tive force and whereas the argument advanced by the learned senior counsel appearing for the respondents/defendants is really having subsisting force and altogether Appeal Suit No. 176 of 2001 is liable to be dismissed.

55. Now, the Court has to analyse the relief sought for in Original Suit No. 109 of 1998 (Appeal Suit No. 282 of 2002), wherein the plaintiff has sought for the relief of perpetual injunction to the effect that the defendants 2 to 4 should not let out the suit property mentioned therein to third parties. The suit property is the absolute property of the first defendant, father of the plaintiff and defendants 2 and 3, and husband of the 4th defendant.

56. It has already been held in Appeal Suit No. 176 of 2001 that the suit property is the separate property of the deceased first defendant and he subsequently settled the same in favour of the 4th defendant under Exhibit B-68. Therefore, on the date of filing of the suit, the plaintiff is not entitled to get the relief sought for and further virtually on the date of filing of the suit, he has no *locus standi* to institute the same.

57. At this juncture, it would be more useful to look into the well-known Latin maxim "*Ubi jus ibi remedium.*" It means that where there is a legal right, there is a legal remedy.

58. In the instant case, as pointed out earlier, on the date of filing of the suit itself, the plaintiff has had no semblance of right over the suit property and therefore, the plaintiff is not entitled to file the present suit for the relief of perpetual injunction against the contesting defendants.

59. The trial Court, after considering all the contentions raised on either side, has rightly dismissed the suit. In view of the discussion made earlier, it is very clear that the judgment and decree passed by the trial Court in Original Suit No. 109 of 1998 are also perfectly correct and the same need not be interfered with and altogether Appeal Suit No. 282 of 2008 is also liable to be dismissed.

60. In fine, these appeal suits are dismissed without costs. The common judgment passed in Original Suit No. 91 of 1992 and 109 of 1998 by the Principal Subordinate Court, Tirunelveli is confirmed. Consequently, connected M.P. No. 2 of 2008 is also dismissed.

—— *Appeal suits dismissed.*

(2010) 1 MLJ 1033

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Present: *R.S. Ramanathan, J.*

W.P. (MD) Nos. 5050 and 6542 of 2009 and M.P. (MD) Nos. 1 and 2 of 2009
24th September, 2009

S. Sree Niranjanaa Bose and Others
... Petitioners

Versus

Government of Tamil Nadu, rep. by its Secretary, Health and Family Welfare (MCA 1) Department, Chennai 600 009 and Others *... Respondents*

Constitution of India, 1950, Article 226 – Petitions filed by the grand children of the freedom fighters – Deleting the grand children from the special category to MBBS admission by the Government of Tamil Nadu G.O (2D) No. 23, Health and Family Welfare (MCA) Department dated 28.5.2004 and clause and Appendix of the prospectus of MBBS and BDS course – Case laws discussed – While deciding the earlier writ petitions the reservation for the grand children of freedom fighters were not decided – Orders passed in earlier Writ Peti-

tions would not bind the present case – Government order and the relevant clause and the Appendix in the prospectus set aside – Writ petitions allowed.

In Writ Petition 5050 of 2009, the G.O (2D) No 23, Health and Family Welfare (MCA) Department dated 28.5.2004 passed by the Government of Tamil Nadu deleting the grand children from the reservation category and consequent clause in MBBS/BDS admission were challenged Writ Petition allowed. In Writ Petition No. 6542 of 2009 the appendix in the prospectus for admission to MBBS/ BDS prescribing children of freedom fighters alone eligible for reserved seats was challenged. Writ Petition allowed.

Held: Meaning and the effects of *ratio decidendi* discussed, distinction between *ratio decidendi* and *obiter dicta* made.

[Paras 37-43]

When the grand children of freedom fighters were included in the year 2002-2003 or one year earlier, the Government had taken conscious decision after due deliberation, having realized that the children of freedom fighters may not be eligible to claim seats in the medical college and therefore, to confer the benefits to the family of freedom fighters whose forefathers have struggled for the freedom for our country including them. Therefore, the grand children were consciously included in the category of persons eligible for reservation and that cannot be set at naught, by relying upon the observations in the judgment when the observations are not *ratio decidendi* *[Para 37]*

From the judgments of Supreme Court and various other Courts, it can be safely concluded that the observations referred to above in the Full Bench judgments 2002 (4) CTC 449, which was the reason for passing the Government Order can only be termed as *obiter* and not *ratio decidendi* and therefore when the G.O was passed on the basis of the above observation, then the said Government Order is not legal and it shows the non-application of mind and it is also unreasonable against the purpose for which the grand children were brought to the category of reservation in the year 2002-2003. *[Para 44]*

It can be clearly stated that the exclusion of grandchildren by the impugned Government Order on the basis of the observation of the Full Bench judgment is unreasonable, arbitrary and is liable to be struck down. The Government has not taken a conscious decision while excluding the grand children of freedom fighters and passed the Government Order on the basis of full bench judgment. And hence, it cannot be taken that it is a policy decision of the government and the decision was taken on the basis of the observation made in the Full Bench judgment and when the observation is not *ratio decidendi* of the judgment, the Government should not have passed that G.O on that basis. Hence, it is liable to be struck down and it is struck down. *[Para 46]*

RATIO DECIDENDI

"When the issue was not argued or raised by the parties before the Court, that should not form any basis and any observation made by the Court should not be taken as law settled by that Court."

CASES CITED/REFERRED TO:

Anil Kumar Gupta v. State of U.P (1995) 5 SCC 173 *[Para 14]*

Arnit Das v. State of Bihar (2009) 5 SCC 488 *[Para 41]*

Divisional Controller, KSRTC v. Mahadeva Shetty (2003) 7 SCC 197 ***(referred)*** *[Para 40]*

H.U. Prasanth rep. by father and guardian K.S. Harikumar v. Government of Tamil Nadu rep. resented by its Secretary, Department of Medical Education, Fort St. George, Chennai ***009*** W.P. (MD) No. 5851 of 2007 ***(referred)*** *[Para 11]*

In Flower v. Ebbw Vale Steel Iron and Coal Co. (1934) 2K.B.132 ***(referred)*** *[Para 10]*

M. Arthi (Minor) rep. by her mother and natural guardian Ms. M. Renuka v. State of Tamil Nadu, rep. by its Secretary to Government, Health & Family Welfare Department, Fort St.,George, Chennai-600 009 2002 (4) CTC 449 (FB) ***(distinguished)***

[Paras 5, 11, 33, 44, 48]

M. Satyanarayana v. State of Karnataka AIR 1986 SC 1162 ***(referred)*** *[Para 24]*

M. Shaikh Dawood v. Collector of Central Excise, Madras AIR 1961 Mad 1 (FB) ***(referred)***

[Para 38]

Mukund Lal and Gurdial Sing AIR 2005 SC 3330 ***(referred)*** *[Para 21]*

Mukund Lal Bhandari v. Union of India (1993) Supp 3 SCC 2 ***(referred)*** *[Para 20]*

P. Jeyaraman v. Secretary, Selection Committee for MBBS/BDS Course, Chennai-10 W.P. No. 13616 of 2009 *[Para 24]*

P.L. Karthika v. 1. State of Tamil Nadu rep. by its Secretary to Government, Health Department and two others W.P. No. 12979 of 2009 dated 16.7.3009 ***(referred)*** *[Para 24]*

Philip Jeyasingh v. Joint Registrar of Co-operative Societies, Chidambaranar Region, Tuticorin (1992) 2 MLJ 309 (FB) ***(referred)*** *[Para 38]*

Rajbir Singh Dalal (Dr) v. Chaudhari Devi Lal University, Sirsa (2008) 9 SCC 284 ***(followed)***

[Para 43]

S. Hari Ganesh (Minor) v. State of Tamil Nadu AIR 1987 Mad. 55 (DB) *[Para 31]*

Saravanan T.T. v. State of Tamil Nadu (2004) 4 MLJ 283 ***(referred)*** *[Paras 26, 35]*

State of Orissa v. Sudhansu Sekhar Mistra AIR 1968 SC 647 ***(followed)*** *[Para 42]*

Swati Gupta v. State of U.P. (1995) 2 SCC 560 ***(referred)*** *[Para 36]*

Union of India v. Avtar Singh (2007) 1 MLJ 162 ***(referred)*** *[Para 22]*

ADVOCATES APPEARED:

S. Natarajan and *N. Balakrishnan* for Petitioners

R. Manoharan Government Advocate and *K. Balasubramaniam* Additional Government Pleader for Respondents

COMMON ORDER

Heard both sides.

2. In both the writ petitions, the petitioners claim reservation in the admission of medical college on the ground that they are the grand children of freedom fighters and therefore, they must be given admission in the medical college, as per reservation quota applicable to the descendants of freedom fighters.

3. In W.P. (MD) No. 5050 of 2009, the petitioner challenges the G.O.(2D) No. 23, Health and Family Welfare (M C A -1) Department, dated 28.5.2004, by virtue of which reservation given to the grand children of freedom fighters was removed and in W.P. (MD) No. 6542 of 2009 without challenging the said G.O., the petitioner prayed for quashing that part of MBBS/BDS prospectus of the first respondent appendix, Serial No. I, Code No. I prescribing that the children of freedom fighters alone are eligible for three reserved seats and to consider the case of the petitioner for admission in the medical college on the ground of grand children of the freedom fighters.

4. In both the cases, the petitioners are the grand children of freedom fighters and that fact is not disputed. The case of the petitioners is that till, the passing of G.O. (2D) No. 23, Health and Family Welfare (M C A-1) Department, dated 28.5.2004, the category of seats reserved for special categories in Government Colleges, under the Group No. 1 included seat for children/Grand children of freedom fighters, in the seats reserved for MBBS along with others stated therein and after the G.O. (2D) No. 23, grand children were deleted from the that list and therefore, challenging the same these writ petitioners were filed.

5. Mr. S. Natarajan, the learned counsel appearing for the petitioner, in W.P. (MD) No. 5050 of 2009, contended that originally the reservation was made applicable to the chil-

dren of freedom fighters for the admission of seats in the medical college and later, the Government having realised that the children of the freedom fighters could not be eligible for getting admission in the medical colleges, having regard to the fact that more than 60 years passed after independence and therefore, the Government has decided to confer the benefits to the grand children and that was in vogue till 2003-2004. Thereafter, on the basis of the observation made in Full Bench judgment in the matter of *M. Arthi (Minor) rep. by her mother and natural guardian Ms. M. Renuka and two Others v. State of Tamil Nadu, rep. by its Secretary to Government, Health & Family Welfare Department, Fort St., George, Chennai-600 009 and 11 Others* (2002) 4 CTC 449, the impugned G.O.(2D) was passed deleting the grand children of the freedom fighters from the list of persons eligible to get admission in the medical college under the reservation category. He further submitted that even thereafter, grand children of the freedom fighters were given preference in the admission to the medical colleges and that is evident from the manual, issued by the Government, which was obtained by the petitioners under the Right to Information Act and that particulars provided in that manual was as on 21.12.2007 and as per that manual, the grand children of the freedom fighters were eligible to get preference in the reservation of seats in professional colleges and in the academic year 2009-2010, the grand children of the freedom fighters were not included for claiming reservation of seats in professional colleges and the omission or deletion of the grand children of the freedom fighters from the reservation category is against the purposes, for which originally they were included and it was only based on the Full Bench judgment in *M. Arthi (Minor) rep. by her mother and natural guardian Ms. M. Renuka and two Others v. State of Tamil Nadu, rep. by its Secretary To Government, Health & Family Welfare Department, Fort St., George, Chennai-600 009 and 11 Others (supra)* and it is unreasonable as the said Full Bench judgment did not decide that issue.

6. Mr. S. Natarajan, the learned counsel appearing for the petitioner in W.P. (MD) No. 5050 of 2009 further contended that G.O. (2D) No. 23, Health and Family Welfare (M C A - 1) Department, dated 28.5.2004 was passed on the basis of the judgment rendered by the Full Bench in W.A. 3221 of 2002 and batch cases and in that judgment, the Honourable High Court was not dealing with the issue of reservation granted to grand children of freedom fighters and that judgment was rendered with reference to the G.O. Ms. No. 477, Social Welfare Department, dated 27.6.1975, by which a children born of inter caste marriage such as belonging to ST and SC or born to a person of SC and Backward class or born to a person of a Backward class and of a forward class were given reservation. While setting aside the reservation to such persons, it has been observed by the Full Bench as follows:

> "Other than the reservation in Tamil Nadu Act 45 of 1994, what is permissible is only for physically handicapped, eminent sportsmen, children of freedom fighters and Children of Ex-servicemen being horizontal reservation and not vertical and the State has to bear this in mind in future."

7. This was taken into account by the State Government and it is also specifically stated in the said G.O. in para 2 as follows:

> "The Director of Medical Education is of the view that as per the judgment delivered by the Full Bench of the High Court of Madras in W.A. No. 3221 of 2002 only the following categories are eligible to be considered for selection for MBBS Course under special categories and this should be done only on horizontal reservations:
>
> 1. Physically Handicapped

2. Eminent Sports person

3. Children of Freedom Fighters

4. Children of Ex-servicemen

In this connection, the Director of Medical Education is of the view that the grand children of Freedom Fighters shall be deleted to avail the concession under the special category Freedom Fighters and the concession extended to the Children of Defence Personnel shall be restricted only to the children of Ex-servicemen and the other two categories, namely children of serving Defence Personnel, killed in Action shall be deleted and the seats earmarked shall be added to the General Pool and filled up on merit basis."

8. Therefore, on the basis of the observation in the Full Bench judgment, the Government approved in that G.O. that the grand children of freedom fighters were deleted under the special category 'Freedom Fighters' and therefore, he contended that the withdrawal of concession granted to grand children of Freedom Fighters is erroneous, unreasonable and against the purpose for which it was included.

9. Mr. S. Natarajan, the learned counsel appearing for the petitioner in W.P. (MD) No. 5050 of 2009, further submitted that the State Government without appreciating the judgment rendered by the Full Bench of this Court, deleted the grand children of the Freedom Fighters from the category of persons, who are entitled to avail the reservation, as if the Full Bench has restricted the concession only to the children of Freedom Fighters.

10. Mr. R. Manoharan, the learned Government Advocate appearing for the respondents in W.P. (MD) No. 5050 of 2009 contended that considering the limited number of seats available in MBBS Course, the Government has decided to restrict the benefit of reservation only in favour of children of Freedom Fighters and the Full Bench of this Honourable Court also held that the special category of reservation can be only in favour of the children of Freedom Fighters and it cannot be extended.

11. He further contended that there is no *mala fide* on the part of the Government and the Government Order was passed on the basis of the observation made in the Full Bench judgment in *M. Arthi (Minor) rep. by her mother and natural guardian Ms. M. Renuka and two Others v. State of Tamil Nadu, rep. by its Secretary to Government, Health & Family Welfare Department, Fort St., George, Chennai-600 009 and 11 Others (supra).*

12. Mr. R. Manoharan, the learned Government Advocate, further submitted that the admission to the medical college is governed by the prospectus issued for that particular year and merely because in the earlier years, the grand children of the Freedom Fighters were included as eligible for claiming reservation, the same cannot be extended for this academic year. When the prospectus issued for this academic year, does not mention that the grand children of Freedom Fighters are eligible to seek reservation for seats in the medical colleges, they cannot claim as of right and are bound by the prospectus.

13. He further submitted that the matter is no longer *res intera* and Mr. Justice K. CHANDRU in the judgment in W.P. (MD) No. 5851 of 2007 between *H.U. Prasanth rep. by father and guardian, K.S. Harikumar v. Government of Tamil Nadu, represented by its Secretary, Department of Medical Education, Fort St. George, Chennai – 600 009 and two Others* has clearly held that word 'children' mentioned in the prospectus will not include the grand children and it has been held that by no stretch of imagination, the grand children of the Freedom Fighters can never get into the quota in the special category found in para 14(1) of the medical college prospectus. He further relied upon the observation of the Full Bench judgment in his said judgment in para

are not eligible to claim the benefit for reservation. A perusal of the judgments of the Mr. Justice M. JAICHANDRAN would reveal that the point that was argued before the learned Judge was whether children of freedom fighters would include the grand children and it was argued by the petitioners that when the concession given to the children of the freedom fighters it also includes the grand children and that was negatived by the learned Judge holding that children will not include grand children and hence, the petitioners are not eligible to claim reservation. Therefore, the judgments rendered by Mr. Justice M. JAICHANDRAN cannot be used against the petitioner in the present case as the issue involved in those two cases are different. Further, in the judgment in the case of *M. Satyanarayana v. State of Karnataka* AIR 1986 SC 1162 : (1986) 2 SCC 512, which was relied upon by Mr. Justice M. JAICHANDRAN in his judgment in para 18, it is held as *"Reservation in favour of sons of political sufferers are considered to be belonging to a special category. There is rationale behind it, those who are political sufferers undergo certain disadvantages and pass on such disadvantages to their children. They will be in a worse position than the children of those who are not political sufferers for the purpose of taking adequate education, attention, etc. because their parents might have languished in any prison or might have been deprived of property. Looked at from that point of view, political sufferer should be an identifiable person who could be recognised as such on certain rational basis."* Relying on that passage, the learned judge held "these reasons cannot apply to grandchildren or great grandchildren. Therefore, if the State takes a decision not to extent the benefit under the special category to "grand children and other descendants: it cannot be said to be unreasonable The fact that no applicant falls under the category of children cannot advance the petitioner's case. As a consequence, the State is under no obligation to widen the net nor can a *mandamus* be issued. As regards the word "children" in the prospectus, it is plain and clear and therefore, must be understood to mean only children. In different circumstances, children may be construed to mean grandchildren. But in this case, when the word 'grandchildren' in the previous prospectus has been consciously removed, we cannot given an inclusive meaning to the word."

25. In this case, the State has not taken a decision consciously and the G.O. was passed only on the basis of the observation made in the Full Bench judgment and hence, even according to the reasoning of the learned Judge Mr. Justice M. JAICHANDRAN, the G.O. cannot be a reasonable one.

26. The another judgment is rendered by Ms. Justice PRABHA SRIDEVAN in the matter of *Saravanan T.T. v. State of Tamil Nadu* (2004) 4 MLJ 283 : 2004 (5) CTC 704 and it has been held that omission of grand children in the prospectus is deliberate and hence they are not entitled to be included in the reservation. It has been held in the reported judgment in *Saravanan T.T. v. State of Tamil Nadu (supra)* in para 17 as follows at p. 289 of MLJ:

> "*17.* It is difficult to accept that the exclusion of grand children must only be by inadvertence. It is true that children of freedom fighters may not apply for admission in the medical college because of their age. But the extract from the prospectus of this year and last year would show that this year not only under the caption "Seat Reserved" is the word "grandchildren" removed, it clearly says that along with the application there should be documentary proof that the candidate "is the children of the freedom fighters." Last year, the candidate was required to show that he/she is "the grandchildren of the freedom fighters" Appendix I makes it clear that the special category is "children of freedom fighters." Appendix I

of last year's prospectus read "grandchildren of freedom fighters." Therefore the respondent intended to exclude the grandchildren. To the question whether any thought was applied to the fact that no child of a freedom fighter would now apply for admission, the answer may be in the negative. But on that score, a *mandamus* cannot be granted."

It is seen from the above judgment that the learned Judge also admitted that before deleting grand children from the reserved category, the executive may not have taken a conscious decision. Further, it is seen from the above judgment that prior to 2004-2005, the grand children were included. However, the learned Judge decided the case on the basis of the prospectus issued for the year 2004-2005 and there was no reference to the impugned G.O. (2D) No. 23, Health & Family (MCA-1) Department, dated 28.5.2004.

27. Therefore, from the judgments of learned judges referred to above, they were dealing with the prospectus issued for a particular year in which the grand children were excluded from the category of eligible persons to claim reservation and in all those judgments, the question of validity of G.O. Ms. No. 2D referred to above, which is challenged in this writ petition was not at all in issue nor discussed. As stated *supra,* while passing the impugned G.O, the Government has not taken a deliberate stand or a policy decision by which the grand children or the student form the category of persons claiming reservation under freedom fighters are to be excluded. In other words, the deletion of grand children was not a conscious decision taken by the Government and it is manifest from the Government Order itself that the decision to exclude the grand children was only taken on the basis of the observations in the Full Bench judgment. Therefore, we will have to see whether the Full Bench has dealt with that issue and held that the grand children cannot be included in the category of reservation and whether the observations made in the Full Bench judgment as referred to above is *ratio decidendi* of that decision. If the observation made in that decision is the *ratio decidendi* of the case then I am bound to follow the same. If it is otherwise and the observations is only a *obiter* and in that case, there is no need to follow the same. Before finding whether the observation stated in Full Bench is the *ratio decidendi* of the case or *obiter*, we will have to see the context in which the observation has been made. As stated *supra,* the point in issue in the Full Bench judgment is the reservation given to children born out of inter caste marriage as specified under G.O. Ms. No. 477, Social Welfare Department, dated 27.6.1975.

28. A reading of the Full Bench judgment, would reveal that it was not at all argued in that case by the lawyers about the reservation to be given to the children or the grand children of freedom fighters and the point in issue of the Full Bench judgment was whether the Government can create any other special category of reservation in addition to reservation already provided under T.N. Act 45 of 1994. The point in the issue in the Full Bench judgment has been aptly stated in para one as follows:

"This writ appeal and writ petitions raised an important question relating to the entitlement of separate reservation for the children of inter-caste marriage under special category other than the reserved categories."

29. Therefore, the Full Bench was dealing with the entitlement of separate reservation for the children of inter-caste marriage under special category other than the reserved categories.

30. While dealing with that issue, the Full Bench has observed that "other than the reservation in Tamil Nadu Act 45 of 1994, what is permissible is only for Physically Handi-

capped, Eminent Sportsmen, children of freedom fighters and children of Ex-servicemen being horizontal reservation and not vertical. The State has to bear this in mind in future."

It should not be forgotten that originally that grandchildren of freedom fighters were not included in the category of persons eligible for claiming reservation and the learned counsel appearing for the petitioner and the learned Government Advocate were not able to state the exact year during which the grand children were also included in the category of reservation under the freedom fighters category.

31. It is seen from the Division Bench judgment of this Court in the reported judgment in the case of *S. Hari Ganesh (Minor) and Another v. State of Tamil Nadu and Another* AIR 1987 Mad. 55 that in the academic year 1986-86 eight special categories, had been provided for reservation for the year 1985-86 and they were as follows:

"*(i)* physically handicapped

(ii) widows

(iii) eminent sportsmen

(iv) children born of inter-caste marriage in the order of preference mentioned in that clause

(v) defence quota

(vi) children of freedom fighters

(vii) Tamil language candidate whose parent/parents has/have suffered for the cause of development of Tamil and contributed towards the protection of Tamil; and

(viii) For orphans from orphanages approved and aided by State Government."

32. Therefore, the grand children must have been included under the category of freedom fighters only later.

33. Further, in the Full Bench judgment rendered in *M. Arthi (Minor) rep. by her mother and natural guardian Ms. M. Renuka and two Others v. State of Tamil Nadu, rep. by its Secretary to Government, Health & Family Welfare Department, Fort St., George, Chennai-600 009 and 11 Others (supra)*, the argument that was advanced was whether special reservation which has been provided for the children born of inter caste marriage is one traceable to Article 15(4) on the ground of social and educational backwardness and in that context it has been observed as follows:

"The executive power of the State under Article 162 of the Constitution is co-extensive with the legislative power and when the field of law is occupied by a legislative Act, the exercise of executive power is not available. There is no dispute about the State's power to provide reservation even by executive order under Article 162 of Indian Constitution. But such power can be exercised only in the absence of a legislative Act. Of course, if an aspect is not covered by the legislative Act, then the executive power can be resorted to. To put it precisely, if the power of reservation is exhausted under Tamil Nadu Act 45 of 1994, then no power exists to invoke the executive power under Article 162 of the Constitution. The special reservation, which has been provided for the children born of inter-caste marriage is one traceable to Article 15(4) on the ground of social and educational backwardness. That power has already been exhausted by the State by enacting the Tamil Nadu Act 45 of 1994. We are unable to accede to the contention that the special reservation provided for the children of inter-caste marriage is not traceable to Article 15(4) but to Article 15(1) or Article 14 or Preamble of the Constitution. The very basis of reservation for inter-caste children is based on their social and educational backwardness and is only traceable to Article 15(4) and when the State had already exhausted that power of reservation by enacting Act 45 of 1994,

15 and contended that the petitioners are not entitled to claim reservation.

14. It is not disputed that originally the grand children were not included and around 2001-2002, the government thought fit to include grand children also in the category of children of freedom fighters having realised that children of freedom fighter may not be eligible to seek admission. Therefore, a conscious decision was taken by the Government to include the grand children in that category and it is also seen from the prospectus for the year 2002-2003, 2003-04 that grand children were also included. In the year 2004, the grand children was deleted from that category to claim eligible for reservation and that was on the basis of the aforesaid Full Bench judgment.

15. Therefore, we will have to see the context in which, the observation was made in the Full Bench judgment regarding reservation to be given to the children of Freedom Fighters, which resulted in the passing of the impugned G.O. In the Full Bench judgment, as stated supra, challenge was made to the G.O. Ms. No. 477, Social Welfare Department, dated 27.6.1985, by which the children born of inter-caste marriage were also made eligible to claim reservation in the matter of admission to the professional colleges and that was struck down by the Full Bench of this Honourable Court. As rightly contended by the learned counsel appearing for the petitioner, in W.P. (MD) No. 5050 of 2009, Mr. S. Natarajan, eligibility to the grand children of the Freedom Fighters to be included in the category of 'Special Reservation' for seeking admission in the medical colleges, was not at all argued or in issue before the Full Bench. Therefore, in my opinion, with due respect to the Honourable Judges of the Full Bench judgment that the passage which was relied upon by the Mr. Justice K. CHANDRU in his judgment cannot be ra- G.O. relying upon that passage in that judgment for passing the impugned G.O., without understanding the legal effect of that observation.

16. It is seen from the Full Bench judgment that the Full Bench was concerning about the additional reservation given to the children of inter-caste marriages, in addition to the reservation policy enumerated by the State Act 45 of 1994 and in that context, while setting aside the said G.O. Ms. No. 477, the above observation was made by the Full Bench that other than the reservation in Tamil Nadu Act 45 of 1994 (sic), what is permissible is only for Physically Handicapped, Eminent sportsmen, Children of Freedom Fighters. Therefore, in my opinion, the Full Bench has not decided the issue whether the grand children of the Freedom Fighters were eligible to be included in the special category of reservation for seeking admission.

17. My finding is further fortified that even before and after the Full Bench judgment, the grand children of the Freedom Fighters were given admission in the medical colleges, under the reservation category and when the Government having included the grand children of the Freedom Fighters in the list of reserved category for seeking admission after realising that after a lapse of 60 years of independence, the children of the Freedom Fighters cannot be eligible to seek admission and on that ground conferred the benefits to the grand children of the Freedom Fighters and when this fact was not at all in issue before the Full Bench and therefore, it cannot be stated that the Full Bench has decided that the grand children of the Freedom Fighters are not eligible to be included in the reservation category for seeking admission in the medical colleges.

18. Further, by including the grand children of Freedom Fighters in the reserved cate-

the quota prescribed for the reservation category, in the absence of children of Freedom Fighters the grand children will become eligible to claim reservation in the admission and hence, by including the grand children the quota of reservation is not going to be increased.

19. Further, Mr. Justice K. CHANDRU, in his judgment has quoted the Supreme Court judgment to highlight the reason for giving such concession to the descendants of Freedom Fighters in para 19 of the said judgment. The learned Judge quoted the following Supreme Court judgments:

20. In the decision of the Supreme Court in *Mukund Lal Bhandari v. Union of India* (1993) Supp 3 SCC 2, the following passage found in para No. 9 is as follows:

> "The object was to honour and where it was necessary, also to mitigate the sufferings of those who had given their all for the country in the honour of its need. In fact, many of those who do not have sufficient income to maintain themselves refuse to take benefit of its, since they consider it as an affront to the sense of patriotism with which they plunged in the freedom struggle. The spirit of the Scheme being both to assist and honour the needy and acknowledge the valuable sacrifices made, it would be contrary to its spirit to convert in into some kind of a programme of compensation.
>
> *(emphasis added)*

21. Further, in *Mukund Lal and Gurdial Sing* case AIR 2005 SC 3330 : (2005) 7 SCC 605), the Supreme Court has held that

> "genuine freedom fighters deserve to be treated with reverence, respect and honour. But at the same time, it cannot be lost sight of that people who had no role to play in the freedom struggle should not be permitted to benefit from the liberal approach required to be adopted in the case of the freedom fighters, most of whom in the normal course are septuagenarians and octogenarians."
>
> *(emphasis added)*

22. Following above two judgments, the Supreme Court in *Union of India v. Avtar Singh* (2006) 6 SCC 493 : (2007) 1 MLJ 162, has held that "High Court in writ petition under Article 226 was not justified in directing the authorities to grant freedom fighter's pension to all though liberal approach s warranted, false claims should not be permitted on that basis."

23. Therefore, the object of giving benefit to descendants of the freedom fighters was made clear and by excluding the grand children of the freedom fighters in the reserved category for admission, the purpose for which reservation was granted to the children of the freedom fighters would be defeated. As stated *supra*, one cannot expect the children of freedom fighters to apply for a seat in medical college and realising that fact and with an intention of conferring benefits to the descendants of freedom fighter, the Government of Tamil Nadu has included the grand children of freedom fighters in the special category for reservation in 2002-03 and without appreciating that the Government deleted the grand children of the freedom fighters from the list of reservation category on the basis of the Full Bench judgment and hence, it is not legally sustainable.

24. In this connection to my knowledge that there are three other judgments of our High Court which dealt with this issue. Mr. Justice M. JAICHANDRAN in his judgment in W.P. No. 12979 of 2009, dated 16.7.2009 between *P.L. Karthika v. 1. State of Tamil Nadu rep. by its Secretary to Government, Health Department and two Others* and in the judgment in W.P. No. 13616 of 2009 between *P. Jeyaraman v. Secretary, Selection Committee for MBBS/BDS Course, Chennai-10* has held that the grand children of the freedom fighters

there is no other reason for invocation of Article 162 of the Constitution. In fact, the State did not even invoke such power under Article 162 of the Constitution, obviously, for the reason of its exhaustion of power under Tamil Nadu Act 45 of 1994. A reading of G.O. Ms. No. 477, Social Welfare Department, dated 27.6.1975, on the basis of which this special reservation for the children born of inter-caste marriage has been provided, makes it clear that the State did not venture to carve out any special reservation as pleaded by the parties."

34. The Full Bench further held that the special category of reservation given to the children born of inter-caste marriage is illegal and unconstitutional and held that the judgment of the Supreme Court in *Anil Kumar Gupta v. State of U.P* (1995) 5 SCC 173, is an authority for this proposition. It has also been stated further that the reservations of several kinds like widows, deserted women and any candidate, whose parent has suffered for the cause of development of Tamil and contributed towards the protection *etc.*, are quite untenable. They do not have any constitutional or legal sanction. But we are not dwelling on that as they have not been questioned here and as the admissions to that category have already completed. Immediately thereafter, they have stated the observation, which was relied upon by Mr.Justice K. CHANDRU in his judgment *viz.*, "other than the reservation in Tamil Nadu Act 45 of 1994, what is permissible is only for Physically Handicapped, Eminent Sportsmen, children of freedom fighters and children of Ex-servicemen being horizontal reservation and not vertical. The State has to bear this in mind in future."

Therefore, a overall reading of the Full Bench judgment makes it very clear that the issue whether the grand children are eligible to be included under the category of freedom fighters was not at all an issue before the Full Bench and the Full Bench has not decided that issue.

35. Further at that time, *i.e.* for the year 2001-2002, admittedly, the grand children were not included in the category of freedom fighters and they were included only in the year 2002-2003. This is also made clear in the judgment in *Saravanan T.T. v. State of Tamil Nadu (supra)*. Therefore, there is no necessity for the Full Bench to decide that issue and therefore, the observations by the Full Bench as stated above should not be meant to exclude the grandchildren which category was included later.

36. In this connection, it is useful to refer to the Supreme Court in the case of *Swati Gupta v. State of U.P.* (1995) 2 SCC 560, which was relied upon by Mr. Justice R. JAYASIMHA BASU, in his minority judgment in the aforesaid Full Bench judgment and the learned judge has held in para 34 as follows:

"Courts of law are not to clutch at jurisdiction and embark on adjudication when the issue sought to be adjudicated has not even been raised by the parties before the Court. The Supreme Court in the case of *Swati Gupta v. State of U.P. (supra)* while considering the extent and the manner in which reservation had been made for admission to medical college in UP, declined to go into the question of the validity of the reservation by observing, "whether the reservation for such persons should have been made or not was not challenged, therefore, this Court is not required to examine it."

Therefore, when the issue was not argued or raised by the parties, that should not form any basis and any observation made by the Court should not be taken as law settled by that Court.

37. As I have already stated that when the grand children of freedom fighters were included in the year 2002-2003 or one year ear-

lier, the Government had taken conscious decision after due deliberation, having realised that the children of freedom fighters may not be eligible to claim seats in the medical college and therefore, to confer the benefits to the family of freedom fighters whose forefathers have struggled for the freedom for our country including them. Therefore, the grand children were consciously included in the category of persons eligible for reservation and that cannot be set at naught, by relying upon the observations in the judgment when the observations are not *ratio decidendi*:

38. The Rule of Precedents, *Obiter, ratio decidendi* were fully discussed in the Full Bench judgment in the case of *Philip Jeyasingh v. Joint Registrar of Co-operative Societies, Chidambaranar Region, Tuticorin and Others* (1992) 2 MLJ 309. It is stated in that judgment what is meant by *obiter dictum* '.. The expression *obiter dictum* means " that which is said in passing." In MOZLEY and WHITELEY'S LAW DICTIONARY', 7th Edition, at page 240, it is defined as 'a dictum of a judge on a point not directly relevant to the case before him." If a Court expresses its opinion on a point which has not arisen for consideration in the case, it is not binding as a precedent. What is binding in a judgment is only the *ratio decidendi*, which means, the reason or principle on which a case is decided. An interesting and instructive passage is found in the judgment of a Full Bench of this Court in *M. Shaikh Dawood v. Collector of Central Excise, Madras,* AIR 1961 Mad 1 : 73 L.W.491 (F.B) expounding the difference between *obiter dictum* and *ratio decidendi*. It reads as follows:

> "It is occasionally helpful to remind oneself of basic principles and we therefore make no apology for quoting the following passages from SALMOND ON JURISPRUDENCE, On pages 223 and 224 of the 11th Edn. The following passages appear:" A precedent, therefore, is a judicial decision which contains in itself, a principle. The underlying principle which thus forms its authoritative element is often terms the *ratio decidendi*. The concrete decision is binding between the parties to it, but it is the abstract *ratio decidendi* which alone has the force of law as regards the world at large. The only use of authorities or decided cases says Sri George Jessel, "is the establishment of some principle which the Judge can follow out in deciding the case before him. The only thing says the same distinguished judge in another case, in a Judge's decision binding as an authority upon a subsequent judge is the principle upon which the case was decided." The only judicial principles which are authoritative are those which are thus relevant in their subject matter and limited in their scope. All others, at the best, are of merely persuasive efficacy. They are not true *ratio decidendi* and are distinguished from dicta, things said by the way. The prerogative of judges is not to make law by formulating an declaring it pertains to the Legislature but to make law by applying it. Judicial declaration, unaccompanied by judicial application, is not of binding authority."

39. It is further held that in *Flower v. Ebbw Vale Steel Iron and Coal Co.,* (1934) 2K.B.132, the following passage appears at page 154:

> "It is of course perfectly familiar that *obiter dicta*, though they may have great weight as such, are not conclusive authority. *Obiter dicta* in this context mean what the words literally signify namely, statements by the way. If a judge thinks it desirable to give his opinion on some point which is not necessary for the decision of the case, that of course has not the binding weight of the decision of the case and the reasons for the decision. We should remark in passing that this passage has been incorporated in

STROUD'S JUDICIAL DICTIONARY under the heading "*Obiter Dicta.*"

"In *Punjab Land Devt. & Reclamation Corporation Ltd. Chandigarh and several Others v. Presiding Officer, Labour Court, Chandigarh and several Others* 1990-II-LLJ-70, the Supreme Court analysed the principle of *ratio decidendi* and said thus: An analysis of judicial precedent, *ratio decidendi* and the ambit of earlier and later decisions is be found in the House of Lords decision in *F.A.& A.B.Ltd v. Lupton,(Inspector of Taxes)* (1972) AC 634, LORD SIMON concerned with the decision in *Griffiths v. J.P.Harrison (Warford) Ltd.,* (1963) AC 1 and *Finsbury Securities Ltd. v. Inland Revenue Commissioners,* (1966) 1 WLR 1402, with their inter-relationship and with the question whether *F.A & A.B.Ltd., v. Lupton, (Inspector of Taxes) (supra)*, fell within the precedent established by the one or the other case, said : What constitutes binding precedent is the *ratio decidendi* of a case and this is almost always to be ascertained by an analysis of the material facts of the case that is, generally, those facts which the Tribunal whose facts which the Tribunal whose decision is in question itself holds, expressly or implicitly, to be material." It has also been analysed "A judicial decision will often be reached by a process of reasoning which can be reduced into a sort of complex syllogism, with the major premise consisting of a pre-existing rule of law (either statutory or judge-made) and with the minor premise consisting of the material fact of the case under immediate consideration. The conclusion is the decision of the case, which may or may not establish new law in the vest majority of cases it will be merely the application of existing law to the facts judicially ascertained. Where the decision does constitute new law, this may or may not be expressly stated as a proposition of law; frequently the new law will appear only from subsequent comparison of, on the one hand, the material facts inherent in the major premises with, on the other, the material facts which constitute the minor premise. As a result of this comparison it will often be apparent that a rule has been extended by an analogy expressed or implied."

"To consider the *ratio decidendi* of a case we have, therefore, to ascertain the principle on which the case was decided. Sir George Jessel in (sic) *Osborne v. Rowlett*, (1880) 13 Ch.D. 774 remarked that the only thing in a judge's decision binding as an authority upon a subsequent judge is the principle upon which the case was decided."

40. Further, in the case of *Divisional Controller, KSRTC v. Mahadeva Shetty and Another* (2003) 7 SCC 197, it has been held in para 23 as follows:

"The decision ordinarily is a decision on the case before the Court, while the principle underlying the decision would be binding as a precedent in a case which comes up for decision subsequently, Therefore, while applying the decision to a later case, the Court dealing with it should carefully try to ascertain the principle laid down by the previous decision. A decision often takes its colour from the question involved in the case in which it is rendered. the scope and authority of a precedent should never be expanded unnecessarily beyond the needs of a Judge is the principle upon which the case was decided. Statements which are not part of the *ratio decidendi* are distinguished as *obiter dicta* and are not authoritative. The task of finding the principle is fraught with difficulty as without an investigation into the facts, it cannot be assumed whether a similar direction must or ought to be made as a measure of social justice. Precedents *sub silentio* and without argument are of no moment. Mere casual expressions carry no

weight at all, nor every passing expression of a Judge, however eminent, can be treated as an *ex cathedra* statement having the weight of authority."

41. In the case of *Arnit Das v. State of Bihar* (2009) 5 SCC 488, it has been held in para 20 as follows:

"A decision not expressed, not accompanied by reasons and not proceeding on a conscious consideration of an issue cannot be deemed to be a law declared to have a binding effect as it contemplated by Article 141. That which has escaped in the judgment is not the *ratio decidendi*. This is the rule of *sub silentio*, in the technical sense when a particular point of law was not consciously determined."

42. In the case of *State of Orissa v. Sudhansu Sekhar Mistra* AIR 1968 SC 647 (v55 C 131) it has been held that

"A decision is only an authority for what is actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. On this topic, this is what Earl of Halsbury LC sand in *Quinn v. Leathem* (1901) AC 495.

"Now before discussing the case of *Allen v. Flood* (1898) AC I and what was decided therein, there are two observations of a general character which I wish to make and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical Code,whereas every lawyer must acknowledge that the law is not always logical at all. It is not a profitable task to extract a sentence here and there from a judgment and to build upon it."

43. In the judgment, *Rajbir Singh Dalal (Dr) v. Chaudhari Devi Lal University, Sirsa and Another* (2008) 9 SCC 284, it has been held in para 34:

"The decision of a Court is a precedent if it lays down some principles of law supported by reasons. Mere casual observations or direction without laying down principle of law and without giving reasons does not amount to precedent."

44. Therefore, from the above judgments, it can be safely concluded that the observations referred to above in the Full Bench judgment in *M. Arthi (Minor) rep. by her mother and natural guardian Ms. M. Renuka and two others v. State of Tamil Nadu, rep. by its Secretary to Government, Health & Family Welfare Department, Fort St.,George, Chennai-600 009 and 11 Others (supra)*, which was the reason for passing the Government order can only by termed as *obiter* and not *ratio decidendi* and therefore,when the G.O. was passed on the basis of the above observation then the said Government order is not legal and it shows the non application of mind and it is also unreasonable and against the purpose for which the grand children were brought to the category of reservation in the year 2002-2003.

45. In my respective opinion, there is no need to refer this issue before the larger Bench having regard to the judgments of the Justice, Ms. PRABHA SRIDEVAN, Mr. Justice JAICHANDRAN and Mr. Justice K. CHANDRU, as in my opinion, the issue involved in this case, was not at all raised or considered by those Judges, in those judgments

46. Therefore, having regard to the above judgments of the Supreme Court, it can be clearly stated that the exclusion of grand children by the impugned Government Order on the basis of the observation of the Full Bench judgment is unreasonable, arbitrary and is liable to be struck down. The Government has not taken a conscious decision while excluding the grand children of freedom fighters and passed the Government Order on the basis of the Full Bench judgment which according to me, is not a *ratio decidendi* of the Full Bench judgment and hence, it cannot be taken that it is a policy decision of the Government and the decision was taken on the basis of the observation made in the Full Bench judgment and when the observation is not *ratio decidendi* of the judgment, the Government should not have passed that G.O. on that basis. Hence, it is liable to be struck down and it is struck down.

47. Therefore, having regard to the above judgments of the Supreme Court, it can be clearly stated that the exclusion of grand children by the impugned Government Order on the basis of the observation of the Full Bench judgment is unreasonable, arbitrary and is liable to be struck down. The Government has not taken a conscious decision while excluding the grand children of freedom fighters and passed the Government Order on the basis of the Full Bench judgment which according to me, is not a *ratio decidendi* of the Full Bench judgment and hence, it cannot be taken that it is a policy decision of the Government and the decision was only taken on the basis of the observation made in the Full Bench judgment and when the observation is not *ratio decidendi* of the judgment, the Government should not have passed that G.O. on that basis. Hence, it is liable to be struck down and it is struck down.

48. In W.P. (MD) No. 6542 of 2009 the G.O. (2D) No. 23, Health and Family Welfare (MCA-1) Department, dated 28.5.2004 was not challenged. I have already held that but for the observation in the Full Bench judgment in *M. Arthi (Minor) rep. by her mother and natural guardian Ms. M. Renuka and two Others v. State of Tamil Nadu, rep. by its Secretary to Government, Health & Family Welfare Department, Fort St., George, Chennai-600 009 and 11 Others (supra)*, the Government would not have passed the impugned G.O. and the Grand children would not have been deleted from the special category of reservation. When that G.O. is struck down, the petitioner in W.P. (MD) No. 6542 of 2009 is also eligible to claim reservation as grand children of the freedom fighter.

49. In the result, the impugned Government Order is set aside and the petitioner, in both the writ petitions, is eligible to claim reservation under the category of grand children of freedom fighters and accordingly, the writ petitions are allowed. Consequently, connected Miscellaneous Petitions are closed. No costs.

——— *Petitions allowed.*