Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 1956-1957 OF 2015
(@ SLP (C) Nos.11924-11925 of 2012)

Nawal Kishore Mishra & Ors. Etc. …Appellant (s)

VERSUS

High Court of Judicature at Allahabad …Respondent(s)
Through its Registrar General & Ors. Etc.

WITH

CIVIL APPEAL NOS. 1992-1993 OF 2015
(@ SLP (C) Nos.18597-18598 of 2012)

Udai Bhanu Mishra & Ors. Etc. …Appellant (s)

VERSUS

High Court of Judicature at Allahabad
Through its Registrar General & Ors. Etc. …Respondent(s)

&

CIVIL APPEAL NOS. 1958-1959 OF 2015
(@ SLP (C) Nos.26015-16 of 2012)

Arvind Kumar Sudhanshu & Ors. …Appellant (s)

VERSUS

High Court of Judicature at Allahabad
Through its Registrar General & Ors. Etc. …Respondent(s)

J U D G M E N T

Fakkir Mohamed Ibrahim Kalifulla, J.

1. Leave granted.

2. Since the issues involved in the above appeals are identical, all these appeals are disposed of by this common judgment. We, however, refer to the facts dealt with by the Division Bench of the High Court in SLP (C) 11924-25/2012 by judgment dated 02.03.2012.

3. The challenge in the writ petitions was to the appointment made by the High Court to the post of Direct Recruit District Judges in the unfilled reserve vacancies, to the extent of 34 in number by way of promotion from the 'in service candidates' by applying Rule 8(2) of the Uttar Pradesh Higher Judicial Service Rules, 1975 (hereinafter referred to as "the Rules"). The Division Bench of the High Court dismissed the writ petitions. Aggrieved, the appellants have come forward with these appeals.

4. To trace the brief facts, on 15.04.2009 the High Court notified and called for applications for filling up 68 vacancies in the Higher Judicial Service. Of the 68 vacancies, 24 vacancies were meant for open category, 21 for Other Backward Classes (OBC), 21 for SC and 2 for ST. It is not in dispute that all the 24 vacancies in the open category got filled up on merits. Of the 21 vacancies in the OBC, 10 alone could be appointed leaving 11 vacancies to remain. All the SC/ST vacancies numbering 23 were also not filled up. In the unfilled 34 vacancies, the High Court promoted the 'in

service candidates'. The appellants were successful in the written test and also attended the interview. According to the appellants, even applying Rule 8(2) of the Rules, all the 68 vacancies were direct recruit vacancies and that in the first instance, the unfilled vacancies should have been filled up only from the other successful candidates from the direct recruitment source. In other words, the contention was that only if no other successful candidate was available from the direct recruit source belonging to any of the categories, namely, open category or any other category such as OBC or SC/ST then and then alone the High Court could have resorted to promotion of 'in service candidates'. To put it differently, according to the appellants since the posts advertised were by way of direct recruitment, it was meant for that particular source of recruitment, namely, "direct recruit" and all those successful candidates of that source alone, namely, 'direct recruit' were in the first instance eligible to be considered for being appointed to the unfilled posts of any of the categories, namely, open or OBC or SC or ST and in the event of unavailability of any candidate from that source then and then alone the High Court could have resorted to filling up of those posts by way of promotion of 'in service candidates'. Since, the above submission of the appellants did not find favour with the High Court, the appellants are before us.

5. We heard Mr. Dwivedi, learned Senior Counsel for the appellants Mr. Ashok Srivastava, learned counsel for the High Court and Mr. Irshad Ahmad, Additional Advocate General for the State.

6. The contentions of Mr. Dwivedi learned Senior Counsel while assailing the judgment of the High Court were three-fold. The learned Senior Counsel submitted that in order to apply the rule of reservation by the High Court, as has been stipulated in the Uttar Pradesh Public Services (Reservation) for Scheduled Casts and Scheduled Tribes and Other Backward Classes Act, 1994 (hereinafter referred to as "the Reservation Act of 1994"), there should have been express adoption of only orders pertaining to such reservation passed by the Government and not the Act itself. The said contention of learned Senior Counsel was based upon the specific contents of Rule 7 of the Rules. The learned Senior Counsel then contended that in order to apply the rule of reservation under Rule 7, the High Court should adopt such Order pertaining to reservation and according to the appellants there was no adoption of either any of the order of the Government providing for reservation or the application of the Reservation Act of 1994 itself as claimed by the High Court. It was then contended that the claim of the High Court that the High Court adopted the rule of reservation under Rule 7 was not true. It was lastly contended that assuming the High Court was correct in claiming that the whole of the Reservation Act was adopted by it then Section 3(2) of the Reservation Act was violated and consequently the filling up of the unfilled posts of direct recruits of the year 2009 by way of promotion of 'in service candidates' was liable to be set aside. In support of his submissions, learned Senior Counsel relied upon the Constitution Bench decision of this Court reported in ***State of Bihar and Another v. Bal Mukund Sah & Others*** - (2000) 4 SCC 640

(CB), as well as the decisions reported in ***Ashok Pal Singh & Ors. v. Uttar Pradesh Judicial Services Association & Ors.***- (2010) 12 SCC 635, ***State of U.P. & Anr. v. Johri Mal*** - (2004) 4 SCC 714, ***Union of India v. Naveen Jindal & Anr.*** - (2004) 2 SCC 510 and ***Sri Dwarka Nath Tewari & Ors. v. State of Bihar & Ors.*** - AIR 1959 SC 249 **(CB)**.

7. As against the above submissions Mr. Raghvendra Shrivastava, learned standing counsel for the High Court submitted that the appellants have no locus to challenge the appointments made to the posts meant for reserved category, that under Article 13(3) of the Constitution, a law would include inter alia an Act, rules, regulations and orders of the Government and, therefore, the adoption of the whole of the Reservation Act by the High Court cannot be faulted. He placed reliance upon the decision of this Court reported as ***R.K. Sabharwal & Ors. v. State of Punjab & Ors.*** - (1995) 2 SCC 745 and ***Pashupati Nath Sukul v. Nem Chandra Jain & Ors.*** - (1984) 2 SCC 404. According to learned standing counsel, as per the proceedings of the Selection Committee meeting, which was also approved by the Full Court, the Reservation Act on the whole was adopted in accordance with Rule 7 of the Rules and, therefore, the action of the High Court could not have been challenged. The learned standing counsel by referring to an order passed by this Court in the earlier round in I.A. No.87 of 2010 contended that applying Section 3(2) of the Reservation Act and as directed by this Court in the said order, selection was again held in the same year to fill those unfilled reserved vacancies and as in that process

also, the seats could not be filled up, the High Court invoked Rule 8(2) of the Rules by promoting the 'in service candidates' to those unfilled vacancies. The learned standing counsel further contended that the proviso to Rule 8(2) was strictly followed and those vacancies of the year 2009 which were filled up from 'in service candidates' were subsequently carried forward in the subsequent years as reserved category vacancies. The learned counsel, therefore, contended that there was no violation in the appointment and filling up of Direct Recruit District Judge posts of the year 2009 and no interference is called for by this Court.

8. Having heard learned counsel for the respective parties, the questions that arise for consideration in these appeals are as under:

a) Whether the appellants have the *locus standi* to challenge the appointments made by the High Court in the filling up of the unfilled vacancies of the reserved categories in the Direct Recruitment Posts by way of promotion of the 'in service candidates'?

b) Whether the High Court could have validly adopted the Reservation Act of 1994 by relying upon Rule 7 of the High Court Rules?

c) Whether the Reservation Act of 1994 or any of the order of the Government providing for reservation was validly adopted by the High Court as claimed by it?

d) While filling up the unfilled posts of direct recruit vacancies by way of promotion under Rule 8(2), did the High Court fall into errors in not considering the appellants who were the successful candidates and who hailed from the very

same source, namely, direct recruitment, who alone were eligible to be considered in the first instance even as per Rule 8(2)?

e) Assuming the Reservation Act of 1994 was validly adopted by the High Court, yet by ignoring Section 3(2) of the said Act, was the High Court justified in filling up the posts by way of promotion of 'in service candidates'?

9. As far as the first question is concerned, namely, about the locus of the appellants which was raised at the instance of learned standing counsel for the High Court, it was contended that the appellants belonged to general category and the posts which were filled up were all reserved category posts and, therefore, appellants had no locus to challenge the action of the High Court. In support of the said contention, reliance was placed upon the Constitution Bench judgment of this Court reported in ***R.K. Sabharwal (supra).*** In paragraph 4, this Court held that when a percentage of reservation is fixed in respect of particular cadre, the fact that considerable number of reserved category candidates got appointed against the general category, the given percentage of reservation has to be provided in addition. By relying upon the said ratio of the judgment, it was contended that the appellants had no locus.

10. When we test the contention of the learned standing counsel, it will have to be pointed out that the challenge in the writ petition before the High Court was to the appointment made to the unfilled vacancies of 'reserve category' posts by way of promotion of 'in service candidates' in violation of

Rule 8(2) of the Rules. The contention was that while making such appointments by way of promotion, the High Court ignored the successful candidates who competed in the 'direct recruit' source though they belonged to the general category. The challenge was on the ground that since the source of recruitment was direct recruitment, unless the candidates available in the direct recruitment source were considered in the first instance for appointment, the High Court could not have resorted to filling up of those posts by way of promotion of 'in service candidates'. In fact, it is not the stand of the High Court that the posts in the reserve category were kept intact for being considered by way of selection and appointment from the reserve category candidates as provided under Section 3(2) of the Reservation Act of 1994. A glance of Section 3(2) for the present purpose, would show that in the event of inability to fill up the reserved category posts, the process of selection should be continued in the very same year in which the selection was earlier made and even thereafter if it remained unfilled, the post should be kept vacant for the future years of recruitments. Since the High Court has not adopted the said procedure except making an attempt to fill up by way of selection in that year itself as directed by this Court in I.A. No.87 of 2010, it must be stated that there was every scope to contend that the procedure prescribed under Section 3(2) of the Reservation Act of 1994 was not strictly adhered to. Whether Section 3(2) will be applicable at all is one other question involved in this appeal with which we will make a detailed consideration at an appropriate stage.

11. In the above stated background, when we examine the contention of learned standing counsel for the High Court as regards the locus of the appellants, it must be stated that a larger issue as to the entitlement of the appellants as successful candidates belonging to 'direct recruit' source to seek appointment to the unfilled posts of that very source, namely, 'direct recruit' though belonging to reserved category, merits consideration and would not disentitle the appellants to raise a challenge as made in the writ petition. If the appellants are able to make out a case on the said contention, it will have to be stated that their challenge to the filling up of the posts as made by the High Court by adopting the procedure prescribed under Rule 8(2) can be validly raised as a point of challenge. Consequently, it will have to be held that the appellants had every locus to challenge the appointment made by the High Court by invoking Rule 8(2) of the Rules. In the light of the above special features in this case, we do not find any scope to apply the decision relied upon by learned counsel for the High Court which stands on entirely different principle.

12. While examining this contention based on Rule 7 as well as Rule 8(2) of the Rules of the High Court, we feel it appropriate to refer to a Constitution Bench decision of this Court reported in ***State of Bihar v. Bal Mukund Sah (supra)*** and ***Ashok Pal Singh (supra)***. In the Constitution Bench decision, the question which was posed for consideration was "*whether the Legislature of the appellant State of Bihar was competent to enact the Bihar Reservation of Vacancies in Posts and Services (for Scheduled*

Castes, Scheduled Tribes and Other Backward Classes) Act, 1991 (hereinafter referred to as "the Act"), insofar as Section 4 thereof sought to impose reservation for direct recruitment to the posts in the Judiciary of the State, subordinate to the High Court of Patna, being the posts of District Judges as well as the posts in the lower judiciary at the grass-root level, governed by the provisions of the Bihar Judicial Service (Recruitment) Rules, 1955. Civil Appeal No.9072 of 1996 deals with the question of reservation in the posts in the District Judiciary while the companion appeal deals with the posts in the Subordinate Judiciary at grass-root level under the District Courts concerned……"

13. While dealing with the said contention, the points for determination were formulated in paragraph 17 which reads as under:

> "**17**. In the light of the aforesaid rival contentions, the following points arise for our determination:
>
> *1*. Whether the impugned Act of 1991 on its express language covers "Judicial Service" of Bihar State.
>
> *2*. If the answer to Point 1 is in the affirmative, whether the provisions of the impugned Act, especially, Section 4 thereof in its application to the Subordinate Judiciary would be ultra vires Articles 233 and 234 of the Constitution of India and hence cannot be sustained.
>
> *3*. In the alternative, whether the aforesaid provisions of the Act are required to be read down by holding that Section 4 of the Act will not apply to direct recruitment to the posts comprised in the Bihar Superior Judicial Service as specified in the Schedule to the Bihar Superior Judicial Service Rules, 1951 as well as to the Bihar Judicial Service governed by the Bihar Judicial Service (Recruitment) Rules, 1955, comprising of the posts of Subordinate Judges and Munsiffs under the District Judiciary.
>
> *4*. What final order.
>
> Before we deal with the aforesaid points for determination, it

will be necessary to keep in view the relevant provisions of the Constitution which have a direct impact on the resolution of the controversy projected by these points."

14. On point number one, the Constitution Bench took the view as under in paragraph 27:

"**27**.....On the aforesaid scheme of the Act, the High Court in the impugned judgment, has taken the view that the operation of Section 4 for offices or departments of the Judiciary of the State of Bihar would cover only the Ministerial Staff of the District Courts and courts subordinate .thereto and would not include Presiding Officers and therefore, Section 4 will not govern the direct recruitment to the posts of Presiding Officers of the District Judiciary as well as of the Subordinate Judiciary. It is difficult to appreciate this line of reasoning on the express language of the relevant provisions of Section 4 read with the definition provisions. It becomes obvious that the term "any office" of the Judiciary of the State of Bihar would naturally include not only Ministerial Staff but also officers, including Presiding Officers of courts comprised in the Judiciary of the State. Once that conclusion is reached on the express language of the relevant provisions of the Act, it cannot be held that the thrust of Section 4 would not apply to govern reservation for direct recruitment to the posts of Presiding Officers in the District Courts as well as courts subordinate thereto, as all of them will form part and parcel of the Judiciary of the State of Bihar and will have to be treated as holders of offices in the State Judiciary. Consequently, it is not possible to agree with the contention of learned Senior Counsel, Shri Thakur for the High Court that on the express provisions of the Act, Section 4 cannot apply to govern recruitment to posts in the Subordinate Judiciary. The first point for determination, therefore, has to be answered in the affirmative in favour of the appellants and against the respondents."

15. On point number two, the position was stated as under in paragraphs 30, 31 and 32:

30. It has also to be kept in view that neither Article 233 nor Article 234 contains any provision of being subject to any enactment by the appropriate Legislature as we find in Articles

98, 146, 148, 187, 229(2) and 324(5). These latter Articles contain provisions regarding the rule-making power of .the authorities concerned subject to the provisions of the law made by Parliament or the Legislature. Such a provision is conspicuously absent in Articles 233 and 234 of the Constitution of India. Therefore, it is not possible to agree with the contention of learned counsel for the appellant State that these Articles only deal with the rule-making power of the Governor, but do not touch the legislative power of the competent Legislature. It has to be kept in view that once the Constitution provides a complete code for regulating recruitment and appointment to the District Judiciary and to the Subordinate Judiciary, it gets insulated from the interference of any other outside agency. We have to keep in view the scheme of the Constitution and its basic framework that the Executive has to be separated from the Judiciary. Hence, the general sweep of Article 309 has to be read subject to this complete code regarding appointment of District Judges and Judges in the Subordinate Judiciary.

31. In this connection, we have also to keep in view Article 245 which, in its express terms, is made subject to other provisions of the Constitution which would include Articles 233 and 234. Consequently, as these twin Articles cover the entire field regarding recruitment and appointment of District Judges and Judges of the Subordinate Judiciary at base level *pro tanto* the otherwise paramount legislative power of the State Legislature to operate in this field clearly gets excluded by the constitutional scheme itself. Thus both Articles 309 and 245 will have to be read subject to Articles 233 and 234 as provided in the former articles themselves.

32. It is true, as submitted by learned Senior Counsel, Shri Dwivedi for the appellant State that under Article 16(4) the State is enabled to provide for reservations in services. But so far as "Judicial Service" is concerned, such reservation can be made by the Governor, in exercise of his rule-making power only after consultation with the High Court. The enactment of any statutory provision dehors consultation with the High Court for regulating the recruitment to the District Judiciary and to the Subordinate Judiciary will clearly fly in the face of the complete scheme of recruitment and appointment to the Subordinate Judiciary and the exclusive field earmarked in connection with such appointments by Articles 233 and 234. It is not as if that the High Courts being constitutional functionaries may be oblivious of the need for a scheme of

reservation if necessary in appropriate cases by resorting to the enabling provision under Article 16(4). The High Courts can get consulted by the Governor for framing appropriate rules regarding reservation for governing recruitment under Articles 233 and 234. But so long as it is not done, the Legislature cannot, by an indirect method, completely bypassing the High Court and exercising its legislative power, circumvent and cut across the very scheme of recruitment and appointment to the District Judiciary as envisaged by the makers of the Constitution. Such an exercise, apart from being totally forbidden by the constitutional scheme, will also fall foul on the concept relating to "separation of powers between the Legislature, the Executive and the Judiciary" as well as the fundamental concept of an "independent Judiciary". Both these concepts are now elevated ,to the level of basic structure of the Constitution and are the very heart of the constitutional scheme."

(Emphasis added)

16. Ultimately by referring to the Constitutional mandate of Articles 233 and 234, it was held as under in paragraph 38:

"**38.** Shri Dwivedi, learned Senior Counsel for the appellant State was right when he contended that Article 16(4) is an enabling provision permitting the State to lay down a scheme of reservation in State services. It may also be true that Judicial Service can also be considered to be a part of such service as laid down by this Court in the case of *B.S. Yadav*. However, so far as the question of exercising that enabling power under Article 16(4) for laying down an appropriate scheme of reservation goes, as seen earlier, we cannot be oblivious of the fact that the High Court, being the high constitutional functionary, would also be alive to its social obligations and the constitutional guideline for having a scheme of reservation to ameliorate the lot of deprived reserved categories like SC, ST and Other Backward Classes. But for that purpose, the Governor can, in consultation with the High Court, make appropriate rules and provide for a scheme of reservation for appointments at grass-root level or even at the highest level of the District Judiciary, but so long as this is not done, the State Legislature cannot, by upsetting the entire apple cart and totally bypassing the constitutional mandate of Articles 233 and 234 and without being required to consult the High Court, lay down a statutory scheme of reservation as a roadroller

straitjacket formula uniformly governing all State services, including the Judiciary. It is easy to visualise that the High Court may, on being properly and effectively consulted, endorse the Governor's view to enact a provision of reservation and lay down the percentage of reservation in the Judicial Service, for which it will be the appropriate authority to suggest appropriate measures and the required percentage of reservation, keeping in view the thrust of Article 335 which requires the consideration of the claim of members of SC, ST and OBC for reservation in services to be consistent with the maintenance of efficiency of administration. It is obvious that maintenance of efficiency of judicial administration is entirely within the control and jurisdiction of the High Court as laid down by Article 235. The State Legislature, on its own, would obviously lack the expertise and the knowledge based on experience of judicial administration which is possessed by the High Court. Consequently, bypassing the High Court, it cannot, in exercise of its supposed paramount legislative power enact any rule of thumb and provide a fixed percentage of reservation for SC, ST and Other Backward Classes in Judicial Services and also lay down detailed procedure to be followed as laid down by sub-sections (3) to (6) of Section 4 for effecting such statutorily fixed 50% reservation. It is easy to visualise that if the High Court is not consulted and obviously cannot be consulted while enacting any law by the State Legislature and en bloc 50% reservation is provided in the Judicial Service as is sought to be done by Section 4 of the Act and which would automatically operate and would present the High Court with a fait accompli, it would be deprived of the right to suggest during the constitutionally guaranteed consultative process, by way of its own expertise that for maintenance of efficiency of administration in the Judicial Service controlled by it, 50% reservation may not be required, and/or an even lesser percentage may be required or even may not be required at all. Even that opportunity will not be available to the High Court if it is held that the State Legislature can enact the law of reservation and make it automatically applicable to the Judicial Service bypassing the High Court completely. Such an exercise vehemently canvassed for our approval by learned Senior Counsel for the appellant State cannot be countenanced on the express scheme of the Constitution, as discussed by us earlier. Even proceeding on the basis that the scheme of Article 16(1) read with Article 16(4) may be treated to be forming a part of the basic feature of the Constitution, it has to be appreciated that for fructifying such a constitutional scheme Article 335 has to be kept in view by the authority concerned before such a scheme of reservation can be promulgated. Once

> Article 335 has to be given its full play while enacting such a scheme of reservation, the High Court, entrusted with the full control of the Subordinate Judiciary as per Article 235 by the Constitution, has got to be consulted and cannot be treated to be a stranger to the said exercise as envisaged by the impugned statutory provision.
>
> **(Emphasis added)**

17. While thus highlighting the basic features of the Constitution which aimed at preserving the independence of judiciary as mandated in Articles 233 to 235 of the Constitution, this Court had the occasion to deal with the Rules of the High Court in the subsequent decision reported in ***Ashok Pal Singh (supra)***. In the said decision, the points for consideration have been set out in paragraph 16 and what are relevant for our purpose are sub-paragraphs (ii), (iii) and (iv) which reads as under:

> "**16**.(*ii*) Whether the direct recruits are entitled to 15% of the vacancies as a fixed quota or whether the said percentage is a ceiling imposed in regard to direct recruitment meaning that the vacant posts shall not be filled up more than 15% by the direct recruits?
>
> (*iii*) Whether the words "15% of the total *permanent* strength of the service" occurring in the first proviso to sub-rule (2) of Rule 8 of the unamended Rules (as contrasted from "15% of the strength of the service" after the amendment), shall be given effect in computing the respective quotas of promotees and direct recruits till the amendment of the Rules (effective from 15-3-1996) deleting the word "permanent" in the said first proviso?
>
> (*iv*) Whether the procedure of carrying forward vacancies adopted by the Full Court of the High Court is erroneous having regard to the specific provisions of Rule 8(2) and Direction (3) issued by this Court in *Sri Kant Tripathi?"*

18. While dealing with the said questions, this Court has held as under in paragraphs 28 and 40:

> "**28.** To conclude, the following clear indicators show that the quota of direct recruits is "15%" and not "up to 15%":
>
> (*a*) Rule 6 uses the words "15% of the vacancies" as the quota of direct recruits and does not use the words "not more than 15% of the vacancies".
>
> (*b*) The purpose and intent of Rule 8(2) is not to dilute or change the quota of direct recruits. Its object is to ensure that no vacancy remains unfilled for want of adequate number of direct recruits under their 15% .quota. This is because there are reasonable chances of adequate number of candidates being not available for direct recruitment, whereas usually sufficient number of candidates will be available for promotion. The first proviso to Rule 8(2) ensures that the shortfall in 15% quota for direct recruits in any recruitment does not get permanently converted to promotee quota, by providing that the shortfall shall be made good at the next recruitment. The words "does not in any case exceed 15%" are used to further ensure that while making good the shortfall of direct recruits at the next recruitment, the direct recruits do not encroach upon the quota of promotees.
>
> (*c*) The provision for appointment to the service by rotational system [that is Rule 22(2) providing that the first vacancy to be filled from the list of Nyayik Sewa Officers and the second vacancy to be filled from the list of direct recruits and so on], makes it clear that the overall scheme of the Rules is to provide a clear 15% quota for direct recruits.
>
> **40**…….The total vacancies to be filled at a recruitment shall have to be filled by applying sub-rules (1) and (2) of Rule 8 and its provisos. In that sense all vacancies, which are not filled by direct recruitment, get filled by promotion and there will be no carry over. There is only a limited "carry over" of unfilled direct recruitment vacancies in the manner stated in Rule 8(2) and the first proviso thereto." **(Emphasis added)**

19. Since the Constitution Bench of this Court has dealt with the larger question as to how the constitutional mandate as provided under Article 16(1) and (4) qua Article 335 on the one hand and Articles 233 to 235 on

the other is to be reconciled made it clear that while the scheme of Article 16(1) read with Article 16(4) may be treated to be forming part of the basic feature of the Constitution, by Articles 233 to 235 of the Constitution, full control of the judiciary having been entrusted with the High Court is also equally a basic feature of the Constitution and both can be reconciled only by way of a consultation of the Governor with the High Court and by making appropriate rules to provide for a scheme of reservation and unless such a provision is made by following the constitutional scheme under Articles 233 to 235, it would be well-neigh possible to thrust upon the rule of reservation by the State Legislature even by way of a legislation. Inasmuch as the Constitution Bench has dealt with this vital issue in an elaborate manner and laid down the principles relating to application of reservation in the matter of appointments to be made to the post of direct recruit District Judges, in fitness of things, it will be profitable for us to note the salient principles laid down therein as that would throw much light for us to resolve the question raised in these appeals.

20. Such principles can be culled out and stated as under:

(α) Neither Article 233 nor Article 234 contain any provision of being subject to any enactment by the appropriate legislature as is provided in certain other Articles of the Constitution.

(β) Articles 233 and 234 of the Constitution are not subject to the provisions of law made by the Parliament or the Legislature as no such provision is found in Articles 233 and 234 of the Constitution.

(χ) Articles 233 to 235 provide a complete code for regulating recruitment and appointment to the District Judiciary and

the subordinate judiciary and thereby it gets insulated from interference of any other outside agency.

(δ) The general sweep of Article 309 has to be read subject to the complete code regarding appointment of District Judges and Judges in the subordinate judiciary governed by Articles 233 and 234.

(ε) Even under Article 245, it is specifically provided that the same would be subject to other provisions of the Constitution which would include Articles 233 and 234.

(ϕ) As the twin Articles cover entire field regarding recruitment and appointment of District Judges and Judges in the subordinate judiciary at base level *pro tanto* the otherwise paramount legislative power of State Legislature to operate in this field clearly gets excluded by the constitutional scheme itself.

(γ) Both Articles 309 and 245 will have to be read subject to Articles 233 and 234 as provided in the former Articles themselves.

(η) Though under Article 16 (4), the state is enabled to provide for reservations in services, insofar as judicial service is concerned such reservation can be made by the government in exercise of its rule making power only after consultation with the High Court.

(ι) The enactment of any statutory provision *de hors* consultation with the High Court for regulating the recruitment to the District Judiciary and the subordinate judiciary will clearly fly in the face of complete scheme of recruitment and appointment to the subordinate judiciary and the exclusive field earmarked in connection with such appointments under Articles 233 and 234.

(φ) Realising the need for a scheme of reservation in appropriate cases by resorting to the enabling provision under Article 16(4), the High Court can be consulted by the Government for framing appropriate rules regarding reservation for governing recruitment under Articles 233 and 234. But so long as it is not done, the legislature cannot by an indirect method completely bypass the High Court and by exercising its legislative power circumvent and cut across the very scheme of recruitment and appointment to the District Judiciary as envisaged by the makers of the Constitution.

(κ) Any such attempt by the legislature would be forbidden by the constitutional scheme as that was found on the concept relating to separation of powers between the legislature, the executive and the judiciary as well as the fundamental concept of an independent judiciary as both the concepts having been elevated to the level of basic structure of the Constitution and are the very heart of the Constitution scheme.

(λ) Having regard to Article 16(4), the High Court being a high constitutional functionary would also be alive to its social obligations and the constitutional guideline for having a scheme of reservation to ameliorate the lot of deprived reserved categories like SC, ST and OBC. But for that the Governor in consultation with High Court should make appropriate rules and provide for a scheme of reservation for appointments at grass root level and even at the highest level of District Judiciary. If that was not done, the State Legislature cannot upset the entire apple cart and by bypassing the constitutional mandate of Articles 233 and 234 lay down a statutory scheme of reservation governing all state services including judiciary.

(μ) Even in that respect it is obvious that maintenance of efficiency of judicial administration is entirely within the control and jurisdiction of High Court as laid down by Article 235.

(ν) If the proper course of formulating the scheme in the form of a rule by the High Court to provide for reservation is not made, that would deprive of the right to suggest the consultative process by way of its own expertise that for maintenance of the efficiency of administration of judicial service controlled by it 50% reservation may not be required and/or and even lesser reservation may be required or even may not be required at all.

(ο) To give Article 335 its full play for enacting a scheme of reservation, the High Court entrusted with the full control of the subordinate judiciary as per Article 235 of the Constitution has got to be consulted and cannot be treated to be a stranger to the said service by trying to apply the whole of the Reservation Act.

21. Having noted the above salient principles laid down in the

Constitution Bench decision, when we refer to the subsequent decision reported in ***Ashok Pal Singh (supra)*** wherein this very Rule 8(2) came up for consideration, this Court has held that the purpose and intent of Rule 8(2) is not to dilute or change the quota of direct recruits. It also made it clear that its object must be to ensure that though vacancy remained unfilled for want of adequate number of direct recruits under 15% quota, it also highlighted that the first proviso to Rule 8(2) would ensure that any shortfall in 15% quota for direct recruit in any recruitment cannot be permanently converted to promotee quota and that such a short fall should be made good in the next recruitment. In other words, it will be a limited carrying over of unfilled direct recruitment vacancies in the manner set out in Rule 8(2) and the first proviso thereto.

22. Keeping the above principles in mind, we go to the next contention. The next contention of the appellants is whether the High Court could have validly adopted the Reservation Act, 1994 by relying upon Rule 7 of the High Court Rules. To appreciate the said contention, Rule 7 requires to be noted, which reads as under:

> ***"Rule 7. Reservation of posts for Scheduled Caste, etc.***- *Reservation to posts in the service for the members of the Scheduled Castes, Scheduled Tribes and other categories including women shall be in accordance with orders of the Government for reservation as adopted by the High Court.*
>
> *Provided that twenty percent horizontal reservation for women to posts in service in direct recruitment from Bar in Uttar Pradesh Higher Judicial Service shall be subject to suitability i.e. if the sufficient number of women candidates is not available, then and in that event, the reservation shall not have any operation to the extent*

of such unavailability.

Provided further that there shall be no carry forward of reservation for women."

23. A reading of the said Rule makes it clear that application of the rule of reservation is permissible under the High Court Rules provided such reservation is in accordance with government orders as adopted by the High Court. At present we are not concerned with the nature of reservation specified in the proviso to the said Rule. We are only concerned with the validity of rule of reservation in the Higher Judicial Service of the High Court. When we meticulously consider the said rule, we will have to state that such reservation of posts should be in accordance with the orders of the government as adopted by the High Court. The contention of the learned senior counsel for the appellants was that in Rule 7 what was permissible by way of adoption was only the orders of the Government prescribing the extent of reservation for various categories such as Scheduled Castes, Scheduled Tribes including women. In that context, the learned counsel in the first instance made a reference to what was the position prior to the present selection viz., 2009. The learned senior counsel referred to Rule 7 as it previously existed. The un-amended Rule can also be noted by extracting the same, which was as under:

*"**Rule 7. Reservation of posts for Scheduled Caste etc.**- Reservation to posts in the Service for Members of the Scheduled Castes, Scheduled Tribes and others shall be in accordance with the orders of the Government for reservation in force at the time of recruitment."*

24. Appendix 'B' which was part of un-amended rule was the Official Memorandum of the Uttar Pradesh Government Recruitment Department - 4, dated 18.07.1972. The relevant part of the said Appendix 'B' with which we are concerned is as under:

> *"Hence, the government has reconsidered all the questions in respect of the reservation and has taken the following decisions:*
>
> *1. In any service by direct recruitment, upon including the carried forward reserved vacancies, if any, the reservation shall not be more than total of 50%.*
>
> *2. In all the services, there will be 18% and 2% reservation for the Scheduled Castes and Scheduled Tribes, respectively but for the Class 3 clerical services and Class 4 service, there will be 25% and 36% reservation respectively, for the Scheduled Castes, until when their quota of 18% is not completed in these services."*

25. By referring to the said rules which prevailed prior to the amendment, Mr. Dwivedi, learned senior counsel contended that as the High Court having understood the extent to which the rule of reservation can be adopted, as could be seen from the un-amended Rule by which the relevant Government Order prescribed the extent of reservation for Scheduled Castes and Scheduled Tribes etc., was specifically adopted by way of Appendix 'B'. The Government order itself was annexed as Appendix 'B' to Rule 7 and thereby, there was no scope for any controversy. According to learned counsel similar such method should have been followed if the rule of reservation is to be applied.

26. According to the learned senior counsel, after Rule 7 was amended, when the Rule specifically stated that it would be in order for the High Court to apply the rule of reservation in accordance with the order of the Government as adopted by the High Court, the extent to which any

application of rule of reservation could have been only by way of adoption of any order of the Government of Uttar Pradesh prescribing the rule of reservation and not the adoption of the whole of Reservation Act, 1994. The learned senior counsel, therefore, contended that the High Court could not have validly adopted the Reservation Act, 1994 by applying Rule 7 of the High Court Rules.

27. Though in the first blush, such a contention of the learned senior counsel appears to be appealing, on a deeper scrutiny, it must be stated that the said contention cannot be countenanced. It is true that in the present Rule 7 also it is specifically mentioned that adoption of the rule of reservation can be made in accordance with the 'orders of the Government' as adopted by the High Court. It must be stated, at the very outset, that it is not the case of the appellants that there were any specific orders of the Government providing for the extent of reservation for different categories, in particular, for Scheduled Castes, Scheduled Tribes and Other Backward Classes. No such specific Government order was either referred to or relied upon before the High Court. No such orders were also brought to our notice to support the said contention.

28. Be that as it may, as far as the High Court was concerned, the stand was that the entirety of the Reservation Act, 1994 was adopted and, therefore, whatever stipulations contained in the Act relating to reservation was applicable as adopted. It will be relevant to note the extent of reservation provided after the Reservation Act, 1994 came into force.

Section 3(1) of the said Act with the relevant provisos is relevant for our purpose which reads as under:

> *"3(1)* ***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 per cent;* |
> | *(b) in the case of Scheduled Tribes* | *Two per cent;* |
> | *(c) in case of Other Backward Classes Of citizens* | *Twenty seven per cent:* |
>
> *Provided that the reservation under clause (c) shall not apply to the category of Other Backward Classes of citizens specified in Schedule II:*
>
> *Provided further that reservation of vacancies for all categories of persons shall not exceed in any year of recruitment fifty per cent of the total vacancies of that year as also fifty per cent of the cadre strength of the service to which the recruitment is to be made."*

29. It must be stated that what was provided by way of reservation for different categories including the Scheduled Castes and Scheduled Tribes etc., prior to the coming into force of 1994 Act, has been brought into an Act by way of substantive provision under Section 3(1). It must, therefore, be stated that what was provided in the form of Government Order prior to the Reservation Act, 1994 apparently appeared to have been specifically spelt out in Section 3(1) itself, by providing a reservation of 21% for Scheduled Castes, 2% for Scheduled Tribes and 27% for Other Backward Class citizens. Therefore, if any Department of the State including the High Court were to adopt the prescribed rule of reservation after the coming into

force of the Reservation Act, 1994, such adoption can be only by way of adopting the relevant provision viz., Section 3(1) of the Act. After the emergence of the Reservation Act, 1994, the application of Rule 7 of the High Court rules can be only by way of adopting the statutory prescription contained in Section 3(1). Therefore, it will have to be held that the High Court would be well in order in adopting the said statutory prescription contained in the Reservation Act 1994 for the purpose of complying with the rules of reservation. We do not find any other scope for the High Court to look for any Government order for the purpose of applying the rule of reservation. Further when Section 3(1) of the Reservation Act, 1994 specifically provides for the extent of reservation for Scheduled Castes and Scheduled Tribes and Other Backward Classes in the matter of said services, there is no reason why the High Court should search for any other Government Order for the purpose of complying with the rules of reservation.

30. As was stated by us earlier, our attention was not drawn to any other Government Orders other than what was found in appendix 'B' under the erstwhile Rule 7 which prescribes the rule of reservation or the extent of reservation for Scheduled Castes and Scheduled Tribes and Other Backward Classes in order to state that the High Court could have only adopted any such order and not looked for the Reservation Act 1994 for the purpose of applying the rule of reservation. Therefore it must be stated that the High Court was well justified in applying the extent of reservation

prescribed in the Reservation Act, 1994 by invoking the existing Rule 7 of the High Court Rules. By relying upon the judgment reported in ***Pashupati Nath Sukul (supra)*** **para 13,** the learned standing counsel for the High Court contended that when the expression "Government" under the Constitution would include the Legislature, Executive and the Judiciary and the Act passed by the Legislature should nonetheless be construed and held on par with the orders of the Government. In support of the said submission, the learned counsel also relied upon Article 13(3)(a) of the Constitution of India, which states that the "law" would include any ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law. The learned standing counsel therefore contended that as per Article 13(3)(a), the order of the Government would include the laws of the State as in force and when the Reservation Act, 1994 is a law, it must be stated that such a law can very well be held to be one which falls within the scope of amended Rule 7 of the High Court Rules.

31. For the sake of argument, even if we ignore such an extended contention made on behalf of the High Court by relying upon Article 13(3)(1) of the Constitution, we are convinced that having regard to the specific prescription providing for reservation under Section 3(1) of the Reservation Act, 1994 and there being no other specific order of the Government providing for reservation in any other manner and as stated by us no other specific order of the Government, as was previously issued viz., the one

dated 18.07.1972 after the emergence of the Reservation Act of 1994, we hold that for all practical purposes the usage of the expression 'order' in Rule 7 is only referable to the provision for reservation as contained in Section 3(1) of the Reservation Act, 1994. Therefore if the said Act was adopted by the High Court in exercise of its powers under Rule 7, that would be sufficient for applying the rule of reservation. Therefore, we hold that in the event of valid adoption of the rule of reservation of the Reservation Act of 1994 by the High Court by exercising its power under Rule 7 of the High Court Rules the same would be valid and in accordance with law.

32. The next contention of the learned senior counsel for the appellants is that the High Court cannot be said to have validly adopted the provision for reservation as provided under the Reservation Act of 1994 in order to gain any advantage for applying the rule of reservation with reference to the recruitment made in the year 2009.

33. When we consider the said question, it is necessary to deal with the grievance of the appellants as to the non-consideration of their stand by the Division Bench about there being no adoption of rule of reservation by the High Court as provided in Rule 7 of the High Court Rules. In that context, the learned senior counsel for the appellants referred to certain earlier orders passed by the High Court. While expressing the said grievance Mr. Dwivedi, the learned senior counsel for the appellants brought to our notice the order passed by the Division Bench of the High Court dated 21.12.2011,

02.01.2012 and 03.01.2012. In the order dated 21.12.2011, the Division Bench referred to the stand of the appellants based on Section 3(2) & (3) of the Reservation Act, 1994 and the amended Rule 7 of the High Court Rules to the effect that whatever provision for reservation has been adopted earlier by the High Court would alone apply and that vacancies of the direct recruit could not be carried forward, and that the unfilled reserved category vacancies of the direct recruit could be filled up from the general category candidates. The Division Bench after noticing the said submission also referred to the Full Court resolution and directed the High Court to place the Full Court resolution for consideration on the next hearing date. Thereafter in the order dated 02.01.2012, the excerpts of the Full Court meeting dated 09.01.2010, containing the resolution on Agenda Item No.2 was taken on record and it was further directed that the report dated 24.12.2009 and supplementary report dated 09.01.2010 along with the note dated 24.12.2009 of the Registrar (Selection and Appointment) was directed to be produced to appreciate the arguments as to whether the carry forward rule was adopted by the High Court or not. But on 03.01.2012, the order of the Division Bench merely mentioned that the matter was heard and the judgment was reserved.

34. While referring to the above referred to proceedings of the Division Bench of the High Court, the learned senior counsel brought to our notice the reference to proceedings of the Full Court dated 11.12.2012, which was relied upon by the Division Bench in the impugned judgment and

contended that such reliance was placed upon by the Division Bench without giving due opportunities to the appellants.

35. The learned senior counsel contended that the appellants were unaware of any of the said resolutions passed by the Full Court in order to place their submissions as to whether such Full Court proceedings really fulfilled the requirements of valid adoption of the rule of reservation as stipulated in Rule 7 of the High Court Rules.

36. Initially, when we heard the Special Leave Petitions, we directed the learned standing counsel appearing for the High Court by our order dated 28.10.2014 after taking note of the stand of the learned standing counsel for the High Court that on 10.04.2004 by the Full Court Resolution the report of a Committee constituted earlier to provide for reservation in the appointment of various posts in the subordinate judiciary was accepted, we directed the High Court to place it before us. The appellants were given time to examine the said report filed before this Court for the first time on behalf of the High Court and thereafter make the submissions.

37. Subsequently, when these appeals came up for hearing on 05.11.2014, Mr. Ashok Srivastava learned standing counsel for the High Court offered his apologies for not filing the proper proceedings of the High Court and contended that he would file the relevant documents by which the rule of reservation was accepted and adopted by the High Court in the Full Court proceedings and sought for time. We could have very well set

aside the order of the Division Bench and remanded the matter back to the High Court for consideration of the said issue on merits after giving due opportunity to both the parties. Since the issue pertains to the recruitment and appointment of candidates to Higher Judicial Service of the vacancies notified in the year 2009, we thought it fit to direct the learned standing counsel for the High Court to produce the relevant proceedings before us with a view to give full fledged opportunity for the learned senior counsel for the appellants to make his submission based on any such materials that may be placed before us in order to decide the issue once and for all in these proceedings. We, therefore, directed the learned standing counsel for the High Court to file necessary affidavit along with the documents by serving advance copies on the counsel for the appellants.

38. Pursuant to our orders, the High Court filed its affidavit sworn to by the Registrar General of the High Court at Allahabad dated 28.11.2014, along with annexures 1 to 9. By placing reliance on these annexures, the learned standing counsel for the High Court submitted that the provision for reservation was validly adopted by the High Court as provided under Rule 7 of the High Court Rules. Since whatever proceedings relating to the adoption of the rules of the reservation based on which the selection and appointment of the year 2009 of the higher judicial service was made by the High Court, we asked the learned senior counsel for the appellants to make his submissions based on the said materials placed before this Court.

39. Before considering any submissions, it will be worthwhile to refer to

the proceedings placed before us on behalf of the High Court vide Annexure – II viz., the minutes of the meeting of the Selection and Appointments Committee dated 24.03.2009. In Agenda Item No.III, the various vacant positions in different categories viz., General Turn, Scheduled Castes, Scheduled Tribes and Other Backward Classes alongside the existing strength were all noted and ultimately the Committee resolved to initiate the process of recruitment for all the three streams as per the Uttar Pradesh Higher Judicial Service Rules, 1995 including the carry forward of 41 vacancies. Ultimately the resolution further stated as under:-

> *"To break up of 41 carry forward vacancies, details of which have been given above, shall also be filed up by simultaneous recruitment. The recruitment of carry forward vacancies shall be made in their respective reserve category as indicated in the chart mentioned above. The vacancies shall be filled up applying reservation as per the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 as amended up to date. The current vacancies in different categories should be reserved are like this."*
>
> ***(emphasis added)***

40. Lastly, the resolution stated that the Committee resolved to the extent that after the Full Court determine the vacancies, necessary advertisement informing applications against 41 carry forward + 27 vacancies would be published.

41. Thereafter, under Annexure No.3, the proceedings of the Full Court by way of circulation to consider the Agenda viz., the determination of vacancy under Rule 8 of the Uttar Pradesh Higher Judicial Service Rules, 1975 was circulated. Under the said annexure, the proceedings of the

Selection and Appointment Committee dated 24.03.2009, along with the office note was circulated for the opinion of the Hon'ble Judges. Out of 71 Judges, 50 Judges expressed their opinion agreeing to the whole of the resolution of the Selection and Appointment Committee while 21 of them did not express any opinion. Under Rule 7 of Chapter III of the Rules of the Court, if a Judge failed to send his opinion in writing within a week, he shall be deemed to have declined to express any opinion in the matter. Based on the opinion of the majority of the Hon'ble Judges approving of the resolution of the Selection and Appointment Committee, the whole proceedings was approved by the Chief Justice signifying the approval expressed by the Full Court.

42. We heard the submissions based on the above proceedings placed before this Court on behalf of the High Court to find out whether such a course adopted by the High Court can be said to have validly adopted the provisions for reservation in the matter of appointment for the post of Higher Judicial Services which was held in the year 2009. Mr. Dwivedi, learned senior counsel for the appellants contended that there was no specific adoption made by the Full Court with reference to the nature of reservation to be provided in the matter of filling up of the post of Higher Judicial Service.

43. According to the learned senior counsel under Rule 7 of the High Court Rules, it is specifically provided that such adoption should be for reservation in accordance with the Order of the Government. The learned

senior counsel contended that there is no specific reference to the percentage of reservation in respect of Scheduled Casts, Scheduled Tribes or Other Backward Classes having been adopted either by the Selection Committee or by the Full Court with particular reference to any Order of the government. The learned senior counsel would, therefore, contend that in effect, there was no adoption made by the High Court to provide for reservation and consequently no such reservation can be held to have come into effect. Here again, though the submission appears to be sound, having regard to the proceedings of the Selection and Appointment Committee as well as that of the Full Court resolution, the details of which, when we refer to with some amount of serious look to those proceedings, we are convinced that there was sufficient compliance of the requirements of Rule 7 of the High Court Rules in the matter of adoption of the rules of reservation. The relevant part of amended Rule 7 is to the following effect:

> *"....shall be in accordance with the orders of the Government for reservation <u>as adopted</u> by the High Court."*
>
> ***(emphasis added)***

44. While dealing with the second submission made on behalf of the appellants, we have held that the rule of reservation and the extent of reservation has been specifically spelt out in Section 3(1) of the Reservation Act, 1994. We have also held that apart from such prescription contained in Section 3(1) of the Reservation Act, 1994, no other Government order or any other prescribed notification was placed before us in order to hold that while applying Rule 7, the High Court was expected to consider any such order or notification issued by the Government. Therefore, while invoking

Rule 7 of the High Court Rules, if at all the High Court wanted to adopt the rule of reservation, the same can only relate to what has been prescribed under the Reservation Act of 1994, in particular Section 3(1) of the said Act. The said conclusion of ours is inescapable in the context of the provisions relating to rule of reservation in the State of Uttar Pradesh.

45. The only other aspect to be considered is what was the rule relating to reservation which was adopted by the High Court. In that context, when we read the resolution of the Selection and Appointment Committee dated 24.03.2009, after referring to the vacancies that existed which were to be filled up in the year 2009, the Selection Committee expressly resolved as under:

> *".....The vacancies shall be filled up applying reservation as per the Uttar Pradesh Public Services (Reservation for Scheduled Casts, Scheduled Tribes and Other Backward Classes) Act, 1994 as amended up to date....."*

46. In the light of the said resolution passed by the Selection and Appointment Committee constituted by the High Court, there can be no two opinions that by the said resolution the rule of reservation as prescribed under Section 3(1) of the Act was decided to be followed by the High Court. Consequently, if the proceedings of the Full Court pursuant to the direction of the learned Chief Justice dated 31.03.2009, approved the resolution of the Selection and Appointment Committee, as per the Rules of the Courts, it must be held that a reading of the resolution of the Selection Committee and the resolution of the Full Court together would constitute a valid

adoption as contemplated under Rule 7 of the High Court Rules.

47. We have elaborately set out the nature of the resolution passed by the Full Court by way of circulation. Out of 71 Judges, 50 Judges of the High Court expressed their support to the resolution of the Selection and Appointment Committee dated 24.03.2009 and such an expression made by majority of the Judges was ultimately approved by the learned Chief Justice by affixing his signature on 10.04.2009. In the light of the said proceedings, we hold that the High Court adopted the rule of reservation as per the Reservation Act, 1994 which was well within the prescription contained in Rule 7 of the High Court Rules. The said course adopted by High Court is also in consonance with the various principles laid down in the Constitution Bench decision of this Court reported in ***State of Bihar v. Bal Mukund Sah (supra)***.

48. Once we are able to satisfactorily reach the said conclusion what falls for consideration is the next submission of the learned senior counsel appearing for the appellants as to whether the High Court was justified in filling up unfilled posts of reserved category by way of promotion of in-service candidates.

49. In order to appreciate the submissions so made on behalf of the appellants, the relevant provisions contained in the Reservation Act, 1994 as well as Rule 8 of the High Court Rules are required to be examined. Section 3(2) of the Reservation Act which deals with the manner in which

unfilled vacancies of different reserved categories are to be filled up has been set out, which reads as under:

> *"3(2) If, in respect of any year of recruitment any vacancy reserved for any category of persons under sub-section (1) remains unfilled, such vacancy shall be carried forward and be filled through special recruitment in that very year or in succeeding year or years of recruitment as a separate class of vacancy and such class of vacancy shall not be considered together with the vacancies of the year of recruitment in which it is filled and also for the purpose of determining the ceiling of fifty per cent reservation of the total vacancies of that year notwithstanding anything to the contrary contained in sub-section (1)."*

50. While referring to Section 3(2) of the Reservation Act, 1994, we should also simultaneously refer to Rule 8(2) of the High Court Rules which reads as under:

> *"8(2) If at any selection the number of selected direct recruits available for appointment is less than the number of recruits decided by the Court to be taken from that source, the Court may increase correspondingly the number of recruits to be taken by promotion from the Nyayik Sewa.*
>
> *Provided that the number of vacancies filled in as aforesaid under this sub-Rule shall be taken into consideration while fixing the number of vacancies to be allotted to the quota of direct recruits at the next recruitment, and the quota for direct recruits may be raised accordingly; so, however, that the percentage of direct recruits in the service does not in any case exceed 25% of strength of the service."*

51. At the very outset, it must be stated that if Rule 8(2) were to be applied, on its own, it will have a direct impact on the prescription contained in Section 3(2) of the Reservation Act, 1994. When we consider Section 3(2), a little more elaborately, the said sub-Section under the Reservation Act, 1994 prescribes that any unfilled reserved vacancy should be carried forward and filled through special recruitment in that very year

or in succeeding year or years of recruitment as a separate class of vacancy. It also states that such class of vacancy should not be considered together with the vacancies of the year of recruitment in which it is filled, meaning thereby the vacancies that exist in any subsequent year or years of recruitment. It further stipulates that for the purpose of deciding the maximum percentage of reservation viz., 50% of the total vacancies such carry forward vacancies should never be counted. At the risk of repetition, it will have to be stated that in the first instance going by Section 3(2), any unfilled reserved vacancies arising in the process of recruitment, a special recruitment should be made in that very year itself. In fact it was brought to our notice that by an order passed in I.A.No.87 of 2010, dated 15.11.2010 of this Court, the High Court was directed that the special recruitment should be made in that very year itself. According to the learned senior counsel for the High Court, such an exercise was carried out but yet the posts could not be filled up in that very year from the reserved category.

52. When we come to the next stage to be carried out as provided under Section 3(2), the High Court should have carried forward the unfilled vacancies of the reserved category in the succeeding year or years of recruitment as a separate class of vacancy. Therefore, applying Section 3(2), there is no scope for filling up of any of those unfilled vacancies of the reserved category of any particular recruitment year by the candidates belonging to any other categories either of Direct recruitment source or by

any other source viz., from the in-service candidates by way of regular promotion or by way of special merit promotion.

53. Keeping the said prescription as provided in Section 3(2) in mind, when we examine the provision contained in Rule 8(2) of the High Court Rules, it is specifically provided that in respect of direct recruitment if the selected candidates from the direct recruitment available for appointment was less than the number of candidates to be recruited from that source, the High Court could correspondingly increase the number of recruits to be taken by way of promotion from the Nyayik Sewa viz., in-service candidates.

54. When we consider the application of Section 3(2) of the reservation Act of 1994 a further question arises as to whether the application of the said Section can be made in the matter of recruitment for the post of direct recruit District Judges. In this context, the principles set down by the Constitution Bench of this Court require to be noted:

> (l) Having regard to Article 16(4), the High Court being a high constitutional functionary would also be alive to its social obligations and the constitutional guideline for having a scheme of reservation to ameliorate the lot of deprived reserved categories like SC, ST and OBC. But for that the Governor in consultation with High Court should make appropriate rules and provide for a scheme of reservation for appointments at grass root level and even at the highest level of district judiciary. If that was not done, the State Legislature cannot upset the entire apple cart and by bypassing the constitutional mandate of Articles 233 and 234 lay down a statutory scheme of reservation governing all state services including judiciary.
>
> (m) Even in that respect it is obvious that maintenance of efficiency of judicial administration is entirely within the control and jurisdiction of High Court as laid down by Article 235.

(n)If the proper course of formulating the scheme in the form of a rule by the High Court to provide for reservation is not made, that would deprive of the right to suggest the consultative process by way of its own expertise that for maintenance of the efficiency of administration of judicial service controlled by it 50% reservation may not be required and/or and even lesser reservation may be required or even may not be required at all."

55. Keeping the said principles in mind when we consider, even though the High Court having taken into account the constitutional mandate as prescribed under Articles 16(1), 16(4) and 335 and specifically provided in Rule 7 for applying the rule of reservation by adopting the same, the question is as to what extent the High Court decided to adopt the rule of reservation. In this context, when we refer to the specific content of Rule 7, it specifically provides that reservation to post in the service for the members of SC, ST and other categories including women should be in accordance with the orders of the Government for reservation "as adopted" by the High Court. Therefore, even while applying the rule of reservation, it must be seen as to what extent the High Court chose to adopt the rule of reservation. When we refer to the resolution of the Full Court by which we have found that the High Court decided to apply the rule of reservation, we have to in turn refer to the resolution passed by the selection and appointment committee dated 24.3.2009 which resolution was adopted by the Full Court and that is how the rule of reservation came to be implemented. The said resolution of the selection and appointment committee specifically mentioned that the 'vacancies' should be filled up applying the 'reservation' as per the Reservation Act of 1994 as amended up

to date.

56. We are, therefore, clear of the position that what was adopted was 'reservation' simplicitor and not other consequences. Therefore, there is no question of invoking Section 3(2) of the Reservation Act, 1994 relating to consequential action to be taken if the posts of direct recruit District Judges are not filled up. Section 3(2) only prescribes as to the manner in which unfilled reserved seats are to be filled up by resorting to fresh selection in that very year and in the event of the posts still not being filled up, continue to retain the posts in the reserved category and notify the same in the subsequent years for being filled up. Such a consequence cannot be stated while applying Rule 7 of the High Court Rules which merely refers to provision for reservation and nothing more. Insofar as provision for reservation is concerned, in the absence of any Government order prescribing reservation, the only provision available is Section 3(1). Section 3(2) is only a methodology to be followed for filling up the unfilled reserved posts. As far as the said methodology in respect of the unfilled reserved posts of direct recruit District Judges is concerned, it is governed only by Rule 8. In fact, even by applying Rule 8(2) by virtue of the proviso to the said Rule, the interest of the reserved category candidates is sufficiently safeguarded which is preserved and filled up in the selection to be made in the future years.

57. Therefore, if we consider the adoption made by the High Court, as regards the rule of reservation, we find that what was adopted was to apply

the 'RESERVATION' as provided under the Reservation Act of 1994 while filling up the vacancies of direct recruit District Judges. In other words, the High Court chose to adopt the prescription of various percentage of 'reservation' in the Reservation Act of 1994 and stop with that. To put it differently, what was adopted by the High Court was to the limited extent of providing the prescribed percentage of 'reservation' under Section 3(1) of Reservation Act of 1994 and nothing beyond that. Since the principles laid down in the Constitution Bench decision of this Court succinctly stated as to how Articles 233 to 235 of the Constitution empower the High Court to maintain its independent functioning by allowing its recruitment process by prescribing its own limitations and not to be affected by even a statutory prescription relating to reservation, it must be stated that in order to ensure that the independence of institution of judiciary is safeguarded, such a strict construction of its decision pertaining to the rule of reservation must be maintained or otherwise, as cautioned by this Court in the Constitution Bench decision, that would impinge upon the very basic structure of the Constitution vis-à-vis the judiciary.

58. Therefore, we hold that by virtue of the adoption of the rule of reservation by invoking Rule 7 when the High Court decided to apply only to the extent of prescribed percentage of 'reservation' for different categories, namely, SC, ST and OBC as provided under Section 3(1) of the Reservation Act 1994 in all other respects, it must be held that it would be governed by its own rule namely the rules of the High Court pertaining to the judicial

service. In this context, a question may arise that earlier this Court directed the High Court in its order dated 15.11.2010 passed in IA 87 of 2010 to go in for a special recruitment in that very year itself which was apparently based on the prescription contained in Section 3(2) of the Act and by going by that direction should it not be held that the said procedure should follow for all time to come. It will have to be stated that the said order passed in an IA cannot be taken as a final statement of law when the legal principle has been succinctly set out with reference to the application of rule of reservation in so many words in the decision of the Constitution Bench of this Court. Therefore, based on the said order, it cannot be held that various other provisions contained in the Reservation Act of 1994 would get attracted.

59. When the said legal position can be stated without any scope for contradiction, what remains to be considered is the scope of application of Rule 8 (2) and the proviso attached to that sub-rule. In this context, we have to go by the decision of this Court reported in ***Ashok Pal Singh (supra)*** wherein this very Rule 8(2) came up for consideration. In the said decision while considering the purport and intent of Rule 8 (2), it was held that the same was not to dilute or change the quota of direct recruits. It further held that its object is to ensure that no vacancy remains unfilled for want of adequate number of direct recruits under the prescribed quota. While holding so, this Court noted that there were reasonable chances of adequate number of candidates being not available for direct recruitment

whereas usually sufficient number of candidates will be available for promotion. It also made further clear that the proviso to Rule 8(2) ensures that the short fall in quota for direct recruits in any recruitment does not get permanently converted to promotee quota by providing that the short fall should be made at the next recruitment. Again in para 40, it was reiterated that all vacancies which are not filled by direct recruitment would get filled up by promotion and that the limited carry over unfilled direct recruitment vacancies are in the manner stated in Rule 8(2) and the proviso thereto. From what has already been held by this Court, it was made clear that under Rule 8(2) since the object was to ensure that no vacancy remains unfilled, for want of adequate number of direct recruits under the prescribed quota sufficient safeguard is provided in the proviso to Rule 8(2) by which those unfilled vacancies to be carried forward in the future years to be filled only through direct recruitment. To that extent, there is no scope for any controversy.

60. In the case on hand, it is not in dispute that after the special recruitment was made in respect of unfilled reserved vacancies, the High Court proceeded to fill up all the unfilled vacancies of the direct recruits in the reserved category and those posts were all filled up by promoting the members of the Nyayik Sewa viz., in-service candidates. While referring to Rule 8(2) Mr. Dwivedi, learned senior counsel for the appellants contended that when Rule 8(2) specifically states that at any selection the number of selected direct recruits available for appointment is less than the number of

recruits decided by the High Court to be taken from that source meaning thereby the source of direct recruitment then and then alone, the High Court was empowered to look upon the members of Nyayik Sewa viz., in-service candidates for their promotion to the post of Higher Judicial Service.

61. The question raised on behalf of the appellants was that since Rule 8(2) specifically refers to the source and when the direct recruitment source candidates belonging to general category are available, only in the absence of any candidates from the general category or any other category, then alone the High Court could have resorted to filling up the unfilled vacancies of reserved category by promotees.

62. It is well settled principle of law as has been laid down by this Court in the decision relied upon by learned counsel for the High Court, namely, the Constitution Bench decision reported in ***R.K. Sabharwal (supra)*** wherein it has been held as under in para 4:

> "No general category candidate can be appointed against a slot in the roster which is reserved for the backward class."

63. Therefore, when the posts were reserved for the SC, ST, filling up of those posts from the general category candidates would seriously affect the rule of reservation, as once the posts of direct recruit are filled up from other category candidates even the carrying forward of those vacancies as provided under the proviso to Rule 8(2) cannot be operated upon. In other

words, by applying Rule 8(2) in the event of vacancies remaining due to non-availability of the candidates of the reserved category and such vacancies were filled up by the 'in service candidates' by resorting to promotion, the proviso can be conveniently operated upon by carrying forward those vacancies in the future years in the direct recruit source and by maintaining the rule of reservation to the extent it could not be filled up in the relevant recruitment years. If instead of resorting to promotion of 'in service candidates' those unfilled reserved vacancies are filled from the general category candidates there would be no scope for applying the proviso to Rule 8(2). Such a contingency created would run counter to the rule of reservation and, therefore, the same cannot be countenanced.

64. We have to, therefore, hold that the High Court by adopting the Reservation Act, 1994 adopted the rule of reservation to the full extent provided for and as prescribed under Section 3(1) of the Reservation Act, 1994 and that in respect of any unfilled vacancies of that category, the High Court rightly resorted to the prescription contained in Rule 8(2) by resorting to filling up of such vacancies by special recruitment in that year as directed by this Court and in the absence of not getting such vacancies filled up by resorting to such filling up by promotion of 'in service candidates' and also by applying the proviso to Rule 8(2) and thereby carry forward those vacancies in the future years of recruitment.

65. Keeping the said legal principle relating to applicability of Section 3(1) of the Reservation Act, 1994 vis-à-vis Rules 7 and 8(2) of the High

Court Rules in mind, when we consider the last of the submissions made on behalf of the appellants, it must be held that the action of the High Court in having resorted to filling up of the unfilled reserved vacancies by taking umbrage under Rule 8(2) was perfectly justified. The said action of the High Court in having filled up those unfilled reserved vacancies of direct recruitment of the year 2009 was stated to have been made by promoting the in-service candidates. Though we have found that such a course adopted by the High Court was in order, as the proviso to Rule 8(2) specifically mandates that while fixing the number of vacancies to be allotted to the quota of direct recruitment at the next recruitment, it should be raised accordingly. We are of the view, without disturbing whatever promotions already made by resorting to Rule 8(2), the High Court can be permitted to provide that number of vacancies which remained unfilled in the year 2009 in the reserved category of direct recruit source by adding that number of vacancies in the recruitment to be made in the future years until such number of vacancies of unfilled reserved category pertaining to 2009 are filled.

66. With the above limited directions to the High Court, we do not wish to meddle with the promotions already made. We do not find any scope for granting any relief to the appellants, as none of the submissions raised on behalf of the appellants, which were though not considered by the Division Bench of the High Court and which were also dealt with by us *in extenso*

and we find no merit. These appeals, therefore, fail and the same are accordingly dismissed.

.....J.
[Fakkir Mohamed Ibrahim Kalifulla]

.....J.
[Abhay Manohar Sapre]

New Delhi;
February 17, 2015.

ITEM NO.1A (For Judgment) COURT NO.8 SECTION XI

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

C.A. NOS...../2015 @
Petition(s) for Special Leave to Appeal (C) No(s).11924-11925/2012

(Arising out of impugned final judgment and order dated 02/03/2012 in CMWP No. 20566/2010 & CMWP No. 57625/2010 passed by the High Court of Judicature at Allahabad)

NAWAL KISHOR MISHRA & ORS. ETC. Petitioner(s)

VERSUS

HIGH COURT OF JUDICATURE AT ALLAHABAD
THROUGH ITS REGISTRAR GENERAL & ORS ETC. Respondent(s)

WITH
C.A. NOS...../2015 @ SLP(C) No. 18597-18598/2012
C.A. NOS...../2015 @ SLP(C) No. 26015-26016/2012

Date : 17/02/2015 These appeals were called on for pronouncement of judgment.

For Petitioner(s) Ms. Minakshi Vij,AOR

Mr. P. K. Jain,AOR

Mr. Mushtaq Ahmad,AOR

For Respondent(s) Mr. Ashok K. Srivastava,AOR

Mr. Som Raj Choudhury,Adv.
Mr. Abhisth Kumar,AOR

Hon'ble Mr. Justice Fakkir Mohamed Ibrahim Kalifulla pronounced the judgment of the Bench comprising His Lordship and Hon'ble Mr. Justice Abhay Manohar Sapre.

Leave granted.

The appeals are dismissed in terms of the signed judgment.

(NARENDRA PRASAD) (SHARDA KAPOOR)
COURT MASTER COURT MASTER
(Signed 'Reportable' Judgment is placed on the file)