Than Singh and ors. Vs. the State of Madhya Pradesh

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Court : Madhya Pradesh

Decided On : Mar-30-2005

Reported in : AIR2005MP170; 2005(2)MPLJ353

Judge : Dipak Misra, ;A.K. Mishra and ;A.K. Shrivastava, JJ.

Acts : Madhya Pradesh Panchayat Raj Evam Gram Swaraj Adhiniyam, 1993 - Sections 2, 5, 6, 6(2), 6A, 6B, 6C, 7, 11A, 49A, 95 and 95(1); Madhya Pradesh Panchayat Raj (Sanshodhan) Adhiniyam, 2001 - Sections 49; Andhra Pradesh Co-operative Societies Act, 1964; Uttar Pradesh Panchayat Raj Act; Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Sections 3, 3(1) and 18; Constitution of India - Articles 14, 15(3), 15(4), 17, 21, 29, 234G, 243, 243A, 243B, 243C, 243D, 243(G), 243H, 323(3A), 327, 329, 332, 333, 334, 371A and 371F; Code of Criminal Procedure (CrPC) , 1973 - Sections 438; Indian Penal Code; Madhya Pradesh Gram Sabha (Procedure of Meeting) Rules, 2001 - Rules 3, 4 and 4(1)

Appeal No. : Writ Petition No. 1573/2001

Appellant : Than Singh and ors.

Respondent : The State of Madhya Pradesh

Advocate for Def. : S.K. Yadav, Govt. Adv.

Advocate for Pet/Ap. : Rajendra Tiwari, Sr. Adv. and ;Deepak Panjwani, Adv. in W.P. No 1573/2001, ;J.K. Lodhi, Adv. in W.P. No. 2046/2001 and ;Mohammad

Kasim, Adv. in W.P. No. 2495/2001

Judgement :
ORDER

Dipak Misra, J.

1. The present reference has arisen in a different factual matrix inasmuch as certain provisions of Madhya Pradesh Panchayat Raj Evam Gram Swaraj Adhiniyam, 1993 (for brevity 'the Act') that were incorporated by way of amendment into the aforesaid statute faced assail pertaining to their constitutional validity in the case of Jankidas Bairagi and Anr. v. State of M.P., 2001(2) M.P.H.T. 229, wherein a Division Bench declared the provisions under attack as constitutionally valid and dismissed the writ petition in limine, and thereafter when the present writ petition was filed challenging the enactment the same Division Bench issued notice and when the matter was placed for final hearing the Bench hearing the matter recorded a finding that the learned Counsel appearing for the petitioners had a sanguine grievance with regard to a singular provision and had no cavil in respect of any other provision and accordingly thought it condign to recommend the matter to be referred to a Larger Bench and resultantly, the matter has been placed before us for adjudication in respect of the question which is as under:--

'Whether the provision of Sub-section (2) of Section 6 of the Panchayat (Amendment) Act, 2001 is constitutionally valid ?'

2. To appreciate the controversy in proper perspective it is seemly to state that Madhya Pradesh Panchayat Raj (Sanshodhan) Adhiniyam, 2001 was enacted by the State Legislature and received assent of the Governor on 21-1-2001 and published in the Madhya Pradesh Gazette (Extra-ordinary) on 22-1-2001. The constitutional validity of the said enactment was challenged in the case of Jankidas Bairaghi (supra) which was decided by a Division Bench on 22-3-2001. After referring to certain provisions of the Act the Division Bench in Paragraphs 5 to 7 expressed the view as under :--

5. The contentions that these provisions clash with powers, functions and responsibilities of the Gram Panchayat, are, therefore, unsustainable. Both the institutions aim at serving the people under their jurisdiction, which is not possible without an entrustment of functions, facilities and funds. The statutory provisions enumerated above, look after this requirement, they do not destroy the existence and utility of Gram Panchayat which performs distinct functions kept apart by Section 49 of the Panchayat (Sanshodhan) Adhiniyam, 2001 and Section 49-A of the M.P. Panchayat Raj Adhiniyam, 1993. Therefore, apprehensions that Gram Panchayat would be denuded of its responsibility and utility, have no basis and are liable to be rejected.

6. Proper reading of various provisions of the M.P. Panchayat Raj Adhiniyam, 1993 and Panchayat (Sanshodhan) Adhiniyam, 2001, would clearly demonstrate that challenges against the validity of some of sections raised by the petitioners have no substance. Since Gram Sabhas at the village level are being constituted for the first time, some of the functions at village level are going to be performed by it. There is a feeling of alienation and apprehension as to the role by Gram Panchayat, but look at the real substance of the functions, would make it clear that they are constituted for discharging well defined functions in different areas. The contention that since the Gram Sabha comprised of none elected persons, therefore, it would not be fit to operate the funds placed at its disposal whereas Gram Panchayat has elected members, therefore, elected persons would be fit to handle fund, can not be accepted. Neither there is presumption that only elected persons are fit to manage financial matters nor it can be so said so. Gram Sabha has separate funds like Gram Panchayat. From the statement of objects and reasons, it is crystal clear that object for constituting Gram Sabha is to enable people at the village level to participate in development of the village with respect to matters of their concern and interest and with a view to discharge them, the Gram Kosh has been established and power to augment financial resources conferred. Separate functions and powers have been vested in Gram Panchayal, Janpad Panchayat and Zila Panchayat.

7. What emerges out of the aforesaid discussion is that challenges raised by the petitioners against the provisions of Panchayat (Sanshodhan) Adhiniyam, 2001,

do not rest on sound footing, therefore, they are liable to be rejected. Consequently, the petition is dismissed in limine.

3. As has been indicated earlier the Division Bench after noting the contentions of the learned Counsel for the parties considered it appropriate to refer the matter to a Larger Bench only for the purpose of testing the constitutional validity of Sub-section (2) of Section 6 of the Act.

4. Before we proceed to note the rivalised contentions raised at the Bar, it is apposite to produce the provision under assail. It reads as under:--

'6. (1) ***

(2) Not less than one-fifth of the total number of the Gram Sabha shall form a quorum for a meeting of Gram Sabha out of which not less than one-third shall be women members and members of Scheduled Castes and Scheduled Tribes shall be represented in proportion to their population in the Gram Sabha. Quorum shall be necessary for every meeting of the Gram Sabha.'

5. Mr. Rajendra Tiwari, learned Senior Counsel, Mr. J.K. Lodhi and Mr. Mohammed Kasim, learned Counsel for the petitioners assailing the constitutional validity of the aforesaid provision have submitted that by incorporation of the aforesaid provision by which the concept of quorum, in a different way, has become an imperative and categorical mandate, the basic conception of democracy is destroyed and the democracy being an essential feature of the Constitution, the provision can not withstand scrutiny when tested on the anvil of the Constitutional provisions. It is submitted by them that the provision is not protected under Articles 15(3) and 15(4) of the Constitution of India inasmuch as the same is not in the realm of protective discrimination but does tantamount to a discrimination which is destructive, non-affirmative and hence, impermissible. It is further urged by them that though the power of self-governance has been conferred on the Gram Panchayat under the provisions of the Constitution but the said provisions would neither engulf nor encompass in its denotative contour or connotative expanse the concept of quorum of this nature. It is also argued by the learned Counsel for the petitioners that the provision if allowed to stand, would be

contrary to the wholesome concept of welfare state, being totally unworkable as the conception of unworkability is inherent in the provision itself. It is further proponed that even if it is regarded as a special provision it is unreasonable and irrational and is totally inconsistent with the interest of community or society as a whole and as a logical corollary invites the frown of second limb of Article 14 of the Constitution. It is also argued that if the provision is dissected and analysed it is a negation of the spirit of the Act and instead of subserving the object of the Act subverts it by creating a classification at the level of quorum which has no intelligible differentia and the avowed purpose which it is supposed to achieve, hence is fundamentally and basically self- defeating.

6. Mr. S.K. Yadav, learned Government Advocate for the State submitted that if Articles 243, 243A, 243D, 243G and 243H of the Constitution of India are properly appreciated there can not be a scintilla of doubt that the Constitution had mandated the State Legislature to make such legislation to usher in the concept of self-governance and the amendment in the instant case being on the path of achieving constitutional goal can not be struck down on the bedrock that it suffers from any kind of vice. The learned Counsel for the State has pyramided his contention by putting forth the stance that the conception of democracy at the grassroot level has been attempted to be fructified, concretised and ripened by way of decentralisation and a sense of participation has sensitively been incorporated into the provision and hence, the enormous conceptual assail by the learned Counsel for the petitioners to the effect that basic perception of democracy is smothered is absolutely erroneous. On the contrary, submitted Mr. Yadav, strength of democracy is heightened and augmented by introduction of the said provision. Incrementing the submission that effective and purposeful participation in a democratic process by the weaker sections of the people who have suffered for centuries has been achieved by the provision under challenge and hence, it has become the beacon light of a prosperous and progressive democracy in a backward State like Madhya Pradesh, and once it is perceived from that spectrum in juxtaposition of the real essentiality the factum of direct democracy can be envisioned, and viewed on that backdrop, no fault can be found in the provision. It is also put forth by him that provision is workable and there are no complaints with regard to workability of the same and, therefore, the argument that the provision is

unworkable is basically a sisyphean endeavour to establish a proposition of law and in fact, an argumentum at frustration. The learned Counsel for the State has further proponed that the provision has been introduced in the statute book to ensure positive participation of all classes and sections of the society thereby concretising the concept relating to empowerment of women and conferral of benefit on reserved categories in the decision-making process and if the same are appreciated on the foundation of historicity, the constitutional vice which on a first flush looks quite convincing would melt and pale into insignificance and eventually founder.

7. To appreciate the aforesaid rivalised pronouncements raised at the Bar it is appropriate to refer to Articles 243, 243A, 243B, 243D, 243G and 243H and other Articles of the Constitution which were incorporated by 73rd amendment in the year 1993. They read as under:--

'Article 243. In this part, unless the context otherwise requires,--

(a) 'district' means a district in a State;

(b) 'Gram Sabha ' means a body consisting of persons registered in the electoral rolls relating to a village comprised within the area of Panchayat at the village level;

(c) 'intermediate level' means a level between the village and district levels specified by the Governor of a State by public notification to be the intermediate level for the purposes of this Part;

(d) 'Panchayat' means an institution (by whatever name called) of self-Government constituted under Article 243B, for the rural areas;

(e) 'Panchayat area' means the territorial area of a Panchayat;

(f) 'Population' means the population as ascertained at the last preceding census of which the relevant figures have been published;

(g) 'Village' means a village specified by the Governor by public notification to be a village for the purposes of this part and includes a group of villages so specified.

Article 243A. A Gram Sabha may exercise such powers and perform such functions at the village level as the Legislature of a State may, by law, provide.

Article 243B. (1) There shall be constituted in every State, Panchayats at the village, intermediate and district levels in accordance with the provisions of this Part.

(2) Notwithstanding anything in Clause (1), Panchayats at the intermediate level may not be constituted in a State having a population not exceeding twenty lakhs.

Article 243D. (1) Seats shall be reserved for--

(a) the Scheduled Castes; and

(b) the Scheduled Tribes,

in every Panchayat and the number of seats so reserved shall bear, as nearly as may be, the same proportion to the total number of seats to be filled by direct election in that Panchayat as the population of the Scheduled Castes in that Panchayat area or of the Scheduled Tribes in that Panchayat area bears to the total population of that area and such seats may be allotted by rotation to different constituencies in a Panchayat.

(2) Not less than one-third of the total number of seats reserved under Clause (1) shall be reserved for women belonging to the Scheduled Castes or, as the case may be, the Scheduled Tribes.

(3) Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election may very Panchayat shall be reserved for women and such seats may be allotted by rotation to different constituencies in a Panchayat.

(4) The offices of the Chairpersons in the Panchayats at the village or any other level shall be reserved for the Scheduled Castes, the Scheduled Tribes and women in such manner as the Legislature of a State may, by law provide:

Provided that the number of offices of Chairpersons reserved for the Scheduled Castes and the Scheduled Tribes in the Panchayat at each level in any State shall bear, as nearly as may be, the same proportion to the total number of such offices in the Panchayats at each level as the population of the Scheduled Castes in the State or of the Scheduled Tribes in the State bears to the total population of the State :

Provided further that not less than one-third of the total number of offices of Chairpersons in the Panchayats at each level shall be reserved for women:

Provided also that the number of offices reserved under this clause shall be allotted by rotation to different Panchayats at each level.

(5) The reservation of seats under Clauses (1) and (2) and the reservation of offices of Chairpersons (other than the reservation for women) under Clause (4) shall cease to have effect on the expiration of the period specified in Article 334.

(6) Nothing in this part shall prevent the Legislature of a State from making any provision for reservation of seats in any Panchayat or Offices of Chairpersons in the Panchayats at any level in favour of backward class of citizens.

Article 243G. Subject to the provisions of this Constitution, the Legislature of a State may, by law, endow the Panchayats with such powers and authority as may be necessary to enable them to function as institution of self-Government and such law may contain provisions for the devolution of powers and responsibilities upon Panchayats at the appropriate level, subject to such - conditions as may be specified therein, with respect to--

(a) the preparation of plans for economic development and social justice;

(b) the implementation of schemes for economic development and social justice as may be entrusted to them including those in relation to the matters listed in the Eleventh Schedule.

Article 243H. The Legislature of a State may, by law,--

(a) authorise a Panchayat to levy, collect and appropriate such taxes, duties, tolls and fees in accordance with such procedure and subject to such limits;

(b) assign to a Panchayat such taxes, duties, tolls and fees levied and collected by the State Government for such purposes and subject to such conditions and limits;

(c) provide for making such grants-in-aid to the Panchayats from the Consolidated Fund of the State; and

(d) provide for Constitution of such Funds for crediting all moneys received, respectively, by or on behalf of the Panchayats and also for the withdrawal of such moneys therefrom, as may be specified in the law.

8. On a perusal of the aforesaid provisions it is noticeable that Gram Sabha has been defined under Article 243(b) of the Constitution to mean a body constituted of persons registered with the electoral roll relating to a village comprised within the area of Panchayat in the village level. The term 'Panchayat' has also been defined to mean an institution by whatever name called of self-Government constituted under Article 243(d) for the rural areas. Article 243A postulates that a Gram Sabha would exercise such powers and perform functions at the village level as the Legislature of the State may by law provide. Article 243C provides composition of the Panchayat. 243-D which is relevant for the present purpose deals with the reservation of seats. The seats are reserved for Scheduled Castes and Scheduled Tribes and there is also reservation for women belonging to the Scheduled Castes or as the case may be, the Scheduled Tribes. Such reservation is restricted to one-third of the total number of seats reserved under Clause (1) of Article 243D. Manner of computation has been provided in the said Article. It is also provided therein that one-third of the seats to be filled up by direct election, shall be reserved for women and the seats would be allotted by rotation of different constituencies in a Panchayat. It is also pertinent to state that offices of the Chairpersons are also reserved for Scheduled Castes and Scheduled Tribes and women in such manner as the State Legislature may provide and the said reservation is dependent upon the population of the Scheduled Castes and Scheduled Tribes in the State. There are also provisions for reservation for women on the concept of rotation. The aforesaid provision also prescribes that the

Legislature shall have the authority for making any provision for reservation of Chairpersons in the Panchayat at any level in favour of backward class of citizens. We have scanned the anatomy of the aforesaid provisions to show that the provision specifically and precisely deal with reservation of seats as well as reservation of Chairpersons at various levels and also confer powers on the State as regards the reservation of seats for backward class of citizen. On a deeper reading of the aforesaid provisions it is not perceivable there is any provision relating to Constitution of quorum. Submission of Mr. Yadav is that the manner in which a quorum has been made is in consonance with the aforesaid provisions of the Constitution and, therefore, it can not be regarded as unconstitutional. Per contra, Mr. Rajendra Tiwari, learned Senior Counsel for the petitioner would submit that Constitution mandates reservation of seats of the Panchayat to be reserved for the Scheduled Castes, Scheduled Tribes and women and confers the power on the State Legislature to make provision for reservation in respect of other backward classes. The said would give, contends Mr. Tiwari positive and progressive in a way, protective reservation and affirmative discrimination but the manner in which the language relating to quorum has been couched is not traceable in the Constitution since on a scanning of the constitutional provisions under this chapter the conception of reservation of quorum of 'Gram Sabha' is absent. From the aforesaid it is absolutely clear that there is no constitutional mode for any kind of reservation or providing a preference to the Scheduled Caste, Scheduled Tribe or women in the 'Gram Sabha'. The reservation pertains to 'Gram Panchayat'. True it is there is a distinction between 'Gram Panchayat' and 'Gram Sabha' but to contend that inferentially it is permissible on the bedrock of the provisions of Chapter IX of the Constitution and it is in consonance with the same is a stretched proposition to which, we are afraid, can not accede.

9. Presently we shall proceed to deal with the validity of the impugned provision on the anvil and touchstone of Articles 15(3) and 15(4) of the Constitution as the learned Counsel for the State submitted that the present one is a special provision introduced keeping in view the interest of women and members of the Scheduled Castes and Scheduled Tribes. To appreciate the said stand in proper perspective we think it apposite to reproduce Articles 15(3) and 15(4):--

'Article 15(1) *** *** *** ***

(2) *** *** *** ***'

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this article or in Clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.'

There can be no cavil over the proposition that the said Constitutional provisions enable the Legislature to make special provisions for women, Scheduled Castes and Scheduled Tribes and permit protective discrimination, but the said provisions have to stand the test of reasonability and rationality. In this context we think it condign to notice few decisions. In the case of Toguru Sudhakar Reddy and Anr. v. The Govt. of Andhra Pradesh and Ors., AIR 1994 SC 544 the Apex Court declared the provision in the A.P. Co-operative Societies Act, 1964 wherein power was conferred on the Registrar to nominate two women members who had the right to vote as constitutional.

10. In the case of Dr. Preeti Srivastava and Anr. v. State of Madhya Pradesh and Ors., AIR 1999 SC 2894, it has been held as under:--

'..... While the object of Article 15(4) is to advance the equality principle by providing for protective discrimination in favour of the weaker sections so that they may become stronger and be able to compete equally with others more fortunate, one can not also ignore the wider interests of society while devising such special provisions. Undoubtedly, protective discrimination in favour of the backward, including Scheduled Castes and Scheduled Tribes inasmuch as in the interest of society as the protected groups. At that same time, there may be other national interests, such as promoting excellence as the highest level and providing the best talent in the country with the maximum available facilities to excel and contribute to society, which have also to be borne in mind. Special provisions must strike a

reasonable balance between these diverse national interests. Moreover, study and training at the level of specialities and super-specialities in medicine involve discharging the duties attached to certain specified medical posts in the hospital attached to the medical institutions giving education in specialities and super-specialities.'

Though the said case was rendered in the backdrop of reservation and in respect of medical admission but the basic concept has its applicability when the question of reservation would arise. To elaborate: the interest of the community or society as a whole can not be totally eliminated. The foundation should be reasonable to meet the norms protective discrimination and would not create an uncurable dent in the social fabric.

11. In the case of R.C. Poudyal v. Union of India and Ors., 1994 (Supp) (1) SCC 324, challenge was to the constitutionality of the special status conferred on the State of Sikkim by virtue of the Constitution (Thirty Sixth Amendment), 1975 particularly in the matter of the reservation of the seats for various ethnic and religious groups in the Legislative Assembly of the State. The said facet was called in question and prayer was made to declare the same as unconstitutional. The majority speaking through Vekatachalliah, J. (as His Lordship then was) in Paragraphs 119 and 120 expressed the view as under:--

'119. It is true that the right to vote is central to the right of participation in the democratic process. However, there is less consensus amongst theorists on the propriety of judicial activism in the voting area. In India, the Delimitation Laws made under Article 327 of the Constitution of India, are immune from the judicial test of their validity and the, process of allotment of seats and constituencies is not liable to be called in question in any court by virtue of Article 329(a) of the Constitution. But the laws providing reservations are made under authority of other provisions of the Constitution such as those in Article 332 or Clause (f) of Article 371F which latter is a special provision for Sikkim.

120. The rationale and constitutionality of Clause (f) and the other provisions of the electoral laws impugned in these petitions are sought to be justified by the respondents on grounds that first, a perfect arithmetical equality of value of votes

is not a constitutionally mandated imperative of democracy and, secondly, that even if the impugned provisions make a departure from the tolerance limits and the constitutionally permissible latitudes, the discriminations arising are justifiable on the basis of the historical considerations peculiar to and characteristic of the evolution of Sikkim's political institutions. This, it is urged, in the justification for the special provisions in Clause (f) which was specifically intended to meet the special situation. It is sought to be pointed out that throughout the period when the ideas of responsible Government sprouted in Sikkim, there has been a vigilant political endeavour to sustain that delicate balance between Bhutanis-Lepchas on the one hand and the Sikkimese of Nepalese origin on the other, essential to the social stability of that mountain-State. Clause (f) of Article 371F was intended to prevent the domination of the later Nepali immigrants who had, in course of time, outnumbered the original inhabitants. What Article 371F(f) and the electoral laws in relation to Sikkim seek to provide, it is urged, is to maintain this balance in the peculiar historical setting of the development of Sikkim and its political institutions.'

12. Thereafter in Paragraphs 126 and 127 Their Lordships ruled thus:--

126. An examination of the constitutional scheme would indicate that the concept of 'one person one vote' is in its very nature considerably tolerant of imbalances and departures from a very strict application and enforcement. The provision in the Constitution indicating proportionality of representation is necessarily a broad, general and logical principle but not intended to be expressed with arithmetical precision. Articles 323(3A) and 333 are illustrative instance. The principle of mathematical proportionality of representation is not a declared basic requirement in each and every part of the territory of India. Accommodations and adjustments, having regard to the political maturity, awareness and degree of political development in different parts of India, might supply the justification for even non-elected Assemblies wholly or in part, in certain parts of the country. The differing degrees of political development and maturity of various parts of the country, may not justify standards based on mathematical accuracy. Articles 371A a special provision in respect of State of Nagaland, 239-A and 240 illustrate the permissible areas and degrees of departure. The systemic deficiencies in the plenitude of the doctrine of full and effective representation has not been understood in the

constitutional philosophy as derogating from the democratic principle. Indeed, the argument in the case, in the perspective, is really one of violation of the equality principle rather than of the democratic principle. The inequalities in representation in the present case are an inheritance and compulsion from the past. Historical considerations have justified a differential treatment.

127. Article 371F(f) can not be said to violate any basic feature of the Constitution such as the democratic principle.'

13. At this juncture we think it profitable to reproduce Paragraphs 129 to 131:--

'129. It is true that the reservation of seats of the kind and the extent brought about by the impugned provisions may not, if applied to the existing States of the Union, pass the constitutional muster. But, in relation to a new territory admitted to the Union, the terms and conditions are not such as to fall outside the permissible constitutional limits. Historical considerations and compulsions do justify inequality and special treatment. In Lachman Dass v. State of Punjab this Court said :--

'The law is now well settled that while Article 14 prohibits discriminatory legislation directed against one individual or class of individuals, it does not forbid reasonable classification, and that for this purpose even one person or group of persons can be a class. Professor Willis says in his Constitutional Law p. 580 'a law applying to one person or one class of persons is constitutional if there is sufficient basis or reason for it'..... And if after reorganisation of States and integration of the Pepsu Union in the State of Punjab, different laws apply different parts of the State, that is due to historical reasons, and that has always been recognised as a proper basis of classification under Article 14.'130. In State of M.P. v. Bhopal Sugar Industries Ltd., this Court said:--

'The Legislature has always the power to make special laws to attain particular objects and for that purpose has authority to select or classify persons, objects or transactions upon which the law is intended to operate. Differential treatment becomes unlawful only when it is arbitrary or not supported by a rational relation with the object of the statute ..... Where application of unequal laws is reasonably justified for historical reasons, a geographical classification founded on those

historical reasons would be upheld. 131. We are of the view that the impugned provisions have been found in the wisdom of Parliament necessary in the admission of strategic-State into the Union. The departures are not such as to negate fundamental principles of democracy. We accordingly hold and answer contentions (b), (c) and (d) also against the petitioners.'

14. We have referred to the aforesaid judgment in extenso to understand the concept of reservation, departure from the tolerance limits and constitutionally permissible latitudes and historical backgrounds meant in a democratic set up in India and where does the Article 14, the fon juris of the Constitution, come into play.

15. In this context it is noteworthy to refer to the decision rendered in the case of Kuldeep Kumar Gupta v. H.P. SEB, (2001) 1 SCC 475, wherein the Apex Court has ruled thus :--

'5..... Classification must be truly founded on substantial differences which distinguish persons grouped together from those left out of the group and such differential attributes must bear a just and rational relation to the object sought to be achieved and judicial scrutiny extends only to the consideration whether the classification rests on a reasonable basis and whether it bears nexus with the object in view. It can not extend to embarking upon a nice or mathematical evaluation on the basis of classification.'

16. At this juncture we may fruitfully refer to the decision rendered in the case of Kailash Chandra Sharma v. State of Rajasthan and Ors., (2002) 6 SCC 562, wherein the Apex Court has expressed thus :--

'The justifiability of the plea stemming from the premise that uplifting the rural people is an affirmative action to improve their lot can be tested from the concrete situation obtaining in the present case. The Court can not proceed on the assumption that the candidates residing in the town areas with their education in the schools are colleges located in the towns or its peripheral areas and on a higher pedestal than the candidates who had studied in the rural area schools or colleges. The latter can not be said to be comparatively a disadvantaged and

economically weaker segment when compared to the former. The aspirants for the teacher's job in primary schools-- be they from rural area or town area do not generally belong to the affluent class. Apparently they come from the lower middle class or poor background. By and large in the pursuit of education, they suffer and share the same handicaps as their fellow citizens in rural areas. Further, without any data, it is not possible to presume that the schools and colleges located in the towns-- small or big-- and their peripheral areas are much better qualitatively.'

17. In the case of Vijay Lakshmi v. Punjab University, (2003) 8 SCC 440, while upholding the reservation for women as permissible the Apex Court expressed the view as under :--

'8. (a) For the policy decision of classification, we would straight away refer to the decision rendered by this Court in State of J& K v. Triloki Nath Khosa, wherein the Court [Chandradhud, J, (as He then was), in Para 20] succinctly held thus :--

'The challenge, at best, reflects the respondent's opinion on promotional opportunities in public services and one may assume that if the roles were reversed, respondents would be interested in implementing their point of view. But we can not sit in appeal over the legislative judgment with a view to finding out whether on a comparative evaluation of rival theories touching the question of promotion, the theory advocated by the respondents is not to be preferred. Classification is primarily for the Legislature or for the statutory authority charged with the duty of framing the terms and conditions of service; and if, looked at from the standpoint of the authority making it, the classification is found to rest on a reasonable basis, it has to be upheld.'

18. In this regard it would be profitable to reproduce a passage from the recent decision rendered in the case of E.V. Chinnaiah v. State of Andhra Pradesh and Ors., (2005) 1 SCC 394 :--

'39. Legal constitutional policy adumbrated in a statue must answer the test of Article 14 of the Constitution. Classification whether permissible or not must be judged on the touchstone of the object sought to be achieved. If the object of reservation is to take affirmative action in favour of a class which is socially,

educationally and economically backward, the State's jurisdiction while exercising its executive or legislative function is to decide as to what extent reservation should be made for them either in public service or for obtaining admission in educational institutions. In our opinion, such a class can not be subdivided so as to give more preference to a minuscule proportion of the Scheduled Castes in preference to other members of the same class.'

19. We have referred to the aforesaid paragraph to highlight that the object of reservation is to take an affirmative action n favour of a class. In the said case in Paragraph 42 Their Lordships have expressed the view as under:--

'42. Reservation must be considered from the social objective angle, having regard to the constitutional scheme, and not as a political issue and, thus, adequate representation must be given to the members of the Scheduled Castes as a group and not to two or more groups of persons or members of castes.'

20. In the concurring judgment S.B. Sinha, J., while dealing with the equal protection clause under Article 14 of the Constitution has expressed the view as under :--

'68. Equal protection clause mandates that all persons under like circumstances should be treated alike. Article 14 is in many respects similar to the Fourteenth Amendment of the American Constitution, the relevant portion whereof reads as follows :--

'..... no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'74. Article 14 of the Constitution aims at equality. It prohibits discrimination in any form. At its worst form, it will be violative of a basic and essential feature of the Constitution.'

21. His Lordship while dealing with the concept of reservation in the backdrop of doctrine of equality in Paragraph 79 has expressed the view as under:--

'79. Indisputably, only because the Scheduled Castes and Scheduled Tribes and other socially and economically backward class of citizens are not in a position to compete with the general category candidates, the equality principle has been adopted by way of affirmative action by the State Government in making reservations in their favour both as regards admission in educational institutions and public employment. The doctrine of equality is the fibre with which the constitutional scheme is woven.'

22. In this context we may refer with profit to the concept of equality as has been laid down by Their Lordships in the case of Ashutosh Gupta v. State of Rajasthan and Ors., (2002) 4 SCC 34 :--

'The concept of equality before law does not involve the idea of absolute equality amongst all, which may be a physical impossibility. All that Article 14 guarantees is the similarity of treatment and not identical treatment. However, what amount of dissimilarity would make the people disentitled to be treated equally, is rather a vexed question. Mere differentiation of inequality of treatment does not 'per se' amount to discrimination within the inhibition of the equal protection clause. When a law is challenged as violative of Article 14, it is necessary in the first place to ascertain the policy underlying the statute and the object intended to be achieved by it. Thereafter, the Court has to apply a dual test in examining the validity, viz. whether the classification is rational and based upon an intelligible differentia which distinguished persons or things grouped together from those left out of the group, and whether the basic of differentiation has any rational nexus or relation with its avowed policy and objects.'

23. The Apex Court in the case of People's Union for Civil Liberties and Anr. v. Union of India and Ors., JT 2004 (1) SC 152, has held that the question as to whether a provision is ultra vires the Constitution is to be scrutinised whether there has been conferral of unguided, uncanalised or wide power and such consideration can not be determined in the vacuum. It has to be considered having regard to the text and context of the State as also the character thereof.

24. We have referred to the aforesaid pronouncements to apprise ourselves that a provision is not declared ultra vires on abstract grounds or in vacuum. The real

test has to be applied. To elaborate; if reading of the provision appears to be ex facie and manifestly, unreasonable or arbitrary indubitably, the same can be declared as ultra vires. If the provision has an object to achieve but it actually does not so achieve, there can be no iota of doubt, it defeats the scheme of the Act and thereby can be regarded as ultra vires.

25. We have referred to the aforesaid decisions though they were rendered in different contexts but the basic issues were reservation, classification and reasonableness of such classification. We may repeat at the cost of repetition that reservation for women is permissible and classification is primarily dependent on the Legislature but the classification has to rest and founded on reasonable criteria. It can not be carried to such a point which would subvert and submerge the precious guarantee of equality clause. The case at hand has a different scenario to fresco. Chapter IX of the Constitution has made provisions for Panchayat. It has made provision for reservation of seats for Scheduled Castes, Scheduled Tribes and women. As far as this reservation is concerned, it is the mandate of the Constitution and that has to be followed by the State Legislature. But the controversy involved is in a different realm, a separate arena. As has been seen while providing the quorum for holding of a meeting of Gram Sabha the Legislature has couched it in a different way. On a scanning of the anatomy of the provision two limbs emerge. One lays a requisite postulate as regard the number and the other a prescription of the percentage of members for a quorum.

26. There is subtle and fine distinction between protective discrimination and a protective discrimination that destroys a larger public interest or social interest and also defeats the fundamental requirement of the body polity. The proponement that the said provision is in consonance with Articles 15(3) and 15(4), in our considered opinion, is neither correct nor sound inasmuch as the concept of reservation to that extent would not be within the ambit and sweep of protective or affirmative discrimination. We are disposed to think so as there is reservation in respect of seats and a further reservation would tantamount to reservation within reservation. We may hasten to clarify that on he first flush the provision may not appear to be reservation because it has been grafted and woven into the concept of quorum but on an deeper probe and keener scrutiny it becomes patent that

there is reservation in the quorum inasmuch as without the presence of the reserved categories of persons the 'Gram Sabha' becomes non-functional. It is so, as no alternative has been provided under the Act. An argument may be advanced that the empowerment of the women is a necessity and the same has to be done keeping in view the historical and cultural background in which women have led their lives for centuries, and keeping in view that they belong to the weaker sections of the society a balance has to be struck by conferring more power on them. It may be felt that to endow women with more power and proceed for affirmative discrimination as far as Scheduled Castes and Scheduled Tribes are concerned, is the call and warrant of the day and should not be deferred till tomorrow. It may be urged that in a progressive democracy such a recognition is sine qua non and the instant provision achieves it but, a pregnant and significant one, that the weaker sections have been protected at the level of the Panchayat as per reservation of seats as is demonstrable from the provisions of the Constitution and to put them in a further smaller group they have the latent potentiality as well as patent power to act in contra democratic way. It would not be within the ambit and sweep of special provision which would stand the test of reasonableness and non-arbitrariness which is a part of the Article 14 of the Constitution as that would be farther than the Constitutional latitudes. The conception of mini reservation in fact, destroys the principle of affirmative protection as it has proceeded to such an extent by which if we are permitted to say, a small fish in a big pond threatens the big fishes that it has the sharpness to destroy them.

27. It is to be borne in mind, the purpose of the quorum is to ensure that there is proper transaction of business and the decision taken epitomises the representative character. In the instant provision the representative character of the decision is likely to be caged. It is not out of place to state that concept of quorum is basically a safeguard against the apprehension that a minuscule persons or members may boast of having taken a decision on behalf of the body even though the large body of members are unaware or not parties to the decision. The quintessentiality of quorum is on the number and not on the Constitution of the number which in the ultimate eventuality destroys the rationality, the reasonableness and ushers in arbitrariness. It has to be

appreciated that all members who are members of the Gram Sabha are such persons without any distinction or colour attached to them and they participate in the meeting of the body without any kind of distinction. There can be no differentiation in individual characteristic of a member and a member of the Scheduled Caste and Scheduled Tribe for the purpose of a quorum in a meeting since quorum is only a guarantee of persons of minimum number of persons from amongst the effective body of which has the same homogenous character qua such members. A provision like the present one unmistakably makes a distinction between two similar members. It is worthnoting after an election is held in respect of the Panchayat and all the elected members constitute a homogenous group and no distinction is formed or introduced which is dependent upon the constituency or source of membership. They are all treated as equals but the present provision while laying down that the quorum would have one third women, and such proportionate members of the Scheduled Castes, Scheduled Tribes to constitute mandatorily the one-fifth of members treats equals as unequals violating the mandate of Article 14 of the Constitution. In fact, such members become more important members than other members without a rational basis and have the effect potentiality to take the majority to ransom as a consequence of which the majority decision paves the path of marginalization and in a way, extinction. The representative character of the decision becomes an anathema to its basic concept. Judged from these spectrums there can be no iota of doubt, the second limb of the provision is not rested on reasonableness and in fact, smacks of arbitrariness in its conceptual eventuality.

28. The classification of the protective discrimination is sought to be sustained by the learned Counsel for the State on the base that it has an object to achieve and is in consonance with the provisions of the Act. There can be no iota of doubt that every classification must pass the test of reasonableness which is determined with reference to the object for which the action is taken. The purpose is paramount. The learned Counsel for the State has drawn the distinction between the 'Panchayat' and 'Gram Sabha'. There is no doubt, they are different bodies but each one has its own functions and responsibilities. In this context we may reproduce certain provisions of the Act which are essential to be noted. It is worth-mentioning here that 'Gram Sabha' has also been defined under Section 2 (viii) of

the Act to mean a body consisting of persons registered in the electoral rolls relating to a revenue village or forest village. Section 5 of the Act deals with registration of voters of a village. Section 6 deals with meeting of Gram Sabha. Section 6-A deals with special meeting of Gram Sabha and Section 6-B of the Act lays down a postulate that the Secretary of the Gram Panchayat shall also be the Secretary of the Gram Sabha. Section 6-C of the Act deals with decision by Gram Sabha. It reads as under:--

'6-C. Decision by Gram Sabha.-- (1) All matters brought before any meeting of Gram Sabha shall be decided, as far as possible, unanimously failing which by general consensus of the members present:

Provided that where there is difference of opinion on any issue such matter shall be brought before the next meeting. If a decision is not taken unanimously or by general consensus in successive two deferred meetings then such matter shall be decided by majority of members present thereat by secret voting. In the case of equality of votes, the person presiding over the meeting shall have a second casting vote.(2) If any dispute arises as to whether a person is entitled to vote, the same shall be decided by the person presiding regard being had to the entry in the list of voters of the Gram Sabha area and his decision shall be final,'

29. There are various provisions relating to the functioning of the Gram Sabha and holding of meetings but as has been provided, Section 6 (2) clearly provides that quorum shall be necessary for every meeting of the Gram Sabha. There is no provision in the Act which states that quorum would not be necessary. The Gram Sabha has been conferred certain duties under Section 7 of the Act. The said provision reads as under:--

'7. Powers and functions and Annual Meeting of Gram Sabha.--

(1) Subject to the rules, which the State Government may make in this behalf, and subject to the general or special orders, as may be issued by the State Government from time to time, the Gram Sabha shall have the following powers and functions, namely:--

(a) to lay down the principles for identification of schemes and their priority for economic development of the village;

(b) to approve all plans including Annual Plans, programmes and projects for social and economic development before such plans, programmes and projects are taken up for implementation by the Gram Panchayat;

(c) to consider the Annual Budget of the Gram Panchayat, and make recommendations thereon; -

(d) to consider the report of audit and accounts of the Gram Panchayat;

(e) to ascertain and certify the proper utilization by the Gram Panchayat of the funds for plans, programmes and projects referred to in Clause (b);

(f) to identify and select persons as beneficiaries under the poverty elevation and other programmes;

(g) to ensure proper utilization and disbursement of funds or assets to the beneficiaries;

(h) to mobilize people for community welfare programmes;

(i) to ensure active participation of people in implementation, maintenance and equitable distribution of benefits of development schemes in the village;

(j) to promote general awareness amongst the people; and

(j-i) to exercise control over institutions and functionaries in social sectors transferred to or appointed by Gram Panchayat through that Panchayat;

(j-ii) to manage natural resources including land, water, forests within the area of the village in accordance with the provisions of the Constitution and other relevant laws for the time being in force;

(j-iii) to advise the Gram Panchayat in the regulation and use of minor water bodies; (j-iv) to control local plans, resources and expenditure and abatement of nuisance;

(k) sanitation, conservancy and prevention and abatement of nuisance;

(l) construction repair and maintenance of public wells, ponds and tanks and supply of water for domestic use;

(m) construction and maintenance of sources of water for bathing and washing and supply of water for domestic animal;

(n) construction and maintenance of village roads, culverts, bridges, bunds and other building of public utility;

(o) construction, maintenance and clearing of public streets, latrines, drains, tanks, wells and other public places;

(p) filling in of disused wells, unsanitary ponds, pools ditches and pits and conversion of step wells into sanitary wells;

(q) lighting of village streets and other public places;

(r) removing of obstructions and projections in public streets and places and sites not being private property or which are open to use of public, whether such sites are vested in the Panchayats or belongs to the State Government;

(s) regulating the control entertainment shows, shops, eating houses and vendors of drinks, sweet meats, fruits, milk and of other similar article;

(t) regulating the construction of house, latrines, urinals, drains and water closets;

(u) management of public land and management, extension

and other offensive matters;

(v) (i) regulating places for disposal of dead bodies, carcasses and other offensive matters;

(ii) disposal of unclaimed corposes and carcasses;

(w) earmarking places for dumping refuse;

(x) regulation of sale and preservation of meat;

(y) maintenance of Gram Sabha property;

(z) establishment and management of cattle, pools and maintenance of records relating to cattle;

(aa) maintenance of ancient and historical monuments other than those declared by or under law made by Parliament to be of national importance, grazing lands and other lands vesting in or under the control of the Gram Sabha;

(bb) maintenance of records of births, deaths and marriages;

(cc) rendering assistance in the census operation and in the surveys conducted by the State Government or Central Government or any other local authority lawfully constituted;

(dd) rendering assistance in prevention of contangious diseases;

(ee) rendering assistance in inoculation and vaccination and enforcement of other preventive measures for safety of human being and cattle prescribed by Government Department and destitutes;

(ff) rendering assistance to the disabled and destitutes;

(gg) promotion of youth welfare, family welfare and sports;

(hh) establishment of Raksha Samiti for:

(a) safety of life and property;

(b) prevention of fire and extinguishing fire and safety of property during outbreak of such fires;

(ii) plantation and preservation of village forest;

(jj) removal of social evils like dowry;

(kk) granting loans for the purposes of--

(i) providing medical assistance to indigent persons in serious and emergency cases;

(ii) disposal of dead body of an indigent person or any member of his family; or

(iii) any other purpose for the benefit of an indigent person as may be notified by the State government from time to time subject to such terms and conditions as may be prescribed.

(ll) (i) carrying out the directions or orders given or issued by the State Government, the Collector or any other Officer authorised by the State Government in this behalf with respect to the measures for amelioration of the condition of the Scheduled Castes and Scheduled Tribes and other backwards classes and in particular in regard to the removal of untouchability;

(ii) perform such functions as may be entrusted to it by Zila Panchayat or Janpad Panchayat by general or special order;

(iii) to exercise and perform such powers and functions as the State Government may confer on or entrust to under this Act or any other law for the time being in force in the State;

(iv) with prior approval of Janpad Panchayat may also perform other functions as it may desire to perform:

Provided that where any such function is entrusted to the Gram Sabha, it shall act as an agent of the State Government, Zila Panchayat, as the case may be, and necessary funds and other assistance for the purpose shall be provided to it by the State Government, Zila Panchayat or Janpad Panchayat, as the case may be;

(mm) plan and manage basic amenities;

(nn) select beneficiaries under various programmes;

(oo) implement, execute and supervise development schemes and construction work within the Gram Sabha area;

(pp) control and monitor beneficiary oriented schemes and programmes;

(rr) organise voluntary labour and contribution for community work and promote the concept of community ownership;

(ss) to plan, own and manage minor water bodies upto a specified water area situated within its territorial jurisdiction;

(tt) to lease out any minor water body upto a specified area for the purpose of fishing and other commercial purposes;

(uu) to regulate the use of water of rivers, streams, minor water bodies for irrigation purposes;

(vv) to exercise control over institutions and functionaries in all social sectors transferred to or appointed by the Gram Sabha.

(2) The annual meeting of the Gram Sabha shall be held not less than three months prior to the commencement of the next financial year, and the Gram Panchayat shall place before such meeting:--

(a) the annual statement of accounts;

(b) the report of administration of the proceedings financial year;

(c) The development and other programme of the works proposed for the next financial year;

(d) the last audit note and replies, if any, thereto; and

(e) the Annual Budget and Annual Plan for the next financial year of the Gram Panchayat.

(2-A) The Gram Panchayat shall place such matters before the Gram Sabha which the Janpad Panchayat, the Zila Panchayat, the collector or any Officer authorised in this behalf may require to be placed before such meeting.

(3) The Gram Panchayat shall carry out the recommendations, if any, made by the Gram Sabha in regard to the matters before it under this section.'

30. On a perusal of the aforesaid provisions it is clear as crystal that the Gram Sabha enjoys many a power including consideration of Annual Budgets of the Gram Panchayat and consider the report and audit of the Gram Panchayat. In this context we may refer with profit to the Madhya Pradesh Gram Sabha (Procedure of Meeting) Rules, 2001 which have been framed in exercise of powers conferred by the Sub-section (1) of the Section 95 read with Section 6 of the Madhya Pradesh Panchayat Avam Gram Swaraj Adhiniyam, 1993. Rule 3 states that the meeting of Gram Sabha shall be held at the Headquarters of the Gram Sabha. Rule 4 deals with manner of giving notice of the meeting. It reads as under :--

'4. Manner of giving notice of the meeting.-- (1) Notice of every meeting of the Gram Sabha specifying date, time and place and business to be transacted shall be given in Form I (appended to these rules) at least seven days before the date of the meeting. In case of any emergency, the nature of which shall be recorded in writing, a meeting can be called with a prior notice of clear three days.

(2) Such notice of the meeting shall be published,--

(a) by affixing a copy of notice at conspicuous places in the Gram Sabha area; and

(b) by making an announcement by beat of drum in the Gram Sabha area.'

It is interesting to note Form 1 which has been referred to Rule 4(1) reads under:--

FORM 1

[See Rule 4(1)]

Notice is hereby given to all the member of the Gram Sabha the meeting of the Gram shall be held on the following place, date and time:--

Place of meeting.....Date.....Time.....All members of the Gram Sabha whose names are in voters list are invited to participate in the meeting.

For the meeting of the Gram Sabha one fifth of the total number of members thereof shall form the quorum. If there is no quorum at the time fixed for the meeting, it will be adjourned and the adjourned meeting will be held on the same place after half an hour for which the quorum shall be necessary.

The following subjects will be placed before the meeting and will be considered in the following order:--

(i)..... ....(2)..... ....(3)..... ....(4) any other subject with the permission of the Chairman of meeting. If any member desires to make suggestions or raise any subject in the meeting, the same shall be given in writing to the Secretary of the Gram Sabha within three days of the issue of notice for meeting of the Gram Sabha.

(Signature)Secretary, Gram Sabha.

31. While providing the categorical mandate as regards the Constitution of the quorum the aforesaid provisions are to be kept in mind. The basic question that requires to be answered is whether the said mandate acts in furtherance of the statute or frustrates it by conferring an unbridled power on the minuscule constituents of the quorum. On a perusal of the aforesaid provisions it is manifest and patent that Gram Sabha has been conferred certain powers and the decisions of the Grams Sabha have to be taken in a particular manner. We have produced the provisions to show that an attempt has been made by the Legislature to arrive at a unanimous decision. It has also been provided under Section 6-B that if it is not possible to take unanimous decision the meeting shall be adjourned. The intendment of the Legislature is quite clear about the role of Gram Sabha and the decision taken by it. While so providing the Legislature has also provided that it shall be necessary to have a quorum for every meeting. Thus, it is enjoined that no meeting can take place without a quorum which definitely would mean a valid quorum. The Legislature has used the word 'every meeting', even if there is a special meeting there has to have the quorum. Even if there is an adjournment of the meeting there has to be a quorum. Without quorum there can not be a meeting. To appreciate the situation an example can be cited. Assuming in a Gram Sabha there is one thousand registered members. As provided in the first

part of Section 6 (2) of the Act one-fifth of the members would constitute the quorum. Hence, quorum shall be of a two hundred members. Out of these two hundred members one-third will be women members and the members of the Scheduled Castes and Scheduled Tribes shall be represented in proportion to their population in the Gram Sabha. If from the women members that is prescribed, there would be a shortfall a singular member the quorum would be imcompleted and the meeting can not take place. Similar consequence would also occur in the absence of requisite Scheduled Caste and Scheduled Tribe members. Be it stated at the cost of repetition that no alternative has been provided. In view of the aforesaid, we are inclined to think that provision relating to the mandatory constitution of the quorum which relates to its constituent frustrates the purpose of the Act and runs counter to its inherent spirit. It defeats the avowed purpose which is to involve more people in participation of the affairs of a village.

32. The next facet which we would presently advert to is whether the said provision defeats the essential nature of democracy. It is seemly to note that the preamble of the Constitution provides that India would be a democratic republic. In the case of S.R. Bommai and Ors. v. Union of India and Ors., (1994) 3 SCC 1, Their Lordships have held that preamble to the Constitution is a part of its basic structure. Similar view has been expressed in the case of Union of India and Anr. v. Madhav s/o Gajanan Chaubal and Anr., (1997) 2 SCC 332.

33. In the case of State of U.P. and Ors. v. Pradhan Sangh Kshettra Samiti and Ors. etc., AIR 1995 SC 1512, a two Judge Bench of the Apex Court while upholding the constitutional validity of the U.P. Panchayat Raj Act has expressed the view as under :--

'With the nature and range of functions entrusted to the new village panchayats under the Act, and the expenditure that may have to be incurred in constituting and running them, it can hardly be said that their number, structure and organisation militate in any way against the concept of democracy and the principle of self-governance. Section 11-F (1) by laying down for non-hilly areas norm of a Village Panchayat for every 1000 population as far as practicable and for hilly areas, for every 5 kilometers radius-- distance, has in fact tried to observe

the principle of self-governance as closely as possible.'

Thus, it is seen emphasis was laid on concept of democracy and the principle of self-governance and Their Lordships appreciating the facts have ruled that the impugned provision has tried to observe the principle of self-governance.

34. In the case of Samatha v. State of A.P. and Ors., (1997) 8 SCC 191, the Apex Court has held that the social and economic democracy is the foundation on which political democracy would be a way of life in the Indian polity. Law as a social engineering is to create just social order removing inequalities in social and economic life, socio-economic disabilities with which poor people are languishing by providing positive opportunities and facilities to individuals and groups of people. Thereafter in Paragraph 77, Their Lordships expressed the view as under:--

'77. The core constitutional objective of 'social and economic democracy' in other words, just social order, can not be established without removing the inequalities in income and making endeavour to eliminate inequalities in status through the rule of law. The mandate for social and economic retransformation requires that the material resources or their ownership and control should be so distributed as to subserve the common good. A new social order, thereby, would emerge, out of the old unequal or hierarchical social order. Legislative or executive measures, therefore, should be necessary for the reconstructions of the unequal social order by corrective and distributive justice through the rule of law.'

35. Keeping in view the aforesaid pronouncements it is to be seen whether the concept of quorum as enshrined in the provision subserves the cause of democracy or militates against the said conception and eventually defeats the constitutional scheme of self-governance. To appreciate the aforesaid spectrum it is necessitous to understand what is exactly the term 'quorum' means and what is the basic idea behind such a conceptual conscience. It is to be scanned and discerned by democratic etymological sense.

36. In Halsbury's Law of England, Third Edition, Volume 6, while dealing with the factum of regulation and management of companies 'quorum' has been described

as under :--

'630. A quorum.-- A quorum means the minimum number of directors who are authorised to act as a Board (b). Each director of the quorum must be qualified to act, and if by the withdrawal of those directors who are disqualified from voting on the ground of interest or otherwise there would be no quorum, no business can be transacted (c). Where some of the directors are interested in a contract and not by the articles permitted to vote, a reduction in the quorum of the purpose of authorities the contract is invalid (d), and where a transaction is really one transaction, the necessary quorum can not be obtained by dividing the transaction into two (e). The articles may provide that in the case of certain contracts or arrangements a director may be permitted to vote and be included in the quorum present notwithstanding the fact that otherwise he would have been disqualified on grounds of interest (f). Where no quorum is specified in the articles the number who usually act will constitute a quorum (g). Though one director can not constitute a 'meeting' (h), the articles may permit on director to be a quorum (i). Unless so provide by the articles, there can not be a quorum competent to act where the number of directors is not filled up to the minimum number (k).'

37. In Encyclopedia Britannica 'quorum' has been defined as under:--

'Quorum : In its general sense, a term denoting the number of members of any body of persons whose presence is requisite in order that business may be validly transacted by the body or its acts be legal. The term is derived from the wording of the commission appointing justices of the peace which appoints them all, jointly and severally to keep the peace in the country named. It also runs-- 'We have also assigned you, and every two or more of you (of whom [quorum], any one of you the aforesaid A, B, C, D, etc., we will shall be one) our justices to inquire the truth more fully', whence the justices so named were usually called justices of the quorum. The term was afterwards applied to all justices, and subsequently, by transference, to the number of members of a body necessary for the transaction of it business.'

38. In Corpus Juris Secundum Volume LXXIV 'quorum' has been described as under:--

'Quorum: The word 'quorum', now in common use, is from the Latin, and has come to signify such a number of the officers or members of anybody as is competent by law or constitution to transact business; such a number of an assembly as is competent to transact its business; such a number of the members of anybody as is, when duly assembled, legally competent to transact business; such a number of a body as is competent to transact business in the absence of the other members. The quorum of a body is an absolute majority of it unless the authority by which the body was created fixes it at a different number. The idea of a 'quorum' is that when that required number of persons goes into a session as a body the votes of a majority thereof are sufficient for binding action. Thus, the word 'quorum' implies a meeting, and the action must be group action, not merely action of a particular number of members as individuals.'

39. In the case of The Punjab University, Chandigarh v. Vijay Singh Lamba etc., AIR 1976 SC 1441, the Apex Court has ruled thus :--

'Quorum' denotes the minimum number of members of anybody of persons whose presence is necessary in order to enable that body to transact its business validly so that its acts may be lawful. The fixation of quorum for the meetings of a committee does not preclude all the members of the Committee from attending the meetings. By the quorum, a minimum number of members of the committee must be present in order that its proceedings may be lawful but that does not mean that more than the minimum are denied an opportunity to participate in the deliberations and the decisions of the committee. Whenever, a committee is scheduled to meet, due notice of the meeting has to go to all the members of the committee and it is left to each individual member whether or not to attend a particular meeting. Every member has thus the choice and the opportunity to attend every meeting of the committee. If any member considers the determined in a particular meeting as of such importance that he must make his voice heard and cast his vote, it is open to him and indeed he is entitled to attend the meeting and make his presence felt.'

Thus, the basic and fundamental principle inhered in the term 'quorum' is presence of minimum number of members to transact business with the avowed purpose to

make it lawful.

40. In the instant case, the quorum has been differently prescribed. The effect and import of such enjoining has to be scrutinised in the backdrop of democracy albeit at the grassroot level. By introduction of such a provision the control from the majority slowly but steadily in a different manner travels to the very small and thin body. The democracy is built on the idea of the majority. All have a right to participate as permissible within the parameters of law. But to conceive of a situation that to empower certain weaker sections they would be allowed to have control in entirety the democracy at the grassroot level would itself be an anathema to the basic requirement of democracy. To have an idea that the protection of weaker sections should percolate to the minuscule level in a minutest manner can not but smack of unreasonableness and irrationality. It can be well imagined if in one of the three categories as provided under Section 6 (2) is absent the meeting of Gram Sabha can not be held. We have been apprised at the Bar, that provision has become workable but it can never be the test in a case of this nature. In the case at hand, we are testing the provision keeping in view the democratic polity, rationality of the provision, the non- arbitrariness of it, and when tested on the bedrock of the same we are of the opinion, the second part of the provision can not stand the test of the Article 14 of the Constitution. The percolation to that extent, if we say so, is not permissible in a beyond constitutional tolerance. The learned Counsel for the State submitted that unless they are allowed to control 'Gram Sabha' would be controlled by a different kind of majority and the entire Panchayat system would collapse. As has been stated above, number is the basic substratum of a quorum but, significant and pregnant one, the Legislature has further proceeded to provide how the quorum would be formed or to put it differently, who would constitute the quorum. It is interesting to note that no alternative is provided what would happen in the absence of a quorum. The words used therein cast a mandate. Submission of the learned Counsel for the State is that in a democratic polity there has to be participation of the weaker sections of the society, more so, in a country like India where Scheduled Castes, Scheduled Tribes and women who have suffered for centuries. The aforesaid submission has its own significance and import and that has been met with by the Parliament while making provisions for reservation. Once the seats are reserved

there can be no trace of doubt that the affirmative steps have been taken for progress and upliftment of the weaker sections of the society. The litmus test that is to be applied to the provision is whether a further controlling tool in the hands of a particular number of a particular caste or tribe as well as woman is affirmative or necessary. An argument has been advanced that unless such a provision is engrafted into the marrows of the Statute the aforesaid three categories would not come to the meetings and the democracy at the grassroot level would remain a myth. The aforesaid argument at a first flush may sound attractive but on a deeper probe, greater scrutiny, subtle analysis and pregnant penetration would make it a submission which has to face the founder but can not form the foundation.

41. It is well settled concept that democracy is nothing but the rule of majority, though it may assume certain shades of adjustability and suitability to match certain circumstances. If the second limb of definition of quorum is allowed to stand the representative character of the decision of the Gram Sabha is likely to be destroyed and the majority would be in the hands of an absolute minuscule minority and would be controlled by it. The possibility of microcosm totally ruling the macrocosm can not be brushed aside. In fact, the said facet is inherent in providing the constituent in a quorum. An example can be cited. Gram Sabha has certain powers as has been indicated hereinabove. A person in power can manipulate a very small fraction of electorate to frustrate functioning of the Gram Sabha. It has been said by Alfred E. Smith that 'All the ills of democracy can be cured by more democracy'. Be it noted that 'democracy is a rising and not a setting sun' to quote the words of Benjamin Franklin. But the instant provision frescoes a different frame and projects a different panorama. It is to be borne in mind that law is to serve the cause of welfare of the people. It is inherent in the maxim 'salus populi est superma lex'. In the instant provision the collective interest is smothered which in effective eventuate creates concavity in the governance of the society by a true democratic process. Therefore, we have no hesitation in holding it destroys the basic feature of democracy and runs counter to constitutional philosophy, the preamble and the basic structure of the Constitution.

42. At this juncture, we may note another submission that is advanced by the learned Government Advocate for the State that if the historical background of

women, Scheduled Castes and Scheduled Tribes in India is studied with anxious scrutiny it would become demonstrable that such a provision as regards the quorum is not only necessitous but in a way, imperative. It is proponed by him that unless their representation is allowed in a mandatory manner there would be no participation at their behest and the majority of other classes would take the decision in the Gram Sabha to the detriment of these people. The aforesaid submission has an inherent fallacy. There is no prohibition for any number of members of the Gram Sabha to be present in the meeting. There is a procedure for conveying the meeting. There is no impediment for participation of women, Scheduled Castes and Scheduled Tribes people. The decision has to be taken by collective but to say that women, Scheduled Castes and Scheduled Tribes have suffered for centuries and, therefore, they should be allowed to have the acceptance by no stretch has rationality. It can not come within the ambit and sweep of protective discrimination or affirmative discrimination making the provision a special provision. In this context, we may refer with profit to the decision rendered in the case of State of M.P. and Anr. v. Ram Kishna Balothia and Anr., AIR 1995 SC 1198, wherein constitutional validity of Section 18 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 was upheld. Section 18 of the said Act provides as under:--

'Nothing in Section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence under this Act.'

Their Lordships while upholding the said provision as constitutionally valid expressed the view as under:--

'6. It is undoubtedly true that Section 438 of the Code of Criminal Procedure, which is available to an accused in respect of offences under the Penal Code, is not available in respect of offences under the said Act. But can this be considered as violative of Article 14 The offences enumerated under the said Act fall into a separate and special class. Article 17 of the Constitution expressly deals with abolition of 'Untouchability' and forbids its practice in any form. It also provides that enforcement of any disability arising out of 'Untouchability' shall be an offence

punishable in accordance with law. The offences, therefore, which are enumerated under Section 3 (1) arise out of the practice of 'Untouchability'. It is in this context that certain special provisions have been made in the said Act, including the impugned provision under Section 18 which is before us. The exclusion of Section 438 of the Code of Criminal Procedure in connection with offences under the said Act has to be viewed in the context of the prevailing social conditions which give rise to such offences, and the apprehension that perpetrators of such atrocities are likely to threaten and intimidate their victims and prevent or obstruct them in the prosecution of these offenders, if the offenders are allowed to avail of anticipatory bail. In this connection we may refer to the State of Objects and Reasons accompanying the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Bill, 1989, when it was introduced in Parliament. It sets out the circumstances surrounding the enactment of the said Act and points to the evil which the statute sought to remedy. In the Statement of Objects and Reasons it is stated:--

'Despite various measures to improve the socio-economic conditions of the Scheduled Castes and Scheduled Tribes, they remain vulnerable. They are denied number of civil rights. They are subjected to various offences, indignities, humiliations and harassment. They have, in several brutal incidents, been deprived of their life and property. Serious crimes are committed against them for various historical, social and economic reasons.

2..... When they assert their rights and resist practices of untouchability against them or demand statutory minimum wages or refuse to do any bonded and forced labour, the vested interests try to cow them down and terrorise them. When the Scheduled Castes and the Scheduled Tribes try to preserve their self-respect or honour of their women, they become irritants for the dominant and the mighty. Occupation and cultivation of even the Government allotted land by the Scheduled Castes and Scheduled Tribes is resented and more often these people become victims of attacks by the vested interests. Of late, there has been an increase in the disturbing trend of commission of certain atrocities like making the Scheduled Castes persons eat inedible substances like human excreta and attacks on and mass killing of helpless Scheduled Castes and Scheduled Tribes and rape of

women belonging to the Scheduled Castes and the Scheduled Tribes..... A special legislation to check the deter crimes against them committed by non-Scheduled Castes and non-Scheduled Tribes has, therefore, become necessary.

The above statement graphically describes the social conditions which motivated the said legislation. It is pointed out in the above statement of Objects and Reasons that when members of the Scheduled Castes and Scheduled Tribes assert their rights and demand statutory protection, vested interests try to cow them down and terrorise them. In these circumstances, if anticipatory bail is not made available to persons who commit such offences, such a denial can not be considered as unreasonable or violative of Article 14, as these offences form distinct class by themselves and can not be compared with other offences.

7. We have next to examine whether Section 18 of the said Act violates, in any manner, Article 21 of the Constitution which protects the life and personal liberty of every person in this country. Article 21 enshrines the right to live with human dignity, a precious right to which every human being is entitled; those who have been, for centuries, denied this right, more so. We find it difficult to accept the contention that Section 438 of the Code of Criminal Procedure is an integral part of Article 21. In the first place, there was no provision similar to Section 438 in the old Criminal Procedure Code. The Law commission in its 41st Report recommended introduction of a provision for grant of anticipatory bail. It observed:--

'we agree that this would be a useful advantage. Though we must add that it is in very exceptional cases that such power should be exercised.'In the light of this recommendation, Section 438 was incorporated, for the first time, in the Criminal Procedure Code of 1973. Looking to the cautious recommendation of the Law Commission, the power to grant anticipatory bail is conferred only on a Court of Session or the High Court. Also, anticipatory bail can not be granted as a matter of right. It is essentially a statutory right conferred long after the coming into force of the Constitution. It can not be considered as essential ingredient of Article 21 of the Constitution. And its non-application to a certain special category of offences can not be considered as violative of Article 21.

10. It was submitted before us that while Section 438 is available for graver offences under the Penal Code, it is not available for even 'minor offences' under the said Act. This grievance also can not be justified. The offences which are enumerated under Section 3 are offences which, to say the least, denigrate members of the Scheduled Castes and Scheduled Tribes in the eyes of society, and prevent them from leading a life of dignity and self-respect. Such offences are committed to humiliate and subjugate members of Scheduled Castes and Scheduled Tribes with a view to keeping them in a state of servitude. These offences constitute a separate class and can not be compared with offences under the Penal Code.'

43. The aforesaid decision has to be seen in the context it was delivered. In the scheme of the said Act atrocities on the Scheduled Castes and Scheduled Tribes were sought to be prohibited. The historical background was accentuated upon by the Apex Court. It is to be noted that grant of anticipatory bail has different concept altogether and Section 438 of the Code of Criminal Procedure has a different purpose. The present provision does not save the women, Scheduled Castes and Scheduled Tribes from any kind of harassment or humiliation. The provision is so couched that though they would be in minuscule proportion, would control the entire functioning at the Gram Sabha level. To elaborate: in the Act of 1989, the purpose of the Parliament was that the Scheduled Castes and Scheduled Tribes are not harshly or badly dealt with in view of their social condition. By engrafting of the present provision the malady of the centuries is not eradicated but creates a dent and concavity in the democratic fabric and a cavity crater in the social architecture. One may harbour the notion that it subserves the cause of democracy and social justice as it empowers the women, Scheduled Castes and Scheduled Tribes, but if the provision is appreciated in proper perspective it would clearly exposit that a very minutest microcosm would control the majority. Even if more than 50 per cent people would like to have the meeting of the Gram Sabha, they would not be in a position to do unless they have the presence of the constituent members. The possibility of the quorum is not the test. The acid test is providing for such conception in the quorum. If we permit ourselves to say so the constituents of the quorum have been treated as if they are the Eiensteins of democracy without whom the high pedestal of democracy would be

padestrainized. In our view, the compassionate constitution of ours does not so prescribe and it is not saved by the principle of historical balancing.

44. We have already expressed our opinion with regard to second limb of the provision. As far as first part of the provision is concerned, that not less than one-fifth of the total number of Gram Sabha shall form a quorum is permissible by the basic concept of quorum. The said part is also severable. It is well settled in law, when a provision can be severed from the other part of the provision and independently operate and stand on its own it can be saved and the same should be saved. In our considered opinion, doctrine of severability would apply to the case at hand and applying the said doctrine we uphold constitutional validity of the first part of Sub-section (2) of Section 6 of the Act. We say so as the valid and invalid provisions are not so that they can not be separated from one another and further invalidity of a portion does not result in the invalidity of the provision in entirety. We are of the considered view that both limbs of the provision are distinct and separate and after striking out what is invalid what remains is in itself a complete provision independent of the rest and can be upheld notwithstanding the rest is constitutionally invalid. We are also of the opinion, the concept of quorum is the basic scheme when one-fifth of the members of Gram Sabha are taken into consideration and the constituents do not really form a part of an inseparable singular scheme. They are different in substance and if the invalid provision is expunged the other part of the provision is workable, enforceable and have its own existence in a legitimate manner. Our view gets reinforced by the decision rendered in the case of R.M.D. Chamarbaugwalla and Anr. v. Union of India and Anr., AIR 1957 SC 628.

45. In view of our preceding analysis and studies scrutiny on the foundation of prismatic premises, we conclude and hold the second limb of Section 6 (2) of the Act intending that 'out of which not less than one third shall be women members and members of Scheduled Castes and Scheduled Tribes shall be represented in proportion to their population in the 'Gram Sabha' is unconstitutional on the ground which we proceed to state in seriatim.

(a) There is no constitutional mandate under Articles 243, 243A, 243B, 243D, 243G and 243H that provides constituent of quorum pertaining to the mandatory presence of specific women members and members of the Scheduled Castes and Scheduled Tribes.

(b) The argument that the constitution of quorum as has been envisaged by the State Legislature is inferentially permissible from the aforesaid Articles is fallacious and does not withstand close scrutiny.

(c) The second limb of the provision is not saved by the conception of affirmative or protective discrimination as conceptually inhered under Articles 15(3) and 15(4) of the Constitution of India.

(d) The classification that has been made in the quorum does not stand the test of equality clause as enshrined under Article 14 of the Constitution.

(e) The provision also is hit by the principle of reasonability and smacks of arbitrariness.

(f) It does not subserve the purpose of the Act but in a way, subverts the same and hence, it is not in consonance with the scheme and spirit of the Act.

(g) The purpose of quorum always lays emphasis of a particular number of members for transacting business but in the case at hand when the constituents have become the paramount and governing factors it basically runs counter to the idea of quorum, as a consequence of which the representative character of the decision melts into oblivion.

(h) The provision on a deeper penetration and pregnant probing allows the minuscule number of defeat the decision of the majority in a way and thereby ushers in the design that the microcosm has the effect potentiality to dominate over the macrocosm which is an anathema or betenoire to the basic feature of democracy which is a part of the philosophy of the Constitution, a compassionate one.

(i) The provision is not saved even if the doctrine of social balancing is applied.

46. Ex consequent, we declare that the second part of Sub-section (2) of Section 6 of the Act which postulates that 'out of which not less than one third shall be women members and members of Scheduled Castes and Scheduled Tribes shall be represented in proportion to their population in the Gram Sabha' is ultra vires the Constitution.

47. The reference is answered accordingly.