

Allahabad High Court

Sarika vs State Of U.P. And Ors. on 24 February, 2005

Equivalent citations: 2005 (4) ESC 2378

Author: S Ambwani

Bench: S Alam, B Chauhan, S Ambwani

JUDGMENT Sunil Ambwani, J.

1. In Vinod Kumar Rai v. Public Service Commission, U.P., Allahabad, 2002 (2) ESC 143 (All), a Division Bench of this Court held that the Full Court of the Allahabad High Court in its resolutions dated 17.3.1993 and 7.3.1998 while approving the draft Rules for making U.P. Judicial Service Rules, 2001, had given consent for reservation in favour of physically disabled persons in recruitment to the judicial service, and thus there is 3% reservation in favour of physically disabled persons in accordance with U.P. Public Service (Reservation for Physically Disabled, Dependents of Freedom Fighters and Ex-Servicemen) Act, 1993 (U.P. Act No. 4 of 1993). The Division Bench further held that this reservation for physically disabled persons must be read harmoniously with Rule 20 of the U.P. Judicial Service Rules, 2001, which provides that no person should be appointed as member of the service unless he be in good mental and bodily health and free from any physical defect likely to interfere with the efficient performance of his duties as a member of the service. The benefit of the reservation could, however, be given to only those persons, who are free from any physical and mental defect which may interfere with efficient performance of their duties if appointed to the judicial service, and this must be certified by the Medical Board set up for this purpose. The Division Bench directed that the total vacancies for the 3% reservation should be advertised together and those who would have been eligible for the post on the relevant time, should be treated as eligible and they can now apply for the same and in future also 3% reservation for physically handicapped persons should be provided.

2. In Sarika v. State of U.P, and Ors., (Civil Misc. Writ Petition No. 55266 of 2003), a Division Bench hearing the matter of recruitment to judicial service of the year 2003, did not agree with the conclusion reached in Vinod Kumar Rai's case, and referred the following questions for consideration by a Larger Bench :

(1) Whether Section 3 (1) (ii) of Act, 1993 as amended by the U.P, Act No. XXIX of 1999 entitles the physically handicapped candidate to claim reservation for physically handicapped persons in the posts of Civil Judge (Junior Division) in the absence of the requisite identification of the post in question, extending to it the benefits of such reservation?

(2) Whether the State Government has or it. was permissible for it to have identified the post of Civil Judge (Junior Division) by issuing a notification as contemplated in Section 3 (1) (ii) of 1993 Act as one of the post for which reservation was to be provided for persons suffering from disabilities (Physically handicapped persons) in view of the resolutions of the Administrative Committee dated 8.12.1979 and 31.1.1981 and the decision of the Court dated 20.1.1982, which had been accepted by the State Government?

(3) Whether the Full Court vide its resolutions dated 17.7.1993 and 7.3.1998 can be deemed to have given its concurrence to the State Government for providing reservation for physically handicapped persons in the posts of Civil Judge (Junior Division)?

(4) Whether the Division Bench judgment of this Court in the case of Vinod Kumar Rai. v. Public Service Commission, U.P. Allahabad and Ors., 2002 (2) ESC 143, does not lay down the correct law?

3. We have heard Sri Ash ok Khare, learned senior Advocate, assisted by Sri Pankaj Kumar Tyagi and Ms. Archana Tyagi for petitioners and Sri Sudhir Agarwal, Additional Advocate General for the State. Sri Amit Sthelekar appears for the Registrar General, High Court, Allahabad. All the parties have given their consent that the writ petition may also be heard alongwith the reference.

4. The brief facts giving rise to the issues involved and to be resolved by this Full Bench are stated as below :

"The U.P. Public Service Commission issued an advertisement No. A-2/E-1/2003 inviting application for U.P. Judicial Service Civil Judge (Junior Division) Preliminary Examination, 2003. Out of 347 advertised vacancies, 73 are reserved for Scheduled Caste candidates, 7 for Scheduled Tribes and 94 for Other Backward Classes candidates. A reservation benefit for 2% has been provided for the dependents of freedom fighters, and 1% to Ex Army personnels. The advertisement provides that according to nature of posts the benefits of reservation to physically handicapped persons in U.P. is not admissible."

5. The petitioner, Sarika claims to be physically disabled person with locomotor disability to the extent of 70%, as she had suffered from polio. She claims herself to be eligible and qualified for the post of Civil Judge (Junior Division), She has relied upon the provisions of U.P. Public Services (Reservation for Physically Handicapped, Dependents of Freedom Fighters and Ex-Servicemen) Act, 1993, as amended in 1997 (in short U.P. Act No. 4 of 1993), which is applicable to recruitment in, public services in U.P. by direct recruitment. The Division Bench, in its order dated 23.1.2004 found that the reservation under Section 3 (1) (ii) to the Physically handicapped persons at 3% divided into three sub-categories namely blindness or low vision; hearing impairment; and locomotor disability or cerebral palsy, is applicable at the stage of direct recruitment, shall be in such public services and posts as the State Government may, by notification, identify. The identification of the public service and posts for such reservation is a pre-condition for providing the reservation. Section 32 of the Persons with Disabilities (Equal Opportunity, Protection of Rights and Full Participation) Act, 1995 (in short, Act No. 1 of 1996) also provides for the identification of the establishment and thereafter the posts for giving effect to the reservation for physically disabled persons. It was found that the resolutions dated 17.7.1993 and 7.3.1998 which have been extracted in the reference order, passed by the Full Court of the High Court did not specifically consider the question of providing reservation to physically handicapped persons in judicial service. The Full Court only approved the draft rules for judicial service namely the U.P. Judicial Service Rules, 2001. The Full Court did not review its earlier categorical stand that the reservation for physically disabled persons be not provided in judicial service. The new set of Rules were required to be framed by the High Court and in the new draft Rules the question of specifically providing reservation for physically disabled

persons was not considered and that the approval was given only to the draft Rules and amendments. It was found that this aspect of the matter needs further consideration.

6. In order to appreciate the issues, it is necessary to firstly set out a brief history of the law relating to reservation for physically disabled person in the State of U.P.

7. The State Government issued Government Orders dated 18.7.1972, 20.8.1977 and 25.5.1978 for providing reservations for physically handicapped persons in service of the State Government to the extent of 2%. This reservation is not applicable to judicial service without consulting the High Court. The State Government as such sent a letter to the High Court to express its desire for reservation for physically handicapped person in judicial service. The U.P. Nyayik Seva Niyamawali, 1951 provided for reservations in Rule 7. The Rule is quoted as below :

"Ride 7--Reservation of seats for Scheduled Caste.--The reservation, for Scheduled Castes etc. shall be in accordance with the orders for reservation in force at the time of recruitment."

8. The Administrative Committee of the High Court, considered the proposals of the State Government and resolved on 8.12.1989 that no such reservation can be provided in judicial service. The decision of the Court was communicated to the State Government by the High Court on 12.2.1980,

9. The State Government in the year 1980 again requested the Court: to reconsider its decision regarding reservation for physically disabled, persons in judicial service. The Court again considered the request and by its resolution dated 31.1.1981 of the Administrative Committee, rejected the proposals, which was communicated to the State Government vide letter dated 11.2.1981, Once again on 26.10.1981. the State Government required the High Court to inform as to what kind of disabled persons can be allowed appointment in judicial service by making provisions for reservations. The High Court once again informed the State Government vide letter dated 29.1.1982 that the Court, is not in favour of such reservations in judicial service. Finally the State Government by its letter dated 24.7.1982 communicated the acceptance to the Court's decision that no reservation for physically disabled person be made in judicial service. A new set of service Rules, for laying down service condition, on U.P. Judicial Officer in pursuance of decisions of the Supreme Court were proposed, and in the year 1985, the draft rules were sent for consultation of the High Court.

10. In the meantime the Supreme Court, in Data .Ram Tripathi v. State of U.P., 1986 (Supp) SCC 497, considered and directed reservation for physically disabled persons in Provincial Civil Service (Executive Branch). It was found by the apex Court that by Government Order dated 18.7.1972 and 20.5.1978 the Government of Uttar Pradesh had affirmed the reservation on 2% posts for appointment of disabled persons in all the sendees under the Government. In response to a letter from Public Service Commission, for identification of such posts, the State Government informed the Commission by its letter dated 1.3.1979 that none of categories of disabled persons were suitable for appointment to the U.P. Civil Service (Executive Branch), and that no reservation for disabled persons be made in the said service. It was held that the State Government had taken a decision by a Government Order dated 18.7.1972 to provide reservation to physically handicapped persons and

the necessity of making such appointment was impressed upon all Secretaries. Heads of the Departments and Commissioners, and it. was particularly brought to their attention that the year 1981, had been declared as 'the International Year for the Physically Handicapped Persons'. It was admitted that the vacancies should be carried forward and efforts should be made to ensure that the maximum number of physically handicapped persons were appointed and therefore, it was futile for the Government to say that the appellants cannot be appointed to the Provincial Civil Sendee (Executive Branch). In the words of Supreme Court, 'having announced their determination' very rightly too in its opinion, to rehabilitate physically handicapped persons by reserving posts for them in all the services of the Government, the Government cannot now create needless hurdle. The appeal was allowed giving direction to the Government of U.P. to appoint petitioner with all other service benefits.

11. After the judgment of Supreme Court in Day a Ram Tripathi's case some individuals again requested the State Government seeking reservation to physically disabled persons in judicial service and wanted the matter to be sent for consideration of the Court, and once again the Court vide resolution No. 5 dated 9.2.1988 resolved for not providing any reservation to the physically handicapped person in judicial service. The decision was conveyed to the State Government on 12.2.1988.

12. The draft rules for framing service conditions of the judicial service were finalised by three Judges Committee of this Court and were considered by the Full Court in its meeting dated 17.7.1993. These Rules were approved subject to certain modifications in Rules 9 and 10 relating to the academic qualification and to substitute the word 'relaxed' between the word 'fixed' occurring in between 'may be' and 'from time to time'.

13. There was no comprehensive legislation with regard to the rights of physically disabled persons, enacted either by Parliament or by State Legislature of Uttar Pradesh. The U.P. Act No. 4 of 1993 provided for reservation for physically handicapped person in public service and post in the affairs of the States, the respective quota of which was to be determined by the State Government from time to time by notified order. The Act did not define 'Public Service'. The word physically handicapped was defined in Section 2 (e) of the Act to mean a person : (i) who suffers from total absence of eye sight or for limitation of the field of vision subtending an angle of 20 degree or worse or whose visual acuity does not exceed 6/60 or 20/20 (snellen) in the better eye with correcting lenses; or (ii) whose sense of hearing is non-functional for ordinary purposes of life or who suffers from hearing loss of more than 90 decibels in the better ear (profound impairment) or total loss of hearing in both ears; or (iii) who has a physical defect or deformity which causes an interference with the normal functioning of the bones, muscles and joints.

14. A meeting to launch the Asian and Pacific Decade of the Disabled Persons, 1993-2002 convened by the Economic and Social Commission for Asian and Pacific Region, held at Beijing on 1st to 5th December, 1992 adopted the proclamation on the full participation and equity to people with disabilities in the Asia and the pacific region. India was signatory to this proclamation and found it necessary to enact a suitable legislation to provide for the social welfare obligation of the State towards the prevention of disabilities, protection of rights, provision of medical care, education,

training employment and rehabilitation of persons with disabilities; to create barrier free environment to remove any discrimination, to counteract any situation of the abuse and the exploitation, to lay down a strategies for comprehensive development of programme and service and equalisation of opportunities for persons with disabilities and to make special provision for the integration of persons with disabilities into the social mainstream. The Persons with Disabilities (Equal Opportunity, Protection of Rights and Full Participation) Act, 1995 (Act No. 1 of 1996) was as such enacted, to give effect to the proclamation. Sections 32 and 33 of this Act in Chapter VI provide for employment. These sections are relevant for the purpose of this reference and are quoted as below :

"32, Identification of posts which can be reserved for persons with disabilities.--Appropriate Governments shall--

(a) identify posts, in the establishments, which can be reserved for the persons with disability;

(b) at periodical intervals not exceeding three years, review the list of posts identified and up-date the list taking into consideration the developments in technology.

33. Reservation of Posts. --Every appropriate Government shall appoint in every establishment such percentage of vacancies not less than three per cent for persons or class of persons with disability of which one per cent each shall be reserved for persons suffering from--

(i) blindness or low vision; (ii) hearing impairment;

(iii) locomotor disability or cerebral palsy, in the posts identified for each disability :

Provided that the appropriate Government may, having regard to the type of work carried on in any department or establishment, by notification subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section."

15. In order to synthesise the State Act in tune with Central Act, U.P. Act No. 4 of 1993 was amended by U.P. Act No. 6 of 1997. The definition of physically handicapped persons was amended. The blindness or low vision, hearing impairment and locomotor disability were provided to be disabilities for reservation. Low vision was defined separately. The substituted Clause (f) of Section 2 provides that the words and expressions used but not defined in the Act and defined in the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1993, shall have the same meaning assigned to them in that Act. The expression 'Public Service' was thus given the same meaning as in U.P. Act No. 4 of 1993. Section 3 was also amended, providing for 3% reservation for physically disabled persons in such public service and posts as the State Government may by notification identify, with 1% of the vacancy for each category of the persons suffering from blindness or low vision, hearing impairment and locomotor disability or cerebral palsy. It was also provided in the substituted Sub-section (5) of Section 3 that where, due to non-availability of suitable candidates any of the vacancies reserved under Sub-section (1) remained unfilled it shall be carried over to the next recruitment. The amended Sub-section (3) is quoted as

below :

"3. Amendment of Section 3.--In Section 3 of the principal Act,--

(a) for Sub-section (1), the following Sub-section shall be substituted, namely :--

"(1) There shall be reserved at the stage of direct recruitment,--

(i) in public services and posts two per cent of vacancies for dependent of freedom fighters and one per cent of vacancies for ex-servicemen;

(ii) in such public services and posts as the State Government may, by notification, identify one per cent of vacancies each for the persons suffering from--

(a) blindness or low vision;

(b) hearing impairment; and

(c) locomotor disability or cerebral palsy."

(b) Sub-section (2) shall be omitted;

(c) in Sub-section (3) for the words "Backward Classes", the words "Other Backward Classes of citizens" shall be substituted;

(d) Sub-section (4) shall be omitted;

(e) for Sub-section (5), the following Sub-section shall be substituted namely :--

"(5) Where, due to nonavailability of suitable candidates any of the vacancies reserved under Sub-section (1) remains unfilled it shall be carried over to the next recruitment."

16. The U.P. Act No. 4 of 1993 was again amended by U.P. Act No. 29 of 1999. These amendments, however, are not relevant for the purpose of this reference.

17. The approved draft of U.P. Judicial Service Rules, 1998 was again put for consideration before the Judges' meeting held on 7.3.1998. The Full Court considered the draft of the U.P. Judicial Services Rules, 1998 prepared by the three Judges' Committee and approved the same with certain modification in Rules 10, 16, 22, 24 and 25. The Resolution of the Judges' Committee dated 7.3.1998 is extracted as below :

Re. Uttar Pradesh
Judicial Services
Rules, 1998.

Resolution :

Consideration
of draft of
"Uttar Pradesh
Judicial Service
Rules, 1998"
prepared by
the Committee
consisting of
Hon'ble Mr.
Justice Brijesh
Kumar and
Hon'ble Mr.
Justice J,C.
Gupta for its
approval.

Considered draft of
"Uttar Pradesh Judicial
Service Rules, 1998"
prepared by the Committee
consisting of Hon'ble Mr.
Justice Brijesh Kumar
and Hon'ble Mr. Justice
J.C. Gupta.

Resolved that the draft Rules
be approved subject to the
following modifications :

(i) In Rule 10 in
in place of words :

"age of 22 years"
the words "age of 24
years" be substituted and
a proviso be added to
the effect "Provided further
that the maximum number
of chances a candidate is
permitted to take will be
four" after the second proviso.

(ii) In Clause (b) of Rule 16 the
word "English" be added in between
the words "Hindi" and "Urdu"

(iii) In Sub-rule (2) of Rule 22
the words "with the prior approval
of the Chief Justice" be
substituted by the words "with the
prior approval of the Committee
constituted by the Chief Justice".

(iv) In Rule 24 the proviso to
Sub-rule (2) shall stand deleted.

(v) In Rule 25 the word "shall"
occurring in the first sentence
be substituted by the word "may".

At the end of Rule 25 the
following sentence be added :
"A probationer shall continue as
such till an order of confirmation
in service is passed in his favour
by the Court."

The approved U.P. Judicial Service Rules, 2001 came into force w.e.f. 1.7.2000. Rules 8 and 38

"8. Reservation.--Reservation to posts in the service for the members of Scheduled Castes, Schedules Tribes and Other Backward Classes, etc."

38. Savings.-- Nothing in these rules shall affect any order passed under the Uttar Pradesh Nyayik Sewa Niyamawali, 1951 or reservations and other concessions required to be provided for the candidates belonging to the Scheduled Castes, Scheduled Tribes and other special categories of person in accordance with the orders of the Government issued from time to time in this regard."

18. Shri Ashok Khare, learned senior Advocate, appearing for the petitioner submits that the first and second question referred to this Bench are inter related and may be considered together we agree. He submits that legal position with regard to the application of the reservation rules to Judicial service, has been settled by the Supreme Court in State of Bihar v. Bal Mukund Sah, . In this Constitution Bench Judgment the Supreme Court held that Article 309, which, on its express terms, is made subject to other provisions of the Constitution, does get circumscribed to the extent to which its general field for operation by the relevant provisions of Articles dealing with Subordinate Judiciary is found in Chapter VI of Part VI of the Constitution. The recruitment to the judicial service, under Article 234 is not subject to any legislation made by appropriate legislature. So far as the recruitment of judicial service is concerned, Article 234 is paramount and the power of the legislature to make law under Article 309 does not extend to make law for such recruitment. It was held by the Supreme Court that Bihar Reservation of Vacancies (in post and service) for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1999, providing for reservation by resorting to reservation under Article 16(4) is not applicable to the Judicial service until the High Court is 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 by-passing the High Court and exercising its legislative power, circumvent and cut. across the very scheme of recruitment and appointment to District Judiciary as envisaged by the makers of the Constitution.

19. Sri Ashok Khare submits that the requirement of 3% reservation being a minimum in every establishment in favour of persons with disabilities is an absolute requirement to which every establishment must comply and confirm, with sole exception of the establishments granted exemption by the State Government by a notification in this regard. There exists a further requirement that the appropriate Government shall identify the posts in the establishment which are to be so reserved. The power of identification of the posts conferred upon the appropriate Government does not mitigate the requirement of 3% reservation in every establishment. The power to identify as to which particular post in the establishment would be reserved under Section 32 of the Act No. 1 of 1996, for which particular disability out: of the three categories, is a power which cannot be utilised by the State Government to conclude that against a particular post or particular establishment there will be no reservation in favour of physically disabled persons. The limited power of identifying the particular posts cannot be utilised by the Government to deny reservation in a particular establishment or a part thereof. Equally any inaction of the Government in identifying such posts does not in any manner leads to the conclusion that the requirement of 3% reservation does not exist. The sole method in which the establishment or part thereof could be exempted from the statutory obligation under Act No. 1 of 1996, is by means of exemption

notification under the proviso conferring power of exemption to any department/establishment which includes the power of granting exemption to a part of the department or a establishment. The exemption under the proviso need not to be given for the entire establishment/ department. In exercise, of power under the said proviso the appropriate Government may exempt either whole or part of the department/establishment from the requirement fulfilling such statutory obligation. Sri Khare submits that there is a contradiction between Sections 32 and 33 of the Act No. 1 of 1996 and Section 3 of U.P. Act 4 of 1993 as amended in 1997.

20. Sri Khare further submits that the stand of the respondents that there can be no reservation for physically disabled persons on account of the nature of work is not based upon any exemption notification by the appropriate Government to be issued both under Section 33 and Section 47 of the Act No. 1 of 1996. He submits that it is illogical to suggest that whereas by the mandate of Section 47 a member of U.P. Nyayik Sewa which acquires physical disability while in service, cannot be dismissed nor can he be denied promotion, but still there will be no reservation in favour of persons with disability in initial recruitment, as the nature of functions discharged with a physical disability would be the same. He submits that the U.P. Act No. 29 of 1999 received the assent of the Governor on 27.7.1991. It was not reserved for Presidential assent nor it has been assented by the President, and thus in view of Article 254 of the Constitution of India, the Central Act will prevail over the State Act. For this proposition he has relied upon the Division Bench Judgment of this Court in Shiv Kumar Singh Yadav v. State of U.P., 2001 (2) ESC 863 (All) (DB). He has also relied upon the Division Bench Judgment in State of Rajasthan v. Dr. Vijai Kumar Agarwal, 2002 (1) ESC 205, for dealing with Section 39 of the Act No. 1 of 1996, which lays down that any inaction of the Government apply for the procedural requirement does not do away with the statutory mandate of that section.

21, Sri Khare submits that U.P. Act No. 4 of 1993 as amended in 1997 has been enacted with reference to Entry 41 in List II of the Constitution of India (State Public Service Commission). The power for providing reservation to the disabled person, however, has reference to Entry No. 23 of List III of 7th Schedule of the Constitution of India (social security and social insurance, employment and unemployment). Relying upon Union of India and Ors. v. Shah Goverdhan L. Kabra Teachers College, he submits that the widest interpretation has to be given to the entries in the Seventh Schedule subject to the condition that the meaning of the words should not be extended beyond their reasonable connotation and that the construction should not be so wide, as to over ride or render any another entry otiose. In case of a conflict between the two entries, the true character of the impugned enactment as a whole including its object, scope and effect should be examined and the principle of pith and substance should be applied. In this case National Council for Teacher Education Act, 1993 dealing with co-ordination and determination of standards in institutions for higher education within the meaning of Entry 66 of List I of the Seventh Schedule, provided for grant of recognition to the Bachelor Education (Vacation Course) failing which the course was provided to be de-recognised. The Rajasthan High Court struck down Section 17(4) of the Act on the ground that parliament under Entry 66 of List I of Schedule VII of the Constitution is empowered to make law prescribing qualification of entry into service under the State Government and that such law could only be made under the proviso to Article 309. The Supreme Court held that on examining the statute as a whole and on scrutiny the object and scope of the statute which deals with the

co-ordination and determination of the standards of the institutions for higher education falls within Entry 66 of List I of the Seventh Schedule and, thus the Union Legislature did have the competence for enacting the said provision.

22. On question No. 3 with regard to the consent of the High Court for reservation in favour of physically handicapped person, Sri Ashok Khare submits that the committee of two members submitted its report on 8.7.1991 to Hon'ble the Chief Justice that there should be no reservation in favour of physically handicapped persons. This report was considered by the Full Court in a meeting held on 25.7.1992. This meeting did not approve the report dated 8.7.1991 and instead resolved to reconsider the issue by a three member committee. This matter was reserved for a resolution by the Full Court on 17.7.1993. In the meantime the approved rules were received by the State Government for reservation in favour of the Scheduled Castes and Scheduled Tribes and Other Backward Classes. The Rules were subsequently approved by the resolution dated 7.3.1998 and were notified in pursuance of which the recruitment in question is under way. Rule 8 of Rules of Judicial Service provide that there shall be reservation for the Scheduled Castes, Scheduled Tribes and other categories in accordance with provisions of law prescribing reservation for Scheduled Castes and Scheduled Tribes and other categories. These other categories, according to Sri Khare include physically disabled under the Act No. 4 of 1993 as amended in 1997 and which was in vague when these rules were approved and thus the consent of the High Court was accorded. The High Court agreed for reservation in favour of other categories, and thus there is no scope for submission that these other categories did not include the physically disabled persons.

23. Sri Sudhir Agarwal, learned Additional Advocate General, appearing for the State submits that the recruitment and condition of service in the Judicial Service in the State Government was provided under U.P. Nyayik Sewa Niyamawali, 1951 and U.P. Higher Judicial Service Rules, 1975. These Rules do not contain any provision for reservation for physically disabled persons in the Judicial Service. The U.P. Act No. 4 of 1993 were not enacted by U.P. Legislation in consultation with the High Court and therefore, in view of the law laid down by Supreme Court in Bal Mukund Sah case (supra) legislation on its own could not have been applied to the judicial service unless and until the High Court was consulted. The U.P. Act No. 4 of 1993 was enforced w.e.f. 11.12.1992. The reservation to physically disabled persons, however, could only be determined by the State Government by a notified order. The notification means an order contemplated under Sub-section (2) of Section 3. Under Section 4 (29-A) of the U.P. General Clauses Act, the notification means a notification published in a gazette of the State. For the first time a notification under Section 3 (2) was issued by the State Government on 4.5.1995 providing for 2% reservation for physically handicapped, 2% for dependent of Freedom Fighters and 1% for Ex-Serviceman. This order was not issued in consultation with the High Court. In any case this notification could be made applicable to the recruitment commencing from 1st July, 1995 which was the recruitment year as defined under Section 2 (o) of 1993 Act. On 1.1.1996 the Central Act, 1995 was published and came into force on 7th February, 1996. Section 33 of 1995 Act provides for reservation for persons not less than 3% of the vacancies which is further to be distributed to the categories of disabled persons mentioned in Section 33. The Government Order dated 4.5.1995 being inconsistent with Section 33 of Act 1 of 1996, could not have been given effect from 7.2.1996, until the decision of the State Government and Central Government were harmonized. Sections 32 and 33 require identification for such reserved

post for disabled persons. So long as this identification is not made by identifying judicial service also and for which consultation of the High Court was necessary, the provisions of these Acts shall have no application to judicial service. In these circumstances on and after 7.2.1996 no reservation for physically handicapped or disabled persons could have been applied in judicial service, in any manner. The U.P. Act 4 of 1993 was amended in 1997 w.e.f. 9.7.1997 bringing Section 3 of the Act of 1993 in harmony with Sections 32 and 33 of the Act of 1996. However, since even thereafter, the judicial service is not identified, there was no occasion to provide reservation for physically disabled persons in judicial service.

24. Shri Agarwal submits that the Legislature has identified certain posts and services for reservation for physically disabled persons. The U.P, Amendment Act 29 of 1999 clearly provides that no reservation for physically handicapped persons will be available in Group A and B posts, hence, there was and there could be no occasion to apply any reservation for physically disabled persons in judicial service in the State of U.P. He submits that in V.K. Rat's case this Court had taken a view without examining the legal position, and requires reconsideration. He has relied upon doctrine of per incuriam and 'sub silentto' which in fact mean that where a decision has been rendered without examining the relevant provisions of the Act, it does not have a binding effect.

25. On Question No. 3 Sri Sudhir Agarwal submits that the factual history of the decisions taken by this Court shows that Full Court while passing resolution dated 17.7.1993 and 7.3.1998 did not consider the question of reservation for physically disabled persons in judicial services a I all. The Full Court was considering the matter for approval of the draft of service rules received from the State Government. There is no material on the record to show that the question of reservation for physically handicapped person was considered by the Full Court, and thus there was no occasion for the Court to apply its mind, and to deliberate on the question. On 17.7.1993 there was no existing provisions operating to provide reservation to physically handicapped persons in judicial service. The draft rules as approved on 17.7.1997, were remitted back for reconsideration. The proceedings for approval of these draft rules dated 7.3.1998 do not disclose any deliberations on the consideration of the question as to reservation to physically handicapped person were to apply to the judicial service. He submits that the view taken by the Division Bench in V.K. Rai's case with reference to the resolution to the Full Court dated 17.7.1993 and 7.3.1998 is incorrect, as the Court did not consider whether the Full Bench had any occasion to consider the question of reservation in judicial service. The language of Rule 8 in the Draft Rules was by 7.2.1998, which came in fact on 1.7.1998 nowhere admits any such reservation. He submits that for the same reasons the judgment in V.K. Rai's case in Writ Petition No. 35604 of 2001 decided on 11.3,2002 also requires to be reconsidered,

26. In reply to the submission that U.P. Act Mo. 4 of 1993, as amended in 1997, has been made with reference to Entry 41 List. II of the 7th Schedule of the Constitution of India providing for State Public Service and State Public Service Commission, and thus Article 254 has no application, it is contended by Sri Agarwal that doctrine of pith and substance is clearly applicable to the present case, He has relied upon judgment In Bat Mukund Shah's case in submitting that the service rules with regard to judicial service are made with reference to Articles 233 and 234 of the Constitution of India. Relying upon para 37 of the judgment he submits that the rules regulating the

general-recruitment, other conditions of service of judicial officers fall within, the Entry 41, List I! of the 7th Schedule of the Constitution of India (State Public Service, State Public Service Commission). The provisions of the Act may also relate to Entry 9, List II (Relief to the disabled and unemployed). The reservation to physically handicapped persons in service in the State Government, as such, do not fall, in any of the items in List I, and thus Article 254 has no application. The Central Act, as such, will not: prevail over the State Act. In substance Sri Sudhir Agarwal, learned Additional Advocate General, submits that since the judicial service has not been identified for application of reservations for physically handicapped persons, that further since the High Court has not, approved such reservation, and that the resolutions of the Full Court approving the draft rules did not have the occasion to discuss and to provide the consent for application of such reservation, to judicial service, there is no reservation so far. for physically handicapped persons in judicial service in the State of U.P.

27. In order to consider the Question Nos. 1 and 2, we have to first find out whether there is any repugnancy between the provisions of the Central Act namely the Act: No. 1 of 1996, and the U.P. Act No. 4 of 1993 as amended in 1997 and 1999. Article 254 of the Constitution of India provides that if any provisions of law made by the Legislature of the State is repugnant to any provision of law made by the parliament which the parliament is competent to enact, or to any provision of the existing law, with respect to one of the matters enumerated in the concurrent list, then subject to the provisions of Clause (2) the law made by the parliament whether passed before or after the law made by the Legislature of such State, shall prevail and the law made by the Legislature of the State shall to the extent of repugnancy be void. Clause (2) of Article 254 provided that where the law made by the legislature of a State, with respect to one of the matters enumerated in the concurrent list, contains any provisions repugnant to the provisions of an earlier law made by the Parliament, or an existing law with respect to that matter then, the law so made by the legislature of such State, shall, if it has been reserved for the consideration of the President, and has received his assent, prevail in that State.

28. in the present case Act No. 1 of 1996 provide for special measure to give full participation and equality to the people with disabilities. It is a social welfare measure. The Act was enacted, to give effect to the proclamation signed by India in the Meeting to Launch the Asian and Pacific Decade of Disabled Persons 1993-2002, convened by the Economic and Social Commission for Asia and Pacific held at Beijing on 1st to 5th December, 1992. The Act is a comprehensive legislation for providing equality to disabled persons. A reference to the entries in the 7th Schedule, shows that the Act tails within the Entry 9 (Relief of the disabled and unemployed), Entry 13 (Participation in International Conference, Associations and other Bodies and Implementing of decisions made thereat), and Entry 70 (Union Public Services, Ail India Services, Union Public Service Commission). It may also be referred to Entry 23 of List III (Social Security and Social Insurance, employment and unemployment). The State Act namely U.P. Act No. 4 of 1993 refers to Entry 41 in List II (State Public Services, State Public Service Commission).

29. In Shiv Kumar Singh Yadav v. State of U.P. and Ors., 2001 (2) ESC 863 (All) (DB), a Division Bench of this Court held that there is conflict between the term 'physically handicapped' as used in the State Act and the expression 'person with disability' as defined in the Central Act. It was held

that both the Acts are covered by Entry 23 of List III and that since the State Act does not appear to have been reserved for the consideration of President under Article 254(3), the law made by the Parliament will prevail over the Legislature of the State. It was further held that, Clause (2) of Article 254 is not attracted and thus the law made by the Parliament will prevail over the legislature of the State, and that any person with disability of less than 40% in any category, which is not the requirement in the State Act, is not entitled to the benefit of reservation.

30. We do not find any error in the ratio of the judgment in Shiv Kumar Singh Yadav's case. Applying the test of pith and substance, we find that the provisions for reservation of physically disabled persons in public service fall within Item No. 23 of List III of the Seventh Schedule of the Constitution of India which provides for legislative competence to the Parliament to make laws relating to social security, and social insurance, employment and unemployment.

31. In Shah Goverdhan L. Kabra case (supra) the Supreme Court explained the doctrine of pith and substance and held as follows :

"7. It is further a well-settled principle that entries in the different lists should be read together without giving a narrow meaning to any of them. Power of Parliament as well as the State Legislature are expressed in precise and definite terms. While an entry is to be given its wide meaning but it cannot be so interpreted as to override another entry or make another entry meaningless and in case of an apparent conflict between different entries, it is the duty of the Court to reconcile them. When it appears to the Court that there is apparent overlapping between the two entries the doctrine of "pith and substance" has to be applied to find out the true nature of a legislation and the entry within which it would fall. In case of conflict between entries in List I and List II, the same has to be decided by application of the principle of "pith and substance". The doctrine of "pith and substance" means that if an enactment substantially falls within the powers expressly conferred by the Constitution upon the legislature which enacted it, it cannot be held to be invalid, merely because it coincidentally encroaches on matters assigned to another legislature. When a law is impugned as being ultra vires of the legislative competence, what is required to be ascertained is the true character of the legislation. If on such an examination it is found that the legislation is in substance one on a matter assigned to the legislature then it must be held to be valid in its entirety even though it might incidentally trench on matters which are beyond its competence. In order to examine the true character of the enactment, the entire Act, its object, scope and effect, is required to be gone into. The question of invasion into the territory of another legislation is to be determined not to degree but by substance. The doctrine of "pith and substance" has to be applied not only in cases of conflict between the powers of two legislatures but in any case where the question arises whether a legislation is covered by particular legislative power in exercise of which it is purported to be made."

32. In Welfare Association ARP v. Ranjit P. Gohil , the Supreme Court explaining the test of 'pith and substance' with reference to the Bombay Rents Hotel and Lodging House Rates Control, Bombay Land Acquisition and Bombay Government Premises (Eviction) (Amendment) Act, 1996 set aside the judgment of the High Court holding that the Act was beyond legislative competence of the State Legislature and held that in 'pith and substance' the Act is covered by Entry 18 of List II i.e.

(Economic and Social Planning). In paragraph 31 it was held as follows :

"A note of caution was sounded by the Constitution Bench in *Synthetics and Chemicals Ltd. v. State of U.P.* The Constitution must not be construed in any narrow or pedantic sense and that construction which is most beneficial to the widest possible amplitude of its power must be adopted. An exclusionary Clause in any of the entries should be strictly and, therefore, narrowly construed. No entry should be so read as to rob it of its entire content. A broad and liberal spirit should inspire those whose duty it is to interpret the Constitution. The Constitution is a living and organic thing and must adopt itself to the changing situations and pattern in which it has to be interpreted. To bring any particular enactment within the purview of any legislative power, it is the pith and substance of the legislation in question that has to be looked into by giving the widest amplitude to the language of the entries. The Constitution must be interpreted in the light of the experience gathered. It has to be flexible and dynamic so that it adapts itself to the changing conditions in a pragmatic way. The undisputed constitutional goals should be permitted to be achieved by placing an appropriate interpretation on the entries. The Constitution has the greatest claim to live. The claim ought not to be throttled. The oodirective principles of State Policy can serve as a potent and useful guide for resolving the doubts and upholding the constitutional validity of any legislation, if doubted."

33. The Supreme Court in this case followed its earlier judgments in *Diamond Sugar Mills Ltd. v. State of U.P.*, ; *Synthetic Chemicals Ltd. v. State of U.P.*, ; *United Provinces v. Atiqa Begum*, AIR 1941 SC 16.

34. Applying the test of 'pith and substance' as explained above we find Act No. 1 of 1996 which seeks to achieve social welfare measures for physically disabled persons, not confined only to employment alone, falls within" the Entry 23 (Social Security, and Social insurance; employment and unemployment) of the List III of 7th Schedule of the Constitution of India, and that the law made by the Parliament, in case of repugnancy will prevail over the law made by the legislature of the State namely U.P. Act No, 4 of 1993, and that Clause (2) of Article 254 will not apply as the State Act was not reserved for the consideration of the President.

35. We have carefully considered the provisions of Sections 32, 33 and 47 of Act No. 1 of 1996 and the provisions of the U.P. Act No. 4 of 1993 as amended in 1997 and in 1999, and do not find that there is any repugnancy so far as the provisions of reservation in public employment is concerned. Under Section 32 of the Central Act, the Appropriate Government defined in Section 2 (a), and which in relation to the State Government in Sub-section (ii) to the State Government or any establishment wholly or substantially financed by that Government, or any local authority other than the Cantonment Board, the State Government is required to identify posts in the establishment which can be reserved for the persons with defined disabilities. The reservation under Section 33, by the appropriate Government in every establishment is to be appointed on such percentage of vacancies not less than three percent for persons or class of persons with disability of one per cent, shall each be reserved for persons suffering on blindness or low vision, hearing impairment, locomotor disability or cerebral palsy in the posts identified for each disability. The appropriate Government may having regard to the type of work carried on in any department or establishment

by notification subject to such conditions as may be specified exempt any establishment from the provisions of Section 33.

36. The expression 'public services', in Section 3 of the State Act, by virtue of Section 2 (f), as amended by the Amendment. Act (U.P. Act No. 6 of 1997), borrows the definition in Section 2 (c) of U.P. Public Services (Reservation of Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994. The reservation under Section 3, is at the stage of direct recruitment. This reservation is, however, subject to identification of 1% of vacancy each i.e. 3% for the persons suffering from blindness or low vision, hearing impairment, and locomotor disability or cerebral palsy. The identification of establishment and the post for such disability, under Sections 32 and 33 of the Central Act, is also required as condition precedent under Section 3(1) (ii) of the State Act. Hence, we find that so far as the conditionally for providing reservation for Physically Disabled Persons, in public service and posts, and the identification of vacancies for each disability is concerned, there is no repugnancy between the provisions of Central Act and the State Act.

37. There is no dispute between the parties, that the State Government has not identified the judicial service and the posts in judicial service, for the purpose of reservation for physically handicapped persons. In Bal Mukund Shah's case (supra), the Supreme Court held that the provisions under Articles 233, 234 and 235 for the recruitment to the post of District Judge and other civil judicial posts, fall in a different part of the Constitution, and that these provisions stand on their own and are independent of Part XIV which deal with services under the Union and the State. The Article 309 on its express terms is made subject to other provisions of the Constitution, and is circumscribed to the extent to which from its general field of operation carves out a separate and exclusive field for operation by the provisions of the Article dealing with Subordinate Judiciary as found in Chapter VI of Part VI of the Constitution. Articles 233 and 234 provide for a complete code and thus rule-making power of the Governor as well as other powers of the State Legislature on the subject are excluded. Relying upon the concept of separation of powers between the legislature, execution and judiciary the Supreme Court held that the independent, judiciary is the basic structure of Constitution. The High Court can alone recognise the vacancies and the reservation even if provided by the State Act under Article 16(4) of the Constitution. The reservation in judicial services by the State without consulting the High Court or without concurrent recommendation of the High Court is an encroachment on such exclusive powers.

38. The identification of posts in question is a sine qua non for extending the benefit of reservation for Physically Disabled Persons. It is so because the persons for which the reservation has been provided may be having such disabilities which may cause obstruction to discharge on such posts in the establishment or public service. For example a blind person will not be able to drive a motor vehicle. A person with both legs amputated may will not be in a position to perform the duties of a job which require extensive tour, and a person with hearing impairment: will not be able to handle the job of telephone operator. A blind or deaf and mute person will not be able to perform the duties of a judicial officer. We are informed that the State Government has identified the posts, only in Group 'C' and 'D' for the purposes of such reservations. The posts in Group 'A' and 'B' have not been identified so far. Sri Sudhir Agarwal, learned Additional Advocate General submits that: in view of the Day a Ram Tripathi's case the State Government has provided reservation for physically disabled

persons in Provincial Civil Services (Executive Branch). We are not able to appreciate as to how the State Government is providing such reservation without identification of the public service and the posts, and the disabilities for which the posts may be reserved. He was hesitant in admitting that the reservation for physically disabled persons is not provided in any other Group 'A' and 'B' service.

39. We are extremely pained and distressed to learn that inspite of the constitutional obligation of the social welfare measures and providing for reservation for physically handicapped by Government Orders beginning from 18.7.1972 and enacting U.P. Act No. 4 of 1993, amended in 1997 and 1999, the State Government even after 57 years of independence, has not on its own given the full meaning and purpose to the provisions of reservation for physically disabled in all public service and posts in the State of Uttar Pradesh.

40. We, therefore, answer the Question No. 1 in affirmative and Question No, 2 in negative, and hold that the Division Bench of this Court in V.K. Rai's case has not laid down the correct law. A Physically Handicapped person is not entitled to reservation on the post; of Civil Judge (Junior Division), in the absence of requisite identification of the posts in question. We further find that the State Government is not. authorised to identify the posts in judicial services by notification as contemplated under Section 3 (1) (ii) of U.P, Act No. 4 of 1993 as one of the post for which reservation could be provided for persons suffering from physical disabilities, until the High Court is consulted and grants approval for such reservation.

41. Coming to the third question, we find that the resolutions of the Full Court dated 17.3.1997 and 7.3.1998 approving the draft of the judicial service rules, which were notified as U.P. Judicial Service Rules, 2001 with effect from 1.7.2000 did not consider and in fact the committees which had framed and recommended the draft rules and the Full Court did not deliberate over the issue of reservation to the physically disabled persons. Rule 8 provide for reservation to the post in services for persons of Scheduled Caste, Scheduled Tribes and other categories to be in accordance with the provisions of the law prescribing reservation for Scheduled Caste, Scheduled Tribes and other categories. The words 'other categories' and the word 'law in Rule 8 do not include physically disabled persons. The word 'other categories' has been used In reference to the reservation for the members of Scheduled Caste and Scheduled Tribes, which have been provided as a special measure under Article 16(4) of the Constitution of India. The word 'other categories' coming immediately after the words Scheduled Caste and Scheduled Tribes, and the contest of Rule 8 have to be assigned the same meaning, and are required to be read 'ejusdem generis', with the words scheduled caste and scheduled tribes. These reservations are subject to the law prescribing reservation for Scheduled Caste and Scheduled Tribes and other categories. The law in Rule 8 must be a law which is validly made and is operating. In Bal Mukund Shah's case the Supreme Court has held that the law relating to reservation applicable to judicial service must be approved by the High Court of the State. As we have already found that the rules of reservation for physically handicapped candidates were not approved by the High Court, and that there was no consultation with regard to applicability of rules of reservation for physically disabled persons in respect of judicial service and posts. These rules as such cannot be said to be the law which was valid and operating for the purpose of its applicability in judicial service. The same reasonings applies to existing orders in Rule 38.

42. Sri Sudhir Agarwal, learned Additional Advocate General after going through records produced by the High Court, made a statement and which was not objected to by the Counsel for the petitioner, that the committee of Hon'ble Judges who had framed the U.P. Judicial Service Rules, notified in 2001, and the Full Court had not deliberated over the matter of reservation for physically disabled persons in judicial service, and that at no time after the acceptance of the resolution of the Court by the State Government on 24.7.1982 any fresh consultation with regard to the reservation for physically disabled persons in judicial service was made in consultation with the High Court. We, therefore, answer the Question No. 3 in negative and thus on Question No. 4 we find that Vinod Kumar Rai's case did not lay down correct law.

43. We accordingly answer to questions placed before us as follows :

(1) Physically disabled persons are not entitled to claim reservation under Section 3 (1) (ii) of the Act of 1993 as amended in 1997 and 1999, for the posts of Civil Judge (Junior Division) until the requisite identification of posts in question extending the benefit of such reservations.

(2) It is not permissible for the State Government to identify the post of Civil Judge (Junior Division) by issuing a notification as contemplated under Section 3 (1) (ii) of the Act of 1993, until and unless the High Court is consulted afresh in accordance with the law laid down in Bal Mukund Shah (supra).

(3) The Full Court vide its resolutions dated 17.7.1993 and 7.3.1998, did not have an occasion to deliberate over the reservations for physically disabled persons. These resolutions approving draft of the U.P. Judicial Service Rules, did not give concurrence to the State Government for providing reservation for physically disabled persons.

(4) The Division Bench judgment of this Court in Vinod Kumar Rai (supra) has not laid down the correct law.

44. Learned Counsel for the parties suggested that, the petition also be disposed of by this Bench as sending the matter back to the Division Bench would not serve any purpose.

45. It is settled law that vacancies, advertised require to be filled up as per the rules existing on the last date of submissions of the applications vide Y.V. Rangaich and Ors. v. J. Sreeniwasa Rao and Ors., AIR 1983 SC 532; A.A. Calton v. Director of Education and Anr., ; P. Gyaneshwar Rao and Ors. v. State of Andhra Pradesh and Ors., ; P. Mahendran and Ors. v. State of Karnataka and Ors., ; and Ramesh Kumar Choudha, v. State of Madhya Pradesh and Ors.,].

46. In the present case, the petitioner has claimed reservation in judicial service in the vacancies advertised by the U.P. Public Service Commission vide advertisement No. A-2/E-1/2003. On the date of advertisement, the reservation for physically handicapped persons was not available in judicial service, and hence the petitioner is not entitled to the prayers made in the writ petition.

47. However, before parting with the matter, we find that the State Government has not carried out its statutory responsibility, cast upon it by both the Act No. 1 of 1996, and U.P. Act No. 4 of 1993, in identifying the post in Group 'A' and 'B' in the Public Services in the State, and to initiate a process of consultation with regard to such reservation in the judicial service with the High Court. We find substance in the submission of Sri Ashok Khare appearing for the petitioner that the State Government cannot, scape its liability to give full effect to the constitutional and legislative mandate, and that effective dialogues must be initiated for identifying the posts in the judicial service for the purpose of reservation for such disabilities which may not effect, the performance of judicial duties by such officer, Article 38 of the Constitution of India directs the State to strive to promote the welfare of the people by securing and protecting as effectively as it may, a social order in which justice, social, economic and political shall inform all the institutions of the national life. The State shall in particular strive to minimise the inequalities in income and end eavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations. The Parliament has accepted this responsibility towards physically disabled persons. The welfare of the disabled persons has been recognised, and accepted. The welfare of the disabled, to bring him in the main stream of the active social life, is a constitutional goal to be achieved by the State,

48. In Superintending Engineer Public Health U.T. Chandigarh and Ors. v. Kuldeep Singh and Ors., the "Supreme Court coming heavily upon the appellant therein in failing to provide promotion to a scheduled caste eligible candidate for promotion as Head Draftsmen, while dismissing the Civil Appeal quoted the observations of Earl Cairns, L.C. in the House of Lords in Julius v. Lord Bishop of Oxford, (1880) 5 AC 215 : (1874-80) Ail ER Rep. 43, HL (pp 222-23) approved in Commissioner of Police v. Gordhan Das Bhanji, 1952 SCR 135 (p. 147), thus :

"There may be something in the nature of the things empowered to be done, something in the object for which it is to be done, something in the conditions of which it is to be done, something in the title of the person or persons, for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whose the power is reposed, to exercise the power when called upon to do so."

49. The physically disabled handicapped persons are no less citizens of the Country. They are entitled to equality of opportunity, and deserve protection of their rights and full participation in all walks of life, The State cannot ignore the rights of such disabled persons and fail to perform statutory duty of identifying the posts for reservation for disabled persons in all the categories of public services. We are of the view that locomotor disability of a limited extent, and which docs not, affect the mental ability, vision and hearing impairment of a person shall not be of impediment in performance of judicial functions and that in view of the new found welfare approach and the duty to the rights of equality of physically disabled persons, the High Court, may be willing to provide reservation to such persons in. Judicial Services in the State.

50. The State Government is directed to identify Group 'A' and Group 'B' posts in all the services for reservation for physically disabled persons as expeditiously as possible as also the post of Civil Judge (Junior Division) after consultation with the High Court.

51. The writ petition is disposed of accordingly.