Judgment reserved on 25.11.2010
Judgment delivered on 11.2.2011

CIVIL MISC. WRIT PETITION NO.22511 OF 2009

Sudha Tiwari vs. Union of India and others

Hon'ble Sunil Ambwani, J.
Hon'ble Yogesh Chandra Gupta, J.

We have heard Shri Raj Kumar Pandey for the petitioner. Dr. Ashok Nigam, Additional Solicitor General of India assisted by Shri S.K. Misra represents Union of India. Shri V.K. Singh, Additional Advocate General assisted by Shri A.K. Sinha appears for the State respondents. Shri B.D. Mandhyan, Senior Advocate assisted by Smt. Sunita Agarwal appears for the University.

The applications for B.P.Ed Entrance Examination 2008 were invited by the Deen Dayal Upadhyay Gorakhpur University, Gorakhpur for admissions to the B.P.Ed course, in the self-finance unaided educational institutions. These unaided private institutions are stated to be ten in number affiliated to the University. The advertisement for admissions to the academic session 2008-09 provided, that for the said course, the reservations as provided in the Rules of the Government of U.P will be applicable, clarifying that vertical reservations of 27% for Other Backward Classes (excluding creamy layer); 21% for Scheduled Castes and 2% for Scheduled Tribes will be provided in the entrance examination to be held on 27.6.2008.

The decision of the University proceeded on the basis, and in compliance of Section 4 of the U.P. Admissions to Educational Institutions (Reservation for Scheduled Castes, Scheduled Tribes and

Other Backward Classes) Act, 2006 including the State run educational institutions and private unaided and self-finance educational institutions. Section 4 of the Act of 2006 provides as follows:-

> **"4. Reservation in favour of Scheduled Castes, Scheduled Tribes and Other Backward classes – (1).** In admission to educational institutions, including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30 of the Constitution of India, there shall be reservation at the stage of the admission in the following percentage of sanctioned intake to which admission is to be made in favour of person belonging to Scheduled Castes, Scheduled Tribes and Other Backward Classes of citizens, in the academic year, -
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> | | | |
> |---|---|---|
> | (a) | in the case of Scheduled Castes | twenty one per cent |
> | (b) | in the case of Scheduled Tribes | two per cent |
> | (c) | in the case of Other Backward Classes of citizen. | twenty seven per cent |
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> (2). In respect of any academic year if any vacancy reserved for any category of persons under sub-section (1) remains unfilled, another special admission drive shall be made to fill such vacancy from amongst the person belonging to that category.
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> (3). If in the special admission drive referred to in sub section (2) suitable candidates belonging to the Scheduled Tribes are not available to fill the vacancy reserved for them, such vacancy shall be filled by persons belonging to the Scheduled Castes.
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> (4) Where, due to non-availability of the suitable candidates, any of the seats reserved under the sub-section (1) remains unfilled even after special admission drive referred to in sub-section (2), or sub-section (3), then such vacancy shall be filled by any other suitable candidate, on the basis of merit.
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> (5) If a person belonging to any of the categories mentioned in sub-section (1) gets selected on the basis of merit as general candidate, and if he wants to remain as a general candidate, then he shall not be adjusted against the vacancies reserved for such categories under sub-section (1)."

The petitioner applied for admission to the B.P.Ed course in pursuance to the advertisement, to appear in the entrance test in

general category. She was issued admit card to appear in the examination, which was re-scheduled to be held on 4.7.2008. She was declared successful in the results published in daily newspaper 'Amar Ujala' on 7.1.2009. The Department of Education of the University informed her that she is placed in the waiting list and was asked to be personally present for the counselling on 11.4.2009. Her merit percentile was shown to be 34.67. She appeared before the committee but was not allowed to take part in the counselling on the ground that the seats available for un-reserved candidates were filled up, and that the remaining seats were reserved only for OBCs; SCs and STs candidates.

The petitioner has filed this writ petition claiming following reliefs:-

> "(i) issue a writ, order or direction in the nature of certiorari quashing the 93rd Constitutional Amendment Act, 2005 whereby a new clause has been inserted/added to the Article 15 as 15 (5) in Part III of the Constitution of India and Section 4 of the U.P. Admission to Educational Institutions (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act 2006 (U.P. Act No. 23 of 2006), to the extent it relates to the private unaided and self financed educational institutions, by declaring the same to be invalid, ultra vires to the provisions of the Constitution of India and unconstitutional and/or
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> (ii) issue a writ, order or direction in the nature of certiorari quashing the decision of the admission committee of the D.D.U. University Gorakhpur to proceed with the reservation policy of the State of U.P. in the matter of admission to the B.P.Ed course in the self financed and unaided educational institutions as mentioned in the information brochure received by the candidates along with the application forms and/or
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> (iii) issue a writ, order or direction in the nature of mandamus commanding the respondent no. 4 to consider the candidature of the petitioner for counseling to the B.P.Ed course on the basis of her percentile of merit secured by her in the entrance examination for the said course and/ or."

In Civil Misc. Writ Petition No. 2160 (MB) of 2009 Usha Educational Institute vs. State of UP and others, the High Court at Lucknow, has passed an order on 5.3.2009 to the effect that the provisions of the reservation in respect of the admission in private unaided colleges as given in Section 4 of the Act of 2006 shall not be implemented. The High Court relied upon an interim order passed in the Writ Petition No. 8265 (MB) of 2007 in which similar issues are raised and in which similar interim order was passed on 2.11.2007 for academic session 2007-08. The Apex Court in Civil Appeal No. 476 of 2008 against the interim order did not interfere and directed the High court to dispose of the controversy preferably within two months. We are informed that the Writ Petition No. 2160 (MB) of 2009 Usha Educational Institute vs. State of UP and others is still pending.

We followed and passed an interim order relying upon the opinion of Hon'ble Mr. Justice Dalveer Bhandari in **Ashoka Kumar Thakur vs. Union of India and others (2008) 6 SCC 1**:-

> "The office of the Additional Solicitor General of India, High Court, Allahabad has accepted notice on behalf of respondent no. 1. Learned standing counsel appears for respondent nos. 2 and 3. Smt. Sunita Agarwal appears for respondent nos. 5, 5 and 6.
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> The petitioner has appeared in B.P.Ed Entrance Examination-2008. The result of the examination was declared in January, 2009 and was also published in daily newspaper 'Amar Ujala' on 7.1.2009 in which the petitioner was declared successful. She was however placed in the waiting list for counselling of the course on 11.4.2009, as her merit percentile was 34.67. She was however not allowed to participate in the counselling on the grounds that the general category seats were filled up and that only reserved category seats are allowed for counselling amongst other Backward Classes, Scheduled Caste and Scheduled Tribe candidates.
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> The petitioner has challenged the 93rd Constitutional Amendment Act, 2005 by which Art. 15 (5) has been added to

Part III Constitution of India, and Section 4 of the U.P. Admission to Educational Institution (Reservation for Scheduled Caste, Scheduled Tribe and Other Backward Classes) Act, 2006, to the extent that it relates to the private un-aided and self financed institutions by declaring same to be invalid, and ultra vires to the provisions of the Constitution of India.

The petitioner has further prayed for a direction to the University of Gorakhpur to quash the decision of the Admission Committee to proceed with the reservation policy of the State of U.P. in the matter of admissions to B.P.Ed course in the self finance and un-aided educational institutions to which the petitioner seeks admission.

In **Ashok Kumar Thakur vs. Union of India and others, (2008) 6 SCC 1**, a Constitution Bench of the Supreme Court has held Article 15 (5) to be valid to the extent it permits reservation for socially educationally backward classes and other reserved category classes in the State or State aided educational institutions subject to exclusion of creamy layer from O.B.C. Four honourable judges on the Bench did not express any opinion whether the Constitution (Ninety-third Amendment) Act, 2005 was valid so far as private un-aided educational institutions are concerned and have left the question open. Hon'ble Mr. Justice Dalveer Bhandari in his opinion however considered the issue and has held that the Constitution (Ninety-third Amendment) Act, 2005 is not constitutionally valid so far as private unaided educational institutions are concerned. The final order of the Court has been reproduced in paragraph-668 to 672 at page 717 and 718 of the report as follows:-

> "ORDER OF THE COURT
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> 668. The Constitution (Ninety-third Amendment) Act, 2005, is valid and does not violate the "basic structure" of the Constitution so far as it relates to the State-maintained institutions and aided educational institutions. Question whether the Constitution (Ninety-third Amendment) Act, 2005 would be constitutionally valid or not so far as "private unaided" educational institutions are concerned, is not considered and left open to be decided in an appropriate case. Bhandari, J, in his opinion, has, however, considered the issue and has held that the Constitution (Ninety-third Amendment) Act, 2005 is not constitutionally valid so far as private unaided educational institutions are

> concerned.
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> 669. Act 5 of 2007 is constitutionally valid subject to the definition of "Other Backward Classes" in Section 2 (g) of Act 5 of 2007 being clarified as follows: If the determination of "Other Backward Classes" by the Central Government is with reference to a caste, it shall exclude the "creamy layer" among such caste.
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> 670. Quantum of reservation of 27% of seats to Other Backward Classes in the educational institutions provided in the Act is not illegal.
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> 671. Act 5 of 2007 is not invalid for the reason that there is no time-limit prescribed for its operation but majority of the Judges are of the view that the review should be made as to the need for continuance of reservation at the end of 5 years.
> 672. The writ petitions are disposed of in the light of majority judgment. However, in Contempt Petition No. 112 of 2007 in WP (C) No. 265 of 2006, no orders are required."

The issue whether Constitutional Amendment Act providing for reservations in admissions to private un-aided educational institutions are concerned, is therefore open to be considered and on the grounds raised in the writ petition. We find that the petitioner has prima facie made out a case for issuing notices. We are also informed that in Writ Petition No. 2160 (MB) of 2009 Usha Educational Institute vs. State of UP, a Division Bench of Lucknow High Court had also issued notices and had passed interim orders.

Let replies be filed by the Central Government; State Government and the University, and notices be issued to the Attorney General of India and the Advocate General of the State.

Taking into account the public importance of the issues raised in the writ petition and following the interim orders passed by the Division Bench of Lucknow High Court, it is provided as an interim measure that the provisions of the reservations in respect to admissions to the private un-aided colleges in self financed courses, provided in Section 4 of the U.P. Admission to Educational Institutions (Reservations for Scheduled Caste, Scheduled Tribe and Other Backward Classes) Act, 2006 shall not be implemented till further orders of the Court.

> List on 9th July, 2009 after exchange of affidavits. A copy of the order be given to the Additional Solicitor General of India and the Chief Standing Counsel for compliance."

An application for vacating the interim order was rejected on 23.3.2009.

Learned counsel appearing for the petitioner submits that the challenge to the Constitution (Ninety Third) Amendment Act, 2005 inserting Clause-5 in Article 15 in Part III of the Constitution of India has been upheld by the Constitution Bench in **Ashoka Kumar Thakur**'s case (supra). Four Hon'ble Judges, however, did not express any opinion on the question, whether the reservations are permissible in the unaided private educational institutions, and left it open for a later occasion. Hon'ble Mr. Justice Dalveer Bhandari, however, has expressed a reasoned opinion that the inclusion of private unaided institutions in Article 15 (5) is in violation of basic structure of Constitution, and hence invalid.

Shri Raj Kumar Pandey relies upon the reasoning given by Hon'ble Mr. Justice Dalveer Bhandari in challenging the applicability of reservation clause to the private unaided institution. He submits relying upon paragraphs-492 to 544 as follows:-

> (a) Reservation in unaided institution violates petitioner's rights to pursue studies in the institutions, which have a right under Article 19 (1) (g) to carry an occupation. Although no unaided institution had filed writ petition in the Supreme Court, Hon'ble Mr. Justice Dalveer Bhandari proceeded to examine the submission and has declared such reservation as it violates the basic structure of the Constitution and is thus invalid.

> (b) It was held in **Kesavanand Bharti vs. State of Kerela 1973 (4) SCC 225** that an amendment alters the basic structure if its actual or potential effect would be to damage a facet of the basic structure to such an extent that the facet's original identity is compromised (para 485).

> (c) The two-step effect test (also known as the impact or rights test) to confirm whether the legislation affects a facet of the basic structure and that the facet of the structure is to such an extent that the facet's original identity has been altered, is relevant. It is the consequence thereof that matters vide **I.R. Coelho v. State of Tamilnadu JT 2007 (2) SCC 1** (para 497).
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> (d) If legislation merely abridges the basic structure, the structure's identity remains. The legislation has to be upheld. It if abrogates the basic structure, the structure and thus the Constitution looses their identities. In such case the legislation must be struck down. (para 499).
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> (e) Article 15 (5) expressly precludes the application of Article 19 (1) (g). Articles 14, 19 and 21 are the three fundamental rights called as Golden Triangle that stand above the rest. Individual liberty must be protected. The golden triangle was emphasized to be the stand point of the democracy in **Minerva Mills Ltd. and others vs. Union of India and others 1980 (3) SCC 625.**

In para 124 of the judgment in **P.A. Inamdar & others vs. State of Maharashtra and ors 2005 (6) SCC 537** the Supreme Court held that the State cannot impose quotas on unaided (minority and non-minority) institutions. In **T.M.A. Pai Foundation & ors v. State of Karnataka & ors 2002 (8) SCC 481** it was suggested in para 68 that State could compel unaided institutions to admit a reasonable percentage of students via reservation. **Inamdar** clarifies that **T.M.A. Pai** should be read to mean that the State and unaided institutions may enter into consensual agreement regarding reservation. In para-126 in **P.A. Inamdar**'s case it was observed that unaided institutions (minority and non-minority) can admit as they choose, provided their process is fair, transparent, non-exploitative and merit based. The observations are quoted as below:-

> "124. **So far as appropriation of quota** by the State and enforcement of its reservation policy is concerned, **we do not see much of difference between non-minority and minority unaided educational institutions.** We find great

force in the submission made on behalf of the petitioners that the States have no power to insist on seat sharing in the unaided private professional educational institutions by fixing a quota of seats between the management and the State. **The State cannot insist on private educational institutions which receive no aid from the State to implement State's policy on reservation for granting admission on lesser percentage of marks, i.e. on any criterion except merit.**

125. As per our understanding, neither in the judgment of **Pai Foundation** nor in the Constitution Bench decision in **Kerala Education Bill**, which was approved by **Pai Foundation,** there is anything which would allow the State to regulate or control admissions in the unaided professional educational institutions so as to compel them to give up a share of the available seats to the candidates chosen by the State, as if it was filling the seats available to be filled up at its discretion in such private institutions. **This would amount to nationalization of seats which has been specifically disapproved in Pai Foundation. Such imposition of quota of State seats or enforcing reservation policy of the State on available seats in unaided professional institutions are acts constituting serious encroachment on the right and autonomy of private professional educational institutions.**

Such appropriation of seats can also not be held to be a regulatory measure in the interest of minority within the meaning of Article 30(1) or a reasonable restriction within the meaning of Article 19(6) of the Constitution. Merely because the resources of the State in providing professional education are limited, private educational institutions, which intend to provide better professional education, cannot be forced by the State to make admissions available on the basis of reservation policy to less meritorious candidate. **Unaided institutions, as they are not deriving any aid from State funds, can have their own admissions if fair, transparent, non-exploitative and based on merit.**

In **Islamic Academy of Education vs. State of Karnataka (2005) 6 SCC 697** a Five-Judge Bench observed that since **TMA Pai Foundation** was Eleven-Judge Bench, the later decision in **P.A. Inamdar** (Seven-Judge bench) could clarify but not overrule **T.M.A. Pai Foundation**. The **Islamic Academy of Education,** thus

approved the quotas of unaided institutions by way of a scheme in which the States could fix quota of seat sharing between the management and the State. The Islamic Academic of Education was overruled in P.A. Inamdar's case (para-130).

In **T.M.A. Pai Foundation** the Eleven-Judge bench held, by a Six-Judge majority that unaided institutions could admit students free of Government interference, as long as their admission process was transparent and merit based and the minority aided institutions may still admit their own students, contingent upon admitting a reasonable number of non-minority students per the percentage provided by the State Government.

In **T.M.A. Pai Foundation** (para-20) the majority held that education falls within the meaning of "occupation" under Article 19 (1) (g) as large number of persons are employed as teachers and administrative staff. Occupation would be an activity of a person undertaken as a means of livelihood or a mission in life. Stripping private unaided institutions of its right to select students will be unreasonable (para-40). T.M.A. Pai Foundation's case overturned **Unni Krishnan, J.P. & ors v. State of Andhra Pradesh & ors JT 1993 (1) SCC 645** providing for a right of a private unaided institutions to give admission and to fix the fees.

In **T.M.A. Pai Foundation** the autonomy of the institution emphasized in **R. Chitralekha vs. State of Mysore AIR 1964 SC 1823 and P. Rajendran (minor) vs. State of Madras AIR 1968 SC 1012** to the effect that he who funds or runs the institutions holds the powers to select students, was discussed and the principle was extended with a caveat, that the unaided institutions may admit students of their choice, subject to an objective and rational procedure of selection. They might admit a small percentage of students belonging to the weaker sections of the society by granting

those sections freeships or scholarships, if not granted by the Government (para-53 in T.M.A. Pai Foundation). In para 65 in T.M.A. Pai as discussed in para 507 in Ashok Kumar Thakur (supra) it is stated that given a transparent and reasonable selection process, it is up to the institution to define "merit" according to its own values. The private educational institutions have a reputation and personality of their own, and in order to maintain their atmosphere and traditions, they must have the right to choose and select the students who can be admitted to their courses of studies. This analogy was inherent in **St. Stephen College vs. University of Delhi 1992 (1) SCC 558.** It was observed in the majority opinion in **T.M.A. Pai Foundation** in paras 65 to 70:-

> "65.The reputation of an educational institution is established by the quality of its faculty and students, and the educational and other facilities that the college has to offer. The private educational institutions have a personality of their own, and in order to maintain their atmosphere and traditions, it is but necessary that they must have the right to choose and select the students who can be admitted to their courses of studies. It is for this reason that in the St. Stephen's College case, this Court upheld the scheme whereby a cut-off percentage was fixed for admission, after which the students were interviewed and thereafter selected. While an educational institution cannot grant admission on its whims and fancies, and must follow some identifiable or reasonable methodology of admitting the students, any scheme, rule or regulation that does not give the institution the right to reject candidates who might otherwise be qualified according to, say, their performance in an entrance test, would be an unreasonable restriction under Article 19(6), though appropriate guidelines/modalities can be prescribed for holding the entrance test in a fair manner. Even when students are required to be selected on the basis of merit, the ultimate decision to grant admission to the students who have otherwise qualified for the grant of admission must be left with the educational institution concerned. However, when the institution rejects such students, such rejection must not be whimsical or for extraneous reasons.
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> 66. In the case of private unaided educational institutions, the

authority granting recognition or affiliation can certainly lay down conditions for the grant of recognition or affiliation, these conditions must pertain broadly to academic and educational matters and welfare of students and teachers - but how the private unaided institutions are to run is a matter of administration to be taken care of by the Management of those institutions.

Private Unaided Professional Colleges

67. We now come to the regulations that can be framed relating to private unaided professional institutions.

68. It would be unfair to apply the same rules and regulations regulating admission to both aided and unaided professional institutions. It must be borne in mind that unaided professional institutions are entitled to autonomy in their administration while, at the same time, they do not forgo or discard the principle of merit. It would, therefore, be permissible for the university or the government, at the time of granting recognition, to require a private unaided institution to provide for merit-based selection while, at the same time, giving the Management sufficient discretion in admitting students. This can be done through various methods. For instance, a certain percentage of the seats can be reserved for admission by the Management out of those students who have passed the common entrance test held by itself or by the State/University and have applied to the college concerned for admission, while the rest of the seats may be filled up on the basis of counselling by the State agency. This will incidentally take care of poorer and backward sections of the society. The prescription of percentage for this purpose has to be done by the government according to the local needs and different percentages can be fixed for minority unaided and non-minority unaided and professional colleges. The same principles may be applied to other non-professional but unaided educational institutions viz,. graduation and post graduation non-professional colleges or institutes.

69. In such professional unaided institutions, the Management will have the right to select teachers as per the qualifications and eligibility conditions laid down by the State/University subject to adoption of a rational procedure of selection. A rational fee structure should be adopted by the Management, which would not be entitled to charge a capitation fee. Appropriate machinery can be devised by the State or university to ensure that no capitation fee is charged and that there is no profiteering, though a reasonable surplus for the

furtherance of education is permissible. Conditions granting recognition or affiliation can broadly cover academic and educational matters including the welfare of students and teachers.

70. It is well established all over the world that those who seek professional education must pay for it. The number of seats available in government and government-aided colleges is very small, compared to the number of persons seeking admission to the medical and engineering colleges. All those eligible and deserving candidates who could not be accommodated in government colleges would stand deprived of professional education. This void in the field of medical and technical education has been filled by institutions that are established in different places with the aid of donations and the active part taken by public-minded individuals. The object of establishing an institution has thus been to provide technical or professional education to the deserving candidates, and is not necessarily a commercial venture. In order that this intention is meaningful, the institution must be recognized. At the school level, the recognition or affiliation has to be sought from the educational authority or the body that conducts the school-leaving examination. It is only on the basis of that examination that a school-leaving certificate is granted, which enables a student to seek admission in further courses of study after school. A college or a professional educational institution has to get recognition from the concerned university, which normally requires certain conditions to be fulfilled before recognition. It has been held that conditions of affiliation or recognition, which pertains to the academic and educational character of the institution and ensure uniformity, efficiency and excellence in educational courses are valid, and that they do not violate even the provisions of Art. 30 of the Constitution; but conditions that are laid down for granting recognition should not be such as may lead to governmental control of the administration of the private educational institutions."

In **St. Stephen's College** it was observed that so far as standard of education is concerned, it is a matter of body politic and is governed by considerations of the advancement of the country and its people. Such regulations do not bear directly upon management although they may indirectly affect it. In TMA Pai it was further observed that while giving aid to professional institutions, it would

be permissible to the authority to law down conditions on the basis of which admission will be granted to different aided colleges by virtue of merit coupled with the reservation policy of the State. Once aid is granted, the Government can put fetters on the freedom in the matter of administration and management of the institution.

In **Ashoka Kumar Thakur** it was held that the golden triangle of Articles 14, 19 and 21 is to be abridged in limited circumstances. The State shall not discriminate based on religion, race, caste, etc. under Article 14, formal equality such that egalitarian equality may be pursued. The Scheme of Article 15 (3) and (4) and 16 (4) allow the State to impose affirmative action programmes on the public sector. Such provisions necessarily limit the right to formal equality. Considering step one, as a test laid down in I.R. Coelho, if the right to equality, considered by some as a basic postulate of the Constitution, has been limited, a fortiori Article 19 (1) (g) can be too.

Considering step two test in **Ashoka Kumar Thakur**, on the anvil of **I.R. Coelho,** it was held while examining the impact test on the constitution framework, the reservations in private unaided educational institutions will give rise to the problem of maintaining academic standards, attracting and retaining good faculty will become a disincentive to establish a first rate unaided institution, which will affect global reputation of unaided institutions and will compromise them. It was held by Hon'ble Mr. Justice Dalveer Bhandari in para 525 that the institutions in such case, will no longer be able to admit the highest-scoring students; they will not attract the best students and will not be able to churn out the best. Forced to admit students with lower marks, the University's final product will not be as strong. After excluding the creamy layer, the cut of marks will drop. The overall effect will weaken the incentive to establish the unaided institutions. The skills, knowledge and creativity to

compete globally will be lost. The teachers will be asked to teach a class in which half the students are advanced relative to the other half. The shortage of top rate faculty will get worst. It will have a negative impact on the circumstances seeking employment in the knowledge economy. The top rated institutions visited by domestic as well as international entities for recruitment will pace the effect of the reservation and given the dramatic effect as aforesaid the reservation will have on the society as a whole. Article 19 (1) (g) will be abridged for violation of the Constitution basic structure. Hon'ble Mr. Justice Dalveer Bhandari thus held "*I sever the 93rd Amendment's reference to "unaided" institutions as ultra vires of the Constitution.*" He referred to justification of severance by adopting the principle of severability from the judgment in **R.M.D. Chamarbaugwalla vs. Union of India AIR 1957 SC 624**.

Shri Raj Kumar Pandey submits that the view of minority, where the majority have not expressed any opinion in a Constitution Bench, may not be binding upon a subsequent decision of the Supreme Court rendered by a number of Judges larger than the minority, but the same is binding upon the High Court.

Shri S.K. Misra, Standing Counsel, Government of India appearing for Union of India has filed written arguments prepared by Dr. Ashok Nigam, Additional Solicitor General of India, in support of Article 15 (5) of the Constitution of India as a whole. It will be appropriate to refer to the short but whole some written argument as follows:-

> "1. That the Preamble of our Constitution casts a statutory obligation on the State to constitute a sovereign, socialist, secular, democratic republic and to secure to all its citizens social, economic and political justice amongst other things.
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> 2. That the lofty ideals of the Constitution to secure social, economic and political justice to its citizens cannot be realized

unless efforts are made to remove social, economic and political inequality prevalent in society. Education in general and higher education, in particular, offers opportunities for hitherto disadvantaged sections of society to proceed on the both of progress to achieve social, economic and political equality.

3. That the efforts of the State alone in the field of education cannot bring about better opportunities for inclusion in the education system delivering to its citizens a hope of achieving social, economic and political equality. Private investment in higher education especially has grown by leaps and bounds in the past two decades. Therefore, all educational institutes including those established with private investment will have to shoulder responsibility along with State funded institution in delivering the goals set out in the Constitution.

4. That social inequality is an enigma existing in our society in modern times. The Government of India has been concerned about the welfare of Scheduled Castes (SCs), Scheduled Tribes (STs), and Socially and Educationally Backward Classes (SEBCs) of citizens, but it would be not enough unless the education section as a whole, comes forward and contributes in delivering the hope of removal of social and economic inequalities. Justice is the first virtue of social institution and it should be the endevour of every social institution to secure justice for all its stakeholders through its actions. Educational institutions have to play a prominent role in delivering such justice by providing an opportunity to disadvantaged sections to progress in all spheres of life. The onus is as much upon private unaided educational institutions as much upon publicly funded institutions to fulfill the societal obligations. This though finds strength from the judgment of the Hon'ble Supreme Court in the matter of TMA Pai Foundation & Ors vs. State of Karnataka (2002 (8) SCC 481), wherein the Hon'ble Supreme court had held in para 152 that “it would be open to the state authorities to insist on allocating a certain percentage of seats to those belonging to weaker sections of society.”

5. The Constitution (Ninety Third Amendment) Act, 2005 has by inserting a new clause (5) in Article 15 of the Constitution, enabled the State to make special provision, by law, for the protection of the rights of the Scheduled Castes (SCs), the Scheduled Tribes (STs) and Socially and Educationally Backward Classes of Citizens in all educational institutions, including aided or unaided private educational institutions, except minority educational institutions established

under Article 30 (1) of the Constitution.

6. That the Constitution (Ninety-Third Amendment) Act, 2005 is in consonance with the scheme and aims of the Constitution. The aforesaid Amendment neither abrogates fundamental rights of the people of India nor is contrary to the basic feature of the Constitution.

7. The provisions of Article 15 (5) aim at advancement of weaker sections of society including the Socially and Education Backward Classes of Citizens (SEBCs), also referred to as Other Backward Classes (OBCs), in matters of admission to educational institutions. Thus, the Union and the State Governments are competent to enact comprehensive legislation covering all matters, including reservation in admission for weaker sections of Society in all educational institutions coming under their respective domain.

8. The Constitution (Ninety Third Amendment) Act is not only a valid and justified exercise of the amending power of Parliament, but also does not, in any manner, violate the basic structure of the Constitution. In fact, the insertion of sub clause (5) in Article 15 lends strength to the basic structure of the Constitution by giving further contents and strength to the rights conferred by Articles 14, 15, 16, 17, 19, 21 of the Constitution and mandate contained in the Directive Principles of State Police, in particular Articles 38, 39, 41 and 46. The Amendment Act maintains the structure of Article 15, intact. On the contrary, continued denial of educational opportunities to SCs, STs, SEBCs would have been a gross violation of the Basic Structure of the Constitution and its Basic Feature of Equality.

9. The said amendment is intended to provide meaningful equality of educational opportunity by eliminating the existing inequalities in access to education. This Hon'ble Court has emphasized many a time that equality is a positive right and requires the State to minimize the existing inequalities and to treat unequals or the underprivileged with special care as envisaged in the Constitution. (Indra Sawhney vs. Union of India, 1992 Supp (3) SCC 217; St. Stephens College vs. University of Delhi, (1992) 1 SCC 558). The petition turns a blind eye to widespread discrimination and lack of access to education to the weaker sections of society. Given the inequities and inequality of status and opportunity marring Indian Society and the ground reality of widespread disparity in access to education and employment for the SCs, STs, SEBCs

and OBCs, the scheme envisaged under Article 15 (4), 15 (5), 16 (4A) and 16 (4B) and Article 46 and Part XVI of the Constitution is designed to reduce and eliminate inequality including social inequality which clearly and incontrovertibly forms part of the basic structure of the Constitution. Clause (5) of Article 15 was inserted through the Constitution (Ninety Third Amendment) Act to enable and equip the State to implement the said mandate. Article 15 (5) has been inserted in the Constitution in order to open avenues of education including higher, professional and technical education to SCs, STs and OBCs who have been denied their right in this regard. Without such reservation, the SCs, STs, and SEBs and OBCs will not be able to secure a fair share of this opportunity. While reservation for SCs, STs has not been seriously contested with reference to the basic structure, reservation for SEBCs also does not abrogate or abridge the basic structure of the Constitution as has been settled in a number of judgments of this Hon'ble Court.

10. That it may be stated that the constitutional vires of Article 15 (5) of the Constitution of India in regard to admission to Central Education Institutions have been upheld by the Hon'ble Supreme Court in the matter of Ashok Kumar Thakur and others vs. Union of India 2008 (6) SCC 1. This amendment enables the Government of India of make a special provision by law for the advancement of the Scheduled Castes (SCs), the Scheduled Tribes (STs) and socially and educationally backward classes of citizens also known as Other Backward Classes (OBCs) in matters of their admission to educational institutions. The Hon'ble Supreme Court upheld the constitutional vires of Article 15 (5) in so far as its applicability to publicly funded educational institutions were concerned, though the Hon'ble Supreme Court refrained from expressing a view on the vires of the Article 15 (5) in its applicability to private unaided educational institutions.

11. That by way of filing the present writ petition, the petitioner has challenged the constitutionality of U.P. Act 23 of 2006, namely the Uttar Pradesh Admission to Educational Institutions (Reservation for Scheduled Caste, Scheduled Tribe and Other Backward Classes) Act, 2006 as ultra vires and also striking down the condition No. 17 of the information brochure providing 53 per cent reservation in B.Ed Course for the academic session 2008-2009 in private unaided institutions. The petitioner has also prayed to issue an appropriate writ order or direction declaring the Constitution (Ninety Third Amendment) Act, 2005 ultra vires in as much as it pertains to private unaided educational institutions.

12. That presumption is always in favour of Constitutionality of the Act. Hon'ble Supreme Court in case of Rameshwar Prasad vs. Union of India (AIR 2006 SC 980) has approved the principle of interpreting Constitution qua purposive interpretation of the Constitution, which provided as follows:-

"The task of expounding constitution is crucially different from that of construing a Statute. A Statute defines present right and obligations. It is easily enacted and easily repealed. A Constitution, by contrast, is different with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power, when joined by Bill or Charter of rights, for the unremitting protection of individual rights and liberties. Once enacted its provision cannot be easily repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framer. The judiciary is the guardian of Constitution and must, in interpreting its provisions, bear these considerations in mind." It is true that the word 'society' has not been mentioned therein, but it is equally true that while proceeding to construe the provision of the Constitution, the Court does not invalidate a statute lightly, for invalidation of a statute made by the legislature elected by people is a grave step. The legislature must be given freedom to devise ways and means to fulfill constitutional goals and it promises made to the people while exercising its powers, provided it does not clearly and flagrantly violates its constitutional limits. An act of the legislature can be declared invalid only if it clearly violates some provisions of the Constitution. The Court before declaring the statute to be unconstitutional must be absolutely sure that there can be no manner of doubt that it violates a provision of the Constitution. If two views are possible, one making the statute constitutional and the other making it unconstitutional, the former view is always be preferred, even if that requires giving a strained construction or narrowing down its scope.

13. The said view has also been taken by Hon'ble Apex Court in the case of Government of Andhra Pradesh vs. P. Laxmi Devi, (2008) AIR SCW 1826. It has been clarified that the provisions of Article 15 (5) do not curtail the fundamental right to occupation available under Article 19 to any citizen but only circumvent the right to occupation within the Constitutional goal to achieve social, economic and political justice and equality of opportunity enabled by legislation

enacted by virtue of the powers available under Article 15 (5).

Shri V.K. Singh, Additional Advocate General, U.P. assisted by Shri Anand Kumar Sinha, Standing Counsel, High Court submits that the writ petition is not maintainable at the instance of the petitioner, who is seeking the admission to the unaided institution. A claim to validity of Article 15 (5) and Section 4 of the Act of 2006 can be made only by an unaided educational institution and not by an individual. He submits that out of five Hon'ble Judges, Mr. Justice Dalveer Bhandari has taken a view that Article 15 (5) of the Constitution violates the basic features of Article 19 (1) (8). The view, however, is a minority decision and is not binding upon the High Court under Article 141 of the Constitution of India. In the present case the petitioner is not running any trade, business or occupation on which she can claim any restriction to her rights. He submits that Article 15 (5) can be taken as a reasonable restriction, which is permissible under Article 19 (6) of the Constitution. Shri V.K. Singh, Additional Advocate General submits that even in P.A. Inamdar and T.M.A. Pai Foundation the Supreme Court observed that running an institution is covered under Article 19 (1) (g), and at the same time observed that the said institution should not be a profiteering institution and Government may regulate its fee structure by enacting statutes.

Shri V.K. Singh submits that Articles 14, 15 and 16 are equality clauses for the welfare of the entire country. The Parliament is competent to consider the welfare of its people and citizen, even of those persons, who are not aware about their rights of equal protection. The Parliament is under duty to aware them about their constitutional right and to provide them opportunity of education. He submits that Article 16 provides for reservation in employment.

Opportunity of education is necessary to achieve the opportunity in employment. Article 14 cannot be enforced with full spirit if the educationally backwards are not given opportunity in getting admission in the educational institutions. There is no distinction in the Constitution for imparting education class-wise. The avenues of education should be made available to the socially and educationally backward people in both aided and unaided institutions. He would submit that Article 15 (5) does not breach or violate the basic structure of the Constitution of India and that once the Constitution (Ninety Third Amendment) Act, 2005 amending the Constitution has been held valid, it is not open to this Court to take a different view.

In **Common Cause vs. Union of India and others (2004) 5 SCC 222** the Supreme Court held in response to the citation of dissenting opinion in **A.K. Roy v. Union of India (1982) 1 SCC 271** that the view taken by the minority cannot be cited as the law laid down by the Constitution Bench nor can it be followed in the face of the opinion of the majority to the contrary. In the same judgment it was held that the observations without laying down the law cannot be read as a ratio of the judgment and certainly not as a precedent. The reasoned opinion given by Hon'ble Mr. Justice Dalveer Bhandari on a question, which was not decided by the remaining four Hon'ble Judges, and left open for a later decision, cannot be overlooked by the High Court. All Courts in India under Article 141 are bound to follow the decisions of the Supreme Court. Article 141 pronounces in no uncertain terms that law declared by the Supreme Court shall be binding on all Courts within the territory of India. A High Court does not have liberty to consider or rely upon any supposedly conflicting decision, as there is none. It is for the Supreme Court to clarify its decision, even if rendered by an Hon'ble Judge, alone, sitting in Constitution bench. The judicial discipline is to abide by the

declaration of law by the Supreme Court.

The Supreme Court under Constitution of India is the highest court of the country, and the final court of appeal. The opinion of the Supreme Court is the law of the land, and its decisions are binding on all courts. The Supreme Court is the ultimate arbiter and the adjudicator of the laws. The interpretations given by the Supreme Court to the constitutional and other statutory provisions, if they are clear and unambiguous, have to be truthfully followed by the High Courts. The decisions of the Supreme Court cannot be ignored and bypassed even on the ground of equity or on the ground that any review or clarificatory application is pending.

A ruling is generally considered to be binding on lower courts and the courts having smaller bench structure. The doctrine of binding precedent helps in promoting certainty and consistency in judicial decisions and accepts an organic development of the law besides providing assurance to the individual and certainty in the transactions vide **M.A. Murthy vs. State of Karnataka 2003 (7) SCC 517 and also State of Punjab vs. Devans Modern Brewans Limited (2004) 11 SCC 26.**

When the Court is divided, the judgment of majority constitutes the law declared and not the view or observance of the Judges in the minority vide **John Martin v. State of West Bengal (1975) 3 SCC 836.** Where the majority has not expressed any opinion, the decision of the minority in strength, even if by a single Judge amongst five, has the effect, if the reasons are given of the judgment of the Supreme Court to be binding upon the High Court under Article 141 of the Constitution of India. The principle underlying the decision is binding on the High Courts. In **Ashoka Kumar Thakur**'s case, the question answered by Hon'ble Justice Dalveer Bhandari, namely whether the Ninety Third Amendment violates the basic structure of the

Constitution by imposing reservation on unaided institutions, did arise in the case, and was apparently argued by the counsels appearing for the parties. The Hon'ble Judge posed the question and answered it by elaborate reasoning citing the entire case law on the subject on the touchstone of I.R. Coelho's case. He has not only answered the question but has also, in adopting the principles of severability of the offending party, consciously, declared the Ninety-Third Amendment as it refers only to the unaided institutions, as ultra vires the basic structure of the Constitution of India. The ratio of the decision is a binding precedent, and thus once the Constitution (Ninety-Third Amendment) Act 2005, to the extent that it refers to unaided institutions, has been held to be ultra vires, the High Courts are bound with the ratio, as to under Article 141 of the Constitution has to follow it and on the same analogy on which Article 15 (5) as has been declared to be violative of the basic feature of the Constitution of India, of the right to occupation and its abridgment, the provisions of Section 4 of the UP Act No. 23 of 2006 cannot be saved, to that extent.

The decision in Ashoka Kumar Thakur was rendered on 10.4.2008, much before the date of entrance examination was declared in the advertisement for admission to B.P.Ed Self Finance Course. The advertisement providing for reservation in the private unaided colleges running self finance courses, is thus held to be violative of Articles 14, 15 and 19 (1) (g) of the Constitution. This Court had at the instance of the petitioner passed an interim order on 5.5.2009 restraining the University to apply the provisions of reservation in respect to admission to the private unaided colleges in self finance course under Section 4 of the Act of 2006. There is thus no reason for save admissions to B.P.Ed Course in private unaided Colleges, if any, in the year 2008-09, of the students on the basis of

reservation in reserved categories.

The writ petition is **allowed** with a declaration that the Constitution (Ninety-Third Amendment) Act 2005, in so far as it enables to provide reservation for admission to unaided educational institutions, is violative of the basic structure of the Constitution of India, as it has been held in Ashoka Kumar Thakur vs. Union of India, (2008) 6 SCC 1, and further, for the same reason, Section 4 of the UP Admission to Educational Institutions (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 2006 (UP Act No. 23 of 2006) is also declared to be invalid and ultra vires, to the extent it relates to providing reservations, in admission of students to private unaided and self finance educational institutions in the State of UP. The decision of the Admissions Committee of the Deen Dayal Upadhyaya, Gorakhpur University to proceed with the reservations in admission of students, the advertisement, its process and the admission of the reserved category candidates, to the extent that they were provided admissions in the reserved category, is set aside. The University will consider to give admission to the petitioner in the B.P.Ed Course on the basis of her percentile on merits, in B.P.Ed Course 2008-09

Dt.11.2.2011

RKP/