Reserved Judgment

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Writ Petition (S/B) No.45 of 2014

Dhananjay Verma ……. Petitioner

Versus

State of Uttarakhand & others …….Respondents

With

Writ Petition (S/S) No.330 of 2015

Mahesh Singh Negi ……. Petitioner

Versus

State of Uttarakhand & others …….Respondents

Mr. Ashok Singh, Mr. Narendra Bali and Mr. Amar Shukla, Advocate for the petitioners.
Mr. S.N. Babulkar, learned Advocate General assisted by Mr. Paresh Tripathi, Chief Standing Counsel for the State.
Mr. B.D. Kandpal, Standing Counsel for the Uttarakhand Public Service Commission.
Ms. Neeti Rana, Advocate holding brief of Mr. Rakesh Thapliyal, Advocate for the respondent no.2 in Writ Petition (S/S) No.330 of 2015.

Judgment Reserved: 08.04.2019
Judgment Delivered: 21.05.2019

Chronological list of cases referred:

1. AIR 1958 SC 538
2. (2011) 14 SCC 235
3. AIR 1995 SC 191
4. (2010) 4 SCC 150
5. AIR 1999 SC 3471
6. AIR 1967 SC 1427
7. (1974) 4 SCC 335
8. AIR 1974 SC 1
9. 1992 Supp (2) SCC 217
10. (1976) 2 SCC 310
11. [1997] 3 SCR 269
12. (1989) I LLJ 76 SC
13. AIR 1996 SC 18
14. (1991) 4 SCC 139
15. 1944 (2) All ER 293
16. (1990) 3 SCC 682
17. (1996) 6 SCC 44
18. (2006) 1 SCC 275
19. (2005) 6 SCC 404
20. (2007) 7 SCC 555
21. (1976) 2 SCC 521
22. 1901 AC 495 : (1900-03) All ER Rep. 1 (HL)
23. AIR 1968 SC 647
24. (2005) 7 SCC 234
25. (2007) 7 SCC 555
26. (1990) 1 SCC 193
27. (1990) 2 SCC 715
28. (2005) 1 SCC 444)
29. AIR 2005 SC 2392
30. (2005) 7 SCC 190
31. AIR 1990 SC 334
32. AIR 2001 Rajasthan 51
33. 2004(12) SCC 673
34. (2006) 3 SCC 1
35. (2006) 8 SCC 212
36. 1992 (1) SCC 548
37. (2005) 13 SCC 287

38. (2017) 7 SCC 221
39. (2017) 11 SCC 195
40. (1976) 1 SCR 1008
41. (1972) 1 SCR 940
42. (1970) 1 SCC 248
43. (2013) 3 SCC 641
44. (1997) 7 SCC 592
45. (1994) 2 SCC 691
46. (2015) 2 SCC 796

Coram: Hon'ble Ramesh Ranganathan, C.J.
Hon'ble Sudhanshu Dhulia, J.
Hon'ble Alok Singh, J.

Ramesh Ranganathan, C.J.

The question, which are called upon to answer, is whether Article 16(4) of the Constitution of India is exhaustive of all forms of reservation, or whether reservation for the sports category can be provided under Article 16(1) of the Constitution? In order to answer this question, it is necessary to briefly note the facts leading upto the reference being made to this Full Bench.

2. The Chief Secretary, Government of Uttarakhand issued order dated 06.10.2006 informing that the Governor was pleased to sanction 4% horizontal reservation, for players who were successful at the international/national level, for employment in the services of the State Government, Corporations, Councils, Universities and other Organizations. The benefit of reservation was made available thereby to sportsmen in four different categories which included a medal in the Olympics, Commonwealth Games, All India Inter-Universities Competition etc. The list of games, earmarked for horizontal reservation, were detailed in Annexure 1 of the said proceedings wherein Aatya/Paatya was included at Sl. No.3 and Karate-do at Sl. No.22. By proceedings dated 27.02.2009, the Secretary, Government of Uttarakhand informed that the 4% horizontal reservation, admissible to the specific sportspersons mentioned in the G.O. dated 06.10.2006, would be admissible only to domicile specific

sportspersons of Uttarakhand for the purpose of employment in State Government/Semi-Government Departments and Educational Institutions.

3. Writ Petition (S/S) No.897 of 2012 was filed by three sportsmen, from the State of Uttar Pradesh, seeking a writ of mandamus directing the respondents to appoint the petitioners under the sports category. A learned Single Judge of this Court, in his order in Writ Petition (S/S) No.897 of 2012 dated 18.03.2013, took note of the stand of the Government of Uttarakhand, in its counter-affidavit, that, in view of the Government Order dated 27.02.2009, horizontal reservation was not available to sports personalities, who did not have a permanent domicile in the State of Uttarakhand, and they could not be given appointment. The learned Single Judge, thereafter, observed that refusal to appoint the petitioners in the quota, reserved for sportsmen, was illegal as their candidature was entertained, and they were declared successful, even before the Government Order dated 27.02.2009 came into existence; at that time, it was only the Government Order dated 06.10.2006 which was operating in the field; and there was no embargo to appoint the petitioners as the said Government dated 06.10.2006 provided for appointment in the sports quota irrespective of the place of domicile. The respondents were directed to appoint the petitioners if the posts had not already been filled up. Aggrieved thereby, the Government of Uttarakhand carried the matter in appeal to the Division Bench in Special Appeal No.162 of 2013.

4. While holding that the judgment under appeal was not interferable, a Division Bench of this Court, in its order in Special Appeal No.162 of 2013 dated 14.08.2013, opined that an important aspect had been overlooked by the learned Single Judge that the Government, by a Government Order or otherwise, could not reserve any Government post for sports personnel; the same was

impermissible in view of Article 16 of the Constitution of India; the words, in Sub-Article (1) of Article 16, were "any office under the State"; therefore, in respect of each and every office under the State, there shall be equality of opportunity for all citizens; this suggested that, in the matter of public appointment, everybody had the right of equal opportunity of being considered; but for Sub-Article (4) of Article 16, no reservation could be made for backward class citizens; but for Sub-Article (4A) of Article 16, no reservation could be made for the Scheduled Castes and the Scheduled Tribes; in other words, if a class did not come within the exceptions, as provided under Sub-Articles (4), (4A) and (4B) of Article 16 of the Constitution of India, the State was bereft of any power to provide reservation for any person in any employment available within the State; the Government Order dated 06.10.2006, which was the foundation of the right of the respondents-writ petitioners, was *non est* as the same was contrary to the express provisions of Article 16 of the Constitution of India; no right flowed therefrom; and, on the basis of the said Government Order dated 06.10.2006, the respondents-writ petitioners could not ask the writ court to issue a mandamus directing that they be appointed under the sports category. While setting aside the order under appeal, the Division Bench also dismissed the Writ Petition.

5. Subsequently another Division Bench of this Court, in its order in Writ Petition (S/B) No. 45 of 2014 dated 07.07.2015, observed that it was brought to their notice that the Government of Uttarakhand had taken a decision to accept the judgment of the Division Bench in Special Appeal No. 162 of 2013 dated 14.08.2013; accordingly no one, including the petitioner in Writ Petition (S/B) No. 45 of 2014, was being considered in the sports quota; and the counsel for the petitioner had contended that he was not a party to the said judgment, and

the judgment was wrong as there was authority under Article 16(1) of the Constitution of India to make horizontal reservation.

6. Finding itself unable to subscribe to the view taken by the earlier Division Bench, in its judgment in Special Appeal No. 162 of 2013 dated 14.08.2013, that, if a class did not come within the exceptions provided in sub-articles (4), (4A) and (4B) of Article 16 of the Constitution of India, the State was bereft of authority to provide reservation for any person in any employment available within the State, the subsequent Division Bench, in its order in Writ Petition (S/B) No.45 of 2014 dated 07.07.2015, opined that the power to make reservation for sports persons can be traced to Article 16(1) of the Constitution of India; and in view of their disagreement with the view expressed by the earlier Division Bench, in its judgment in Special Appeal No. 162 of 2013 dated 14.08.2013, they thought it fit to refer the matter to a Full Bench.

7. Later a learned Single Judge, by his order in Writ Petition (S/S) No.330 of 2013 dated 28.10.2016, directed that Writ Petition (S/S) No. 330 of 2013 be connected with Writ Petition (S/B) No. 45 of 2014; and Writ Petition (S/S) No. 330 of 2015 be taken up for consideration after the decision of the larger Bench. Liberty was granted to the petitioner to move an application before the larger Bench so constituted. It is in such circumstances that both these writ petitions have been listed before us. While the petitioner in Writ Petition (S/B) No.45 of 2014 claims to have participated in the Aatya-Patya championship, the petitioner in Writ Petition (S/S) No.330 of 2013 claims to have participated in Karate-Do championship, both of which are enumerated in the Appendix to the Government Order dated 06.10.2006.

8. Mr. Ashok Singh, learned counsel for the petitioner, would submit that the earlier Division Bench, in its order in Special Appeal No. 162 of 2013 dated 14.08.2013, had erred in holding that Clauses (4), (4A) and (4B) of Article 16 are exhaustive of all forms of reservation, and no provision for reservation can be made under Article 16(1); Article 16(4), (4A) and (4B) are exhaustive only of reservation provided in favour of the Scheduled Castes, the Scheduled Tribes and the Other Backward Classes, and not of other categories in whose favour reservation can be provided under Article 16(1); and the power to provide reservation, in favour of sportsmen, is traceable to Article 16(1) of the Constitution.

9. On the other hand Mr. Paresh Tripathi, learned Chief Standing Counsel appearing for the State Government, would submit that, while reservation can no doubt be provided for sportsmen under Article 16(1) of the Constitution, no obligation is cast either on the Legislature or the Executive to provide such reservation; it is for them to decide whether or not to provide reservation; the petitioners cannot seek a mandamus either to the State Legislature or to the Government to provide reservation in favour of sportsmen; the earlier Government Order dated 06.10.2006, whereby horizontal reservation was provided in favour of sportsmen, was struck down by a Division Bench of this Court, in its judgment in Special Appeal No.162 of 2013 dated 14.08.2013, as being *non est*; the said judgment has attained finality since no appeal has been preferred there-against; it is only if the Legislature or the Executive pass a law or make a rule or frame a policy afresh, providing reservation in favour of sportsmen, can the petitioners then claim the benefit of reservation under the sports category; and, since no reservation is now provided in the State of

Uttarakhand in favour of sportsmen, the question, whether or not such reservation can be provided under Article 16(1), is merely academic.

I. CAN RESERVATION BE PROVIDED, IN FAVOUR OF SPORTSMEN, UNDER ARTICLE 16(1) OF THE CONSTITUTION?

10. Article 14 of the Constitution of India protects all persons from discrimination by the legislative and the executive organ of the State. "State" is defined in Article 12 as including the Government, and "law" is defined in Article 13 as including any order. **(Ram Krishna Dalmia vs. Justice S.R. Tendolkar[1])**. The words "Equal protection of Law" was incorporated in Article 14 so that, amongst equals, the law could be equally administered and similarly placed persons could be placed in a similar manner. But this has a caveat. The State still has the power to differentiate amongst different classes of people. **(State of Rajasthan and Ors. vs. Shankar Lal Parmar[2])**. The legislature is free to recognise degrees of harm, and to confine its restrictions to those cases where the need is deemed to be the clearest. **(Ram Krishna Dalmia[1])**. Article 14 forbids class legislation, and not reasonable classification for the purposes of legislation. While the classification may be founded on different basis, there must be a nexus between the basis of classification and the object of the Act (or Rule or Policy) under consideration. **(Ram Krishna Dalmia[1]; Budhan Chaudhary v. State of Bihar[3])**.

11. Articles 14 and 16 do not mandate that un-equals should be treated as equals. **(M. Jagdish Vyas and Ors. vs. Union of India and Ors.[4])**. Article 16 (1), which takes its roots from Article 14, particularizes the generality in Article 14 and identifies, in a constitutional sense, "equality of opportunity" in matters of employment and appointment to any office under the State. **(Ajit Singh and Ors. vs. The State of Punjab and Ors[5])**. Article 16, an incident of the application of the concept of equality enshrined in Article 14, gives effect to the doctrine of

equality in matters of appointment, and permits reasonable classification of employees for that purpose. If the preferential treatment of one source, in relation to the other, is based on differences between the two, and the said differences have a reasonable relation to the object sought to be achieved by such recruitment, the said recruitment can legitimately be sustained on the basis of a valid classification.**[S.G. Jaisinghani v. Union of India**[6]; **M. Jagdish Vyas**[4]**)**.

12. The Constitution does not command that, in all matters of employment, absolute symmetry be maintained. A wooden equality as between all classes of employees is not intended. The maintenance of such a 'classless' and undiscerning 'equality', where in reality glaring inequalities exist, will deprive the guarantee of its practical content. **[The General Manager, South Central Railway, Secunderabad and Ors. vs. A.V.R. Siddhantti and Ors.**[7]**)**. The equality of opportunity, for purposes of employment, is available only for persons who fall substantially within the same class. The guarantee of equality is not applicable as between members of distinct and different classes. **(A.V.R. Siddhantti**[7]**)**; **State of Jammu and Kashmir v. Triloki Nath Khosla and Ors.**[8]**)**.

13. Article 16(1) permits reasonable classification, just as Article 14 does **(Indira Sawhney and Others vs. Union of India and Others**[9]; **State of Kerala and Ors. v. N.M. Thomas**[10]**)**, to ensure attainment of the equality of opportunity assured by it. It may well be necessary, in certain situations, to treat unequally situated persons unequally. Not doing so, would perpetuate and accentuate inequality. (**Indira Sawhney**[9]**)**. Article 16(1) permits classification on the basis of the object and the purpose of the law or State action. Article 16(1) is affirmative whereas Article 14 is negative in language. **(N.M. Thomas**[10]**)**.

14. A classification may also involve reservation of seats or vacancies. In other words, under Clause (1) of Article 16, posts can be reserved in favour of a class. **(Indira Sawhney[9]; N.M. Thomas[10])**. Article 16(1) permits not only extending preferences, concessions and exemptions, but also reservation of posts. What kind of special provision should be made in favour of a particular class is a matter for the State to decide, having regard to the facts and circumstances of a given situation. **(Indira Sawhney[9])**.

15. Both Articles 16(4) and 16(4A) do not confer any fundamental rights nor do they impose any constitutional duties, but are only in the nature of enabling provisions vesting a discretion in the State to consider providing reservation, if the circumstances mentioned in those Articles so warrant, **(Ajit Singh[5]; C.A. Rajendran v. Union of India[11])**, for appointment in favour of backward classes of citizens which, in its opinion, is not adequately represented in the services of the State. **(Ajit Singh[5]; P&T SC/ST Employees' Welfare Association v. Union of India[12]** and **SBI SC/ST Employees Welfare Association v. State Bank of India[13])**. The "backward class of citizens" are classified as a separate category deserving special treatment in the nature of reservation in appointment/posts in the services of the State. Backward Classes, having been classified by the Constitution itself as a class deserving special treatment, and the Constitution having itself specified the nature of special treatment, it should be presumed that no further classification or special treatment is permissible in their favour apart from or outside of Clause (4) of Article 16. **(Indira Sawhney[9]).** The larger concept of reservation under Article 16(4) also takes within its sweep all supplemental and ancilliary provisions as also lesser types of special provisions like exemptions, concessions and relaxations **(Indira Sawhney[9]; N.M. Thomas[10])**.

16. Article 16(4), which indicates one of the methods of achieving the equality embodied in Article 16(1) **(N.M. Thomas[10])**, is not an exception thereto, but is merely an emphatic way of stating a principle implicit in Article 16(1) **(Indira Sawhney[9])**. Clause (4) of Article 16, an instance of classification implicit in and permitted by Clause (1), is a provision which must be read along with, and in harmony with, Clause (1). Even without Clause (4), it would have been permissible for the State to have evolved such a classification, and made a provision for reservation of appointment/posts in favour of the backward classes. Clause (4) merely puts the matter beyond doubt in specific terms. **(Indira Sawhney[9])**. Article 16(4) is exhaustive of the subject of reservation in favour of the backward classes, though it may not be exhaustive of the very concept of reservation. Reservations for other classes can be provided under Clause (1) of Article 16. **(Indira Sawhney[9])**. Merely because one form of classification is stated as a specific clause, it does not follow that the very concept and power of classification implicit in Clause (1) is exhausted thereby. **(Indira Sawhney[9])**.

17. Classification, for providing reservation in favour of certain categories, must however satisfy the twin tests of a valid classification under Article 14 and 16(1) of the Constitution of India. While reservation for categories, other than the backward classes, such as sportsmen can be provided under Article 16(1), it is in very exceptional situations, and not for all and sundry reasons, that any further reservations, of whatever kind, should be provided under Clause (1), besides Article 16(4). In such cases, the State has to satisfy, if called upon, that making such a provision was necessary (in public interest) to redress a specific situation. The very presence of Clause (4) should act as a damper upon the propensity to create further classes deserving special treatment. If reservations are made both under Clause (4) as well as under Clause (1) of

Article 16, the vacancies available for free competition would be correspondingly whittled down, and that is not a reasonable thing to do. **(Indira Sawhney[9])**.

18. The judgments of the Supreme Court in **N.M. Thomas[10]** and **Indira Sawhney[9]**, were not noticed by the Division Bench of this Court when it passed the order in Special Appeal No. 162 of 2013 dated 14.08.2013, and the said order is in ignorance of the law declared by the Supreme Court which is binding under Article 141 of the Constitution of India. **"Incuria"** literally means carelessness. A conclusion, without reference to the relevant provision of law, is weaker than even casual observations. **(State of U.P. & another vs. Synthetics and Chemicals Ltd. and another[14])**. The 'quotable in law' is avoided and ignored if it is rendered 'in ignoratium of a statute or other binding authority'. **(Young vs. Bristol Aeroplane Co. Ltd.[15])**. The Latin expression "**per incuriam**" means through inadvertence. A decision can be said generally to be given per incuriam when the Court has acted in ignorance of a binding precedent. **(Punjab Land Development and Reclamation Corporation Ltd. vs. Presiding Officer, Labour Court, Chandigarh & others[16])**.

19. The opinion of the Division Bench, in Special Appeal No. 162 of 2013 dated 14.08.2013, that Article 16(4) is exhaustive of all forms of reservation, and that no reservation can be provided under Article 16(1), runs contrary to law declared by the Supreme Court in **N.M. Thomas[10]**and **Indira Sawhney[9]**, and is, therefore, overruled. We are in agreement with the view expressed in the referral order [order in Writ Petition (S/B) No.45 of 2014 dated 07.07.2015] that the power to make reservation, in favour of sportsmen, is traceable to Article 16(1) of the Constitution of India, subject, of course, that the exercise of power, to provide such reservation, satisfies the twin tests of a valid classification.

II. WOULD THE ORDER NOW PASSED BY US, HOLDING THAT THE JUDGMENT IN SPECIAL APPEAL NO. 162 OF 2013 DATED

14.08.2013 IS NOT GOOD LAW, RESULT IN REVIVAL OF THE GOVERNMENT ORDER DATED 06.10.2006?

20. Having answered the question referred to us, we would, ordinarily, have directed that both the Writ Petitions be listed before the Bench, hearing such matters, for adjudication of the *lis* in the light of the law laid down in this order. We are satisfied however that, in the facts and circumstances of the present case, no useful purpose would be served in doing so and, as both the Writ Petitions are listed before this Full Bench, we shall proceed to examine the rival submissions, urged by learned counsel on either side, on its merits.

21. The only thing in a judicial decision binding a party is the principle upon which the case is decided, and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. Every decision contains three basic postulates—findings of material facts, direct and inferential. An inferential finding of fact is the inference which the Judge draws from the direct or perceptible facts (statements of the principles of law applicable to the legal problems disclosed by the facts); and a judgment based on the combined effect of the above. What is of the essence in a decision is its ratio. The enunciation of the reason or principle, on which a question before a court has been decided, is binding as a precedent. The concrete decision alone is binding between the parties to it, but it is the abstract ratio decidendi, ascertained on a consideration of the judgment in relation to the subject-matter of the decision, which alone has the force of law and which, when it is clear what it is, is binding. A deliberate judicial decision arrived at after hearing an argument on a question which arises in the case or is put in issue would constitute a precedent. (**Union of India v. Dhanwanti Devi**[17]; **State of Orissa v. Mohd. Illiyas**[18]; **ICICI Bank v. Municipal Corpn. of Greater Bombay**[19]; **Girnar Traders v. State of**

Maharashtra[20]; **A D M, Jabalpur vs. Shivakant Shukla**[21]; **Quinn v. Leathem**[22] and **State of Orissa v. Sudhansu Sekhar Misra**[23]**)**.

22. The *ratio decidendi* of a case is the principle of law that decides the dispute in the facts of the case. **(Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.**[24]; **Girnar Traders vs. State of Maharashtra**[25]**)**. As only the *ratio decidendi* can act as the binding or authoritative precedent, (**Girnar Traders**[25]), a Larger Bench would only overrule the law declared in the earlier judgment, as a result of which the earlier judgment will cease to be a precedent binding on future cases. While the law declared by the Division Bench in its order in Special Appeal No.162 of 2013 dated 14.08.2013, that Articles 16(4), (4A) and (4B) are exhaustive of all forms of reservation, stands overruled by this order, the question which necessitates examination is regarding the effect of the said order of the Division Bench, in Special Appeal No.162 of 2013 dated 14.08.2013, declaring the Government Order dated 06.10.2006, whereby reservation was provided in favour of sportsmen, *non est* and that no right flowed therefrom.

23. In examining this issue, the distinction between the law laid down in the earlier judgment being declared erroneous, and the decision itself being overruled, must be borne in mind. An order passed by a Court of competent jurisdiction, after adjudication on merits of the rights of the parties, binds the parties or the persons claiming right, title or interest from them. Its validity can be assailed only in an appeal or review. Its validity cannot be questioned in subsequent proceedings. **(Sushil Kumar Metha Vs. Gobind Ram Bohra**[26]**)**. The judgment of a competent Court, even if it is erroneous, is binding inter-parties and cannot be re-agitated in collateral proceedings. The binding character of judgments, of Courts of competent jurisdiction, is in essence a part of the rule

of law on which administration of justice is founded. **(The Direct Recruit Class-II Engineering Officers' Association and others vs. State of Maharashtra and others[27]; U.P. State Road Transport Corporation vs. State of U.P. and Anr.[28])**. Once a matter, which was the subject-matter of a lis, stood determined by a competent Court, no party can thereafter be permitted to reopen it in a subsequent litigation. **(Swamy Atmananda and Ors. vs. Sri Ramakrishna Tapovanam and Ors.[29]; Ishwar Dutt vs. Land Acquisition Collector and Anr.[30])**.

24. A decision, which has attained finality, is binding between the parties, and they are not to be permitted to reopen the issue decided thereby. **(Supreme Court Employees Welfare Association Vs. Union of India[31])**. Such orders bind the parties in a subsequent litigation or before the same Court at a subsequent stage of proceedings. (**Barkat Ali v. Badrinarain[32])**. An order of a Court/Tribunal of competent jurisdiction, directly upon a point, creates a bar, as regards a plea, between the same parties in some other matter in another Court/Tribunal where the said plea seeks to raise afresh the very point that was determined in the earlier order. **(Swamy Atmananda[29]; Iswar Dath Land Acquisition Collector[30])**. Issues which have been concluded inter-parties cannot be raised again in proceedings inter-parties. **(State of Haryana Vs. State of Punjab[33])**.

25. A decision inter-parties cannot be overturned in collateral proceedings. A decision can be set aside in the same *lis* on a prayer for review or an application for recall. Overruling of a decision takes place in a subsequent *lis* where the precedential value of the decision is called in question. It is open to a court of superior jurisdiction or strength, before which a decision of a Bench of

lower strength is cited as an authority, to overrule it. This overruling would not operate to upset the binding nature of the decision on the parties to an earlier *lis* in that *lis*, for whom the principle of *res judicata* would continue to operate. **(Bharat Sanchar Nigam Ltd. and Ors. vs. Union of India and Ors[34])**. As the judgment of the Division Bench, in Special Appeal No. 162 of 2013 dated 14.08.2013, has attained finality, no appeal or review having been preferred thereagainst either by the petitioner therein or the Government of Uttarakhand, the said order of the Division Bench, quashing the Government Order dated 06.10.2006 and in holding it *non est*, cannot be set at naught in collateral proceedings even by a Larger Bench.

26. While the law declared therein can always be, and has in fact been, overruled by a Larger Bench, the Government Order dated 06.10.2006, which has been held *non est* by the Division Bench, in its order in Special Appeal No.162 of 2013 dated 14.08.2013, can neither be revived nor resurrected in collateral proceedings. The only consequence of the order now passed by us is that it would now be open to the Uttarakhand State Legislature to make a law, or for the Government of Uttarakhand to make a Rule or frame a policy afresh, providing reservation in favour of sportsmen, ensuring that the classification of persons, in whose favour reservation is sought to be provided under the sports category, satisfy the test of a valid classification under Articles 14 and 16(1) of the Constitution of India.

III. CAN A MANDAMUS BE ISSUED, TO THE LEGISLATURE OR THE EXECUTIVE, TO PROVIDE RESERVATION UNDER ARTICLE 16(1) OF THE CONSTITUTION?

27. As the Government Order dated 06.10.2006 cannot be resurrected even by a larger Bench in collateral proceedings, the next question which necessitates examination is whether a direction can be issued, by the Larger

Bench, for reservation to be provided for sportsmen in the State of Uttarakhand? In this context, it is necessary to note that it is only if a person is denied equality before the law or the equal protection of the law by the State, or if a citizen is denied equality of opportunity in matters relating to employment or appointment to any office under the State, can Article 14 and Article 16(1) of the Constitution be said to have been violated. Such denial would arise only if a law made by the State Legislature, or the Rules made and policies framed by the Executive, violate Articles 14 and 16(1) of the Constitution. While reservation with respect to categories, other than the backward classes, can also be extended under Article 16(1), the power to provide such reservation, under Article 16(1) of the Constitution, enures only in the Legislature and the Executive. In the absence of any such law or rule having been made, or a policy having been framed, the petitioners' request, for reservation to be provided under the Sports Category, cannot be granted by Courts.

28. Whether reservation is desirable or not, as a policy, is not for the Court to decide. **(M. Nagaraj & others vs. Union of India[35])**. Under our Constitutional scheme, Parliament and the State Legislatures exercise sovereign power to enact laws, and no outside power or authority can issue a direction to enact a particular piece of legislation. **(State of J & K v. A.R. Zakki[36]**; **Suresh Seth v. Commr., Indore Municipal Corporation[37]**; **Supreme Court Employees' Welfare Assn.[31]** and **Mangalam Organics Ltd. vs. Union of India[38])**. The judiciary, one among the three branches of the State, is co-equal to the other two branches i.e. the executive and the legislature. Each has specified and enumerated constitutional powers. The judiciary is assigned the function of ensuring that executive actions accord with the law, and that laws and executive

decisions accord with the Constitution. **(State of Himachal Pradesh and Ors. vs. Satpal Saini[39])**.

29. Legislative power is exercised by the legislature directly or, subject to certain conditions, may be exercised by some other authority on such a power being delegated to them. But exercise of that power, whether by the legislature or by its delegate, is an exercise of a legislative power. The fact that the power was delegated to the executive does not convert that power into an executive or administrative power. No court can issue a mandate to a legislature to enact a particular law. Similarly no court can direct a subordinate legislative body to enact or not to enact a law which it may be competent to enact. [**Supreme Court Employees' Welfare Association[31]**; **A.R. Zakki[36]**; **State of Andhra Pradesh v. T. Gopalakrishna Murthi and Ors.[40]**; **Mangalam Organics Ltd.[38]** and **Narinder Chand Hem Raj v. Lt. Governor, Administrator, Union Territory Himachal Pradesh[41])**. While it has the power to strike down a law on the ground of want of authority, this Court would not sit in appeal over the policy of Parliament or the State Legislature in enacting a law. [**Rusom Cavasiee Cooper v. Union of India[42])**. Just as it cannot direct a legislature to enact a particular law, **(Supreme Court Employees' Welfare Association[31])**, the High Court, under Article 226 of the Constitution of India, cannot direct the Executive to exercise power by way of subordinate Legislation, pursuant to the power delegated by the Legislature to enact a law, in a particular manner. **(Indian Soaps and Toiletries Makers Association vs. Ozair Husain and Ors.[43])**.

30. The executive authority of the State must be held to be within its competence to frame a policy for the administration of the State. **(M.P. Oil Extraction and anr. V. State of M.P. and Ors.[44])**. As the duty to formulate policies is entrusted to the executive, which is accountable to the legislature, the

Court would not direct the executive to adopt a particular policy or the legislature to convert it into enacted law. **(Satpal Saini[39])**. The exercise of making policy must be left to the discretion of the executive and legislative authorities. The court is called upon to consider the validity of a public policy only when a challenge is made that such policy decision infringes the fundamental rights guaranteed by the Constitution of India or any other statutory right. **(Premium Granites v. State of Tamil Nadu[45]** and **Census Commissioner and Ors. v. R. Krishnamurthy[46])**.

31. It is not within the domain of the Court to legislate. The Courts interpret the law, and have the jurisdiction to declare the law unconstitutional. But, the courts are not to plunge into policy making by adding something to the policy by issuing a writ of mandamus. **(R. Krishnamurthy[46]** and **Mangalam Organics Ltd.[38])**. Since a writ of Mandamus cannot be issued to the Legislature to enact a particular law, or to the Rule making authority to make rules in a particular manner or even to the Government to frame a policy, providing reservation under Article 16(1) of the Constitution, the petitioners' request, for reservation to be provided under the Sports Category, must be addressed to the Government and not to the Court, for it is only after a law or a rule is made or a policy is framed providing reservation, can Courts, thereafter, be called upon to examine its validity on the touchstone of Articles 14 and 16(1) of the Constitution of India.

IV. CONCLUSION:

32. We answer the reference holding that, in view of the law declared by the Supreme Court, in **Indra Sawhney[9]** and **N.M. Thomas[10]**, the opinion of the Division Bench, in Special Appeal No.162 of 2013 dated 14.08.2013, that Article 16(4) of the Constitution of India is exhaustive of all forms of reservation, is not

good law; and reservation in favour of categories, other than those in whose favour reservation is provided under Articles 16(4), (4A) and (4B), can be extended under Article 16(1), provided such reservation satisfies the test of a valid and reasonable classification. As the Government Order dated 06.10.2006 has been held to be *non est* by the Division Bench in its order in Special Appeal No.162 of 2013 dated 14.08.2013, which order has attained finality, the petitioners in both the Writ Petitions are not entitled to the grant of any relief from this Court. Subject to the aforesaid observations, both the Writ Petitions fail and are, accordingly, dismissed. No costs.

(Alok Singh, J.) (Sudhanshu Dhulia, J.) (Ramesh Ranganathan, C. J.)
21.05.2019

NISHANT