

Sandeep Poddar and anr. Vs. State of U.P. and anr.

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Court : Allahabad

Decided On : Aug-28-2001

Reported in : (2001)3UPLBEC1968

Judge : Anjani Kumar, J.

Acts : Uttar Pradesh State Universities Act, 1973 - Sections 28(5); [Constitution of India](#) - Articles 14, 15(1), 15(4) and 29(2)

Appeal No. : Civil Misc. Writ Petition No. 23863 of 2001

Appellant : Sandeep Poddar and anr.

Respondent : State of U.P. and anr.

Advocate for Def. : U.N. Sharma, ;Dilip Gupta, ;V.B. Upadhya, ;Ramesh Asthana and ;K.M. Garg, Advs.

Advocate for Pet/Ap. : Prakash Krishna and ;Ravi Kant, Advs.

Disposition : Petition allowed

Judgement :

Anjani Kumar, J.

1. This writ petition under Article 226 of the [Constitution of India](#) filed by two petitioners seeking interference of this Court under Article 226 of the Constitution

with the following prayers:

(i) A writ, order or direction in the nature of writ of mandamus restraining the respondents from holding counseling with effect from 16th July, 2001 in UPSEAT-2001.

(ii) A writ order of direction in the nature of writ of mandamus restraining the respondents from granting any preference or reservation to the girl students in the matter of assignment of either institution or subject branch or discipline in Engineering course;

(iii) Any other writ, order or direction as may be deemed fit and proper in the circumstances of the present case;

(iv) Award costs of the writ petition to the petitioners.

2. The facts as narrated in the writ petition, which raises the controversy, are that the petitioners appeared in Combined Entrance Examination known as U.P. State Engineering Admission Test, 2001 (hereinafter referred to as UPSEAT/ 2001). The petitioners asserted that both the petitioners appeared in the aforesaid test and came out with flying colours. While the petitioner No. 1 was placed at serial number 132 in the Combined merit list and petitioner No. 2 was placed at serial No. 154 among the general category candidates.

3. Petitioners thereafter asserted that after the declaration of result, the respondents hold counselling with a view to assign students to a particular college branch disciplines of the engineering according to the merits keeping in view the quota reserved of reservation for various categories of students as explained in the Brochure for the UPSEAT-2001. The relevant portion of the brochure, which has been appended as Annexure-1 is part of this writ petition. The entire brochure is also annexed as Annexure-1 to the rejoinder affidavit which refers at page 25 at item No. 14 under the heading 'BASIS OF SELECTION FOR ADMISSION, ALLOTMENT OF INSTITUTION AND BRANCH', reads as under :

14.1. MERIT LIST

The merit list will be prepared only on the basis of marks secured by the candidates in UPSEAT Examination.

No candidate shall be included in merit list if he/she fails to secure minimum qualifying marks in aggregate in Physics, Chemistry and Mathematics in Group A or Group C; or AG-I, AG-II, AG-III in Group B; or Biology, Physics, Chemistry in Group D; or in the aggregate of all the four subjects in Group E, F, G or H (for direct admission to second year). The Group E, F, G & H candidates may also be considered for admission to first year of different courses depending upon their eligibility (i.e. if they have also passed Intermediate Examination or (10+2) or equivalent and merit. The Aptitude Test in Architecture paper (for Group C & H) shall be of qualifying nature. The merit list of Group C candidates shall be prepared on the basis of total marks obtained by them in Physics, Chemistry and Mathematics papers, based on which they shall also be eligible for admission to first year of B. E./B. Tech/B. Pharma/B. Tech.(Ag. Engg.)/B. Tech. (Technology) courses along with the candidates of other subject groups. They shall be eligible for admission to first year of five year B. Arch. Programme if they also obtain qualifying marks in Aptitude Test in Architecture paper. Thus, no separate merit list of Group C candidates will be prepared.

4. According to Govt. Order No. 7875/98-Solah-1-213/94, dated 21st December, 1998 the minimum qualifying marks will be as follow for different categories:

1. For General Category 30%
2. For Backward (OBC) Category 25%
3. For Scheduled Caste/Scheduled Tribe 15%

The above qualifying marks shall be absolutely exclusive of any weightage applicable to the candidates.

5. Merit list for qualified candidates belonging to various categories will be prepared. The merit list will be prepared for the different courses given below on marks secured in the papers indicated against each course and the weightage, if any. The reserved category candidates will also be placed in the General Merit List depending upon the total marks obtained by them in UPSEAT.

- (i) BE., B. Tech. (Technology Courses) : Physics, Chemistry and Mathematics.
- (ii) B. Tech (Ag. Engg.) : Physics, Chemistry and Mathematics OR AG-I, AG-II and AG-III.
- (iii) B. Arch Course : Mathematics, Physics, Chemistry.
- (iv) B. Pharma: Physics, Chemistry & Mathematics OR Physics, Chemistry and Biology.
- (v) B.E./B. Tech/B. Tech. (Ag. Engg.)/ B. Pharma Second year (only for diploma holders): Total marks obtained in four papers including Technology Test paper in which the candidate has appeared.

6. In case of candidates securing the same marks the relative merit will be decided by considering the marks secured in the order of Mathematics (Biology) and Physics. In case of candidates with Intermediate Agriculture qualification the relative merit among the candidates securing equal marks will be decided by considering the marks secured in the order of AG-I and AG-II.

7. In case there is a tie on the basis of the above criteria, the relative merit will be decided by the age of the candidate. The candidates of higher age will be placed on higher merit.

14.2. COUNSELLING & PRE-COUNSELLING

Counselling-All the candidates are required to obtain the counselling schedule on the first day of examination from their center suptd. The UPSEAT- 2001 result will be declared on 20th June, 2001 and the counselling is likely to commence in the first week of July, 2001. No separate counselling letters will be sent to the candidates. The candidates are required to see their results (refer item 14.5), note down their merit/waiting position in their category, and themselves find out the date of counselling from the counselling schedule. The candidates are required to report in UPSEAT-CELL, IET campus Lucknow at 9.00 A.M. on the date of their counselling. Counselling is conducted to collect all the original mark-sheet/documents/certificates from the candidates along with the counselling fee,

and the advance fee and to verify the eligibility of the candidate. The candidates will be required to give order of preference of their choices of seats (institution, branch, nature of seat-free/payment/NRI) in the seat option form. The candidates will be provided with the required help and information for filling up their choices in seat option form. There are no marks assigned for counselling. The entire information about the counselling will also be available on the internet. The candidates whose complete result of qualifying examination has not been declared by the date of counselling due to any reason whatsoever (as in case of incomplete or with held result of supplementary exam. etc.), or is unable to produce the original mark-sheet of qualifying examination, shall not be eligible for admission under any circumstances and shall not be permitted to fill up the seat option form. The candidature of such candidates shall automatically stand cancelled. The candidate has to be physically present for the counselling on the date and time specified. If for whatever reason, the candidate fails to present himself/herself for the counselling on the date and time specified he/she will not be subsequently considered for seat allotment and his/her candidature will be forfeited.

Pre-Counselling-Pre-Counselling meeting shall be arranged in a few selected cities in U.P. and Uttaranchal on the date (in the last week of June, 2001) to be notified in the News Papers along with the UPSEAT Result. This will assist the candidates to (i) confirm their results and date of counselling, (ii) get the information about available seats in different institutes/colleges, (iii) get clarification about their eligibility for different seats, (iv) educate the candidates to fill up the seat option form and (v) clarify their other doubts.

14.3. SEAT ALLOTMENT (allotment of Institution, Branch and Nature of seat)

The allotment of seat (Institution, Branch, Nature of seat free/payment/NRI) will be made after the counselling on a later date using a computer on the basis of candidate's merit position in UPSEAT, eligibility of the candidate, availability of seats and order of seat preference given by the candidate in the seat option form. No subsequent change of institution shall be permitted under any circumstances. However, in case of some vacancies occurring in an institution on account of dropouts, the candidate may exercise his/her option in writing for change of

branch, which will be allotted subject to availability in accordance with his/her merit position in the Uttar Pradesh State Engineering Admission Test within the same institution only.

8. The individual admission letters will be sent to the candidates by post and the candidate will be required to report at the allotted institution for registration on a particular date (around first week of August, 2001). The complete list of candidates (with requisite details) admitted through UPSEAT-2001 will be available on the internet, and at all the Govt/State funded Institutions of U.P./Uttaranchal. Any complaint regarding seat allotment may be made to the Secretary, UPSEAT Cell by 14th August, 2001.

9. There is no reservation for girl candidates as a separate category. However, preferences for branch and institution will be permitted upto one third of the total seats as per the provisions of the Uttar Pradesh Government Notification No. 438/LXXXIV-18 Pra. Sh-1-169-84, dated August 26, 1989 and G.O. No.. 2827/16-1-2000-169/84, dated 16th June, 2000, where in a branch-wise allocation of this preference has been provided in each institution under this system provided that:

(a) Such minimum number of seats for girl candidates shall include the girl candidates who are allocated in accordance with their preference the colleges/institutes or branches of study being entitled to such allocation on their own merit.

(b) The seats remaining vacant due to in-adequate number of girl candidates not giving preference to fill in the requisite number of seats allocated for them shall be filled up by boy candidates in the respective branches of study and institutes/colleges in accordance with the rules framed by the admission Committee; and

(c) The above preference to choose institute/college or branch of study shall be allowed only to those girl candidates who are selected for admission on the basis of the general merit list and first waiting list published by the Admission Committee and those in the subsequent waiting list shall not be allowed any preference. The Counselling of genuine NRI/Foreign national for NRI quota shall be held on 25th

June, 2001 (or details refer para 10).'

10. It is these notification dated 26.8.1989 and G.O. dated 16.6.2000, which are challenged by the petitioners. The Notification dated August 26, 1989, referred to above, has been issued by the Governor/Chancellor of the University in exercise of power under Sub-section (5) of Section 28 of the U.P. State Universities Act, 1973 (President's Act No. 10 of 1973) as amended and re-enacted by the U.P. State Universities Act (Re-enactment and Amendment), 1974, U.P. Act No. 29 of 1974, read with Section 21 of the U.P. General Clauses Act, 1904 and in partial modification/Government Notification dated December 17, 1988. The relevant portion of Notification referred to above dated 26.8.1989 is reproduced below:-

'The Government with a view o ensure certain minimum number of seats for girl candidates in various engineering colleges and institutions as well as in different branches of studies therein according to their preference is pleased to direct that with effect from the date of the publication of this Notification in the gazette, the minimum number of seats for girl candidates for admission in the various engineering colleges and institutions of the State Government and in different branches studies therein selected on the basis of Combined Entrance Examination, shall be given in the schedule below:

Provided that:-

(a) Such minimum number of seats for girl candidates shall include the girl candidates who are allocated in accordance with their preference to the respective colleges/institutes or branches of study being entitled to such allocation on their own merit.

(b) The seats remaining vacant due to in-adequate number of girl candidates not giving preference to fill in the requisite number of seats allocated for them shall be filled up by boy candidates in the respective branches of study and institutes/colleges in accordance with the rules framed by the Admission Committee; and

(c) The above preference to choose institute college or branch of study shall be allowed only to those girl candidates who are selected for admission on the basis of the general merit list and first waiting list published by the Admission Committee and those in the subsequent waiting list shall not be allowed any preference.'

11. This notification thereby reference of a schedule giving number of seats and the seats according to the aforesaid notification are on-third ear-marked for girl candidates. This notification of August 26, 1989 followed by another GO. dated May 17, 1994, which has been annexed as Annexure SCA-III to the counter affidavit of Dr. A.K. Khare, Vice Chairman, UPSEAT filed on behalf of the respondents-University providing the reservation, which reads as under:

Scheduled Caste 21 per cent.Scheduled Tribes 2 per cent.Other Backward Classes 27 per cent.

12. This G.O. of May 17, 1994 also provides reservation for dependent of freedom fighters, dependent of soldier died during action or disabled defence employee to the extent specified in the aforesaid notification.

13. The G.O. Dated 16/22.11.1995 followed the notification of 1989, which provides that in case a candidate belonging to the aforesaid reserved category secures the position in the merit list, according to which he is entitled for selection among the general category candidates then such student/examinee shall be treated to be a general category candidate and the position vacated by such reserved category examinee, shall be given to another eligible reserved category candidate according to the merit list of the reserved category candidates. The last G.O. on the subject issued on 16th June, 2000 by Special Secretary, U.P. Government to the Director of Engineering and Technology Institute, Lucknow, which provides that the girl candidates for whom 1/3 seats have been ear-marked, now be selected not only from the main merit list but also by inviting the girl candidates from first waiting list.

14. It is this the special provisions of the preference ear-marked for girl candidates pursuance whereof the respondents have invited all the girl candidates from the main merit list as well as from the first waiting list irrespective of their position in

the merit list for counselling on the first day fixed for the counselling to give their institutional preference/branch preference.

15. As narrated when these girl students appeared before the admission committee for counselling, they would be asked to give their options of institutional preference and branch (discipline preference) and it is only after exhausting of the list of girl candidates so prepared containing the girl students from main merit list and from the first waiting list, the boy students Irrespective of their position of the merit list would be invited for counselling. It is this invitation of counselling of the girl students as first preference irrespective of their position in the merit list, which is questioned by this writ petition inter alia on the ground as argued by Sri Ravi Kant, Senior Counsel assisted by Sri Prakash Krishna, Advocate appearing on behalf of the petitioners that since according to the brochure itself, there is no reservation for girls, the preference given to the girls irrespective of their position in the merit list is violative of Articles 14, 15(1) and 15(4) of the [Constitution of India](#), read with Article 29(2) of the Constitution that if the system in which the girl candidates are invited for counselling is to be followed, this takes up a total reservation in the following manner:-

1. Scheduled Caste 21 percent
2. Scheduled Tribes 2 per cent
3. Other Backward Classes 27 per cent
TOTAL 50 per cent.

16. Over and above 50 percent this 33 percent reservation for girls, the reservation will take a total reservation of 83 percent in addition to the reservation provided for dependent of the freedom fighters, dependent of the armed forces as specified above and physically handicapped (here-in-after referred to as 'FF , AF and PH'). This virtually brings us to a situation according to the learned Counsel appearing on behalf of the petitioners that there is infact the reservation for the general category (boys) only to the extent of 7 percent taking cumulative total of seats including 10 percent to dependent of freedom fighters (FF), dependent of armed forces personnel (AF) and physically handicapped (PH) 93 percent. Thus, the total reservation comes to $50 + 33 + 10 = 93$ percent. Reading the notification of 1989, Sri Ravi Kant submitted that this 33 percent allocation for girls is in fact not preference, but is reservation. Referring to the Notification of 1989, learned

Counsel for the petitioners further submitted that this notification has been issued in exercise of power under Sub-section (5) of Section 28 of the U.P. State Universities Act.

17. Section 28 (5) of the U.P. State Universities Act, is reproduced below :-

'28. (5) Notwithstanding anything contained in any other provision of this Act,-

(a) reservation of seats for admission in any course of study in University, Institute, constituent college, affiliated college or associated college for the students belonging to the Scheduled Castes, Scheduled Tribes and Other Backward Classes of citizens may be made and regulated by such orders as the State Government may, by notification, make in that behalf:

Provided that reservation under this clause shall not exceed fifty percent of the total number of seats in any course of study:

Provided further that reservation under this clause shall not apply in the case of an institution established and administered by minorities referred to in clause (1) of Article 30 of the Constitution :

Provided also that the reservation under this clause shall not apply to the category of Other Backward Classes of citizens specified in Schedule II to the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994.

(b) admission to medical and engineering colleges and to courses of instruction for degrees in education and Ayurvedic or Unani systems of medicine (including the number of students to be admitted), shall subject to clause (a), be regulated by such orders (which if necessary may be with retrospective effect, but not effective prior to January 1, 1979) as the State Government may by notification, make in that behalf:

Provided that no order regulating admission under this clause shall be inconsistent with the rights of minorities in the matter of establishing and administering educational institutions of their choice;

(c) in making an order under clause (a), the State Government may direct that any person who willfully acts in a manner intended to contravene, or defeat the purposes of the order shall be punishable with imprisonment for a term not exceeding three months or with fine not exceeding one thousand rupees, or with both, as may be specified in the order.'

18. That according to the aforesaid provisions, namely, Section 28(5) of the U.P. State Universities Act, there is no reservation for girls and the proviso to Section 28(5) (a) provides 'provided that reservation under this clause shall not exceed fifty percent of the total number of seats in any course of study.' Section 28(5) (b) deals with admission to medical and engineering colleges and to courses of instruction for degrees in education and Ayurvedic and Unani systems of medicine (including the number of students to be admitted), shall be subject to clause (a), be regulated by such orders (which if necessary may be with retrospective effect, but not effective prior to January 1, 1979) as the State Government may by notification, make in that behalf. According to the learned Counsel thus the outer ceiling of reservation fixed by Statute U.P. State Universities Act is 50 percent and it also provides the categories for which the reservation can be provided. Reading clause (b) of Sub-section (5) of Section 28 makes it clear that only such orders issued by the State Government can be said to be in conformity with Section 28, which are made by the State Government, by notification in this behalf. Learned Counsel further submits that word 'Notification' has been defined under Section 2 (29-A) of the U.P. General Clauses Act. Section 2 (29-A) of U.P. General Clauses Act, which reads as under: -

'2.(29-A) 'Notification' or 'Public Notification' shall mean a notification published in the Gazette of the State, and the word 'notified' shall be construed accordingly;'

19. That except for the Notification dated August 26, 1989, no G.O., referred to above, has been published in the Gazette by the State including that to the G.O. dated 16.6.2000.

20. Sri Ravi Kant, learned Counsel for the petitioners further submitted that there is no horizontal reservation, it is only a vertical reservation that too only to the extent of 50 percent that has been provided and so-called reservation for FF, AF

and PH concerned, they are within the vertical reservation contemplated under clause (a) of Section 28 (5) of the U.P. State Universities Act, read with clause (b) of the aforesaid Section are subject to sub-clause (a) and the ceiling prescribed therein.

21. Assailing to the Notification dated 26.8.1989, learned Counsel for the petitioners submits that according to the aforesaid notification the minimum number of seats for girls, as indicated in the notification, will be allocated in accordance with their reference to the entitled of such allocation of their own merit. Reading proviso (a) along with proviso (c) of the notification dated 26.8.1989, the preference to choose institute, college or branch of study shall be allowed only to those girl candidates who are eligible for admission on the basis of their own merits position in the general merit list published by the Admission Committee and those in the waiting list shall not be allowed any preference Learned Counsel for the petitioners further assailed that in view of this matter inviting girl candidates on the first day of counselling leaving the boys and not only this but there are such girls who are in the first waiting list as prepared by the Admission Committee is wholly contrary to the aforesaid notification dated 26.8.1989, and the provisions of Section 28(5) of U.P. State Universities Act and also violates the Constitutional guarantee under Articles 14, 15(1) and 15(14), read with Article 29(2) of the Constitution.

22. To strengthen its argument, learned Counsel further submitted that this can be borne out reading proviso itself of the aforesaid notification dated 26.8.1989, which says seats remaining vacant due to adequate number of girl candidates not giving preference to fill in the requisite number of seats allocated for them, shall be filled up by boy candidates in the respective branches of study and institutions and colleges in accordance with the rules framed by the Admission Committee. Counsel for the petitioners thus submitted that the action of the respondents in inviting only girl candidates irrespective of their position in the merit list amongst the general candidate is unconstitutional, contrary to the provisions of Section 28 (5) of the U.P. State Universities Act and is liable to struck down. Learned Counsel further submits that this action of respondents also hit by Article 14, 15(1) and 15(4) read with Article 29(2) of the Constitution.

23. Learned Counsel further submits that suitable directions be issued to the respondents to invite candidates including girls strictly according to their respective position in the combined (main) merit list and no preference/reservation should be given to girl candidates. The petitioners have not challenged the reservation so far as Scheduled Castes, Scheduled Tribes and Other Backward Classes candidates are concern. The challenge is confined only the preference of the reservation to girl candidates. In order to substantiate his arguments, Counsel for the petitioners first relied upon a decision of 9 Judges, Bench of Apex Court, reported in AIR 1993, SC 477 (equivalent to 1992 Supp. (3) SCC 217), famous case of Indra Sawhney etc. v. Union of India and Ors.. Learned Counsel for the petitioners has cited paragraph 400 (of AIR). According to Counsel for the petitioners reading paragraph 400 clearly makes out that:

'reservation can take various forms whether they are made for backward or other classes. They may consist of preferences, concessions, exemptions, extra facilities etc. or of an exclusive quota in appointments as in the present case. When measures other than an exclusive quota for appointments are adopted, they form part of the reservation measures or are ancillary to or necessary for availing of the reservations.'

24. Whatever the form of reservation, the backward classes have to look for them to Article 16(4) and the other classes to Article 16(1).' It is thus according to Counsel for the petitioners that special provisions or preference to girls in terms amounts to reservation and since the Statute, namely, State Universities Act prescribes the Ceiling of 50 percent, which is also prescribed by the aforesaid 9 Judges' Constitutional Bench of Indra Sawhney's case. Referring to Article 15(4) of the Constitution, it is submitted by Counsel for the petitioners that reservation can be provided only to either socially and economically backward classes citizens or socially and educationally backward classes citizens. In this view of the matter also the girl candidates cannot be said to be either socially or economically backward classes or socially or educationally backward classes of citizens. That in the case of M.R. Balaji v. State of Mysore, AIR 1963 SC 649, it has been observed that the protection is available to only two classes of citizens, namely, socially and economically backward classes citizens and socially and educationally backward

classes citizens, the Apex Court in Indra Sawhney's case has dealt with the aforesaid proposition in paragraph 404 (of AIR) in a following sentence:

'it is true that no decision prior to this decision had in terms sought to equate the two expressions, and to that extent the said statement can be faulted as it is sought to be done before us.'

25. Learned Counsel further submitted that in view of the law laid down by the Apex Court in the case of Anil Kumar Gupta and Ors. v. State of U.P. and Ors., reported in 1995 (5) SCC 173, where the challenge was that the reservation in favour of girls by circular to the extent of 35 percent seats for general category over and above 50 percent seats for Scheduled Castes, Scheduled Tribes and Other Backward Classes was found to be in excessive but in view of the statement made by learned Counsel for the State before the Apex Court that now there is no reservation for ladies in the general category for admission to M.B.B.S. course. In view of the latest circular issued by the Government, it is clarified that reservation shall be only to the extent of 50 percent for Scheduled Castes, Scheduled Tribes and Other Backward Classes and 10 percent reservation for FF, AF and PH, including the candidates of hill areas and candidates of Uttarakhand to the extent of 5 percent will be absolute within their respective categories as Horizontal reservation. With a further observation by this Court that the reservation for hill area and Uttarakhand is liable to be struck down on the basis of the law laid down by the Apex Court in the case of State of U.P. and Ors. v. Dr. Pradeep Tandon and Ors., reported in AIR 1975 (Vol. 1) SCC 267. Learned Counsel for the petitioners further submitted that in this view of the matter since the State Government has chosen not to issue any fresh notification in place of the notification dated August 26, 1989, even after the amendment of U.P State Universities Act, which amends the provisions of Section 28, the amendment published in U.P. Gazette dated 26th August, 1989, referred to above, is liable to be quashed as the same is contrary to the law laid down by the Apex Court in the 9 Judges' Constitutional Bench of Indra Sawhney's case and also not in consonance with the provisions of Sub-section (5) of Section 28 of the U.P. State Universities Act. The State of U.P. has chosen not to amend the notification dated 26.8.1989 and the G.O. dated 16.6.2000, which has been issued without

following the procedure prescribed under Sub-section (5) of Section 28, read with Section 2 (29-A) of U.P. General Clauses Act deserves to be quashed. That since the Statute itself was amended prescribing the extent and class of reservation, the notification dated 26.8.1989 has become redundant and not enforceable in past Indra Sawhney's era.

26. Learned Counsel for the petitioners further submitted that even according to the notification of 1989, which provides preference to the girl students to the extent of 1/3 of the total number of seats, the same can not, by any stretch of imagination included into reservations as the women preference as the definition of women preference is only means that if all other citizens are equal the preference should be given to the girl candidates. In the present case, it is neither the case of the petitioner's not the case of the respondents that the girl, who has been invited for counselling on the first day is otherwise equal with a boy in all other aspect and it is only case of the preference being given to the girls that she is invited for counselling on the first day. Thus, though in view of the law laid down by the Apex Court in Indra Sawhney's case (supra) otherwise amounts to reservation but no effort has taken by the respondents to meet this argument by producing any material that their action in fact is not the reservation. In paragraph 16 of the writ petition, the petitioners have cited the affect of inviting the girl candidates on the first day without inviting the boy candidates according to the merit list on the basis of the counselling held in the UPSEAT in year 2000, which is quoted below:

Subjects Boys Girls Computer Science 69 220 Electronics 192 500 Electrical En. 468 900 Mechanical 505 1700 Prod. 677 2378 Civil 1396 3200

27. This is only with regard to Branch preference, same is the result with regard to Institutional preference.

28. It is submitted that a perusal of the aforesaid chart would demonstrate that under the subject of Computer Science, while the male students up to serial No. 69 in the merit list, yet would be accommodated the girl students stood at serial No. 220 were asked for the aforesaid branch. Like wise in Electronics, the branch itself must said for male students up to the serial No. 192 were not accommodated and on the other hand in the case of female it goes up to serial No. 500. The

examples are so many, which are not being referred to and on the basis thereof, it is submitted on behalf of petitioners that in fact the merit is sacrifice and such action not only denies the guarantee of equality enshrined under Article 14 of the Constitution but also under Article 15 of the [Constitution of India](#). The petitioners state that this year the same will be the effect of inviting the girls on the first day of counselling.

29. This Court directed the Counsel representing the University to give the merit list of the examination of UPSEAT 2001, which shows that in the main merit list of Combined General Category, first 50 position has been assigned to boys. The first girl candidate according to the combined merit list is placed at serial No. 51. If the respondents are allowed to proceed in the manner as stated above, it is contrary to the constitutional guarantee under the Constitution. The girl at serial No. 51 in the combined merit list will be afforded her choice of institutional preference/branch institute preference at serial No. 1 leaving aside the boys from serial Nos. 1 to 50 in the merit list, though the girl stood at serial No. 51 in the merit list. The documents annexed as Annexure CA-2 of the counter affidavit of Amrik Singh filed on behalf of the respondents demonstrate that in the main merit list as against 5301 boys, there are only 530 girls, apart from the reserved category and there are 750 girls as against 5116 boys in the first waiting list and in the second waiting list number of girl students are shown to be 1795 as against 11425 boys. But the question being asked as to what would be the approximate figure if the 1/3 seats earmarked for the girls are calculated, the reply was that it would be 1944, which should have been allocated to the girls as against 24882 total seats including boys and girls in the general category.

30. It is further remain un-explained if the preference is to be given to the extent of 1/3 seats to the girls, but the respondents have invited only the girls from the main merit list and first waiting list, the total whereof as far as girl students comes to roughly about 1245 only, therefore including girl only from the main merit list and first waiting list also do not satisfy the requirement of the notification of 1989, though the same strictly prohibits that the girls should be invited according to their own merit and if otherwise or equally, preference should be given to girls to the extent of 1/3. Thus, it is clear that the respondents are neither proceedings

according to the notification of 1989, nor according to Section 28 (5) of the Act as amended and are also denying the guarantee guaranteed under Articles 14 and 15 of the Constitution as explained in Indra Sawhney's case by the Apex Court. Learned Counsel for the petitioners further submitted that the said reservation/preference in favour of the girls can not be justified even as a horizontal reservation. Even if a stand is taken by the University, though said stand has not been taken by the University.

31. The decision reported in 1995 (j) SCC 173, already discussed above and also the case of Swati Gupta, reported in 1995 (2) SCC 560. Both these decisions are the decisions of an era of post Indra Sawhney's case, the Apex Court while dealing the reservation for ladies in admission to the medical colleges to the extent of 30 percent of seats in each category, including the reserved categories has been held to be not justified. See the observation of the Apex Court in para 2 quoting the details of Constituent assembly:-

'2. The Constituent Assembly, though elected on the basis of a limited franchise, yet representative of all sections of society. Above all, it was composed of men of vision, conscious of the historic but difficult task of carving an egalitarian society from out of a bewildering mass of regions, communities, castes, races, languages, beliefs and practices. They knew their country well. They understood their society perfectly. They were aware of the historic injustices and inequities afflicting the society. They realised the imperative of redressing them by constitutional means, as early as possible-for the alternative was frightening. Ignorance, illiteracy and above all, mass poverty, they took note of. They were conscious of the fact that the Hindu religion-the religion of the overwhelming majority-as it was being practiced, was not known for its egalitarian ethos. It divided its adherents into four watertight compartments. Those outside this fourtier system (chaturvarnya) were the outcastes (Panchamas). the lowliest. They did not even belong to the caste system-Ugly as its face was. The fourth, shudras, were no better, though certainly better than the Panchamas. The lowliness attached to them (Shudras and Panchamas) by virtue of their birth in these castes, un-connected with their deeds. There was to be no deliverance for them from this social stigma, except perhaps death. They were condemned to be inferior. All lowly, menial and unsavory

occupations were assigned to them. In the rural life, they had no alternative but to follow these occupations, generation after generation, century after century. It was their 'karma', they were told, the penalty for the sins they allegedly committed in their previous birth. Pity is they believed all this. They were conditioned to believe it. This mental blindfold had to be removed first. This was a phenomenon peculiar to this country. Poverty there has been-and there is-in every county. But none had the misfortune of having this social division-or as some call it, degradation-super-imposed on poverty. Poverty, low social status in Hindu caste system and the lowly occupation constituted-and do still constitute-a vicious circle. The founding fathers were aware of all this and more.'

32. The reservation in Swati Gupta's case for ladies was tried to be justified as Horizontal reservation. The relevant para of the G.O. is reproduced below, which was ultimately not upheld by Apex Court:

'2. The above reservation would be 'horizontal', and the candidates of the above categories, selected on the basis of merit, would be kept under the categories of Scheduled Castes/Scheduled Tribes/Other Backward Classes/General to which they belong. For example, if a candidate dependent on a Freedom-Fighter selected on the basis of reservation, belongs to the Scheduled Caste, he will be adjusted against the seats reserved for Scheduled Castes. Similarly, if a physically handicapped candidate selected on the basis of reservation belongs to Other Backward Classes or general category, he would be adjusted against the seats reserved for Other Backward Classes or general category.

3. I am also directed to say that 'vertical' reservation shall be granted in all medical colleges on total seats of all courses to be filled through CPMT 1994 as given below:(a) Scheduled Caste 21 percent 30 per centCandidates seats in each(b) Scheduled Tribe 02 per cent category re-Candidates served for(c) Other Backward 27 per cent ladies.'Classes Candidates

In the earlier circular the provision for reservation which is relevant reads us under :-

'Out of the total seats being filled up through the CPMT 1994, 35% seats are reserved for the candidates belonging to the general category and remaining 65% seats shall be for the reserved categories which are limited to the percentage mentioned against the following categories of the candidates:-

Reserved Categories Percentage of the reserved seats

1. Backward Classes 27 per cent (of them 30% reserved for ladies)
2. Hilly area 3 per cent (of them 30% reserved for ladies)
3. Uttarakhand area 3 per cent (30% reserved for ladies)
4. Scheduled Castes 21 per cent (30% reserved for ladies)
5. Scheduled Tribes 2 per cent (30% reserved for ladies)
6. Actual departments 5 per cent (30% reserved for ladies)
7. the freedom-fighter
8. Daughter seats of soldiers 2 per cent (30% reserved for ladies)
9. who became handicapped or killed in action/war
10. For handicapped candidates 2 per cent (30% reserved for ladies)

65 per cent

The remaining seats will be of the general category in which 30% reservation will be for the ladies.'

2. Reservation of 65% resulting in reducing the general category to 35% was undoubtedly violative of Article 16. Further by reserving 30% of the general seats for ladies the general category shrank to 5%. But these glaring infirmities have been rectified by the amended circular. Reservation of 30% for ladies has now been confined to para 3 of the amended circular. Dr. Dhavan, learned Senior Counsel appearing for the State clarified that he has instructions to make a statement on the amended circular that now there is no reservation for ladies in the general category.'

33. The State Government has filed counter affidavit, wherein it has been stated that the State Government would be adopting the defence taken by the University and arguments advanced by Counsel for the University shall also be adopted by the learned Standing Counsel. On behalf of the State, except the aforesaid counter-affidavit no other counter-affidavit has been filed by the State Government in the case and State Government has also not taken any other stand except, what has been taken by the University. Sri V.B. Upadhyay, learned Senior Counsel assisted by Sri Ramesh Upadhyay appearing on behalf of University submitted that according to the notification of 1989 and G.O. dated 16.6.2000 it is clear that there is no reservation for girls. Learned Counsel for the University further tries to

justify the notification of 1989 and also G.O. dated 16.6.2000 that the notification of 1989 was issued when the Section 28 (5) of the State University Act was not amended as it stood in its present form of the amendment. It is clear that inspite of Universities Act being amended whereby Sub-section (5) of Section 28 of the State Universities Act has been amended, the State Government chooses not to issue any other notification and still relying upon the notification of 1989, which in view of Indra Sawhney's case, read with Swati Gupta's case and the case Anil Kumar Gupta and Ors. v. State of U.P. and Ors., reported in 1995 (5) SCC 173, which are the decisions to the post Indra Sawhney's case, the notification dated 26.8.1989 and the G.O. dated 16.6.2000 can not be justified and are liable to be struck down being violative of Articles 14 and 15 of the Constitution. Learned Counsel for the University further submits that at the most, the reservation in favour of the girls to the extent of 1/3, as stated above, can be said to be protected by the phrase 'Protective Discrimination' as used by the Apex Court in the case of Dr. Priti Srivastava and Ors. v. State of Bihar, reported in 1999 (7) SCC 120. Dr. Priti Srivastava's case can not come to rescue the defence of the University, inasmuch as that case relates to admission of the speciality and superspeciality in the medical colleges i.e. post-graduate and above.

34. Learned Counsel for the University further tries to justify the action of the respondents by relying upon the decision of Apex Court reported in 1995 (4) SCC 520. Learned Counsel has brought the observations made in paragraphs 5 and 6 of the aforesaid judgment. The Apex Court in the same judgment observed in Paragraph 8, which is reproduced below :

'8. What then is meant by 'any special provision for women' in Article 15(3)? This 'special provision', which the State may make to improve women's participation in all activities under the supervision and control of the State can be in the form of either affirmative action or reservation. It is interesting to note that the same phraseology finds a place in Article 15(4) which deals with any special provision for the advancement of any socially or educationally backward class of citizens or Scheduled Castes or Scheduled Tribes. Article 15 as originally enacted did not contain Article 15(4). It was inserted by the Constitution First Amendment Act, 1951 as a result of the decision in the case of State of Madras v. Champakam

Dorairajan setting aside reservation of seats in educational institutions on the basis of caste and community. This Court observed that the Government's Order was violative of Article 15 or Article 29(2). It said:

'Seeing however, that clause (4) was inserted in Article 16, the omission of such an express provision from Article 29 cannot but be regarded as significant.'

The object of the First Amendment was to bring Articles 15 and 29 in line with Article 16(4). After the introduction of Article 15(4), reservation of seats in educational institutions has been upheld in the case of *M.R. Balaji v. State of Mysore* and a number of other cases which need not be referred to here. Under Article 15(4) orders reserving seats for Scheduled Castes, Scheduled Tribes and Backward Classes in Engineering, Medical and other technical colleges, have been upheld. Under Article 15(4), therefore, reservations are permissible for the advancement of any backward class of citizens or of Scheduled Castes or Scheduled Tribes. Since Article 15(3) contains an identical special provision for women. Article 15(3) would also include the power to make reservations for women. In fact, in the case of *Indra Sawhney v. Union of India*, this Court (in para 846) rejected the contention that Article 15(4) which deals with a special provision, envisages programmes of positive action while Article 16(4) is a provision warranting programmes of positive discrimination. This Court observed: (SCC pp. 755-56).

'We are afraid we may not be able to fit these provisions into this kind of compartmentalisation in the context and scheme of our constitutional provisions. By now, it is well-settled that reservations in educational institutions and other walks of like can be provided under Article 15(4) just as reservations can be provided in services under Article 16(4). If so, it would not be correct to confine Article 15(4) is wider than Article 16(4) inasmuch as several kinds of positive action programmes can also be evolve and implemented thereunder (in addition to reservations) to improve the conditions of SEBSs, Scheduled Castes and Scheduled Tribes, whereas Article 16(4) speaks only of one type of remedial measure, namely, reservation of appointments/posts.'

This Court has, therefore, clearly considered the scope of Article 15(4) as wider than Article 16(4) covering within it several kinds of positive action programmes in addition to reservations. It has, however, added a word of caution by reiterating M.R. Balaji, AIR 1963 SC 649, to the effect that a special provision contemplated by Article 15(4) like reservation of posts and appointments contemplated by Article 16(1), must be within reasonable limits. These limits of reservation have been broadly fixed at 50% at the maximum. The same reasoning would apply to Article 15(3) which is worded similarly.'

35. It would not be out of place to mention here that the Apex Court was considering the impugned Rule 22-A , which reads as under:-

'22-A. Notwithstanding anything contained in these Rules or Special or ad hoc Rules-

(1) In the matter of direct recruitment to posts for which women are better suited than men, preference shall be given to women;

(2) (GOMs No. 472, GA dated 11.10.1985): Provided that such absolute preference to women shall not result in total exclusion of men in any category of posts.

(2) In the matter of direct recruitment to posts for which women and men are equally suited, other things being equal, preference shall be given to women and they shall be selected to an extent of at least 30% of the posts in each category of OC, BC, SC and St quota.

(3) In the matter of direct recruitment to posts which are reserved exclusively for being filled by women they shall be filled by women only.'

36. Learned Senior Counsel Sri V.B. Upadhya appearing on behalf of the University lastly tried to justify the action under the category of Horizontal reservation. Learned Counsel submitted that if the action of the respondents is controlled by the notification of 1989 and the G.O. of 16.6.2000 as covered by reservation is upheld by the Apex Court in Indira Sawhney's case. Needless to say that in view of the cases referred in the preceding paragraphs of this judgment,

particularly the case reported in 1995 (2) SCC 560, Dr. Swati Gupta's case and the case of Anil Kumar Gupta, the special provisions, if any, as suggested by learned Counsel for the University in favour of the girls to the extent of 1/3 of the total seats cannot be covered by horizontal reservation. Apart from same being in excessive number as held by Apex Court in Swati Gupta's case. For the aforesaid reasons, decisions of the Apex Court the defence of the University with regard to the notification of 1989 and G.O. dated 16.6.2000 do not support the case of the respondents.

37. Learned Counsel for the applicants for impleadment Sri U.N. Sharma, Ramendra Asthana, Sri K.M. Garg and Sri Dilip Gupta basically rely upon the arguments advanced by and on behalf of the University with particular reference of the following cases and relied upon the case reported in 1995 (4) SCC 520. Sri U.N. Sharma further relies upon the case reported in 1993 Supp. (4) SCC 439, which relates to reservation in the Committee of Management of Andhra Pradesh Co-operative Societies Act, 1964. The reservation of 29 seats for women out of total 826 seats has been found to be justified. According to the Statute the factual position in the present case is different than what was there in A.P. Co-operative Society. The reservation is to the extent of 33 per cent of the total seats, namely, to the extent of 1/3 can not be equated with that of reservation of A.P. Co-operative Society. The reservation in the case of A.P. Co-operative Society was reservation of socially and economically backward classes of citizens, and women to be represented in the committee of management. Sri Ramendra Asthana appearing for another applicant for impleadment has submitted that after the students declared successful in the combined entrance test, they stood selected and they can not say that they have a right much less a further right to be admitted in any particular college/branch/discipline. The aforesaid argument equally applies to a girl student, who has been declared pass in the combined entrance examination, therefore the aforesaid argument does not help Sri Ramendra Asthana. Sri Asthana further submitted that counselling does not amount to reservation and inviting girls on the first day of counselling irrespective of their position in the merit list, thus cannot be said to be a reservation. From the narration of the fact in the earlier part of this judgment, it is apparently clear that the aforesaid statement is not correct. The invitation of the girls on the first day of

counselling irrespective of their position in the merit list, is affecting the choice of the institution and discipline to the successful candidates affected by the order in which they are called for counselling. Sri K.M. Garg and Sri Dilip Gupta almost reiterated the same arguments with reference to certain cases. Sri Dilip Gupta further refers to paragraphs 812, 830 of the judgment of Indra Sawhney's case, reported in 1992 Supp. (Vol. 3) 217 and tries to draw a distinction that ear marking of 1/3 seats in favour of the girl candidates in accordance with the notification of 1989 cannot be said to be reservation. In the facts and backdrop of the present case, the girl candidates belonging to general category cannot be termed either socially and economically backward classes citizens or socially and educationally backward classes citizens. Thus, the distinction tried to be made out by Sri Dilip Gupta placing reliance of certain paragraphs of Indra Sawhney's case will not help particularly in view of the subsequent decision of the Apex Court, which deals with the controversy in the backdrop of the admission to the medical colleges.

38. It is further significant to note that in State of U.P. so far as the admission to the medical colleges is concerned, there is no reservation for women as will be clear from the judgments of Swati Gupta and Anil Kumar Gupta's case (supra). In the present social set-up, in which we are living, we have to look the controversy from another angle also while State has chosen not to reserve any seat in the medical colleges for ladies for admission, though there are certain fields so far as the doctors are concerned, which can exclusively may be dealt with only by a lady doctor. There is no such field where any such exclusive situation may arise, which can only be looked into by an Engineer, who is a woman. On the contrary, an Engineer in building dams constructions has to live in the forest, terrarium where a life is tuff, which considering the women, as weaker sex can not justify by allocated to a woman. Talking example of an Engineer working in a steel plant where he has to face a molten steel, still coming out of furnishes and many other tuff jobs, such as working in mechanical shops or industries or inasmuch as it will demonstrate that any male Engineer would certainly be a better performing Engineer.

39. If something can be borne out from the policy of the State Government that State Government deliberately chosen not to make any reservation in medical colleges for woman, it is clear that the policy of State Government in post Indra

Sawhney's era is that so far as the admission to the engineering and medical colleges are concerned, the male and female students form the same class. This also is clear from a bare reading of Article 29(2), read with Section 28(5) as is stood today, the only reservation that has been contemplated and that too only to the extent of 50 per cent only is in favour of SC, ST and OBC citizens on the vertical size and dependants of FF, AF and PH on Horizontal side, except no other reservation, preference or concession has been contemplated either from the policy of the State Government above or from the Constitution and the statutory provisions of Section 28 of Sub-section (5) of the Act. Thus, this writ petition deserves to succeed. The notification dated 26.8.1989 deserves to be quashed and is hereby quashed : The G.O. dated 16.6.2000 since do not have any force of law and particularly after quashing the notification dated 26.8.1989 cannot be survive and thus is quashed. The respondents-University is directed to invite all the candidates who are declared successful in the combined entrance test according to their respective merits for counselling and offer them seats, which are available according to their option of the institutional and branch choices.

40. This writ petition, therefore, succeeds and respondents are directed to hold the counselling for UPSEAT 2001 as directed above at the earliest so that the students who have already been declared successful may be able to cope with their courses and there may not be any further delay in their studies.

41. With the aforesaid observations, the writ petition succeeds and is allowed and a writ of mandamus is issued accordingly in view of the observations made above. In the facts and circumstances of the case, the parties shall bear their own costs.