such professorships, readerships, lectureships

and other posts.

Rule 7 of the PGIMER, Chandigarh Rules, 1967 (for short, the 'Rules'), as amended from time to time, envisage) creation of posts, their classification into grades and specification of their designations provided that no post above the Associate professor level shall be created except with the prior approval of the Central Government; (ii) determination of method of recruitment, the age limit, educational qualifications and other matters relating to the appointment to various posts in the Institute, in the manner provided for by the Regulations, as amended from time to time, provides that all matters relating to the administration of the academic affairs of the Institute are required to be considered by the Standing Academic Committee and all proposals for the creation of posts, by the standing Finance Committee. Under Regulation 32, the Institute is competent to specify the age, experience and qualifications for a post subject to the conditions that non-medical persons shall not be appointed to the post of Director and Medical Superintendent. Regulation 32(2) postulates that while filling up vacancies in posts and services, including the vacancies in teaching faculty under the Institute, reservations in favour of the Dalits and Tribes is required to be made as per the reservation orders issued by the Central Government from time to time. "Teaching faculty" includes research post as well. In furtherance thereof, when the question of application of the rule of reservation to senior faculty posts was put up for consideration to the Governing Body of the Institute on September 28, 1984, they resolved as under:

"Reservation be applied on vacant posts of professors, Associate professors and Assistant Professors in addition to lecturers and a 40 Point Roster be maintained for the same. As and when the advertisement was sent to the press, the number of posts reserved should be indicated. On Receipt of applications, candidates belonging to reserved categories who apply for any of the specialities should be considered for those specialities. After comparing merits the best person should be selected on the basis of qualification and merit. If no suitable candidate is then all such posts should be filled in from general candidates and reserved vacancy should be carried forward.

In the next advertisement, the carry forward vacancies should also be indicated."

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 speciality: 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.

The Government of India in their instruction No. 9/2/73-Est.(SCT), dated June 23, 1975, inter alia provided the scheme of reservation for Dalits and Tribes to cover appointments made to 'Scientific and Technical' posts upto and including lowest of Group 'A' (Class I) in the respective services which were not exempted from the purview of the scheme of reservation orders. In the event of Non-availability of candidates belonging to reserved communities, the reserved vacancies were directed to be treated as dereserved by the administrative Ministry or Department concerned without obtaining the approval of the Department of Personnel and Administrative Reforms. Only such 'Scientific & Technical' posts in the Institute as satisfied the following conditions laid down by the Department of personnel and Administrative Reforms dated June 23, 1975 exemption from the purview of reservation Orders:

(i) The posts should be in grades above the lowest grade in Group A (Class I) of the service concerned;

(ii) They should be classified as 'Scientific or technical' in terms of Cabinet Secretariat (Department of Cabinet Affairs) O.M.85/11/CF-

61(1) dated 28.12.1961; and

(iii) They should be posts for conducting research or for organising, guiding and directing research.

The rule of reservation for Dalits and Tribes was applied while filling up various vacant teaching posts at the Institute and for that purpose all the vacant teaching posts at the level of lecturers, Assistant professors, Associate professors and Professors, though in different specialities / superspecialities, were clubbed altogether, because the posts were in the same pay scale under the same designation.

While filling up the posts at each level in different teaching Department or specialities or superspecialities, different educational qualifications in specific field/specialities or super-speciality were prescribed. In the case of non-medical scientists or Ph.D. in the subject concerned, allied subjects also were required to be fulfilled.

As the posts belong to different specialities/super-specialities for which qualifications prescribed are distinct and different, the posts cannot be and are not transferable from one speciality to another. However, the Institute had clubbed all the posts of Assistant professors for the purpose of reservation in view of the fact that they are in the same pay-scale and have the same designation. The Institute has been imparting training for Md/M.Ch. courses in the following super-specialities, besides other post-

graduate

courses:

DOCTOR OF MEDICINE (D.M.)

1. Cardiology
2. Endocrinology
3. Gastroenterology
4. Nephrology
5. Neonatology
6. Pulmonary Medicine
7. Clinical Pharmacology
8. Neurology

MAGISTER CHIRURGIAE (M.CH.)

1. Cardiovascular & Thoracic Surgery
2. Neurosurgery
3. Paediatric Surgery
4. Plastic Surgery
5. Urology

Admission to the above post-doctoral courses conducted at the Institute is made twice a year. The sessions commence from 1st January and 1st July each Year. The Institute provides residency service-cum-training scheme. Candidates selected for M.D./M.Ch. courses and paid by the Institute are designated as senior residents. The admission to the courses imparted at the Institute is made on merit on all India basis by holding an entrance examination after issuing a countrywide admission notice. The admission is published in leading English Newspapers of India.

In the light of the above scheme and the Regulations, the question arises is: whether the reservation in appointment to the posts of Assistant professors in various disciplines in the Institute is violative of Articles 14 and 16 (1) of the Constitution? The High Court has relied on the judgement of Dr. Chakradhar Paswan vs. State of Bihar [AIR 1988 SC 959] to deny the rights to the Dalits and Tribes. The controversy is no longer res integra. In Union of India & Anr. vs. Madhav s/o Gajanan Chaubaal & Anr. [(1997) 2 SCC 332], this court has considered the entire case law on the subject. The question therein was: whether in a single post cadre, namely, Secretary, applying the rule of rotation and application of 40 point roster to successive vacancies is violative of Article 16(1) and 14 of the Constitution? In para 10, this Court had held that "[Thus, we hold that even though there is a single post, if the Government have applied the rule of rotation and the roster point to the vacancies that had arisen in the single point post and were sought to be filled up by the candidate belonging to the reserved categories at the point on which they are eligible to be considered, such a rule is not violative of Article 16(1) of the Constitution". In that case, the post of Secretary carrying the pay scale of Rs.1200-2400/- was a single post cadre. The Government applied 40 point roster for the post of Secretary. The vacancy available at the time of point No. 4 of the roster was reserved for Tribal. The Tribunal had set aside the appointment order on the ground that it amounted to 100% reservation, violating Article 14. While reversing the order of the Tribunal, this Court has applied the rule of rotation and roster and upheld the appointment by reservation in a carry forward post and followed the ratio of the Constitution Bench decision in Arati Roy Choudhary v. union of India [(1974) 2 SCR 1]. In State of Uttar Pradesh vs. Dr. Dina Nath Shukla & anr. [JT 1997 (2) SC 467=1997(3) Supreme Today 386], the question arose whether pooling of all the posts in similar grade or category for application of the rule of reservation and rotation is valid in law? The University, applying the Uttar Pradesh Public Services (Reservation for Scheduled Castes Scheduled

Tribes and OBC) Act, 1994, advertised for appointment of the posts of professors and Lecturers treating the post as one unit; recruitment was made applying the rule of rotation for the Dalits, Tribes and OBCs in respect of all the posts. The Division Bench of the High Court had set aside the notification on the ground that it was violative of Articles 14 and 16(1) of the Constitution. This Court reversed the judgement of the High Court following Madhav's case and R.K. Sabharwal & Ors . vs. State of Punjab & ors. [(1995) 2 SCC 745] relying on the Arati Roy Choudhary's ratio of the Constitution Bench. It was held in paragraph 14 as under:

"Thus it could be seen that if the subject wise recruitment is adopted in each service or post in each cadre in each faculty, discipline, speciality or super-speciality, it would not only be clear to the candidates who seek recruitment but also there would not be an over-

lapping in application of the rule of reservation to the service or posts as specified and made applicable by Section 3 of the Act.

If there is any single post of professor, Reader or lecturer in each faculty, speciality which cannot be reserved for reserved candidates, it should be clubbed roster applied and be made available for the reserved candidates, in terms of section 3(5) of the Act. Even if there exists any isolated post, Rule of rotation by application of roster should be adopted for appointment.

For achieving the said object, the Vice-Chancellor, who is responsible authority under Section 4 enforce the Act, would ensure that single post in each category are clubbed since admittedly all the posts in each of the categories of professor, Readers or Lecturers carry the same scale of pay.

Therefore, their fusion is constitutional and permissible. The Vice-Chancellor should apply the rule of rotation and the roster as envisaged under sub-section(5) of Section 3."

Accordingly, the appeal was allowed. In Union of India & Ors. vs. Brij Lal Thakur [JT 1997(4) SC 195], the post of E.C.G. Technician in the grade of Rs.1200-2040/- was a single cadre post in Central Hospital, Northern Railway. The rule of rotation and 40 points roster was applied. The appellants therein selected the reserved candidate. The Same was questioned by the general candidate. The Tribunal Held that since it was solitary post, reservation amounted to 100% reservation and was, therefore, unconstitutional. Reversing the judgment and reiterating the law laid down in Madhav's case and State of Bihar vs. Bageshwari Prasad [1995 Supp. (1) SCC 432], this court had held that to the single post of E.C.G. Technician, application of 40 point roster and rule of rotation was not violative of Articles 14 and 16(1) of the Constitution. The Promotion was held to be legal and valid. Same was the question in Bageshwari Prasad case. In State of Punjab & Ors. vs. G.S.Gill & Anr. [CA 3005/97 decided on March 27, 1997], the single cadre post of Assistant superintendent,

Quality Market Centre (Textile) was reserved for Dalit candidate applying rule of rotation and the roster. The High Court set aside the promotion as violative of Article 14. Reversing that judgment, it was held that " thus, it is settled legal position that application of roster to single post cadre and appointment by promotion to carry forward post is valid and constitutional. With a view to give adequate representation in public service to reserved category candidates, the opportunity given to them is not violative of Articles 14 and 16(1) of the Constitution". In *Shri Suresh Chandra vs. Shri J.B. Agarwal & Ors.* {CA No. 3081/97 decided on April 4, 1997}, the post of Assistant Manager (Electrical) carrying the pay scale of Rs.1000-1600/- was the feeder channel for promotion to Senior Manager. When the rule of rotation and reservation was applied, the Tribunal declared the reservation as violative of Article 14. Reversing the order of the Tribunal, this court has held that the reservation to single post cadre is not violative of Articles 14 and 16 of the Constitution. The contention of the counsel for the respondent that Madhav's case requires reconsideration in view of *Chetana Dilip Motgnare v. Bhide Girls Edn. Socy., Nagpur & Ors.* [(1985) supp. 1 SCC 157] was rejected.

In all these decisions, the ratio laid down by this Court in *Arati Ray Choudhury* case was followed. Reservation to a single cadre post, applying rule of rotation of 40 point roster, was held valid and constitutional. Clubbing of the posts carrying the same scale of pay or grade is also constitutionally permissible and accordingly clubbing of the single point post of assistant professors in various disciplines of the appellant carrying the same scale of pay and grade has been held to be constitutionally permissible.

Shri P.P. Rao, learned senior counsel for the general candidates, contends that as per the Circular of the Government of India, dated July 17, 1964, the scientific or research posts in the institute are exemptible from the purview of the reservation. The Committee recommended to the Government to dereserve the posts of Professors, Associate Professors and Assistant Professors from the purview of the reservation. Since the Committee had not taken any policy decision, and the Institute being an autonomous body it, by itself, is entitled to take a decision; permission of the Government for dereservation is not necessary. We find no force in the contention. Far from admission by the institute, Regulation 32(2) establishes that the Institute is bound by the reservation policy of the Government of India. Reservation is applicable and, therefore, the Committee is bound to apply the rule of reservation to the said posts. Merely because the Institute is an autonomous body, it cannot, except with the prior permission of the Ministry of personnel and the concerned Ministry of Health and Family Welfare, dereserve the posts. It is then contended that since the committee has deferred the issue requesting the Government of India to consider the dereservation and the same was reiterated in the year 1991, the declaration given by the High Court that the dereservation is constitutionally permissible, does not warrant interference. In respect thereof, he placed strong reliance on the decision of this court in *Comptroller and Auditor General of India, Gian Prakash, New Delhi &*

Anr. vs. K.S.Jagannathan & Anr. [(1996) 2 SCR 78]. We find that there is no force in the contention. It is seen that though the Committee of the Institute had recommended to the Government of India to dereserve the post, so long as the Government of India has not given any direction to the Institute to dereserve the post, it has no power to do the same and is bound to implement the principle of reservation.

The question arises: whether the Court can give such a direction in that behalf? The Department of personnel and Training in O.M. No. 36012, dated April 25, 1989, had imposed a ban on de-reservation in direct recruitment to the vacancies under the Government by letter No. 3612 dated May 9, 1989 issued by the Secretary, Department of Personnel and Training to the Health Secretary. Direction was given to make special recruitment to fill up the backlog vacancies reserved for Dalits and Tribes. By letter No. 36012 dated May 22, 1989, addressed by the Deptt. of Personnel and Training to the Health Secretary, procedure is laid to compute the backlog vacancies to be filled up by special recruitment drive to be launched w.e.f. 1.6.1989, as well as monitoring of filling up of vacancies by special recruitment drive; and preparation of action plan was issued in that behalf. it would, therefore, be incumbent upon the appellant-P.G.I. to make special recruitment to fill up the backlog of carried forward vacancies. Obviously, therefore, for the posts of Asstt. Professor which are backlog vacancies, in the aforesaid O.M.No.36012 dated April 25, 1989, the Government have stated that " it has now been decided that where sufficient number of candidates belonging to SC/ST are not available to fill up the vacancies reserved for them in direct recruitment, the vacancies shall not be filled by candidates belonging to these communities. In other words, there will be a ban on de-reservation. This will come into effect from 1.4.1989 in respect of all direct recruitment to be made to fill up vacancies in groups A B C & D. It is further clarified that this ban will apply not only to vacancies which arise after 1.4.1989, but also the the vacancies reserved for SC/ST communities of earlier years which have not yet been filled up by other community candidates whether such vacancies have been deserved or not. It was further stated that "if the required number of SC/ST candidates are not even then available the vacancies which could not be filled up, shall remain unfilled until the next recruitment year. These vacancies will be treated as backlog vacancies". In the subsequent year, "when recruitment is made for the vacancies of that year (called the current vacancies), the backlog vacancies will also be announced for recruitment, keeping in vacancies of the particular recruitment year, i.e. the current vacancies and the backlog vacancies, for the year of recruitment, the normal instructions relating to calculation of vacancies reserved for SC/ST as well as the instructions for SC/ST, Physically handicapped, etc., will apply to all the backlog vacancies reserved for SC/ST and will be filled up by the concerned candidates belonging to reserved category without any without any restriction whatsoever as they belong to distinct group of backlog vacancies. " It was further stated that "while the vacancies reserved for SC/ST which remain unfilled will be carried forward to the next year of recruitment as backlog vacancies, the carried

forward reservations for SC/ST as on 1.4.89 as a result of the filling up of the relevant vacancies after dereservation, will continue to be operated against a 'current' vacancies following the existing orders and instructions. If such reserved vacancies are still not filled up they will be carried forward as backlog vacancies under these orders.

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With regard to Group 'A' service, it was stated that "while the ban on dereservation comes into effect from 1.4.89 on direct recruitment on Groups A B C & D in case of direct recruitment to the vacancies in group A services, there may be rare and exceptional cases where after the non-availability of suitable SC and ST candidates posts cannot be allowed to remain vacant in public interest." In such situations, "the administrative Ministry/Department under which the recruitment is being made shall make a proposal for de-reservation giving full justification for such action, and consult the Commissioner for SC and ST and obtain his comment on each proposal. After obtaining the comments of the Commissioner for SC and ST, the administrative Ministry shall place the proposal for dereservation along with the Commissioner's comment before a committee comprising the Secretaries in the Ministry of Personnel, in the Ministry of Welfare and the Ministry/Deptt. under which the recruitment is to be made. The recommendation of this committee shall be placed before the Minister-in-Charge of the Ministry of Personnel for a final decision." It would thus be seen that a fool-proof procedure in regard to de-reservation has been provided. Before de-reservation could be made for recruitment of the Dalits and Tribes, special drive is made as is incumbent on the administration to fill up not only the current vacancies but also backlog vacancies. Only in exceptional cases, that too if in spite of all sincere efforts recruitment, the backlog vacancies or current vacancies in Class 'A' posts remain unfilled, for reasons to be recorded for dereservation, they are required to de-reserve the posts; the procedure indicated hereinbefore with prior consultations and concurrence of the Commission for SC/ST, should be obtained and the reserved vacancies be notified for recruitment by general candidates and the denotified vacancies are carried forward.

The question, therefore, is whether the Court can give direction to throw open the reserved vacancies to the general candidates by a writ of mandamus or direction, as the case may be? The contention of Shri P.P. Rao is that since the institute had already apprised the Ministry of Health and Family Welfare of the need for dereservation of the posts relating to scientific and research and no action has since been taken, the Court is empowered to issue directions. In support thereof he placed reliance on the judgment of this Court in *Comptroller and Auditor General of India v. K.S. Jaganathan & Anr.* [(1986) 2 SCR 17]. We find it difficult to give acceptance to the contention. The same question had arisen in *S.S. Sharma v. U.O.I.* [AIR 1981 SC 588], wherein a Bench of three Judges of this Court had considered the question whether the Court could give direction to de-reserve the post. This court pointed out that so long as the recruitment by a limited departmental competitive examination for the Dalits and Tribes could be adopted and followed, i.e., one of the methods to make recruitment, a mandamus cannot be issued by the Court to direct the Government to de-reserve the post. C.A.G. case is a reverse case. Therein, rule of reservation was applicable to all the Departments since the C.A.G. had not applied the relaxed standard in conducting the examination and making recruitment on the basis thereof, the Division Bench of the High Court had directed to relax the standard and make recruitment of the Dalits and Tribes by promotion. This

court had upheld the judgment and held that when the authorities have a power coupled with discretion, they have also a duty to implement the policy of the Government. At page 39, this Court had pointed out that in order to prevent injustice resulting in injustice to the concerned parties, the Court may itself pass an order or give directions which the Government or the competent authority should have passed or given had it properly and lawfully exercised its, discretion. Far from helping the appellants, the ratio goes in favour of the reserved candidates. This question was considered in G.S. Gill's case. Therein, the High Court has given direction to de-reserve the post and to throw open the same to the general candidates, while considering the ratio in C.A.G. case and other decisions, this Court had pointed out that court cannot give mandamus to disobey the Constitution and principle of reservation enshrined in Articles 15(4) and 16; nor it the Court competent to direct the authorities to disobey the constitutional mandate. It would, therefore, be manifestly illegal to seek a mandamus or direction; nor would the Court be justified to issue such mandamus or direction to the appropriate Government to de- reserve vacancy. It is common knowledge that selections are not objectively being made to select the candidates belonging to the Dalits and Tribes to fill up the vacancies reserved for them though qualified candidates are available to be promoted/appointed, with a view to see that reserved vacancies are not filled up and the same are passed off as eligible candidates being not available so as to ensure that carry forward vacancies either exceed 50% of the accumulated total vacancies or that selection goes beyond three years so as to make the Government de-reserve the vacancies. It would, therefore, be clear that the authorities should implement the executive/legislative/ constitutional policy or principle in their true spirit, honestly and sincerely to effectuate the policy; no mandamus or direction should be issued to de-reserve the carry forward vacancies reserved for appointment of the Dalits and Tribes nor should direction be given to fill up the reserved posts with general candidates. Thus, it is settled legal position that application of roster to single post cadre and appointment by promotion to carry forward post is valid and constitutional. With a view to given adequate representation in public service to reserved category candidates, the opportunity given to them is not violative of Articles 14 and 16(1) of the Constitution; nor is it unconstitutional.

In R.K. Sabharwal & Ors. v. State of Punjab & Ors. [(1995) 2 SCC 745], it was held that promotions in accordance with roster are valid and constitutional.

Even in Indira Sawhney's case, this Court has reiterated the view that reservation for the Dalits and Tribes is as a class but not as individual and, therefore, such a reservation is not violative of Article 14 or 16 (1) of the Constitution. This we hold that the fact the Government of India has not de-reserved the post as recommended by the appellant-P.G.I, itself is positive proof that the Government are not in favour of de-reservation; On the other had the aforesaid Government order is a positive mandate not to de-reserve any post. Only in exceptional case that too in group 'A' posts, de-reservation could be resorted to in conformity with the procedure prescribed therein and as per the law above laid. Thus we do not find any force in the contention of Shri Rao.

Shri Rao then contended that this Court in Madhav's case has noted the ratio of Sabharwal' case, upholding the right to reservation in promotion but it relates only to the post and not vacancy and that, therefore, in Madhav's case, the distinction was not considered. Accordingly, it requires reconsideration. We find no force in the contention. In every direct recruitment, appointment is

only to the vacant post. Equally, when appointment by promotion is made, it is only to the vacant post. The 'vacancy' and 'post' are usually used interchangeable. When roster is applied and rule of reservation is implemented, it should be in conformity with the roster by the prescribed procedure and appointments of the reserved candidates by the direct recruitment or by promotion would always be only to vacant post earmarked in the roster to the general candidates. Only in a single post cadre by fiction of law successive vacancies are treated as vacant post as per the roster applying the rule of rotation to vacancies and they are filled up as per the roster. This principle guarantees equality of opportunity to the Dalits and Tribes to occupy the higher echelons of service. Otherwise it would be a reverse case of total denial of opportunity to them violating Article 14, 15(4), 16(1) and 16(4A) read with Article 335. Sabharwal's case does not deal with this aspect of the case as it did not arise therein. Therefore, there is no infirmity either in the judgment in Madhav's case nor is there any inconsistency with Sabharwal's ratio. In fact, Sabharwal's ratio is applicable per force. The fact is that appointment to a post by promotion is also a constitutionally permissible right under Article 16(4A). This Court has observed in Sabharwal's case that the roster should be operated on current account basis in the order in which the vacancies are required to be filled in. No doubt, this Court pointed out that once roster points are filled up, the roster gets exhausted but, in the latter paragraph, it was pointed out that re-cycling would start after the roster points are totally filled up. It was held by this court, in paragraph 10, while pointing out the anomaly, that "on the contrary, if the roster is permitted to operate till the total posts in a cadre are filled and thereafter the vacancy falling in the cadre are to be filled up by the same category of persons whose retirement etc. caused the vacancies, then the balance between the reserved category and the general category shall always be maintained. We make it clear that in the event of non-availability of a reserved candidate at the roster point, it would be open to the State Government to carry forward the point in a just and fair manner." Thus it would be apparent that once the roster point is exhausted, it does not mean that reservation should not be applied thereafter. The recycling of the roster starts running like current account and as and when vacancy arises in accordance with the roster point, the posts/vacancies would subsequently be filled up by appointment. It would be a continuous process.

The contention of Shri Rao that the Institute being an independent and autonomous statutory body, is not bound by the Government of India policy is devoid of base. It is seen that Regulation 32(2) itself makes rules of reservation issued by the Government of India Applicable from time to time. It is not in dispute that the Government of India was not spending the entire expenditure of the Institute from the public exchequer and, therefore, per force the appellants-Institute is enjoined to abide the constitutional policy of reservation.

It is then contended that in view of the decision of this court in *Indira Sawhney v. Union of India* [(1992) Supp. SCC 217], the recruitment to 12 posts reserved for Dalits and Tribes, is in violation of the carry forward principle adumbrated therein. He placed strong reliance on paragraphs 817-18 at pages 739-40. The carried-forward posts cannot be filled up or reservation cannot exceed 50% of the 12 posts, proposed to be filled. It is contended that recruitment to the balance, i.e., 6 posts, whenever made or in whatever manner it is sought to be worked out, should be thrown open for general candidates. We find no force in the contention. The case therein did not relate to carried-forward posts. Firstly, he admits that *Indira Sawhney's* case is not a ratio decided on carried forward rule since the facts therein do not relate to carried forward posts and, therefore, though it

does not operate as a binding precedent, yet, he says, the ratio is obiter and would bind the smaller benches; and, therefore, this Bench is bound by the said ratio. In view of the fair stand taken by Shri Rao that it does not operate as a ratio decidendi, the question arises whether it binds smaller Benches as obiter dicta. On the facts in this case, it is not necessary to go into that aspect of that matter. Suffice to state that the case can be decided on another point without touching upon that issue and leaving it open. It is seen that this notification is only for a special recruitment exclusively for the Dalits and Tribes. In the light of Sharma's ratio, it is always open to the Government to carry out special recruitment to fill up the backlog vacancies reserved for SC/ST. It is not the case that backlog vacancies should be thrown open to the general candidates unless they are de-reserved and notified of recruitment by general candidates and equal number of posts are carried forward. There is no compulsion on the Government to fill up the vacancies stage by stage. For instance, all the 12 vacancies are meant exclusively for Dalits and Tribes. The recruitment is by a special drive. Until the posts are thrown open after de-reservation in accordance with the principle referred to hereinbefore, the post would not be available to the general candidates. The obiter dicta in *Indira Sawhney* case on carry forward rule, even if applied, does not violate 50% reservation principle for the reason that if 12 posts are advertised for recruitment, appointment to 6 posts could be made and the balance 6 posts again would be re-advertised; 3 posts again would be filled up and; when 3 posts would be advertised; two could be filled up and one could be carried forward and the remaining one could be filled up in the last recruitment. There is no prohibition on filling up backlog vacancies by special recruitment. The special recruitment is not treated as routine recruitment in any year. The bar of special recruitment is not treated as routine recruitment in any year. The bar of 50% would apply only when general recruitment is made on both to the general as well as the reserved candidates in respect of the current vacancies. But when special recruitment is made for selection and appointment of the Dalits and Tribes, to the reserved backlog vacancies, the normal rule for recruitment is inapplicable. Accordingly instead of conducting the exams for different categories in the manner indicated above, there is no constitutional prohibition on filling up of the backlog vacancies by a special recruitment in a single go. Thus we hold that the special recruitment is not violative of the principle of carry forward within one year's equally, reservation within 50% quota is not violative of the principle of carry forward within one year's equally, reservation within 50% quota is not violative. In this behalf, this Court in *G.S. Gill's* case had held as under:

"Thus it could be seen that the carry-forward rule is constitutionally permissible. It is an extension of the principle of providing facility and opportunity to secure adequacy of the representation to Dalits and Tribes mandated by Article 335. It should be carried for three years. Even in the post when the vacancy as per roster was available, but candidates were not available, same could be carried forward for three years. However, in each recruitment year, the carry-forward rule cannot exceed 50% of the vacancies. That question does not arise in a situation where there is single post/cadre. In *S.S. Sharma & Ors.*

V/s. Union of India & Ors. [AIR 1981 SC 588] in paragraph 8 at page 592, this Court had held that the limited Departmental competitive examination of recruitment of the members of the scheduled Castes and Scheduled Tribes for determination of eligibility for promotion is not invalid nor the Central Government be directed to

dereserve the vacancies meant for such members when it was found that suitable Schedule Caste and Schedule Tribe candidates were not available for inclusion within the field of selection. Whether or not reserved vacancies should be de-

reserved is a matter falling primarily within the administrative discretion of the Government. There is no right in general candidates to seek filling up of the vacancies belonging to the reserved category and to insist on de-reservation of reserved vacancies so long as it is possible in law to fill the reserved vacancies. In other words, carried forward (unfilled) vacancies reserved for Dalits and Tribes should be filled up only by the reserved candidates and general candidates have no right to seek direction for dereservation thereof for filling up of the same by general candidates. It would thus be clear that carry-forward rule is a permissible constitutional rule.

Carry forward would be done for three years.

The next question is; whether the reservation in post graduate and doctoral courses is violative of Article 15(1) of the Constitution? Shri Gupta, learned counsel appearing for the General candidates, contends that the post graduate and doctoral courses are highly specialised subjects. The reservation for those posts is inconsistent with the maintenance of high degree of excellence which the nation needs for the treatment of the patients suffering from critical diseases. the reservation in these specialities and super specialities Shri Gupta, learned counsel appearing for the General candidates, contends that the post graduate and doctoral courses are highly specialised subjects. The reservation for those posts is inconsistent with the maintenance of high degree of excellence which the nation needs for the treatment of the patients suffering from critical diseases. the reservation in these specialities and super specialities Shri Gupta, learned counsel appearing for the General candidates, contends that the post graduate and doctoral courses are highly specialised subjects. The reservation for those posts is inconsistent with the maintenance of high degree of excellence which the nation needs for the treatment of the patients suffering from critical diseases. the reservation in these specialities and super specialities Shri Gupta, learned counsel appearing for the General candidates, contends that the post graduate and doctoral courses are highly specialised subjects. The reservation for those posts is inconsistent with the maintenance of high degree of excellence which the nation needs for the treatment of the patients suffering from critical diseases. the reservation in these specialities and super specialities is detrimental to the public welfare. As a consequence, this Court has pointed out in *Dr. Jagdish Saran & Ors. vs. Union of India* [(1980) 2 SCC 768 and *Dr. Pradeep Jain & Ors. vs. Union of India & Ors.* [(1984) 3 SCC 654] as was reiterated in *Indira Sawhney's case*. It is contended that the view of the High Court is

correct in law. We find no force in the contention. It is true that the learned single Judge of the High court has held that the Institute has been established with the object of achieving high degree of excellence in medical studies, specialities and super-specialities taught in the Institute as a measure to achieve the highest scales of super-specialities where the best skills or talent must be hand picked by selecting candidates on the basis of capability. As the level of Ph.D, M.D. or M.Ch., proficiency of highest level is required and losing one great scientist or technologist in the making is a national loss. The consideration, therefore, is upon achieving high excellence by measure of matching is a national loss. The consideration, therefore, is upon achieving high excellence by measure of matching excellence; nation cannot afford to lose such excellence by taking grave risk. The Indian Medical Council also emphasis adopting high standards of merit. The question is : whether by applying rule of reservation in admission to into the specialities or super-specialities course/faculties would lead to loss of proficiency or high excellence needed in the specialised or super-specialised faculties? In our considered view, it is not so. It is an accepted position that a student admitted to a medical course of a post graduate course of study is required to pass the same standard of examination as is prescribed in the particular course of study. Equally, a student, admitted on reservation, is required to pass the same standard prescribed for speciality or a super- speciality in a subject or medical science or technology. In that behalf, no relaxation is given nor sought by the candidates belonging to reserved categories. What is sought is a facility or opportunity for admission to the courses, Ph.D., speciality or super-speciality or high technology by relaxation of a lesser percentage of marks for initial admission than the general candidates. For instance, if the general candidate is required to get 80% as qualifying marks for admission into speciality or super-speciality, the relaxation for admission to the reserved candidates is of 10 marks less, i.e., qualifying marks in his case would be 70%. A doctor or a technologist has to pass the post graduation or the graduation or the graduation with the same standard as had by general candidate and has also to possess the same degree of standard. However, with the facility of possessing even lesser marks the reserved candidate gets admission. Thereby, the proficiency is not affected. In Dr. Jagdish Saran's case, this Court pointed out that the reservation of seats on the basis of domicile or residence of the State of student of the same University was not consistent with the high degree of proficiency or excellence required. This Court took care to observe that the above ratio was not intended to be applied to the admission under Article 15(4) of the Constitution. It was expressly stated to be so in paragraph 25 thus:

"we hasten to keep aloof from reservation for backward classes and Scheduled Castes and scheduled Tribes because the Constitution has assigned a special place for that factor and they mirror problems of inherited injustices demanding social surgery which if applied thoughtlessly in other situations may be a remedy which accentuates the malady."

Even in Dr. Pradeep Jain's case also, in paragraph 13, this court pointed out thus;

"we may now proceed to consider what are the circumstances in which departure may justifiably be made from the principle of selection based on merit. Obviously, such departure can be justified only on equality-oriented grounds, for whatever be the principle of selection followed for making admission to medical colleges, it must satisfy the test of equality.

Now the concept of equality under the Constitution is a dynamic concept. It takes within its sweep every process of equalisation and protective discrimination. Equality must not remain mere idle incantation but it must become a living reality for the large masses of people. In a hierarchical society with an indelible feudal stamp and incurable actual inequality, it is absurd to suggest that progressive measures to eliminate group disabilities and promote collective equality are antagonistic to equality on the ground 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* inequality, in fact, in fact, cannot be treated by identical standards that may be 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 social position may enjoy equal opportunity of using to the full his natural endowments of physique, of character and of intelligence."

In *Ajay Kumar Singh & Ors. vs. State of Bihar & Ors.* [(1994) 4 SCC 401], reservation in admission to the post graduate medical courses was challenged. Reliance was placed on *Dr. Jagdish Saran* and *Dr. Pradeep Jain's* cases. This Court, after noticing the law laid down in the aforesaid case, held in paragraph 13 that "it is again necessary to notice the context in which the said observation were made. In *Pradeep Jain's* case the Court was concerned with wholesale reservation made by some of the State Governments on the basis of domicile or residence requirement within the state and admitting only those students to their medical colleges who satisfied the said requirements. With a view to extend the rule of equality, the Court directed that

certain percentage of seats both in M.B.B.S. and postgraduate medical courses should be filled on the basis of All India entrance test and that students to this reserved quota should not be called upon to satisfy the rule of residence or domicile, as the case may be. This was again not a case arising under Article 15(4). The observations made cannot be torn from their context and read as applicable to the situation obtained under Article 15(4). For the above reasons, the second contention of Shri Vikas Singh is also rejected." Thus, this Court has reiterated that the applicability of the reservation in post graduation courses under Article 15(4) is constitutionally permissible. Even the observation in Indira Sawhney's case was explained in para 7, holding that the observations made with reference to Article 335 of the constitution was not with reference to Article 15(4). it is true that a suggestion was made for exclusion of the reservation in the specialised posts etc, under Sections 16(1) and 16(4). But it is to be seen that what Constitution gives to the reserved candidates is facility and opportunity to enjoy the right to equality enshrined under Articles 14, 15(1), 15(4), 16(1), 16(4) and 16(4A) respectively. For educational and economic empowerment and social justice, the arch of the Constitution in the preamble and the relevant articles in Part III & IV, protective discrimination ensures practical content applying the protective and actuality and equality in results, instead of legal equality, in favour of the disadvantaged segments of the society.

In The Ahmedabad St. Xaviers College Society case, a Bench of nine Judges of this Court reiterated the rights of all minorities, while deciding whether the making religion or language as the base of reservation in establishing and administering the educational institution of their choice is unconstitutional. Articles 25 to 30 are a befitting pledge to the minorities. The attempt of the Court interpreting those articles should be such as to facilitate enjoyment of the rights. The object is to integrate them in the mainstream of the society to instill a sense of confidence in the minorities so that none might have a feeling that other section of the population would trample upon the fundamental rights guaranteed under the Constitution. The ration equally applies to the protective discrimination guaranteed to the Dalits and Tribes. The Dalits and Tribes are victims of social injustice, practice of untouchability and segregation from the mainstream of national life. The object of protective discrimination is to integrate them in the national mainstream so as to establish an integrated social order with equal dignity of person in which justice social, economic and political are enjoyed by them in equal measure with the general members of the society. Dr. B.R. Ambedkar in his closing speech, in reply to the Debates in the Constituent Assembly, had stated that the edifice in the Constitution was build up with laborious effect. There is no defect in the Constitution. if the Constitution fails, it fails not because there is defect in the Constitution but on account of the bad management by the administrators. Judiciary is a part of the State under the Constitution. Dr. K.M. Munshi, in reply to the Debates on the minority rights, had stated that one day the minority rights will be decided by 11 worthy judges was so high that they chose to describe Supreme Court Judges as " Worthy Judges' to interpret the Constitution only to sustain the social order, integrate the people in

united Bharat to elongate the constitutional rights and ensure the enjoyment of those rights and make these rights available to the Dalits, Tribes, poor, minorities and all sections in equal measure. It is repeatedly held by this Court that the interpretation of the constitutional provisions should always be such as to enable the availing of the rights given in the Constitution to the citizens, and not to deny or denude them by process of interpretation. The judges of the constitutional Courts, in particular. As judicial statesmen, would always endeavour to ensure enjoyment of the rights enshrined in the Constitution to every section of the society consistent with the policies and principles laid down in the constitution we are to keep at the back of our mind. The above perspectives to reach the result.

As stated earlier, the benefit of reservation does not necessarily imply down-grading the excellence. Every student after admission into the post graduate speciality or super speciality it is required to undergo the same course of study, same standard and higher performance for qualifying the course for conferment of the degrees in the respective specialities or super-speciality or technical subjects. In that regard, there is no relaxation given to the candidates is also expected to have the same degree of excellence on par with general candidate, with a lesser benefit of marks only for admission into the course of study by relaxing the same standard of marks. Securing marks is not the sure proof of higher proficiency, efficiency or excellence. These are matter of acquired ability by studious application of mind, skills in performance by the candidate concerned, be it general candidate or reserved candidate. It is a matter of application of the mind, constant assiduity to improve skills, capabilities and capacities and excellence in the subject or the field of action chosen by the candidate. In that behalf, it is common knowledge that marks would be secured in diverse modes. It is no indicia that particular percentage of the marks secured is an index of the proficiency, efficiency and excellence. They are awarded in internal examination on the basis of caste, creed, colour, religion etc. It is the constitutional imperative of the executive to provide opportunities and facilities to the handicapped to acquire the degree in specialities, super-specialities or technical posts. Denial thereof, is a total denial of right to enjoy equality. It is well-settled legal position that fundamental rights are to be interpreted broadly to enable the citizens to enjoy the rights enshrined in part III and IV of the constitution {Vide The Ahmedabad St. Xaviers College Society & Anr. etc. vs state of Gujarat & Anr. [(1975) 1 SCR 173]; Marri Chandra Shekhar Rao vs. DEAN, Seth G.S. Medical College & Ors. [(1990) 3 SCC 130] and Ashok Kumar Gupta & Anr. vs. State of U.P. & ors. (3) SCALE 289}} pa Under these circumstances, the view of the High Court that the reservation in post graduation specialities or super-specialities are detrimental to the high degree of efficiency and violative of article 14 is clearly incorrect, erroneous, illegal and unconstitutional. Thus, we hold that the reservation in post graduation speciality or super-speciality is valid under Articles 14, 15(1) and 15(4) of the Constitution.

These appeals are accordingly allowed with no order as to costs.

The writ Petition 781/95 filed by Scheduled Association relates to withdrawal of the reservations in the Institute. The action taken by the Institute is pursuant to the directions issued by the High Court. In view of the fact that we allowed the appeals, the Institute, hereafter, should follow the reservation and make appointments to the posts of Assistant professors and other posts in accordance with Regulation 32(2) and in other faculties as well as admission to the various courses in the Institute by applying the rule of reservation.

Accordingly, the writ petition is disposed of, but, in the circumstances, without costs.

We place on record the valuable assistance rendered by the learned counsel appearing for the parties.