1

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN

AT JAIPUR BENCH, JAIPUR

::J U D G M E N T::

1. D.B. CIVIL SPECIAL APPEAL (WRIT) No.618/2009

(State of Rajasthan & Anr.Vs.Bajrang Lal

Sharma &

Ors.)

2. D.B. CIVIL SPECIAL APPEAL (WRIT)No.3/2010

(Suraj Bhan Meena Vs.Bajrang Lal Sharma & Ors.)

3. D.B. CIVIL SPECIAL APPEAL (WRIT) No.611/2009

(State of Rajasthan Vs. Gyan Prakash Shukla)

4. D.B. CIVIL SPECIAL APPEAL (WRIT) NO.610/2009

(State of Rajasthan Vs. M.M. Joshi)

5. D.B. CIVIL WRIT PETITION No.8104/2008

(Bajrang Lal Sharma & Ors.Vs.State of Raj.&

Ors.)

6. D.B. CIVIL WRIT PETITION No.6241/2008

(Gyan Prakash Shukla & Anr.Vs.State of Raj.&

Ors.)

7. D.B. CIVIL WRIT PETITION NO.7775/2009

(M.M. Joshi Vs. State of Rajasthan & Ors.)

Date of Judgment :: 05th February, 2010.

P R E S E N T

HON'BLE MR.JUSTICE NARENDRA KUMAR JAIN

HON'BLE MR.JUSTICE RAGHUVENDRA S. RATHORE

Mr.Sanjeev Prakash Sharma with

Mr.Shobhit Tiwari for Bajrang Lal Sharma &

Others.

Mr. Ashok Gaur for Suraj Bhan Meena.

Mr. R.C. Joshi for M.M. Joshi.

Mr. S.C. Gupta for Gyan Prakash Shukla & Anr.

Mr. H.P. Verma for Sriram Choradia.

Mr. G.S. Bapna, Advocate General,

Mr. S.N. Kumawat, Additional Advocate General

for the State of Rajasthan.

Mr. Sushil Sharma for the Union of India.

Mr. Sanjay Pareek for the UPSC.

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By the Court : (Per N.K. Jain,J.)

Reportable

2

1. D.B. Civil Special Appeal (Writ)

No.618/2008, State of Rajasthan & Anr. Vs.

Bajrang Lal Sharma & Ors. is directed against

the order dated 09.07.2009 passed by the

learned Single Judge on two applications under

Article 226(3) of the Constitution of India

i.e.S.B. Civil Misc. Applications No.8046/2009

and 6550/2009 in S.B. Civil Writ Petition

No.8104/2008, whereby both the applications

were dismissed and the ad-interim ex-parte stay

order dated 22.8.2008 was confirmed till the

disposal of the writ petition.

2. On 27.7.2009, the said special appeal

was listed before the Division Bench presided

by the then Hon'ble Acting Chief Justice, and

it was directed that appeal be listed on

29.7.2009 alongwith the appeals No.05313/2009,

610/2009, 611/2009 & 612/2009 and writ petition

8157/2009. The above cases were listed on

20.10.2009 and the Division Bench passed an

order that, “as suggested and agreed by both

the parties, the registry is directed to list

the writ petitions as well as the special

appeals” (14 in number), as mentioned in the

order. Again on 26.10.2009, the Division Bench

passed an order to list the cases alongwith the

connected matters, as mentioned in the order.

Thereafter, the matters were listed on

4.12.2009, and on that date, one of the member

of Division Bench made an exception, therefore,

3

the matters were put up before Hon'ble the

Chief Justice on 17.12.2009, who constituted

this Bench for hearing the above matters as

well as other connected matters, as mentioned

in the note-sheet of the registry. In these

circumstances, these matters have come up

before us for hearing.

3. We have heard the learned counsel for

the parties and examined the record.

4. Since common questions of fact and law

are involved in these matters, therefore, they

are being disposed of by this common order.

5. Since the writ petitions as well as

special appeals have been tagged together and

writ petition No.8104/2008 is the main case,

therefore, we are referring the facts of the

said writ petition.

6. Petitioners No.1 to 10, who are

members of the Rajasthan Administrative

Service, have preferred this writ petition

under Article 226 of the Constitution of India

challenging the Notification dated 25.4.2008

(Annexure-14), whereby the Government of

Rajasthan, while exercising powers conferred by

the proviso to Article 309 of the Constitution

of India, amended the Rajasthan Various Service

Rules, (hereinafter referred to as 'the Various

Service Rules'), as mentioned in the Schedule

appended therewith with effect from 28.12.2002,

whereby the following existing proviso to the

4

rule, as mentioned in Column No.3 against each

of the Service Rules (110 in number), listed in

Column No.2 of the said Schedule, has been

deleted:-

“Provided that a candidate who

has got the benefit of proviso

inserted vide Notification No.F.7

(1) DOP/A-II/96 dated 01.04.1997

on promotion to an immediate

higher post shall not be reverted

and his seniority shall remain

uneffected. This proviso is

subject to final decision of the

Hon'ble Supreme Court of India in

Writ Petition (Civil) No.234/2002

All India Equality Forum V/s

Union of India & Others.”

7. The petitioners have also prayed; to

issue appropriate writ directing the

respondents to strictly adhere to the “catchup”

rule and revise the seniority of all the

petitioners in comparison to the candidates

belonging to Scheduled Castes and Scheduled

Tribes (for short' the SCs and the STs) after

giving the benefit of regaining of the

seniority by the general/OBC category

candidates as envisaged by the Notification

dated 1.4.1997 (Annexure-3) and provisional

seniority list dated 26.6.2000 of Selection

Scale of the RAS (Annexure-4); to restrain the

respondents from providing the consequential

seniority to the candidates belonging to the

SCs and the STs as the Rajasthan Administrative

Service Rules, 1954 (hereinafter referred to as

'the RAS Rules) were not framed in

5

pursuance of Article 16(4-A) of the

Constitution of India. In the alternative, if

Rule 33 of the RAS Rules talks about giving

benefit of consequential seniority then that

rule may be declared unconstitutional to the

extent it provides consequential seniority to

the employees of the SC and the ST category.

8. The petitioners have given the facts

in respect of petitioner No.1 Bajrang Lal

Sharma, respondent No.3 Suraj Bhan Meena and

respondent No.4 Sriram Choradia.

9. It is pleaded that petitioner No.1,

respondent No.3 and respondent No.4 were

inducted in the Rajasthan Administrative

Service in December 1982 through selection by

the Rajasthan Public Service Commission. The

respondent-State issued a provisional seniority

list of Rajasthan Administrative Service

(R.A.S.) Selection Scale vide notice dated

26.6.2000 as on 1.4.1997, wherein petitioner

No.1 Bajrang Lal was placed at Serial No.129

whereas the names of respondents No.3 and 4

namely, Suraj Bhan Meena (ST) and Sriram

Choradia (SC) were placed at Serial No.142 and

147 respectively. This seniority list was

issued in pursuance of order of the Hon'ble

Apex Court dated 16.9.1999 in the case of Ajit

Singh -II Vs. State of Punjab, (1997) 7 SCC 209

and another order of the Hon'ble Apex Court

dated 16.9.1999 in the case of Ram Prasad Vs.

6

D.K. Vijay, (1999) 7 SCC 251 and other

judgments of the Rajasthan High Court/Appellate

Tribunal and circulars of Department of

Personnel (DOP). Again a provisional seniority

list was issued on 27.11.2003 and 12.5.2008.

Now, the Government of Rajasthan has published

the final seniority lists of Super Time Scale

and Selection Scale of the RAS on 24.6.2008 as

on 1.4.2007 (Annexure-1) and provisional

seniority list dated 02.07.2008 as on 1.4.2008

(Annexure-2), wherein names of petitioner No.1

and respondents No.3 and 4 have been mentioned

as under:-

Petitioner No.1 (Bajrang Lal Sharma) :

Seniority Lists dated :

24.6.2008 at S.No.170 as on 01.04.1997(Selection

Scale)

02.7.2008 at S.No.107 as on 01.04.2008(Selection

Scale)

He was given the benefit of

Selection Scale against the vacancy of

the year 1994-95.

Respondent No.3 (Suraj Bhan Meena) :

Seniority Lists dated:

24.6.2008 at S.No.72 as on 1.4.1997(Selection Scale)

02.7.2008 at S.No.34 as on 1.4.2008(Super Time

Scale)

He was given the benefit of

Selection Scale against the vacancy of

the year 1991-92 and Super Time Scale

in the year 2005-06.

Respondent No.4 (Sriram Choradia) :

Seniority List dated :

7

24.6.2008 at S.No.101 as on 1.4.1997(Selection Scale)

2.7.2008 at S.No.53 as on 1.4.2008 (Selection Scale)

He was given the benefit of

Selection Scale against the vacancy of

the year 1992-93.

10. Shri Sanjeev Prakash Sharma, the

learned counsel for the petitioners argued that

the impugned Notification dated 25.4.2008 is

illegal on two counts. First, is that the

proviso dated 28.12.2002 which was added in the

Various Service Rules, was subject to the

final decision of the Hon'ble Supreme Court in

Writ Petition (Civil) No.234/2002 (All India

Equality Forum V/s Union of India & Others) but

the said writ petition (Civil) No.234/2002 has

not been decided finally so far by the Hon'ble

Supreme Court vide order dated 19.10.2006.

Therefore, during pendency of the said writ

petition before the Hon'ble Apex Court, it was

not proper for the respondents to delete the

proviso in the Various Service Rules including

the RAS Rules. Secondly, the deletion of the

proviso in the Various Service Rules vide the

Notification dated 25.4.2008, amounts to giving

consequential seniority to the candidates

belonging to the SCs and the STs, which could

not have been given without collecting the

required quantifiable data to reach to a

conclusion that reservation is required in

promotion and to show that the State was having

8

any compelling reason, namely, backwardness,

inadequacy of representation and that it would

not cause any overall administrative efficiency

before providing reservation in promotion with

consequential seniority, as held by the Hon'ble

Supreme Court in the case of M.Nagaraj & Ors.

Vs. Union of India & Ors., reported in (2006)

8 SCC 212. Since the State Government has not

complied with the direction of the Hon'ble

Supreme Court before issuing the impugned

Notification dated 25.4.2008, therefore, the

said notification is liable to be quashed being

violative of the directions of the Hon'ble Apex

Court in M.Nagaraj's case (supra).

11. Mr. Sharma further argued that the

Hon'ble Supreme Court in the case of Indra

Sawhney & Ors. Vs. Union of India & Ors,

reported in 1992 Supp.(3) SCC 217, has held

that Article 16(4) of the Constitution does not

permit reservations in the matter of promotion.

Thereafter, the Constitution (Seventy-Seventh

Amendment) Act, 1995 came into force on

17.6.1995. Later on, the Hon'ble Supreme Court

in the cases of Union of India & Ors. Vs.

Virpal Singh Chauhan & Ors., reported in

(1995) 6 SCC 684, Ajit Singh Januja & Ors.

(Ajit Singh-I) Vs. State of Punjab & Ors.,

reported in (1996) 2 SCC 715 and Ajit Singh

(II) & Ors. Vs. State of Punjab & ors.,

reported in (1999) 7 SCC 209, introduced the

9

“catch-up” rule and held that if the senior

general candidate is promoted then he will

regain his seniority on promotion post above

junior reserved promotees. It was also held

that consequential seniority on promotion post

is not covered by Article 16(4A). The State

Government also added the similar 'proviso'

vide Notification dated 1.4.1997 at the next

serial number in the Various Service Rules

including the Rajasthan Administrative Service

Rules.

12. The Parliament, in its wisdom, further

amended the Constitution on 4.1.2002 by way of

'The Constitution (Eighty-Fifth Amendment) Act,

2001', to give the benefit of consequential

seniority to reserved category candidates with

effect from 17.6.1995. The constitutional

validity of both the aforesaid Constitution

Amendment Acts was challenged before the

Hon'ble Supreme Court in number of writ

petitions including writ petitions filed by

M.Nagaraj and All India Equality Forum and

during pendency of the writ petition before the

Hon'ble Apex Court, an interim order was passed

protecting the promotion and seniority of

general/OBC category candidates during pendency

of the writ petition. The Government of

Rajasthan while deleting the proviso added vide

the Notification dated 1.4.1997, inserted the

new proviso vide the Notification dated

10

28.12.2002.

13. The Hon'ble Apex Court in M.Nagaraj's

case on 19.10.2006, while upholding the

constitutional validity of the Constitution

(Seventy-Seventh Amendment) Act, 1995 and the

Constitution (Eighty-Fifth Amendment) Act,

2001, made it clear that it will not be

necessary for the State Government to frame

rule in respect of reservation in promotion

with consequential seniority, but in case the

State Government is willing to frame the rule

in this regard then it has to satisfy, by

quantifiable data, that there is backwardness,

inadequacy of representation in public

employment and overall administrative

efficiency, and unless that exercise is done by

the State Government, the rule relating to

reservation in promotion with consequential

seniority, cannot be introduced.

14. Mr. Sharma further contended that if

the State Government was willing to frame rule

in this regard then the same could have been

done after doing necessary exercise, by

collecting quantifiable data and forming an

opinion that there is backwardness, inadequacy

of representation in public employment and

overall administrative efficiency, as observed

by the Hon'ble Supreme Court M.Nagaraj's case

(supra). But what the State has done in the

present case is that they have deleted the

11

'proviso' which was inserted on 1.4.1997 on the

basis of “catch-up” rule vide Notification

dated 28.12.2002 and further deleted the new

'proviso' added on 28.12.2002 vide Notification

dated 25.4.2008 in Various Service Rules of the

State. The net result of it is that the State

Government has provided consequential seniority

to the SCs and the STs, without undergoing any

exercise in respect of three conditions as laid

down in the judgment of the Hon'ble Apex Court

in M.Nagaraj's case(supra).

15. In these circumstances, the impugned

Notification dated 25.4.2008 is liable to be

declared as ultra vires to the provisions of

the Constitution of India as well as contrary

to the judgment of the Hon'ble Apex Court in

M.Nagaraj's case(supra).

16. The next submission of Mr. Sharma is

with regard to the wrongful seniority list

published inspite of their being a judgment

passed by Division Bench of this Court in the

case of B.K. Sharma & Anr. Vs. State of

Rajasthan & Ors., reported in WLC (Raj.) 1998

(2) 583 and the judgment of the Hon'ble Apex

Court in the case of Ram Prasad & Ors. Vs.

D.K. Vijay & Ors., reported in (1999) 7 SCC

251. It is submitted that combined seniority

list of the RAS cadre was published by the

State Government on 22.4.1995 which carried

names of the petitioners alongwith other RAS

12

officers; the same was quashed by the High

Court, and it was held that Rule 33 of the

RAS Rules nowhere provides for consequential

seniority to reserved category promotees. Thus

after the judgments in B.K. Sharma's and Ram

Prasad's cases (supra), the consequential

seniority could not have been assigned to

reserved promotees above the senior general/OBC

persons. After the judgment in Ram Prasad's

case (supra) by the Hon'ble Apex Court, a

vested right was created of having seniority

over all reserved category persons by general

category persons as per interpretation of Rule

33 of the RAS Rules. Rule 33 has not been

amended thereafter except to withdraw the

notifications dated 1.4.1997 and 28.12.2002.

He, therefore, contended that vested or accrued

rights in the matters of promotion, seniority,

substantive appointments etc. of the employees

cannot be taken back retrospectively. Such an

act of the State Government is arbitrary,

discriminatory and violative of the rights

guaranteed under Articles 14 and 16 of the

Constitution of India.

17. Mr. R.C. Joshi, the learned counsel

appearing on behalf of the petitioners

contended that he has challenged both the

notifications i.e.28.12.2002 and 25.4.2008 in

writ petitions No.7774/2009 and 7775/2009. He

13

contended that so far as argument with regard

to notification dated 25.4.2008 is concerned,

Mr. Sanjeev Prakash Sharma has already argued

the case at length, and he adopts his

arguments. So far as notification dated

28.12.2002 is concerned, he contended that this

notification is also illegal and violative of

Articles 14 and 16 of the Constitution. By way

of the Constitutional (Seventy-Seventh

Amendment) Act, 1995, an enabling provision

with regard to accelerated promotion was made

by inserting the words “reservation in

promotion” in clause (4A) in Article 16 of the

Constitution which was considered and it was

clarified by the Hon'ble Apex Court in the

cases of Union of India Vs. Virpal Singh

Chauhan's case (supra) as well as Ajit Singh-I

(supra) that the reserved promotees be entitled

for accelerated promotion, but they will not be

entitled to get accelerated seniority. The same

view was further taken by the Constitution

Bench of the Hon'ble Apex Court on 16.9.1999

while deciding Ajit Singh-II case. In view of

the judgment delivered in Virpal Singh

Chauhan's case (supra) and further in the

case of Ajit Singh -I, the State Government

vide Notification dated 1.4.1997 inserted the

new proviso in Various Service Rules, as

mentioned in the said notification, whereby

benefit of regaining seniority was given to

14

General/OBC candidates above such earlier

promoted candidates of the SC/ST in the

immediate higher post/grade. Subsequently, “The

Constitution (Eighty-Fifth Amendment) Act, 2001

was passed on 4.1.2002 with effect from

16.9.1995 with regard to consequential

seniority to reserved promotees. The number of

writ petitions were filed before the Hon'ble

Apex Court challenging the constitutional

validity of “The Constitution (Seventy-Seventh

Amendment) Act,1995” as well as “The

Constitution (Eighty-Fifth Amendment)

Act,2001”. The interim order was passed by the

Hon'ble Apex Court in M.Nagaraj's case(supra)

as well as in the case of All India Equality

Forum Vs. Union of India that the general/OBC

candidates who have already been promoted, they

will not be reverted and their seniority will

not be disturbed. Vide the Constitution

(Eighty-Fifth Amendment) Act, the words “with

consequential seniority” was inserted in clause

(4A) of Article 16 of the Constitution after

the words “reservation in promotion”, but it

was only an enabling provision and the said

amendment was under challenge before the

Hon'ble Apex Court. The matter was subjudice

before the Hon'ble Apex Court and during that

period itself,without waiting for the decision

of the Apex Court in M.Nagaraj's case and in

the case of All India Equality Forum Vs.Union

15

of India, the State Government wrongly withdrew

earlier notification dated 1.4.1997 vide

Notification dated 28.12.2002. Now the Hon'ble

Apex Court in M.Nagaraj's case vide judgment

dated 19.10.2006 while upholding the

constitutional validity of the Constitution

(Eighty-Fifth Amendment) Act, has made it

mandatory on the part of the State Government

to go for three exercises, as mentioned in the

judgment in case any rule is to be framed by

the State for reservation in promotion with

consequential seniority. Admittedly, no

exercise was done by the State Government

before amending the Various Service Rules

including the RAS Rules vide Notification dated

28.12.2002, and therefore, it is liable to be

quashed.

18. Apart from the above, he further

contended that proviso introduced vide

notification dated 1.4.1997 had already been

upheld and the rights of number of persons

belonging to the general/OBC category regarding

their regaining seniority above their junior

reserved promotees had already been upheld by

the Division Bench of this Court in B.K.

Sharma's case (supra) and by the Hon'ble Apex

Court in the case of Ram Prasad Vs. D.K. Vijay

(supra). Therefore, the Notification dated

28.12.2002 whereby earlier proviso introduced

vide Notification dated 1.4.1997 has been

16

withdrawn, tantamount to negativing the

judgment of the Division Bench of this Court in

B.K. Sharma's case (supra) and the judgment of

the Hon'ble Apex Court in the case of Ram

Prasad Vs. D.K. Vijay (Supra). He, therefore,

contended that the Notification dated

28.12.2002 is also liable to be quashed by this

Court.

19. Learned counsel for the petitioners,

in support of their submissions, referred to

the judgment of the Hon'ble Apex Court in the

cases of M.Nagaraj & Ors. Vs. Union of India,

(2006) 8 SCC 212; Indra Sawhney & Ors. Vs.

Union of India & Ors., 1992 Supp.(3) SCC 217;

Union of India & Ors. Vs. Virpal Singh Chauhan

& Ors., (1995) 6 SCC 684; Ajit Singh Juneja

(Ajit Singh-I) & Ors. Vs. State of Punjab &

Ors., (1996) 2 SCC 715; Ajit Singh (II) & Ors.

Vs. State of Punjab & Ors.,(1997) 7 SCC 209;

Ram Prasad & Ors. Vs. D.K. Vijay & Ors, (1999)

7 SCC 251; Anil Chandra & Ors. Vs. Radha

Krishna Gaur & Ors., (2009) 9 SCC 454; R.K.

Sabharwal & Ors. VS. State of Punjab & Ors.,

(1995) 2 SCC 745; State of Bihar & Anr. Vs. Bal

Mukund Sah & Ors, (2000) 4 SCC 640; Andhra

Pradesh Public Service Commission Vs. Baloji

Badhavath & Ors., (2009) 5 SCC 1; M.G.

Badappanavar & Anr. Vs. State of Karnataka &

Ors., (2001) 2 SCC 666; D.P. Sharma & Ors. Vs.

Union of India & Anr, 1989 Supp.(1) SCC 244;

17

Chairman, Railway Board & Ors. Vs. C.R.

Rangadhamaiah & Ors., (1997) 6 SCC 623; S.S.

Bola & Ors. Vs. B.D. Sardana & Ors., (1997) 8

SCC 522; Rajesh Kumar Gupta & Ors. Vs. State of

U.P. & Ors., AIR 2005 SC 2540; Arun Tewari &

Ors. Vs. Zila Mansavi Shikshak Sangh & Ors.,

AIR 1998 SC 331; Tridip Kumar Dingal & Ors. Vs.

State of West Bengal & Ors., (2009) 1 SCC 768;

the judgment of the Division Bench of this

Court in the case of B.K. Sharma & Anr. Vs.

State of Rajasthan & Ors., WLC (Raj.) 1998 (2)

583 and the judgment of the Himachal Pradesh

High Court in the case of Himachal Pradesh

Samanaya Varg Karamchari Kalayan Mahasangh Vs.

State of Himachal Pradesh & Ors.(CWP-T No.2628

of 2008 decided on 18.9.2009).

20. Shri G.S. Bapna, the learned Advocate

General contended that the State Government is

empowered under proviso to Article 309 of the

Constitution to frame, amend, add or delete any

rule subject to constitutional limitations,

which have not been breached in the present

case. Although the Constitution (Seventy-

Seventh Amendment) Act, 1995 came into force on

17.6.1995, but in the cases of Virpal Singh

Chouhan (supra) and Ajit Singh-I (supra), the

Hon'ble Apex Court held that if the senior and

general category candidate is promoted then he

will regain his seniority on promotion post

above junior reserved promotees. It was also

18

held that consequential seniority on promotion

post is not covered by Article 16(4A). The

State Government, therefore, added similar rule

in Various Service Rules including the RAS

Rules vide Notification dated 1.4.1997.

However, the Constitution (Eighty-Fifth

Amendment) Act, 2001 came on 4.1.2002 with

effect from 17.6.1995. The number of writ

petitions were preferred before the Hon'ble

Supreme Court challenging the constitutional

validity of the Constitution (Seventy-Seventh

Amendment) Act, 1995 and the Constitution

(Eighty-Fifth Amendment) Act, 2001, wherein

interim order was passed that the general/OBC

persons who have already got the benefit of

promotion will not be reverted and their

seniority shall remain unaffected. The

respondents, therefore, deleted the proviso

from the Various Service Rules, which were

added on 1.4.1997 and added new proviso under

Various Service Rules vide Notification dated

28.12.2002, which was in consonance with the

interim order passed by the Hon'ble Apex Court.

21. Now, the Hon'ble Apex Court upheld the

constitutional validity of both the Amendments

inserted in the Constitution vide order dated

19.10.2006 in M.Nagaraj's case (supra).

Therefore, while exercising the powers under

proviso to Article 309 of the Constitution, the

State Government vide its Notification dated

19

25.4.2008, deleted the proviso added vide

Notification dated 28.12.2002 in Various

Service Rules. Since the State Government is

empowered to add or delete any rule, there is

no illegality in issuing the Notification dated

25.4.2008. It is within competence of the State

Government to add or delete any rule and the

State Government has exercised its powers. The

legislative competence of the State cannot be

allowed to be challenged.

22. He further contended that although a

seniority list dated 26.6.2000 was issued on

the basis of judgment of the Hon'ble Apex Court

dated 16.9.1999 in the case of Ajit Singh

Juneja Vs. State of Punjab (supra) and order

dated 16.9.1999 in the case of Ram Prasad Vs.

D.K. Vijay (supra), but no person belonging to

RAS was promoted on that basis till issuance of

Notification dated 28.12.2002. Therefore, no

right vested in any of the petitioners which

can be said to have been taken away vide

Notification dated 25.4.2008. He contended that

seniority is not a fundamental right and if

position of petitioner is changed in seniority

list on the basis of impugned notification then

the same cannot be said to be taking away the

vested or accrued right. The petitioners cannot

compel the State Government to keep any rule on

the statute. The respondents have not done

anything vide Notification dated 25.4.2008

20

except deleting the proviso added vide

Notification dated 28.12.2002.

23. He further argued that three exercises

which are required to be carried out as held by

the Hon'ble Apex Court in M.Nagaraj's case

(supra) before framing any rule, are to be

carried out only in matters relating to

'reservation in promotion' and not with regard

to 'consequential seniority'. The action of

the respondents is, therefore, not violative of

the ratio laid down by the Hon'ble Apex Court

in M.Nagaraj's case (supra). The forming of

opinion by the State Government that the SCs

and the STs are adequately represented or not

has to be made at the time of providing

reservation in promotion and not for

consequential seniority. The respondents issued

a notification providing reservation to SC & ST

classes way back on 10.2.1975 in promotion.

24. He further contended that the judgment

delivered by the Hon'ble Apex Court in Indra

Sawhney's case (supra) was negatived by the

Constitution (Seventy-Seventh Amendment) Act,

1995 and the judgments of the Hon'ble Apex

Court delivered in the cases of Virpal Singh

Chouhan (supra) and Ajit Singh -I (supra) were

negatived by the Constitution (Eighty-Fifth

Amendment) Act, 2001. The impugned

notifications are in accordance with the

21

provisions of the Constitution, and therefore,

the same cannot be declared ultra vires to the

Constitution by this Court.

25. He further contended that there is a

provision for consequential seniority in Rule

33 of the RAS Rules, therefore, reserve

category candidates are entitled for

consequential seniority as per Rule 33 itself.

However, he admitted that after the judgment

delivered by the Hon'ble Apex Court in

M.Nagaraj's case, Rule 33 has not been amended

providing reservation in promotion with

consequential seniority to SC/ST candidates. He

also admitted that no exercise with regard to

three conditions laid down by the Hon'ble Apex

Court in M.Nagaraj's case has been done before

issuing notifications dated 28.12.2002 and

25.4.2008. His explanation is that the said

exercise is required for reservation in

promotion and not for consequential seniority.

He, therefore, contended that there is no merit

in the writ petition and the same is liable to

be dismissed.

26. Learned Advocate General appearing on

behalf of the State, in support of his

submissions, referred to the judgment of the

Hon'ble Apex Court in the cases of Indra

Sawhney & Ors. Vs. Union of India & Ors., 1992

Supp.(3) SCC 217; M.Nagaraj & Ors. Vs. Union

22

of India (2006) 8 SCC 212; Union of India &

Ors. Vs. Virpal Singh Chauhan & Ors., (1995) 6

SCC 684; Ajit Singh Juneja (Ajit Singh-I) &

Ors. Vs. State of Punjab & Ors., (1996) 2 SCC

715; Ajit Singh (II) & Ors. Vs. State of Punjab

& Ors.,(1997) 7 SCC 209; A.Janardhana Vs. Union

of India & Ors., (1983) 3 SCC 601; B.S. Vadera

Vs. Union of India & Ors., AIR 1969 SC 118; Raj

Kumar Vs. Union of India & Ors., (1975) 4 SCC

13; S.S. Bola & Ors. Vs. B.D. Sardana & Ors.,

(1997) 8 SCC 522.

27. Mr. Ashok Gaur, the learned counsel

appearing on behalf of respondent No.3-Suraj

Bhan Meena, contended that the Hon'ble Apex

Court, while deciding the Indra Sawhney's case

(supra) on 16.11.1992, made it clear that the

existing rule relating to reservation in

promotion to the SCs and the STs would continue

in operation for five years and within this

period, it would be open to the appropriate

authorities to revise, modify or reissue the

relevant rules to ensure the achievement of the

objective of Article 16(4) of the Constitution.

However, before the said period of five years

could have ended on 16.11.1997. “The

Constitution (Seventy-Seventh Amendment) Act,

1995” came into force on 17.6.1995 giving

enabling powers to the State Government to

frame rules with regard to reservation in

promotion. Subsequently, the “catch-up” rule

23

was introduced by the Hon'ble Supreme Court in

the cases of Virpal Singh Chauhan(supra) and

Ajit singh-I(supra), the State of Rajasthan

added 'proviso' below seniority rule in Various

Service Rules vide Notification dated 1.4.1997

giving benefit of regaining seniority to senior

General/OBC category persons. However, the

Central Government further amended the

Constitution by way of Constitution (Eighty-

Fifth Amendment) Act, 2001 on 4.1.2002 with

effect from 17.6.1995 giving further enabling

powers to the State Government to give benefit

of 'consequential seniority' to the SC and the

ST roster promotees.

28. He further argued that a provisional

seniority list of R.A.S. officers was published

as on 26.6.2000, wherein senior general

category candidates were placed above the merit

promotees as well as roster promotees. However,

the said seniority list was challenged by way

of writ petition filed by merit promotee styled

as “Hanuman Singh Bhati Vs. State of Rajasthan

& Ors.(S.B. Civil Writ Petition No.2966/2000)

and other connected writ petitions and the

learned Single Judge of this Court vide its

judgment dated 30.5.2001 quashed the

provisional seniority list dated 26.6.2000.

Thereafter, special appeal was preferred and

the judgment of the learned Single Judge dated

30.5.2001 was upheld by the Division Bench.

24

Special Leave Petition was also preferred

against the order of the Division Bench and the

appeal arising out of it is still pending

before the Hon'ble Apex Court, wherein by way

of an interim order dated 25.2.2002, the

contempt proceedings were stayed. He,

therefore, contended that since no senior

general category candidate was promoted in

pursuance of regaining seniority rule dated

1.4.1997 till it was withdrawn on 28.12.2002,

therefore, no right is accrued or vested in any

of the petitioners. The rights of promotion and

seniority, as per notification dated 1.4.1997,

was protected by adding new proviso on

28.12.2002, but after insertion of the

provision relating to 'consequential seniority'

in Article 16(4-A) by way of the Constitution

(Eighty-Fifth Amendment) Act, 2001 and

upholding of its constitutional validity by the

Hon'ble Supreme Court in M.Nagaraj's case

(supra), the protected rule dated 28.12.2002

was also withdrawn vide the notification dated

25.4.2008 with effect from 28.12.2002. The

State is empowered to insert, amend or delete

any provision of the statutory rule with

retrospective effect. Since no vested or

accrued rights have been taken back vide

Notification dated 25.4.2008, therefore, he

contended that there is no merit in the writ

petition and the same is liable to be

25

dismissed. He has also referred to the prayer

of the writ petition and contended that since

the petitioners want to revise the seniority

list of number of Rajasthan Administrative

Service officers and have not impleaded all of

them as party in the writ petition, therefore,

the present writ petition is liable to be

dismissed on the ground of non-joinder of

necessary party also.

29. Learned counsel appearing on behalf of

respondent No.3, in support of his submissions,

referred to the judgment of the Hon'ble Apex

Court in the cases of Indra Sawhney & Ors. Vs.

Union of India & Ors., 1992 Supp.(3) SCC 217;

M.Nagaraj & Ors. Vs. Union of India, (2006) 8

SCC 212; Union of India & Ors. Vs. Virpal Singh

Chauhan & Ors., (1995) 6 SCC 684; Ajit Singh

Juneja (Ajit Singh-I) & Ors. Vs. State of

Punjab & Ors., (1996) 2 SCC 715; Ajit Singh

(II) & Ors. Vs. State of Punjab & Ors.,(1997) 7

SCC 209; Jagdish Lal & Ors. Vs. State of

Haryana & Ors., (1997) 6 SCC 538; Ram Prasad &

Ors. Vs. D.K. Vijay & Ors., (1999) 7 SCC 251;

and the judgment of this Court in the cases of

B.K. Sharma & Anr. Vs. State of Rajasthan &

Ors., WLC (Raj.) 1998 (2) 583; Hanuman Singh

Bhati Vs. State of Rajasthan & Ors. (SB Civil

Writ Petition No.2966/2000 decided on

30.5.2001). He has also referred Civil Appeal

No.171/2002 (State of Rajasthan Vs. Hanuman

26

Singh Bhati) and Writ Petition (Civil)

No.234/2002 (All India Equality Forum Vs. Union

of India & Ors.).

30. Mr. Hari Prasad Verma, learned counsel

appearing on behalf of respondent No.4-Sriram

Choradia, the SC candidate, contended that

SC/ST is not a caste but it is a class. Since

it is a class based reservation and creamy

layer is applicable for OBC and not for SC/ST,

he argued that after upholding of the

constitutional validity of the Constitution

(Seventy-Seventh Amendment) Act, 1995 and the

Constitution (Eighty-Fifth Amendment) Act, 2001

by the Hon'ble Apex Court, nothing remains to

be decided in the present case and therefore,

the writ petition is liable to be dismissed.

31. Learned counsel appearing on behalf of

the respondent No.4 referred to the judgment of

the Hon'ble Apex Court in the case of Ashoka

Kumar Thakur Vs. Union of India & Ors., (2008)

6 SCC 1.

32. Mr.Ajeet Kumar Sharma, learned counsel

appearing on behalf of the intervenor argued

that all the applicants are senior to both the

parties, therefore, neither he is supporting

nor opposing the writ petition or special

appeals, but the interest of applicants have

been affected by the interim order passed in

D.B. Civil Special Appeal (Writ) No.618/2009.

27

Therefore, the interim order be suitably

modified giving a way to promotion of the

applicants on the posts of Indian

Administrative Service (IAS). Since we were

hearing the matters finally, therefore, interim

stay order was neither vacated nor modified by

us. It is also relevant to mention that interim

order was challenged by State before the

Hon'ble Supreme Court and the same was not

interfered with.

33. Mr. Sanjeev Prakash Sharma, learned

counsel appearing on behalf of the petitioners,

in rejoinder, contended that required exercise

by the State Government, as per M.Nagaraj case

(supra), is necessary for giving the benefit of

consequential seniority also to the reserved

promotees. He contended that he has also

challenged the rule relating to reservation in

promotion in the writ petition. While giving

reply to the objections raised on behalf of

respondent No.3 about non-joinder of necessary

parties, he contended that it is a settled law

that a person in representative capacity of a

class or group can be impleaded as partyrespondent.

In case a representative of a class

or group is impleaded as one of the respondent,

then the writ petition cannot be thrown on this

ground. He has already impleaded respondent

No.3 as a representative of ST category persons

and respondent No.4 as a representative of SC

28

category persons, therefore, he has impleaded

the necessary parties in the case. He has not

sought any relief against any individual so as

to implead a particular person as a party to

the writ petition.

34. We have considered the submissions of

learned counsel for the parties.

35. First of all, we will now take up the

preliminary objection raised on behalf of the

respondent No.3 about maintainability of the

writ petition or its dismissal on the ground of

non-joinder of necessary parties.

36. It is contended that the petitioners

have challenged the seniority list without

impleading all the affected persons as party

respondents in the writ petition, and in their

absence, their rights cannot be determined by

this Court.

37. The petitioners replied that the

number of affected persons is too large that it

is neither possible to implead all of them as

party nor there is any requirement of law in

this regard. He contended that as per the

settled proposition of law, if some of the

respondents are impleaded in representative

capacity on behalf of the affected persons then

it is sufficient compliance. The petitioners

have already impleaded Suraj Bhan Meena as

respondent No.3 as representative of the ST

candidates and has further impleaded Sri Ram

29

Choradia as respondent No.4 as representative

of the SC category. The respondents No.3 and 4

have argued the case at length in

representative capacity also.

38. We have considered the submission of

the learned counsel for the parties and we find

that in this bunch of writ petitions, the main

challenge is about Notifications dated

25.4.2008 and 28.12.2002, and therefore, the

dispute is in between general and SC/ST

candidates about their seniority on promotion

post. No relief against any individual has been

sought in the writ petitions. The Hon'ble Apex

Court in the cases of Rajesh Gupta Vs. State of

U.P., AIR 2005 SC 2540, Arun Tewari Vs. Zila

Mansvi Shikshak Sangh, AIR 1998 SC 331 and

Tridip Kumar Dingal Vs. State of West Bengal &

Ors., (2009) 1 SCC 768, has held that if some

of the respondents are impleaded in

representative capacity considering that their

number was too large for all of them to be

joined individually as respondents, their writ

petition cannot be dismissed only for the

reason that all the persons who would be

vitally affected, have not been impleaded as

party. Since the petitioners have already

impleaded Suraj Bhan Meena as respondent No.3

as representative of the ST candidates and has

further impleaded Sriram Choradia as respondent

No.4 as representative of the SC category, we

30

do not find any substance in the preliminary

objection of the respondent No.3, and the same

is hereby overruled.

39. Now following questions remain for our

consideration in these matters on the basis of

submissions of learned counsel for the

parties:-

1.Whether Notification dated

25.4.2008 which came into force

with effect from 28.12.2002, is

violative of Articles 14 and 16 of

the Constitution, as it takes away

the vested and accrued rights

retrospectively?

2.Whether Notification dated

28.12.2002 is violative of Articles

14 and 16 of the Constitution?

40. Before considering the above

questions, it would be relevant to refer the

relevant rules and the case law cited at the

Bar and also the legislative history of the

Rules as well as Constitutional provisions

relating to the present case.

41. The Rajasthan Administrative Service

Rules, 1954 were published in the Rajasthan

Rajpatra dated 9.7.1954. Rule 4(c) defines “by

promotion” means by the method prescribed by

Rule 7(1)(b). Rule 7 relates to “Source of

Recruitment”. Rule 7(1)(b) reads as under:-

“. . . . .

(b) by promotion of Tehsildars.”

42. Rule 8 is in respect of reservation of

31

vacancies for the Scheduled Castes and

Scheduled Tribes, which reads as under:-

“(1) Reservation of vacancies for the

Scheduled Castes and Scheduled Tribes

shall be in accordance with orders of

the Government for such reservation in

force at the time of recruitment i.e.

by direct recruitment and by

promotion.

(2) The vacancies so reserved for

promotion shall be filled in by

seniority- cum – merit and merit.

(3) In filling the vacancies so

reserved the eligible candidates who

are members of the Scheduled Castes

and the Scheduled Tribes shall be

considered for appointment in the

order in which their names appear in

the list prepared for direct

recruitment by the Commission for post

falling in its purview, and by the

Appointing Authority in other cases

and the Departmental Promotion

Committee or the Appointing Authority

as the case may be in the case of

promotees, irrespective of their

relative rank as compared with other

candidates.

(4) Appointment shall be made strictly

in accordance with the rosters

prescribed separately for direct

recruitment and promotion. In the

event of non – availability of the

eligible and suitable candidates

amongst the Scheduled Castes and the

Scheduled Tribes as the case may be,

in a particular year, the vacancies so

reserved for them shall be carried

forward until the suitable Scheduled

Castes and the Scheduled Tribes

candidate(s), as the case may be, are

available. In any circumstances no

vacancy reserved for Scheduled Castes

and the Scheduled Tribes candidates

shall be filled by promotion as well

as by direct recruitment from general

category candidates. However, in

exceptional cases where in the public

interest the Appointing Authority

feels that it is necessary to fill up

the vacant reserved post(s) by

promotion from the general category

candidates on urgent temporary basis,

the Appointing Authority may make a

32

reference to the Department of

Personnel and after obtaining prior

approval of the Department of

Personnel, they may fill up such posts

(s) by promoting the general category

candidate(s) on urgent temporary basis

clearly stating in the promotion order

that the General category candidate(s)

who are being promoted on urgent

temporary basis against the vacant

post reserved for Scheduled Castes or

the Scheduled Tribes candidates, as

the case may be, shall have to vacate

the post as and when the candidate(s)

of that category become available.

Provided that there shall be no

carry forward of the vacancies in

posts or class/ category, group of

posts in any cadre of service to which

promotions are made on the basis of

merit alone, under these Rules.”

43. Rule 33 is an important and relevant

rule for the purpose of present controversy. It

relates to seniority. Rule 33 is quoted as

under:-

“33. Seniority "Seniority of persons

appointment to the post encadred in

the service shall be determined from

the date of appointment on the post

after regular selection in accordance

with the provisions of these rules.

Appointment on ad hoc or urgent

temporary basis shall not be deemed to

be appointment after regular

selection."

Provided:-

(i) that the seniority inter se of the

persons appointed to the service

before the commencement of these Rules

shall be such as may have been

determined or as hereafter be

determined by the State Government in

accordance with the principles and

instructions set out in Schedule V;

(ii) that persons who are appointed to

the Service by promotion and by

special selections during a year or

whose appointment is deemed to have

been made during a particular year

33

interm of the provisions of the

Rajasthan Service (Recruitment by

promotion against vacancies of earlier

years) Rules, 1972 shall rank senior

to those appointed by direct

recruitment during that year. Persons

appointed to the service by promotion

deemed to have been so appointed in a

particular year shall rank senior to

those appointed or deemed to have been

appointed by Special Selection during

the same year. Persons appointed to a

service by promotion from Tehsildars

shall rank senior to the one appointed

by promotion from the post of

Inspector Grade-I of Devasthan

Department during the same year.

(iii) Deleted.

(iv) Deleted.

(v) Deleted.

(vi) that the persons selected and

appointed as a result of a selection,

which is not subject to review and

revision, shall rank senior to the

persons who are selected and appointed

as a result of sub-sequent selection;

Seniority inter se of persons

selected on the basis of senioritycum-

merit and on the basis of merit in

the same selection shall be the same

as in the next below grade.

(vii)" that the seniority inter se of

the persons appointed to the Service

on the result of one and the same

examination, except those who do not

join the Service when a vacancy is

offered to them, shall follow the

order in which they have been placed

in the list prepared by the Commission

under rule 25;

(viii) Deleted.

(ix) Deleted.

(x) Deleted.

(2) In determination seniority of

persons appointed to the Service in

accordance with the provisions of subrule

(1) Government, if satisfied of

any error or omission having been made

in the seniority list (in consequence

of incorrect data supplied by the

persons appointed to the Service or

otherwise) shall have the power :-

(i) to fit in and adjust any person so

appointed at such position therein as

it may deem just and proper, and

(ii) to after the position for the

34

time being of any such person in the

said list:

Provided - that changes in the

seniority list of persons covered by

proviso (i) of sub-rule (1) will not

be made by Government after 31-

12-1958.

2. This will have effect from the

9th day of July, 1954.”

44. A proviso was added below other

provisos in Rule 33 by way of notification

dated 1.4.1997 giving benefit of regaining

seniority to senior general/OBC candidates,

which is reproduced as under:-

“That if a candidate belonging to the

Scheduled Caste/Scheduled Tribe is

promoted to an immediate higher

post/grade against a reserved vacancy

earlier than his senior general/O.B.C.

candidate who is promoted later to the

said immediate higher post/grade, the

general/O.B.C. candidate will regain

his seniority over such earlier

promoted candidates of the Scheduled

Caste/Scheduled Tribe in the immediate

higher post/grade.”

45. Vide notification dated 28.12.2002,

the above proviso inserted vide notification

dated 1.4.1997 was deleted and new proviso was

substituted protecting the rights of seniority

and promotion in pursuance of notification

dated 1.4.1997. The new proviso which was

substitued on 28.12.2002 reads as under:-

“Provided that a candidate who has got

the benefit of proviso inserted vide

Notification No.F.7 (1) DOP/A-II/96

dated 01.04.1997 on promotion to an

immediate higher post shall not be

reverted and his seniority shall

remain uneffected. This proviso is

subject to final decision of the

35

Hon'ble Supreme Court of India in Writ

Petition (Civil) No.234/2002 All India

Equality Forum V/s Union of India &

Others.”

46. Vide notification dated 25.4.2008, the

proviso which was added below all the provisos

in Rule 33 vide notification dated 28.12.2002,

has been deleted. The relevant portion of the

notification dated 25.4.2008 is as under:-

“2.Amendment:- The following existing

proviso to rule as mentioned in Column

No.3 against each of the Service

Rules, listed in Column No.2 of the

Schedule given below is hereby

deleted, namely:-

“Provided that a candidate

who has got the benefit of

proviso inserted vide

Notification No.F.7 (1)

DOP/A-II/96 dated 01.04.1997

on promotion to an immediate

higher post shall not be

reverted and his seniority

shall remain uneffected. This

proviso is subject to final

decision of the Hon'ble

Supreme Court of India in

Writ Petition (Civil)

No.234/2002 All India

Equality Forum V/s Union of

India & Others.”

47. As per submissions of the learned

Advocate General, a circular was issued by the

State of Rajasthan on 10.2.1975 providing for

reservation in the matter of promotion to the

extent of 16% for the SCs and 12% for the STs.

48. The Hon'ble Apex Court vide judgment

dated 16.11.1992 in Indra Sawhney & Ors. Vs.

Union of India & Ors.(supra) held that Article

36

16(4) does not permit any provision for

reservation in the matter of promotion. Para

859(7) of the judgment reads as under:-

“. . . .

(7) Article 16(4) does not permit

provision for reservation in the

matter of promotion. This rule shall,

however, have only prospective

operation and shall not affect the

promotions already made, whether made

on regular basis or on any other

basis. We direct that our decision on

this question shall operate only

prospectively and shall not affect

promotions already made, whether on

temporary, officiating or

regular/permanent basis. It is further

directed that wherever reservations

are already provided in the matter of

promotion – be it Central Services or

State Services, or for that matter

services under any Corporation,

authority or body falling under the

definition of 'State' in Article 12 –

such reservations may continue in

operation for a period of five years

from this day. Within this period, it

would be open to the appropriate

authorities to revise, modify or reissue

the relevant rules to ensure the

achievement of the objective of

Article 16(4). If any authority thinks

that for ensuring adequate

representation of 'backward class of

citizens' in any service, class or

category, it is necessary to provide

for direct recruitment therein, it

shall be open to it to do so.

(Ahmadi,J expresses no opinion on this

question upholding the preliminary

objection of Union of India). It would

not be impermissible for the State to

extend concessions and relaxations to

members of reserved categories in the

matter of promotion without

compromising the efficiency of

administration.

(emphasis supplied)”

49. The above para makes it clear that

earlier rules relating to promotion were

37

continued for a period of five years and

liberty was granted to the

concerned/appropriate Governments to make rules

in this regard. However, before expiry of five

years period and to nullify the above judgment

of the Hon'ble Apex Court, the Central

Government brought the Constitution (Seventy-

Seventh Amendment) Act, 1995 on 17.6.1995,

which reads as under:-

"THE CONSTITUTION (SEVENTY-SEVENTH

AMENDMENT) ACT, 1995

Statement of Objects and Reasons.- The

Scheduled Castes and the Scheduled

Tribes have been enjoying the facility

of reservation in promotion since

1955. The Supreme Court in its

judgment dated 16th November, 1992 in

the case of Indra Sawhney v. Union of

India, however, observed that

reservation of appointments or posts

under Article 16(4) of the

Constitution is confined to initial

appointment and cannot extent to

reservation in the matter of

promotion. This ruling of the

Supreme Court will adversely affect

the interests of the Scheduled Castes

and the Scheduled Tribes. Since the

representation of the Scheduled Castes

and the Scheduled Tribes in services

in the States have not reached the

required level, it is necessary to

continue the existing dispensation of

providing reservation in promotion in

the case of the Scheduled Castes and

the Scheduled Tribes. In view of the

commitment of the Government to

protect the interests of the Scheduled

Castes and the Scheduled Tribes, the

Government have decided to continue

the existing policy of reservation in

promotion for the Scheduled Castes

and the Scheduled Tribes. To carry

this out, it is necessary to amend

Article 16 of the Constitution by

inserting a new clause (4A) in the

said Article to provide for

reservation in promotion for the

Scheduled Castes and the Scheduled

38

Tribes.

2. The Bill seeks to achieve the

aforesaid object.

An Act further to amend the

Constitution of India

Be it enacted by Parliament in the

Forty-sixth Year of the Republic of

India as follows:-

1.Short title.- This Act may be

called the Constitution (Seventyseventh

Amendment) Act, 1995.

2.Amendment of Article 16. - In Article

16 of the Constitution, after clause

(4), the following clause shall be

inserted, namely:-

"(4A) Nothing in this Article

shall prevent the State from making

any provision for reservation in

matters of promotion to any class

or classes of posts in the

services under the State in favour

of the Scheduled Castes and the

Scheduled Tribes which, in the

opinion of the State, are not

adequately represented in the

services under the State."

50. Though the enabling provision was made

in the Constitution in respect of reservation

in promotion by way of the Constitution

(Seventy-Seventh Amendment) Act, 1995, however,

the Hon'ble Apex Court, for the first time, in

Virpal Singh Chauhan's case (supra), introduced

the 'catch-up' rule and held that if the senior

general candidate is promoted then he will

regain his seniority on promotion post above

junior reserved promotee. The Hon'ble Apex

Court held that the consequential seniority on

promotion post is not covered by Article 16(4-

39

A). Para 27 of the judgment in the case of

Union of India & Ors. Vs. Virpal Singh Chauhan

(supra) is reproduced as under:-

“We are of the opinion

that the aforesaid

circulars/letters providing for

reservation in favour of Scheduled

Castes/Scheduled Tribes candidates,

rosters and their operation and on

the subject of seniority as between

general candidates and reserved

category candidates, being in the

nature of special rules prevail over

the general instructions contained in

Volume-I of the Indian Railway

Establishment Manual including those

contained in Paras 306, 309 and 319 et

al. Accordingly, we agree with the

conclusion of the Tribunal in the

order under appeal (Virpal Singh

Chauhan) though we may not agree with

all the reasons given by the Tribunal.

In other words, we may not agree with

the view expressed by the Tribunal

that a harmonious reading of Clauses

(1) and (4) of Article 16 should

mean that a reserved category

candidate promoted earlier than his

senior general category candidate in

the feeder category shall

necessarily be junior in the promoted

category to such general category

candidate. No such principle may be

said to be implicit in the said

clauses. But inasmuch the Railway

Board's circulars herein concerned

do provide specifically for such a

situation and since they cannot be

said to be violative of the

constitutional provisions, they must

prevail and have to be given effect

to. It is not brought to our notice

that the said instructions are

inconsistent in any manner with any of

the statutory provisions or statutory

rules relevant in this behalf.”

51. The same view was further taken by the

Hon'ble Apex Court in Ajit Singh Juneja-I Vs.

State of Punjab & Ors.(supra). Para 16 of the

judgment is reproduced as under:-

40

“We respectfully concur with the

view in Union of India vs. Virpal

Singh Chauhan that seniority between

the reserved category candidates and

general candidates in the promoted

category shall continue to be

governed by their panel position

i.e. with reference to their

inter se seniority in the lower

grade. The rule of reservation gives

accelerated promotion, but it does

not give the accelerated

“consequential seniority”. If a

Scheduled Caste/Scheduled Tribe

candidate is promoted earlier

because of the rule of

reservation/roster and his senior

belonging to the general category

candidate is promoted later to that

higher grade the general category

candidate shall regain his

seniority over such earlier promoted

Scheduled Caste/Tribe candidate. As

already pointed out above that

when a Scheduled caste/Tribe

candidate is promoted earlier by

applying the rule of

reservation/roster against a post

reserved for such Scheduled

caste/Tribe candidate, in this

process he does not supersede his

seniors belonging to the general

category. In this process there was

no occasion to examine the merit of

such ScheduledCaste/Tribe candidate

vis-a-vis his seniors belonging to

the general category. As such it

will be only rational, just and

proper to hold that when the

general category candidate is

promoted later from the lower grade

to the higher grade, he will be

considered senior to a candidate

belonging to the Scheduled

Caste/Tribe who had been given

accelerated promotion against the

post reserved for him. Whenever a

question arises for filling up a

post reserved for Scheduled

Caste/Tribe candidate in a still

higher grade then such candidate

belonging to Scheduled Caste/Tribe

shall be promoted first but when

the consideration is in respect of

promotion against the general

category post in a still higher

grade then the general category

candidate who has been promoted

later shall be considered senior and

41

his case shall be considered first

for promotion applying either

principle of seniority-cum-merit or

merit-cum-seniority. If this rule

and procedure is not applied then

result will be that majority of the

posts in the higher grade shall be

held at one stage by persons who have

not only entered in service on the

basis of reservation and roster

but have excluded the general

category candidates from being

promoted to the posts reserved for

general category candidates merely

on the ground of their initial

accelerated promotions. This will

not be consistent with the

requirement or the spirit of

Article 16(4) or Article 335 of the

Constitution.”

(emphasis supplied)

52. The Constitution Bench of the Hon'ble

Apex Court in the case of Ajit Singh Juneja II

Vs. State of Punjab & Ors. (supra) further

approved the 'catch-up' rule and followed its

earlier judgments given in Virpal Singh

Chauhan and Ajit Singh-I's case(supra). Paras

81 of the judgment is reproduced as under:-

“81.As accepted in Virpal(see SCC at

p.702) and Ajit Singh (see SCC at

p.729), we hold that in case any

senior general candidate at Level 2

(Assistant) reaches Level 3

(Superintendent Grade II) before

the reserved candidate (roster point

promotee) at Level 3 goes further up

to Level 4 in that case the seniority

at Level 3 has to be modified by

placing such a general candidate

above the roster promotee,

reflecting their inter se seniority

at Level 2. Further promotion to

Level 4 must be on the basis of such a

modified seniority at Level 3,

namely, that the senior general

candidate of Level 2 will remain

senior also at Level 3 to the

reserved candidate, even if the latter

had reached Level 3 earlier and

42

remained there when the senior

general candidate reached that Level

3.In cases where the reserved

candidate has gone upto Level 4

ignoring the seniority of the

senior general candidate at Level

3, seniority at Level 4 has to be

refixed (when the senior general

candidate is promoted to Level 4) on

the basis of when the time of

reserved candidate for promotion to

Level 4 would have come, if the

case of the senior general

candidates was considered at Level 3

in due time. To the above extent, we

accept the first part of the

contention of the learned counsel

for the general candidates. Such a

procedure in our view will properly

balance the rights of the reserved

candidates and the fundamental rights

guaranteed under Article 16(1) to the

general candidates.”

(emphasis supplied)

53. In the case of M.G. Badappanavar &

Anr.Vs. State of Karnataka & ors.(supra), the

Hon'ble Apex Court held that the equality is

the basic feature of the Constitution of India

and any treatment of equals as unequally or

unequals as equals will be violation of the

basic structure of the Constitution of India.

Therefore, if consequential seniority is given

to the roster point promotees it will violate

the equality principle which is part of the

basic structure of the Constitution. Even

Article 16(4-A) cannot, therefore, be of any

help to the reserved candidates.

54. In the case of Jagdish Lal & Ors. Vs.

State of Haryana & Ors.(supra), the Hon'ble

Apex Court held that the SC/ST candidates will

43

get seniority with reference to the date of

their promotion. The plea of general candidates

on the basis of the judgment of the Hon'ble

Apex Court in the cases of Virpal Singh Chauhan

(supra), Ajit Singh I(supra), was rejected. The

relevant portion of Para 17 of the judgment

reads as under:-

“. . . ..Thus, we hold that the

euphoria had by the general candidates

from the ratios in Virpal Chauhan and

Ajit Singh cases is short lived; it

does not help in so realising the

correct implications arising from the

aforesaid ratios. It is settled law

that administrative instructions

supplement the law but do not supplant

the law. It fills only yawning gaps.

The administrative instructions issued

by the Haryana Government after Ajit

Singh's case flies in the face of

statutory Rule 11 of the Rules.

Therefore, it crushes itself with the

grinding teeth of the above statutory

Rule 11 and the principles. Thus

considered, we hold that the view

taken by the High Court in that behalf

is correct in law and is not vitiated

by any infirmity in law. We further

hold that the reserved candidates

became senior to the general

candidates in each successive

cadre/grade from Assistant to

Superintendent in Class III Service

and 5th respondent in Class I Service.

Their seniority is not and cannot have

the effect of getting wiped out after

the promotion of general candidates

from their respective dates of

promotion. The general candidates

remain junior in higher echelons to

the reserved candidates as was held by

the High Court.”

55. It is relevant to mention that the

judgment in the case of Jagdish Lal Vs. State

of Haryana (supra) was over-ruled by the

Constitution Bench of the Hon'ble Apex Court in

44

Ajit Singh II's case Vs. State of Punjab

(supra).

56. In the case of Hanuman Singh Bhati Vs.

State of Rajasthan & Ors.(SBCWP No.2966/2000

decided by the learned Single Judge vide

judgment dated 30.5.2001 and other connected

writ petitions, the Single Bench of this Court

considered the dispute regarding inter se

seniority in between the general category

candidates and held that merit promotees will

rank senior to the seniority promotees. The

reserved category promotees have to be taken to

be entitled to tentative seniority alone which

would depend on promotions of other candidates

senior to them at lower level. The last

operative portion of the judgment reads as

under:-

“. . . . . . . . . . . . . .

The decision of the State

Government to place the merit

promotees below the seniority

promotees is, therefore, arbitrary and

violative of Articles 14 and 16 of the

Constitution of India. The provisional

seniority lists prepared on the basis

of the aforesaid decision of the State

Govt. therefore, are also arbitrary

and violative of Articles 14 and 16 of

the Constitution of India. The

impugned decisions, circular dated

11.2.2000 and the seniority lists

dated 26.2.2000 are all quashed. The

State Government shall now prepare

provisional seniority list in which

the merit promotees shall not be

placed below seniority promotees only

because seniority promotees have to be

45

placed above reserved category

promotees senior to them at lower

level and such reserved category

promotees were promoted earlier than

the merit promotees. The reserved

category promotees have to be taken to

be entitled to tentative seniority

alone which would depend on promotions

of other candidates senior to them at

lower level.”

(emphasis supplied)

57. The aforesaid judgment was challenged

by the State of Rajasthan by way of DBSAW

No.560/2001 and other connected special

appeals. The Division Bench of this Court vide

judgment dated 12.9.2001 upheld the judgment of

the learned Single Judge with slight

modifications. Para 23 of the judgment reads as

under:-

“For the reasons aforementioned we

confirm the impugned order of the

learned Single Judge with slight

modification. We make it clear that no

finality shall be attached to the

provisional seniority list drawn in

pursuance to the order of learned

Single Judge. It would be open to

challenge by the affected members of

RAS. The objections so raised shall

be reasonably considered by the three

member committee headed by the Chief

Secretary and thereafter final

seniority list shall be published.”

58. It is relevant to mention that ten

special appeals were decided by the Division

Bench vide judgment dated 12.9.2001, but the

State of Rajasthan preferred only one special

leave petition against the judgment in the case

of Hanman Singh Bhati (DBSAW No.560/2001) and

46

the Civil Appeal No.171/2002 arising out of it,

is still pending before the Hon'ble Apex Court

as contended by the learned counsel for the

parties. The order dated 25.2.2002 passed by

the Hon'ble Apex Court in Civil Appeal

No.171/2002, State of Rajasthan Vs. Hanuman

Singh Bhati & Ors. was referred during the

course of arguments to show that only contempt

proceedings were stayed in the matter and

operation of the orders of Division Bench and

Single Bench was not stayed. The order dated

25.2.2002 is reproduced as under:-

“Counter affidavit be filed within

three weeks and rejoinder within three

weeks there after. List after six

weeks. Contempt is stayed in the

meantime.”

59. To nullify the aforesaid four

judgments of the Hon'ble Apex Court, the

Central Government has further brought “The

Constitution (Eighty-Fifth Amendment) Act,

2001” on 4.1.2002 with effect from 17.6.1995

which reads as under:-

“THE CONSTITUTION(EIGHTY-FIFTH

AMENDMENT) ACT, 2001

Statement of Objects and Reasons.-The

Government servants belonging to the

Scheduled Castes and the Scheduled

Tribes had been enjoying the benefit

of consequential seniority on their

promotion on the basis of rule of

reservation. The judgments of the

Supreme Court in the case of Union of

India v. Virpal Singh Chauhan and

Ajit Singh Januja v. State of Punjab,

which led to the issue of the O.M.

dated 30th January, 1997, have

47

adversely affected the interest of

the Government servants belonging to

the Scheduled Castes and Scheduled

Tribes category in the matter of

seniority on promotion to the next

higher grade. This has led to

considerable anxiety and

representations have also been

received from various quarters

including Members of Parliament to

protect the interest of the

Government servants belonging to

Scheduled Castes and Scheduled

Tribes.

2.The Government has reviewed the

position in the light of views

received from various quarters and in

order to protect the interest of the

Government servants belonging to the

Scheduled Castes and Scheduled

Tribes, it has been decided to negate

the effect of O.M. dated 30th January

1997 immediately. Mere withdrawal of

the O.M. dated 30th January, 1997 will

not meet the desired purpose and

review or revision of seniority of

the Government servants and grant of

consequential benefits to such

Government servants will also be

necessary. This will require

amendment to Article 16(4A) of the

Constitution to provide for

consequential seniority in the case

of promotion by virtue of rule of

reservation. It is also necessary to

give retrospective effect to the

proposed constitutional amendment to

Article 16(4A) with effect from the

date of coming into force of Article

16(4A) itself, that is, from the 17th

day of June, 1995.

3.The Bill seeks to achieve the

aforesaid objects.

Received the assent of the President

on the 4th January, 2002

An Act further to amend the Constitution of

India.

Be it enacted by Parliament in the

Fifty-second Year of the Republic of

India as follows:-

1. Short title and commencement.-

(1)This Act may be called the

Constitution (Eighty-fifth Amendment)

Act, 2001.

48

(2) It shall be deemed to have come

into force on the 17th day of June

1995.

2.Amendment of Article 16.-In Article

16 of the Constitution, in clause

(4A), for the words "in matters of

promotion to any class", the words

"in matters of promotion, with

consequential seniority, to any

class" shall be substituted."

60. The Constitutional validity of the

Constitution (Seventy-Seventh Amendment) Act,

1995 and the Constitution (Eighty-Fifth

Amendment) Act, 2001 was challenged before the

Hon'ble Apex Court in M.Nagaraj Vs. Union of

India (supra) and other various writ petitions

including Writ Petition (Civil) No.234/2002,

All India Equality Forum Vs Union of India &

Ors., wherein the State of Rajasthan was one of

the respondents. The Constitution Bench upheld

the constitutional validity of the Constitution

(Seventy-Seventh Amendment) Act, 1995 and the

Constitution (Eighty-Fifth Amendment) Act, 2001

vide judgment dated 19.10.2006. Para 124 of the

judgment is reproduced as under:-

“Subject to the above, we uphold the

constitutional validity of the

Constitution (Seventy-Seventh

Amendment) Act, 1995, the Constitution

(Eighty-First Amendment) Act, 2000,

the Constitution (Eighty-Second

Amendment) Act, 2000 and the

Constitution (Eighty-Fifth Amendment)

Act, 2001.”

(emphasis supplied)

61. It is relevant to mention that while

49

upholding the constitutional validity of the

Constitution (Seventy-Seventh Amendment) Act,

1995 and the Constitution (Eighty-Fifth

Amendment) Act, 2001, the Hon'ble Apex Court

specifically directed that the State is not

bound to make reservation for the SCs and the

STs in the matters of promotion. However, if

they wish to exercise their discretion and make

such provision, the State has to collect

quantifiable data showing backwardness of the

class and inadequacy of representation of that

class in public employment in addition to

compliance with Article 335. Para 123 of

M.Nagraj's case (supra) is reproduced as

under:-

“However, in this case, as stated

above, the main issue concerns the

"extent of reservation". In this

regard the State concerned will have

to show in each case the existence of

the compelling reasons, namely,

backwardness, inadequacy of

representation and overall

administrative efficiency before

making provision for reservation. As

stated above, the impugned provision

is an enabling provision. The State

is not bound to make reservation for

SCs/STs in matter of promotions.

However, if they wish to exercise

their discretion and make such

provision, the State has to collect

quantifiable data showing backwardness

of the class and inadequacy of

representation of that class in public

employment in addition to compliance

of Article 335. It is made clear that

even if the State has compelling

reasons, as stated above, the State

will have to see that its reservation

provision does not lead to

excessiveness so as to breach the

ceiling-limit of 50% or obliterate the

creamy layer or extend the reservation

50

indefinitely.”

(emphasis supplied)

62. In the case of B.K. Sharma & Anr. Vs.

State of Rajasthan & Ors., 1998 (2) WLC (Raj.)

583, the writ petitioners in writ petition

No.2545/96 and other connected writ petitions,

were members of the Rajasthan Administrative

Service and they had challenged the vires of

Rule 8 and 33 of the RAS Rules, 1954, being

violative of Articles 14 and 16 of the

Constitution of India. The members of the

Rajasthan Police Service also preferred writ

petitions, which were connected in B.K.

Sharma's case(supra). This Court allowed the

writ petitions and quashed the impugned orders

by which the benefit of accelerated promotions

was extended to the private respondents belong

to the SC/ST/OBC. It was also directed that the

petitioners whose seniority has been adversely

affected, consequent upon passing of the

impugned orders which are subject matter of

challenge in the writ petitions, shall be

entitled to regain their original seniority and

the respondents are directed to restore the

said seniority to the petitioners with effect

from the due date i.e. the date when their

immediate juniors(private respondents) were

promoted with all consequential benefits. The

writ petitions were filed by senior general

51

candidates for regaining their seniority in

promotion post on the basis of judgment of the

Hon'ble Apex Court in the case of Union of

India Vs. Virpal Singh Chauhan (supra) and Ajit

Singh I (supra) and during the pendency of the

writ petition, a proviso in this regard was

also added below other provisos to Rule 33 of

the RAS Rules alongwith Various Service Rules

vide notification dated 1.4.1997 which was

quoted in para 7 of the judgment. Therefore,

the notification dated 1.4.1997 was also taken

into consideration by the Division Bench. Para

47 of B.K. Sharma's case (supra) is reproduced

as under:-

“As a result of above discussions, we

are of the view that the petitioners

deserve to succeed and accordingly the

aforesaid writ petitions are allowed

with the following directions:-

(a) The impugned orders dated

19.1.1996/2.2.1996 passed by the

respondents in DBCWP No.2812/96 by

which the benefit of accelerated

promotions has been extended to the

private respondents belonging to the

SC/ST/BC, are quashed and set-aside;

(b) Seniority list dated 1.7.1987

circulated vide Annexure-3 dated

30.6.1990 in DBCWP No.3086/1996 as

well as the seniority list dated

30.6.1990 and the orders dated

19.1.1996/2.2.1996 passed by the

respondents in DBCWP No.6208/1996,

seniority list dated 23.4.1997 and the

order dated 5.4.1997 in DBCWP

No.4918/1997 in R.P.S. matters are

quashed and set-aside.

(c) Combined seniority list published

by the respondents in DBCWP

Nos.2545/1996, 2675/1996, 4726/1997

(646/97) and 2963/1996 dated 22.4.1995

(in R.A.S. matters) pertaining to

52

grant of selection grade in Rajasthan

Administrative Services of SC/ST/BC

candidates are quashed and set-aside.

(d) Rules 8, 9 28A and 33 of the Rules

of 1954 are held intra-vires of the

Constitution of India and are not open

to challenge;

(e) Benefit of reservation to the

SC/ST/BC candidates in the matter of

promotions to higher posts from State

Service i.e.R.P.S. and R.A.S. to

I.P.S. and I.A.S. respectively should

not exceed the prescribed percentage

quota i.e.28% since otherwise it would

adversely affect the service career of

the general category candidates and

the benefit of this prescribed

percentage in the matter of

reservation should only be conferred

at the time of initial entry in

service and should not extend in the

matter of promotions.

(f) All promotions made from SC/ST/BC

category candidates to R.P.S and R.A.S

and from said cadres to I.P.S and

I.A.S., respectively in excess of the

prescribed percentage quota i.e.28% as

fixed by the State Government for

reserved category candidates by which

the benefit of accelerated promotions

have been conferred on the private

respondents are quashed and set-aside.

(g) the petitioners whose seniority

has been adversely affected consequent

upon the passing of the impugned

orders which are subject matter of

challenge in the aforesaid writ

petitions shall be entitled to regain

their original seniority and the

respondents are directed to restore

the said seniority to the petitioners

with effect from due date, i.e., the

date when their immediate juniors

(private respondents) were promoted

with all consequential benefits; and

(h) Review D.P.C shall be convened by

the respondents with a period of 8

weeks from the date of receipt of

certified copy of this order which

shall draw a fresh seniority list out

of the combined category of general as

well as SC/ST/BC candidates and

promotions to next higher post to

R.P.S and R.A.S and to I.P.S and I.A.S

53

cadres, respectively shall be made

having due regard to the original

panel position in strict order of

seniority of the petitioners as well

as the private respondents in

accordance with the rules. The revised

seniority list shall be published by

the respondents positively within a

period of 60 days thereafter.”

(emphasis supplied)

63. The above judgment of the Division

Bench was challenged by the reserved candidates

by way of Special Leave Petition before the

Hon'ble Apex Court styled as 'Ram Prasad Vs.

D.K. Vijay' which was decided by the Hon'ble

Apex Court on 16.9.1999 [reported in (1999) 7

SCC 251], and the appeals filed by the reserved

candidates were dismissed subject to some

concession as mentioned in the judgment. The

Hon'ble Apex Court held that the result is that

officers from the reserved category who were

promoted at the roster points before 1.4.97

shall not be reverted but their seniority in

the promoted category shall be governed

by the principles enumerated under

Points 1 to 3 in the cases of Ajit

Singh No.1 and Ajit Singh No.II. The

principle of regaining of seniority by the

general candidates was upheld. Para 21 and 22

of the judgment in Ram Prasad's case are

reproduced as under:-

“21. In view of the peculiar facts

of these cases, we are inclined to

accede to this contention. The

result is that officers from the

reserved category who were promoted

54

at the roster points before

1.4.97 shall not be reverted but

their seniority in the promoted

category shall be governed by the

principles enumerated under Points 1

to 3 in Ajit Singh I and Ajit

Singh II. The prospectivity of

Sabharwal as explained under

Point 4 in Ajit Singh II

is not disturbed. So far as

prospectivity of Ajit Singh I is

concerned, the principles in Ajit

Singh II in Point 4 will apply but

subject to postponement of 1.3.96 to

1.4.97.

22. In other words, we agree

that there is no need to

revertthose reserved category

officers, if they were promoted

even beyond 1.3.96 but before

1.4.97. To give an example - in the

case of two rosters from Level 1 to

Level 2 and Level 2 to Level 3,

if the reserved candidate was

promoted before 1.4.97 to Level 4,

such reserved candidate need not

be reverted. If by the date of

promotion of the reserved candidate

before 1.4.97 from Level 3,the

senior general candidate at Level

2 has reached Level 3, he has to be

considered as senior at Level 3 to

the reserved candidate because the

latter was still at Level 3 on that

date. But if such a general

candidate's seniority was ignored

and the reserved candidate was

treated as senior at level 3 and

promoted to Level 4, this has to be

rectified after 1.3.96 by

following Ajit Singh I as

explained in Ajit Singh II. In

other words, if a reserved candidate

was promoted to Level 4 before

1.4.97, without considering the case

of the senior general candidate who

had reached Level 3 before such

promotion, such reserved candidate

need not be reverted but the said

promotion to Level 4 is to be

reviewed and seniority at Level 3

and Level 4 (as and when the

general candidate is promoted to

Level 4) is to be refixed.”

(emphasis supplied)

55

64. In the case of State of Bihar Vs. Bal

Mukund Sah (supra), the Hon'ble Apex Court also

considered the merit and efficiency in

administration of justice in the matter

relating to reservation in judiciary, and held

as under:-

“58. . . . . . . . . . .

It is now time for us to take stock

of the situation. In the light of

the Constitutional scheme

guaranteeing independence of

Judiciary and separation of powers

between the executive and the

judiciary, the Constitution-makers

have taken care to see by enacting

relevant provisions for the

recruitment of eligible persons to

discharge judicial functions from

grass-root level of the Judiciary up

to the apex level of the District

Judiciary, that rules made by the

Governor in consultation with the

High Court in case of recruitment

at grass-root level and the

recommendation of the High Court

for appointments at the apex level

of the District Judiciary under

Article 233, remain the sole

repository of power to effect

such recruitments and

appointments. It is easy to

visualise that if suitable and

competent candidates are not

recruited at both these levels, the

out turn of the judicial product

would not be of that high level

which is expected of judicial

officers so as to meet the

expectations of suffering humanity

representing class of litigants

who come for redressal of their

legal grievances at the hands

of competent, impartial and

objective Judiciary. The Presiding

Officer of the Court if not being

fully equipped with legal grounding

may not be able to deliver goods

which the litigating public expects

him to deliver. Thus, to ensure the

recruitment of the best available

talent both at grass-root level as

well as at apex level of District

56

Judiciary, Articles 233 and 234

have permitted full interaction

between the High Court which is the

expert body controlling the District

Judiciary and the Governor who

is the appointing authority and who

almost carries out the

ministerial function of

appointing recommended candidates

both by the Public Service

Commission and the High Court at

the grass-root level and also has

to appoint only those candidates

who are recommended by the High

Court for appointment at the apex

level of District Judiciary. Any

independent outside inroad on this

exercise by legislative enactment

by the State Legislature which

would not require consultation

with an expert agency like the High

Court would necessarily fall foul on

the touchstone of the

Constitutional scheme envisaging

insulation of judicial appointments

from interference by outside

agencies, bypassing the High Court,

whether being the Governor or for

that matter Council of Ministers

advising him or the Legislature.

For judicial appointments the

real and efficacious advice

contemplated to be given to the

Governor while framing rules under

Article 234 or for making

appointments on the recommendations

of the High Court under Article 233

emanates only from the High Court

which forms the bed- rock and

very soul of these exercises. It

is axiomatic that the High Court,

which is the real expert body in

the field in which vests the

control over Subordinate Judiciary,

has a pivotal role to play in the

recruitments of judicial officers

whose working has to be

thereafter controlled by it under

Article 235 once they join the

Judicial Service after undergoing

filtering process at the relevant

entry points. It is easy to

visualise that when control over

District Judiciary under Article 235

is solely vested in the High Court,

then the High Court must have a say

as to what type of material should

be made available to it both at

the grass-root level of District

57

Judiciary as well as apex level

thereof so as to effectively ensure

the dispensation of justice through

such agencies with ultimate object

of securing efficient administration

of justice for the suffering

litigating humanity. Under

these circumstances,it is impossible

to countenance bypassing of the

High Court either at the level of

appointment at grass-root level or

at the apex level of the District

Judiciary. The rules framed by the

Governor as per Article 234 after

following due procedure and the

appointments to be made by him

under Article 233 by way of direct

recruitment to the District

Judiciary solely on the basis of the

recommendation of the High Court

clearly project a complete and

insulated scheme of recruitment to

the Subordinate Judiciary. This

completely insulated scheme as

envisaged by the founders of the

Constitution cannot be tinkered

with by any outside agency dehors

the permissible exercise envisaged

by the twin Articles 233 and 234.

It is a misnomer to suggest that any

imposition of scheme of reservation

for filling up vacancies in already

existing, created and sanctioned

posts in any cadre of district

judges or Subordinate Judiciary

will have nothing to do with

the concept of recruitment and

appointment for filling up such

vacancies. Any scheme of

reservation foisted on the High

Court without consultation with

it directly results in truncating

the High Courts power of playing a

vital role in the recruitment of

eligible candidates to fill up

these vacancies and hence such

appointments on reserved posts

would remain totally ultra vires

the scheme of the Constitution

enacted for that purpose by the

founding fathers. It is also to be

noted that the concept of social

justice underlying the scheme of

reservation under Article 16(4) read

with Article 335 cannot be said to

be one which the High Court would

necessarily ignore being a

responsible Constitutional

functionary. In fact what is

58

required is that the right decision

should be arrived at in the right

manner. In the facts of the present

case, it is an admitted position

that the High Court of Patna has

already consented to have 14%

reservation for SC candidates and

10% reservation for ST

candidates in recruitment of

Munsiffs and Magistrates at grassroot

level of Subordinate Judiciary

and rules framed under Article 234

by the Governor of Bihar in

consultation with the High Court

have permitted such reservation.

Thus, it is not as if the purpose of

reservation cannot be achieved

without reference to the High

Court. But as the saying goes you

can take a horse to the water

but cannot make it drink by force.

Thus what is expected of the

executive and the Governor is to

have an effective dialogue with the

High Court so that an appropriate

reservation scheme can be adopted

by way of rules under Article

234 and even by prescribing quota

of reservations of posts for

direct recruits to District

Judiciary under Article 233 if found

necessary and feasible. That is

the Constitutional scheme which is

required to be followed both by

the High Court and by the

executive represented through the

Governor. But this thrust of the

Constitutional scheme cannot be

given a go-bye nor can the entire

apple-cart be turned topsy-turvey by

the legislature standing aloof in

exercising its supposed independent

Legislative power dehors the High

Courts consultation.”

(emphasis supplied)

65. In the case of Andhra Public Service

Commission Vs. Baloji Badhavath & Ors., (2009)

5 SCC 1, the Hon'ble Supreme Court held that

shortlisting of the candidates for main

examination based on performance in preliminary

examination is permissible if tested on the

59

touchstone of Article 335, the State is bound

to devise some procedure to shortlist

candidates considering its limited resources,

to restrict lakhs of candidates from appearing

at examination and interview. It was further

held that category-wise reservation would be

detrimental to the interest of meritorious

candidates belonging to the reserved

categories, and would give rise to complexity

since reservation to women and handicapped

persons is on horizontal basis. The Hon'ble

Apex Court held that proviso to Article 335 is

applicable only for the purpose of promotion.

Lowering of marks for the candidates belonging

to the reserved category is not a

constitutional mandate at the threshold. The

minimum marks prescribed at the initial stage

for all categories including the reserved

category was upheld. Paras 18 and 29 to 32 are

reproduced as under:-

“18. The Constitution of India lays

down provisions for both protective

discrimination as also affirmative

action. Reservation of posts for the

disadvantaged class of people as also

seats in educational institutions are

provided for by reason of Articles 15

and 16 of the Constitution of India.

Reservation made for the members of

the Scheduled Castes, Scheduled

Tribes and Other Backward Classes

would, however, is subject to Article

335 of the Constitution of India.

Concededly, Constitution of India can

claim reservation as a matter of

right. The provisions contained in

Articles 15 and 16 of the

Constitution of India are merely

enabling provisions. No writ of or in

60

the nature of mandamus, thus could be

issued.

29. Indisputably, the preliminary

examination is not a part of the main

examination. The merit of the

candidate is not judged thereby. Only

an eligibility criterion is fixed.

The papers for holding the

examination comprise of General

Studies and Mental Ability. Such a

test must be held to be necessary for

the purpose of judging the basic

eligibility of the candidates to hold

the tests. How and in what manner the

State as also the Commission would

comply with the constitutional

requirements of Article 335 of the

Constitution of India should

ordinarily not be allowed to be

questioned.

30. The proviso appended to Article

335 of the Constitution, to which our

attention has been drawn by Mr. Rao,

cannot be said to have any

application whatsoever in this case.

Lowering of marks for the candidates

belonging to the reserved candidates

(sic categories) is not a

constitutional mandate at the

threshold. It is permissible only for

the purpose of promotion. Those who

possess the basic eligibility would

be entitled to appear at the main

examination. While doing so, in

regard to General English whereas the

minimum qualifying marks are 40% for

OCs, it would be 35% for BCs and 30%

for SC/STs and physically handicapped

persons. However, those marks were

not to be counted for ranking.

31. We have noticed hereinbefore,

that candidates belonging to the

reserved categories as specified in

the notification are not required to

pay any fee. Their age is relaxed

upto five years. It is, therefore,

not correct to contend that what is

given by one hand is sought to be

taken by another. They can, thus,

appear in the examination for a

number of times. Indisputably, the

right conferred upon the respondentswrit-

petitioners in terms of Rules 22

and 22-A of the Andhra Pradesh State

and Subordinate Service Rules, 1996

was to be protected. The extent of

61

relaxation has been recognized. By

reason of such a provision, the right

to be considered has not been taken

away.

32. Judging of merit may be at

several tiers. It may undergo several

filtrations. Ultimately, the

constitutional scheme is to have the

candidates who would be able to serve

the society and discharge the

functions attached to the office.

Vacancies are not filled up by way of

charity. Emphasis has all along been

made, times without number, to select

candidates and/ or students based

upon their merit in each category.

The disadvantaged group or the

socially backward people may not be

able to compete with the open

category people but that would not

mean that they would not be able to

pass the basic minimum criteria laid

down therefor.”

(emphasis supplied)

66. In the case of D.P. Sharma & Ors. Vs.

Union of India & Ors., (1989) Supp.(1) SCC 244

the Hon'ble Apex Court considered the

retrospectivity of criterion for determination

of seniority and held that rules will have

prospective effect only. Rules cannot impair

the existing rights of officials who were

appointed long prior to coming into force of

the Rules. That being their right, the Rules

cannot take it away to their prejudice. Paras

No.4 to 6 are reproduced as under:-

“4. We have perused the judgment of

the Division Bench and also

considered the submissions of the

parties. The view taken by the

Division Bench appears to be

erroneous. The Rules, no doubt

provide that all persons

substantially appointed to a grade

shall rank senior to those holding

62

officiating appointments in the

grade. But the Rules have no

retrospective effect. It could not

impair the existing rights of

officials who were appointed long

prior to the Rules came into force.

The office memorandums to which

learned single Judge has referred

in detail and which we have

extracted above clearly laid down

that length of service should be

the guiding principle of arranging

the inter-se seniority of

officials. The appellants being

governed by those memorandums had

the fight to have their seniority

determined accordingly before the

Rules came into force. That being

their right, the Rules cannot take it

away to their prejudice. The

Division Bench was, therefore,

clearly in error in directing that

the seniority shall follow their

respective confirmations.

5. In construing similar office

memorandums in a different context,

this is what this Court has observed

in Union of India v. M. Ravi

Varma, (SCC p.386, para 14)

"As the said Office

Memorandum has, except in

certain cases with which we

are not concerned,

applied the rule of

seniority contained in the

Annexure thereto only to

employees appointed

after the date of that

Memorandum, there is no

escape from the conclusion

that the seniority of

Ganapathi Kini and Ravi

Varma, respondents, who were

appointed prior to December

22. 1959 would have to be

determined on the basis of

their length of service in

accordance with Office

Memorandum dated June 22,

1949 and not on the basis

of the date of their

confirmation."

6. These considerations apply

equally to the present case as

well. The general rule is if

seniority is to be regulated in a

particular manner in a given period,

63

it shall be given effect to, and

shall not be varied to disadvantage

retrospectively. The view taken by

the Division Bench, which is in

substance contrary to this

principle is not sound and cannot

be supported.”

(emphasis supplied)

67. The Hon'ble Apex court in the case of

S.S. Bola & Ors. Vs. B.D. Sardana & Ors.,

(1997) 8 SCC 522, in para 198, held that though

the legislature may be empowered to enact a law

and give it retrospective effect but such law

cannot take away any accrued or vested rights

of the employees. The Hon'ble Apex Court,

however, considered the other judgments and

held that mere chances of promotion are not

conditions of services and the fact that there

was reduction in the chances of promotion

did not tantamount to a change in the

conditions of service. A right to be considered

for promotion is a term of service, but mere

chances of promotion are not. A mere right to

take advantage of the provisions of an Act is

not an accrued right. The Hon'ble Apex Court,

therefore, held that there is no bar for the

legislature to amend the law in consequence of

which the inter se position in rank of

Executive Engineer might get altered.

68. In the case of B.S. Vadera Vs. Union

of India & Ors. (supra), the Hon'ble Apex Court

held that the appropriate legislation will have

64

full effect both prospectively and

retrospectively. The rules can be framed with

prospective effect. Para 24 of the judgment is

reproduced as under:-

“It is also significant to note that

the proviso to Article 309, clearly

lays down that 'any rules so made

shall have effect, subject to the

provisions of any such Act'. The

clear and unambiguous expressions,

used in the Constitution, must be

given their full ad unrestricted

meaning, unless hedged-in, by any

limitations. the rules, which have

to be 'subject to the provisions

of the Constitution, shall have

effect, 'subject to the provisions

of any such Act. That is, if

the appropriate Legislature has

passed an Act, under Article 309,

the rules, framed under the

Proviso,will have effect,-subject

to that Act; but, in the absence of

any Act, of the appropriate

Legislature, on the matter, 'in our

opinion, the rules, made by the

President, or by such person as he

may direct, are to have full

effect, both prospectively and

retrospectively. Apart from the

limitations' pointed out above,there

is none other, imposed by the

proviso to Art.309, regarding the

ambit of the operation of suchrules.

In other words, the rules,

unless they can be impeached on

grounds such as breach of Part

111, or any other Constitutional

provision, must be enforced, if made

by the appropriate authority.”

69. In the case of Raj Kumar Vs. Union of

India & Ors. (supra), the Hon'ble Apex Court

held that rule can be amended retrospectively.

The relevant portion of Para 2 of the judgment

reads as under:-

“. . . . . There is no doubt that

65

this rule is a valid rule because it

is now well established that rules

made under the proviso to Article

309 of the Constitution are

legislative in character and

therefore can be given effect to

retrospectively. . . . “

70. In the case of Ashoka Kumar Thakur Vs.

Union of India & Ors.(supra), the Constitution

Bench of the Hon'ble Apex Court held that

Article 15(5) of the Constitution of India is

valid to the extent that it permits reservation

for socially and educationally backward classes

in State or State-aided educational

institutions subject to the exclusion in the

“creamy layer” from the OBCs. The majority of

Judges i.e.four out of five held that the

question of validity of the inclusion of

private unaided institutions within the purview

of Article 15(5) left open for a later

occasion. However, Hon'ble Mr. Justice Dalveer

Bhandari held that the said inclusion of

private unaided institutions is in violation of

the basic structure of the Constitution and

hence invalid.

71. Now we proceed to decide both the

questions mentioned above which were mainly

argued at length by both the parties.

Question No.1. :

Whether Notification dated 25.4.2008

which came into force with effect from

28.12.2002, is violative of Articles

66

14 and 16 of the Constitution, as it

takes away the vested and accrued

rights retrospectively?

72. Mr. Sanjeev Prakash Sharma , the

learned counsel for petitioners, Bajrang Lal

Sharma & others argued that on the basis of

judgment in the cases of Virpal Singh Chauhan

and Ajit Singh I decided by the Hon'ble Apex

Court, the officers belonging to the

General/OBC category of Rajasthan

Administrative Service filed writ petition

Nos.2545/1996 and other three connected writ

petitions i.e.2675/1996, 4726/96(646/97) &

2963/1996 in the year 1996 challenging the

vires of Rules 8 and 33 of the RAS Rules

consequent upon which the benefit of

accelerated promotions to next promotional

posts were extended to the candidates belonging

to the reserved quota i.e. the SCs and STs and

who were also granted the benefit of

accelerated seniority. The petitioners in those

writ petitions sought directions from this

Court for restoration of their seniority above

the roster promotees. During the pendency of

writ petition, the respondent-Government

amended the Various Service Rules including the

RAS Rules vide Notification dated 1.4.1997

giving the benefit of seniority to senior

general/Other Backward Classes candidates who

were promoted later to the said immediate

67

higher post/grade above the candidates

belonging to the SCs and the STs who were

earlier promoted. The members of the Rajasthan

police Service also filed similar writ

petitions and all were tagged and decided by

the common order dated 2.4.1998 by the Division

Bench of this Court (B.K. Sharma & Anr. Vs.

State of Rajasthan & Ors.(supra)). This Court

allowed the writ petition and one of the

directions was that senior general/OBC

candidates will regain their seniority on

immediate higher post. The above judgment was

challenged by the reserved candidates before

the Hon'ble Apex Court by way of Civil Appeal

No.2866/1998 (Ram Prasad Vs. D.K. Vijay

(supra))and other connected appeals, which were

decided on 16.9.1999. The Hon'ble Apex Court

held that inter se seniority must be determined

on the basis of decision in the cases of Ajit

Singh I and Ajit Singh II on points 1 to 3

stated therein, meaning thereby, the

Notification dated 1.4.1997 was upheld and the

benefit of regaining seniority on promotional

post was maintained. Therefore, the matter

attained finality. So far as members of the

Rajasthan Police Service are concerned, the

judgments of the Division Bench, in the case of

B.K. Sharma (supra) and the Hon'ble Apex Court

in the case of Ram Prasad Vs. D.K. Vijay

(supra) were acted upon. The State Government

68

published a revised seniority list of Rajasthan

Police Service officers on the basis of

regaining principle as on 1.4.1997 and

thereafter, the review DPC was convened for

considering cases of promotions from Rajasthan

Police Service to the Indian Police Service,

and on the basis of revised seniority list,

senior general/OBC candidates were promoted in

I.P.S. including Mr. B.K. Sharma and reserved

promotees like Mr.Chunni Lal etc., were

reverted. In the Rajasthan Administrative

Service also, the State Government complied

with the directions given in the judgments in

the cases of B.K. Sharma (supra) and Ram Prasad

Vs. D.K. Vijay (supra) referred above and

issued a provisional seniority list on that

basis on 26.6.2000 and the senior general/OBC

candidates were shown above the reserved

promotees on immediate higher post. Since the

selection scale in Rajasthan Administrative

Service is granted 50% by merit and 50% by

seniority cum merit, seniority becomes

important and the principle to frame the

seniority, had already been finalised by the

Hon'ble Apex Court. Therefore, the rights of

seniority and promotion which had vested in the

petitioners, as per the judgment of the Hon'ble

Apex Court, itself is being taken back by the

impugned notification.

73. Mr. S.C. Gupta, the learned counsel

69

appearing on behalf of petitioner Gyan Prakash

Gupta contended that on the basis of seniority

list, may be provisional, issued on the basis

of Notification dated 1.4.1997 upheld by the

Hon'ble Apex Court, 15 persons including the

petitioner Gyan Prakash Gupta and Shiv Narayan

were promoted in Super Time Scale under Rule 31

of the RAS Rules against the year 2001-02 for a

period of one year vide the order dated

29.11.2005. The respondent-State extended the

order of promotion in Super Time Scale of 50

persons vide the order dated 26.12.2006. The

earlier orders were further extended vide the

order dated 9.7.2008. He, therefore, contended

that even the petitioners and other similarly

situated persons were promoted in Super Time

Scale. Therefore, the right which stood vested

is being taken back by the State Government by

issuing the impugned Notification dated

25.4.2008, and therefore, the same is violative

of Article 14 and 16 of the Constitution of

India.

74. The submission of Mr. G.S. Bapna, the

learned Advocate General is that no member of

Rajasthan Administrative Service was promoted

during the period from 1.4.1997 to 28.12.2002,

and therefore, no right is accrued to them. So

far as change in position in the seniority list

on the basis of impugned notification is

concerned, the same cannot be said to have

70

taken away the accrued or vested right as

higher position in seniority list is not a

vested right.

75. Mr. Ashok Gaur, the learned counsel

appearing on behalf of respondent No.3, a

reserved candidate, contended that although a

provisional seniority list dated 26.6.2000 was

issued in pursuance of the order of the Hon'ble

Apex Court in the case of Ram Prasad Vs. D.K.

Vijay but thereafter final seniority list was

never issued and the said provisional seniority

list dated 26.6.2000 has been quashed by the

Single Bench of this Court vide order dated

30.5.2001 in the case of Hanuman Singh Bhati

CWP No.2966/2000 and the said judgment was

upheld by the Division Bench also vide its

judgment dated 12.9.2001. The Special Leave

Petition was preferred against the judgment of

the Division Bench and the matter is now

pending before the Hon'ble Apex Court in CA

No.171/2002 wherein the Hon'ble Apex Court has

stayed the contempt proceedings vide the order

dated 25.2.2002. In these circumstances,it

cannot be said that the rights of the

petitioners have been finalized or they have

acquired any right.

76. We have considered the submissions of

the learned counsel for the parties.

77. Article 14 guarantees equality before

law and equal protection of laws. Article 15

71

protects citizens against discrimination. The

word “employment” being wider, there is no

dispute that it takes within its fold, the

aspect of promotions to posts above the stage

of level of recruitment.

78. Article 16(1) provides to every

employee otherwise eligible for promotion or

who comes within the zone of consideration, a

fundamental right to be “considered” for

promotion. Equal opportunity here means the

right to be “considered” for promotion. If a

person satisfies the eligibility and zone

criteria but is not considered for promotion,

then there will be a clear infringement of his

fundamental right to be “considered” for

promotion, which is his personal right.

Promotion being a condition of service and

having regard to the requirements thereof it

was expected that the employer-State should

have followed the said principle.

79. Where promotional avenues are

available, seniority becomes closely

interlinked with promotion provided such a

promotion is made after complying with the

principle of equal opportunity stated in

Article 16(1). For example, if the promotion is

by rule of “seniority-cum-suitability”, the

eligible seniors at the basic level as per

seniority fixed at that level and who are

within the zone of consideration must be first

72

considered for promotion and be promoted if

found suitable. In the promoted category they

would have to count their seniority from the

date of such promotion because they get

promotion through a process of equal

opportunity. Similarly, if the promotion from

the basic level is by selection or merit or any

rule involving consideration of merit, the

senior who is eligible at the basic level has

to be considered and if found meritorious in

comparison with others, he will have to be

promoted first. If he is not found so

meritorious, the next in order of seniority is

to be considered and if found eligible and more

meritorious than the first person in the

seniority list, he should be promoted. In

either case, the person who is first promoted

will normally count his seniority from the date

of such promotion. That is how right to be

considered for promotion and the “seniority”

attached to such promotion become important

facets of the fundamental right guaranteed in

Article 16(1).

80. The principles of seniority-cum-merit

and merit-cum-seniority are conceptually

different. For the former, greater emphasis is

laid in seniority, though it is not the

determinative factor, while in the later, merit

is the determinative factor. Providing a quota

is not new in the service jurisprudence and

73

whenever the feeder category itself consists of

different category of persons and when they are

considered for any promotion, the employer

fixes a quota for each category so that the

promotional cadre would be equi-balanced and at

the same time, category of persons in the

feeder category would get the opportunity of

being considred for promotion. This provision

actually effectuates the constitutional mandate

engrafted in Article 16(1), as it would offer

equality of opportunity in the matters relating

to employment and it would not be the monopoly

of a specified category of persons in the

feeder category to get promotions.

81. Where the seniority list prepared by

the Government ignored the date of selection of

the employees and there was also violation of

the quota rule, it was not only erroneous but

also violative of Articles 14 and 16 of the

Constitution and was liable to be quashed.

82. If the rules were to be interpreted in

a manner conferring seniority to the roster

point promotees who have not gone through the

normal channel where basic seniority or

selection process was involved, then the rules

would be ultra vires of Articles 14 and 16 of

the Constitution of India. Article 16(4-A)

could not also help. Such seniority, if given,

would amount to treating unequals equally,

rather, more than equals. Equality is a basic

74

feature of the Constitution of India and any

treatment of equals unequally or unequals as

equals will be violative of basic structure of

the Constitution.

83. In the case of State of Gujarat & Anr.

Vs. Raman Lal Keshav Lal Soni, reported in

(1983) 2 SCC 33, the Constitution Bench of the

Hon'ble Apex court considered the retrospective

amendment in the facts and circumstances of

that case and held that the legislature is

undoubtedly competent to legislate with

retrospective effect to take away or impair

any vested right acquired under existing laws

but since the laws are made under a written

Constitution, and have to conform to the

do's and don'ts of the Constitution,

neither prospective nor retrospective laws can

be made so as to contravene Fundamental Rights.

The law must satisfy the requirements of the

Constitution today taking in to account the

accrued or acquired rights of the parties

today. The law cannot say, twenty years ago

the parties had no rights, therefore, the

requirements of the Constitution will be

satisfied if the law is dated back by twenty

years. We are concerned with today's rights

and not yesterday's. A legislature cannot

legislate today with reference to a situation

that obtained twenty years ago and ignore the

march of events and the constitutional rights

75

accrued in the course of the twenty years.

That would be most arbitrary, unreasonable

and a negation of history.

84. In the case of Ex-Capt.K.C. Arora &

Anr. Vs. State of Haryana & Ors., reported in

(1984) 3 SCC 281, three-Judge Bench of the

Hon'ble Apex Court held that the amendment of

law taking away vested rights with

retrospective effect is invalid, if it is

violative of the present acquired or accrued

fundamental rights of the affected person. The

Government of Punjab prior to the formation of

Haryana made statutory rules under Article 309

of the Constitution which are called “The

Punjab National Emergency (Concessions) Rules,

1965”. Rule 5 was relating to seniority,

promotion, increment, pension and leave of

Government employees. It says that the period

spent on military service by a Government

employee shall count for seniority, promotion,

increment and pension in the service of post

held by him immediately before his joining the

military service. According to these rules

and the previous assurances given by the

Government the petitioners were to be given

seniority by counting period of military

service for the purpose of determining

seniority, increments and pension etc.

Immediately on appointment of the

petitioners as temporary Assistant Engineers

76

they became entitled to get their seniority

fixed giving them the benefit of their

military service but the gradation list

prepared, however, did not include the military

service of the petitioners for the purpose of

fixation of their seniority. The State of

Haryana just to deprive the petitioners,

and others similarly situated, of military

service amended the rules with retrospective

effect from 1st November, 1966 vide Haryana

Government Gazette Notification

No.G.S.R.77/Const/Art.309/Amend/(1)/76 dated

22nd March, 1976. The definition of 'military

service' was amended. The Hon'ble Apex Court

considered and held that this notification

dated 22.3.1976 has been issued with

retrospective effect from November 1, 1966 and

restricted the benefits of military service

upto January 10, 1968, the date on which, the

first emergency was lifted with the result that

the vested rights which accrued to the

petitioners in 1969, 1970 and 1971 have been

taken away. The Hon'ble Apex Court considered

the right of seniority, promotion, increment,

pension and leave of Government employees as

vested and accrued right. The judgment of the

Constitution Bench in the case of State of

Gujarat Vs. Raman Lal Keshav Lal Soni (Supra)

was also considered in Paras 22 and 23 and the

Hon'ble Apex Court held that the law appears to

77

be well settled and the Haryana Government

cannot take away the accrued rights of the

petitioners and the appellants by making

amendment of the rules with retrospective

effect and declared the Notification dated

22.3.1976 to be ultra vires of the

Constitution, insofar as they affect

prejudicially persons who had acquired rights

stated therein.

85. In the case of T.R. Kapur & Ors. Vs. State

of Haryana & Ors., reported in 1986 (Supp.) SCC

584, the Hon'ble Apex Court considered the

Punjab Service of Engineers, Class I, PWD

(Irrigation Branch) Rules, 1964. The Hon'ble

Apex Court observed that the unamended Rule 6

(b) conferred a vested right on persons like

the petitioners which could not be taken away

by retrospective amendment of Rule 6(b). Any

rule which affects the right of a person to be

considered for promotion is a condition of

service although mere chance of promotion may

not be. The power to frame rules to regulate

the conditions of service under the proviso to

Article 309 carries with it the power to amend

or alter the rules with a retrospective effect.

An authority competent to lay down

qualifications for promotion, is also competent

to change the qualifications. The rules

defining qualifications and suitability for

promotion are conditions of service and they

78

can be changed retrospectively. This rule is,

however, subject to a well recognized principle

that the benefits acquired under the existing

rules cannot be taken away by an amendment with

retrospective effect, that is to say, there is

no power to make such a rule under the proviso

to Article 309 which affects or impairs vested

rights.

86. In the case of P.D. Agarwal & Ors. Vs.

State of U.P. & Ors. reported in (1987) 3 SCC

622, the Hon'ble Apex Court considered the

rights of Assistant Engineers appointed on

temporary basis under the unamended rules and

entitled them to the benefit of the entire

period of their service from the date of such

appointment for the purposes of inter se

seniority and promotion alongwith the

appointees to the permanent posts. Therefore,

on the basis of Rule 23 as it was before the

amendment made in 1971, held that the Assistant

Engineers are entitled to have their

seniority reckoned from the date of their

being members of the service. The Hon'ble Apex

Court held that the amendments of 1969 and

1971 were not only disadvantageous to the

future recruits against temporary vacancies but

they were made applicable restrospectively from

March 1, 1962 even to existing officers

recruited against temporary vacancies through

the Public Service Commission. It is well

79

settled that any rule which affects the rights

of a person to be considered for promotion is a

condition of service. Though the Government has

power under proviso to Article 309 to make such

rules and to amend them giving retrospective

effect, but if the rules purport to take away

the vested rights and are arbitrary and not

reasonable then such retrospective amendments

are subject to judicial scrutiny if they have

infringed Articles 14 and 16. For promotion

from Assistant Engineer to the post of

Executive Engineer seniority-cum- merit is the

criterion in accordance with the service rules

in question.

87. In the case of Union of India & Ors.

Vs. Tushar Ranjan Mohanty & Ors., reported in

(1994) 5 SCC 450, the Hon'ble Apex Court

considered that the respondents in that appeal

who were members of Indian Statistical Service.

The respondent No.1 belonged to the general

category whereas respondents No.2 to 9 belonged

to the Scheduled Castes. Respondents 2 to 9

were promoted from Grade IV to Grade III

against vacancies for SCs & STs under the

instructions of the Government of India from

time to time. Respondent No.1 being senior to

respondents 2 to 9 in the Grade, successfully

impugned his supersession before the Central

Administrative Tribunal on the ground that

reservation in respect of appointments by

80

promotion, was not permitted under the Rules.

The Tribunal, without disturbing the promotion

of respondents 2 to 9, granted to respondent

No.1 necessary relief in respect of promotion

and seniority over respondents No.2 to 9.

Subsequently, Rule 13 was amended with effect

from 27.11.1972 by the notification dated

20.2.1989 and the reservation for Scheduled

Castes and Scheduled Tribes was provided even

in the appointments made by way of promotion.

On the basis of this amendment the appellant

Union of India sought quashment of the

Tribunal's decision in respect of the promotion

of respondent No.1. Respondent No.1 in turn

challenged the validity of the retrospective

amendment of the Rules. The Hon'ble Apex Court

while dismissing the appeal of the Union of

India, held, “The legislatures and the

competent authority under Article 309 of

the Constitution of India have the power to

make laws with retrospective effect. This

power, however, cannot be used to justify

the arbitrary, illegal or unconstitutional

acts of the Executive. When a person is

deprived of an accrued right vested in him

under a statute or under the Constitution and

he successfully challenges the same in the

court of law, the legislature cannot render the

said right and the relief obtained nugatory

by enacting retrospective legislation.

81

88. In the case of K.Ravindranath Pai &

Anr. Vs. State of Karnataka & Anr., reported in

1995 Supp.(2) SCC 246, considered that both the

appellants were belonging to the common cadre

of Junior Engineers upto 8.1.1974. That cadre

got bifurcated into the cadre of Junior

Engineers (Division I) for graduates and

Junior Engineers (Division II) for nongraduates

with effect from 9.1.1974. Therefore,

on 9.1.1974 respondents were required to

fit the appellants in the proper cadre.

Obviously and admittedly on 9.1.1974 the

appellants were having graduation degrees. In

fact both of them had got their degrees

since long from 1967 and 1970 respectively.

Consequently, when the question of

allotting the appellants to the proper

bifurcated cadre of Junior Engineers with

effect from 9.1.1974 came up, the respondents

were bound to treat the appellants as

belonging to the bifurcated cadre of Junior

Engineers (Division-I) for graduates with

effect from 9.1.1974. They cannot be treated

as belonging to the Junior Engineers

(Division-I)from 1967 and 1970 retrospectively

as such a separate cadre of Junior Engineers

(Division-I) did not exist during that period.

The Hon'ble Apex Court held that in view of

the settled legal position, therefore, it

must be held that the Act insofar as it

82

sought to introduce by Section 2(1) (i),

retrospective bifurcation of the common

cadre of Junior Engineers into two cadres of

Junior Engineers (Division I)for graduates

and Junior Engineers (Division-II) for

non-graduates from 1. 11.1956 is

inoperative at law. It must be held, on

a parity reasoning which appealed to the High

Court when it held in writ petition no.3182

of 1973 and connected matters, that Section

2(1)(ii) could not operate retrospectively

to destroy common pay scales available to

both the Junior Engineers graduates and

non-graduates.Section 2(1)(i) also could not

operate retrospectively to bifurcate the

said common cadre with effect from 1.11.1956.

It will also have only prospective effect.

Consequently, the bifurcation of pay scales

as well as of the common cadre of

Junior Engineers would legally become effective

at the highest from 9.1.1974 when the

Government order of even date introducing such

a scheme saw the light of the day.

89. In the case of K.Narayanan & Ors. Vs.

R.Mahadev & Ors., reported in 1994 Supp.(1) SCC

44, the Hon'ble Apex Court considered the

retrospective operation of the rules and held

that the rules operate prospectively.

Retrospectivity is exception. Even where the

statute permits framing of rule with

83

retrospective effect the exercise of power must

not operate discriminately or in violation of

any constitutional right so as to affect vested

right. The rule-making authority should not be

permitted normally to act in the past. The

impugned rule made in 1985 permitting

appointment by transfer and making it operative

from 1976 subject to availability of vacancy in

effect results in appointing a Junior Engineer

in 1986 with effect from 1976.

Retrospectivity of the rules is a camouflage

for appointment of Junior Engineers from a back

date. The rule operates viciously against all

those Assistant Engineers who were appointed

between 1976 to 1975.

90. The Hon'ble Apex Court in the case of

R.S. Ajara & Ors. Vs. State of Gujarat & Ors.,

reported in (1997) 3 SCC 641 held that a

benefit that has accrued under the existing

rules cannot be taken away by an amendment with

retrospective effect. No statutory rule or

administrative order can whittle down or

destroy any right which has become

crystallised. No rule can be framed under the

proviso to Article 309 of the Constitution

which affects or impairs the vested rights.

Para 16 of the judgment is reproduced as

under:-

“The resolution dated 31-1-1992 has

been assailed by the promotee officers

on the ground that it is retrospective

84

in operation and affects their rights.

The law in this field is well settled

by the decisions of this Court. A

benefit that has accrued under the

existing rules cannot be taken away by

an amendment with retrospective effect

and no statutory rule or

administrative order can whittle down

or destroy any right which has become

crystallized and no rule can be framed

under the proviso to Article 309 of

the Constitution which affects or

impairs the vested rights. Can it be

said that the resolution dated 31-1-

1992 makes any change in the existing

provision governing the seniority so

as to take away or deprive the

respondents of a right which has

accrued to them or which has

crystallized? As noticed earlier, the

1981 Rules do not contain any

principle governing the seniority of

Assistant Conservators of Forests

appointed under the said Rules. Shri

P.P. Rao has invited our attention to

the Handbook for Personnel Officers

issued by the General Administrative

Department of the Government Gujarat.

In para 1 of Chapter V, dealing with

Seniority, it is stated:

“In the case of direct

recruits appointed on

probation, the seniority would

be determined ordinarily with

reference to the adte of their

appointment on probation while

in the case of the promotees,

seniority would be determined

with reference to the date of

their promotion to long-term

vacancies”

(emphasis supplied)”

91. The Constitution Bench of the Hon'ble

Apex Court again in case of Chairman, Railway

Board & Ors. Vs. C.R. Rangadhamaiah & Ors.

(supra) considered its earlier judgment in the

case of State of Gujarat Vs. Raman Lal Keshav

Lal Soni referred above and held that

expressions “vested rights” or accrued rights”

85

have been used while striking down the impugned

provisions which had been given retrospective

operation so as to have an adverse effect in

the matter of promotion, seniority, substantive

appointment etc., of the employees, taking away

the benefit already available to the employee

under the existing rule is arbitrary,

discriminatory and violative of the rights

guaranteed under Articles 14 and 16 of the

Constitution. Para 20, 22, 23, 24 and 34 in the

case of Chairman, Railway Board are reproduced

as under:-

“20. It can, therefore, be said that

a rule which operates in futuro so

as to govern future rights of those

already in service cannot be

assailed on the ground of

retroactivity as being violative of

Articles 14 and 16 of the

Constitution, but a rule which seeks

to reverse from an anterior date a

benefit which has been granted or

availed of, e.g., promotion or pay

scale, can be assailed as being

violative of Articles 14 and 16 of

the Constitution to the extent it

operates retrospectively.

“22. In State of Gujarat v. Raman

Lal Keshav Lal Soni decided by a

Constitution Bench of the Court, the

question was whether the status of

ex- ministerial employees who had

been allocated to the Panchayat

service as Secretaries, Officers and

Servants of Gram and Nagar

Panchayats under the Gujarat

Panchayat Act, 1961 as government

servants could be extinguished by

making retrospective amendment of

the said Act in 1978. Striking down

the said amendment on the ground

that it offended Articles 311 and 14

of the Constitution, this Court

said:

"The legislature is undoubtedly

86

competent to legislate with

retrospective effect to take

away or impair any vested right

ac-quired under existing laws

but since the laws are made

under a written Constitution,

and have to conform to the do's

and don'ts of the Constitution

neither prospective nor

retrospective laws can be made

so as to contravene Fundamental

Rights. The law must satisfy

the requirements of the

Constitution today taking into

account the accrued or acquired

rights of the parties today.

The law cannot say, twenty

years ago the parties had no

rights, therefore, the

requirements of the

Constitution will be satisfied

if the law is dated back by

twenty years. We are concerned

with today's rights and not

yesterday's. The legislature

cannot legislate today with

reference to a situation that

obtained twenty years ago and

ignore the march of events and

the constitutional rights

accrued in the course of the

twenty years. That would be

most arbitrary, unreasonable

and a negation of history."

23. The said decision in Raman Lal

Keshav Lal Soni & Ors. (supra) of

the Constitution Bench of this Court

has been followed by various

Division Benches of this Court.

24. In many of these decisions the

expressions "vested rights" or

"accrued rights" have been used

while striking down the impugned

provisions which had been given

retrospective operation so as to

have an adverse effect in the matter

of promotion, seniority, substantive

appointment, etc. of the employees.

The said expressions have been used

in the context of a right flowing

under the relevant rule which was

sought to be altered with effect

from an anterior date and thereby

taking away the benefits available

under the rule in force at that

time. It has been held that such an

87

amendment having retrospective

operation which has the effect of

taking away a benefit already

available to the employee under the

existing rule is arbitrary,

discriminatory and violative of the

rights guaranteed under Articles 14

and 16 of the Constitution. We are

unable to hold that these decisions

are not in consonance with the

decisions in Roshan Lal Tandon, B.S.

Yadav and Raman Lal Keshav Lal Soni.

(emphasis supplied)

34.. . . .The Full Bench of the

Tribunal has, in our opinion,

rightly taken the view that the

amendments that were made in Rule

2544 by the impugned notifications

dated 5.12.1988, to the extent the

said amendments have been given

retrospective effect so as to reduce

the maximum limit from 75% to 45% in

respect of the period from 1.1.1973

to 31.3.1979 and reduce it to 55% in

respect of the period from 1.4.1979,

are unreasonable and arbitrary and

are violative of the rights

guaranteed under Articles 14 and 16

of the Constitution."

92. So far as facts of the present case

are concerned, it is clear that B.K. Sharma's

and other connected writ petitions were filed

before the Division Bench of this Court

challenging the accelerated promotions as well

as consequential seniority to the members of

the reserved category on the basis of ratio

laid down by the Hon'ble Apex Court in Virpal

Singh Chouhan's case (supra) and Ajit Singh-I's

case (supra), and during the pendency of the

writ petition, the respondent-State itself

amended the rule by adding proviso below the

existing provisos in the Various Service Rules

including the RAS Rules on 1.4.1997 giving the

88

benefit of regaining of seniority to senior

general/OBC candidates above the reserved

promotees on the next higher/promotion post.

The writ petitions filed by the members of RAS

as well as the RPS were clubbed. The Division

Bench of this Court allowed the writ petition

vide the judgment dated 2.4.1998. The said

judgment was upheld by the Hon'ble Apex Court

with slight modification in Ram Prasad's case

(supra) on 16.9.1999. The Hon'ble Apex Court

held that inter se seniority vis-a-vis roster

point promotees and general category promotees

will be determined on the basis of judgment in

the cases of Ajit Singh I and Ajit Singh II

(supra) on points 1 to 3 stated therein.

Therefore, the notification dated 1.4.1997

whereby the proviso was added below the

existing proviso in the Various Service Rules

was upheld by the Hon'ble Apex Court also.

Therefore the accrued rights stood vested in

the petitioners and other similarly situated

persons. It is relevant to mention that so far

as the members of the Rajasthan Police Service

are concerned, the order of the Division Bench

of this Court as well as the Hon'ble Supreme

Court referred above were implemented and the

persons who were given accelerated seniority

were reverted and whom were deprived of the

same benefit were promoted. In the RAS also,

the judgments in the cases of B.K. Sharma

89

(supra) and Ram Prasad Vs. D.K. Vijay (supra)

were complied with and on that basis, a

provisional seniority list was issued on

26.6.2000, wherein the name of petitioner No.1

Bajrang Lal Sharma as on 1.4.1997 was mentioned

at Serial No.129, whereas the names of

respondents No.3 and 4 namely, Suraj Bhan Meena

and Sriram Choradia were mentioned at Serial

No.142 and 147 respectively. The said right of

seniority in the petitioners, above the

respondents (reserved promotees) stood vested

as per final adjudication of their rights by

the Hon'ble Supreme Court in Ram Prasad Vs.

D.K. Vijay decided on 16.9.1999. However, there

was some dispute amongst General category

candidates that merit promotees should be

treated as senior and they should be placed

above the seniority promotees. Therefore, the

said seniority list was challenged by the merit

promotees amongst the general promotess and the

Single Bench of this Court vide its judgment

dated 30.5.2001 decided the controversy and

held that merit promotees will rank senior and

will be placed above the general seniority

promotees. The Single Bench judgment was upheld

by the Division Bench also vide judgment dated

12.9.2001. It was also decided that roster

point promotees will rank junior from both the

general category promotees. It is relevant to

mention that the roster point promotee did not

90

challenge the order of the Division Bench in

this regard and it is only the State of

Rajasthan who has challenged the order of the

Division Bench before the Hon'ble Apex Court

against general category promotees on the

ground that seniority promotees should be

placed above the merit promotees. The Civil

Appeal No.171/2002 State of Rajasthan Vs.

Hanuman Singh Bhati & Ors., in this regard is

pending before the Hon'ble Apex Court as stated

by the learned counsel for both the parties.

However, the Hon'ble Apex Court has not stayed

the operation of the order of the Single Bench

or the Division Bench.

93. The accrued rights stood vested in the

petitioners under the Notification dated

1.4.1997, by judgment of Division Bench dated

2.4.1998 in B.K. Sharma Vs. State of Rajasthan

and the judgment of the Hon'ble Apex Court

dated 16.9.1999 in Ram Prasad Vs. D.K. Vijay,

have been taken away by the State Government

retrospectively vide Notification dated

25.4.2008 and has made the above judgment of

the Division Bench and Hon'ble Supreme Court

redundant, which is not permissible. The

Hon'ble Supreme Court in the case of Union of

India Vs. Tushar Ranjan Mohanty reported in

(1994) 5 SCC 450, held, “ When a person is

deprived of an accrued right vested in him

under a statute or under the Constitution and

91

he successfully challenges the same in the

Court of law, the legislature cannot render the

said right and the relief obtained nugatory by

enacting retrospective legislation.

94. The Constitution Bench of the Hon'ble

Supreme Court in the case of Chairman, Railway

Board Vs. C.R. Rangadhamaiah (supra) held, 'a

rule which seeks to reverse from an anterior

date, a benefit which has been granted or

availed of, e.g., promotion or pay scale, can

be assailed as being violative of Articles 14

and 16 of the Constitution to the extent it

operates retrospectively. The Hon'ble

Constitution Bench also considered its number

of earlier judgments and observed that “In many

of these decisions the expressions "vested

rights" or "accrued rights" have been used

while striking down the impugned provisions

which had been given retrospective operation so

as to have an adverse effect in the matter of

promotion, seniority, substantive appointment,

etc. of the employees. The said expressions

have been used in the context of a right

flowing under the relevant rule which was

sought to be altered with effect from an

anterior date and thereby taking away the

benefits available under the rule in force at

that time. It has been held that such an

amendment having retrospective operation which

has the effect of taking away a benefit already

92

available to the employee under the existing

rule is arbitrary, discriminatory and violative

of the rights guaranteed under Articles 14 and

16 of the Constitution........”

95. The above discussion makes it clear

that retrospective effect of Notification dated

25.4.2008 has taken away the accrued and vested

rights of the petitioners, therefore, it is

arbitrary, discriminatory and violative of the

rights guaranteed under Articles 14 and 16 of

the Constitution. Therefore, we declare the

Notification dated 25.4.2008 as ultra vires to

the Constitution and the same is hereby

quashed.

Question No.2 :

Whether the Notification dated

28.12.2002 is violative of

Articles 14 and 16 of the

Constitution?

96. Vide Notification dated 28.12.2002,

the State Government made amendment in the

Various Service Rules as specified in the

Schedule, whereby existing proviso inserted

vide Notification dated 1.4.1997, has been

deleted with effect from 1.4.1997 and by the

same notification dated 28.12.2002, a new

proviso was added that a candidate who has got

the benefit of proviso inserted vide

Notification 01.04.1997 on promotion to an

93

immediate higher post shall not be reverted and

his seniority shall remain unaffected.

97. The Rajasthan Administrative Service

Rules were framed in the year 1954. Rule 8 of

the said Rules provide for reservation of

vacancies for the SC/ST. Rule 33 relates to

seniority. It says that seniority of persons

appointed to the post encadred in the service

shall be determined from the date of

appointment on the post after regular selection

in accordance with the provisions of these

rules. Appointment on ad hoc or urgent

temporary basis shall not be deemed to be

appointment after regular selection. Sub-rule

(vi) of rule 33 says that the persons selected

and appointed as a result of selection, which

is not subject to review and revision, shall

rank senior to the persons who are selected and

appointed as a result of subsequent selection.

98. In the case of Indra Sawhney(supra),

the Hon'ble Apex Court held that Article 16(4)

does not permit reservation in the matter of

promotion. The Hon'ble Apex Court made it clear

that on this question, their decision shall

operate only prospective and shall not affect

the promotions already made, whether made on

temporary or officiating or regular/permanent

basis. It was further directed that wherever

94

resevations are already provided in the matter

of promotion - be it Central Services or State

Services, or for that matter services under any

Corporation, authority or body falling under

the definition of State in Article 12- such

reservations may continue in operation for a

period of five years from this day. Within this

period it would be open to the appropriate

authorities to revise, modify or reissue the

relevant rules to ensure the achievement of the

objective of Article 16(4). If any authority

thinks that for ensuring adequate

representation of 'backward class of citizens'

in any service, class or category it is

necessary to provide for direct recruitment

therein, it shall be open to it to do so. It

was also made clear that it would be

impermissible for the State to extend the

concessions and relaxations to members of

reserved categories in the matter of promotion

without compromising the efficiency of the

administration.

99. In view of the commitment of

government to protect the interest of SC/ST

category, the Central Government decided to

continue the existing policy of reservation in

the matter of promotion for the SC/ST. To carry

out this, Article 16 of the Constitution of

India was amended with effect from 17.6.1995 by

inserting the new clause (4-A) in the said

95

Article to provide for reservation in promotion

of SC/ST. The new clause (4-A) reads as under:-

"(4A) Nothing in this Article shall

prevent the State from making any

provision for reservation in matters

of promotion to any class or classes

of posts in the services under the

State in favour of the Scheduled

Castes and the Scheduled Tribes

which, in the opinion of the State,

are not adequately represented in the

services under the State."

100. After the above amendment made in

the Constitution, the Hon'ble Apex Court in the

case of Union of India Vs. Virpal Singh Chauhan

(supra) held that a roster point promotee

getting benefit of accelerated promotion would

not get consequential seniority. The same view

was further accepted by the Hon'ble Apex Court

in the case of Ajit Singh-I(supra).

101. In view of the above decision of

the Hon'ble Apex court, the State of Rajasthan,

in exercise of powers conferred by the proviso

to Article 309 of the Constitution of India,

made an amendment in various service rules of

Rajasthan on 1.4.1997 by adding new proviso

after existing last proviso of rule, which

reads as under:-

“That if a candidate belonging to

the Scheduled Caste/Scheduled Tribe

is promoted to an immediate higher

post/grade against a reserved

vacancy earlier than his senior

general/OBC candidate who is

promoted later to the said immediate

higher post/grade, the general/OBC

96

candidate will regain his seniority

over such earlier promoted

candidates of the Scheduled

Caste/Scheduled Tribe in the

immediate higher post/grade.”

102. The State Government by way of

above-referred amendment on 1.4.1997 protected

the seniority of senior general/OBC candidates

that they will regain their seniority over

reserved promotees of the SC/ST promoted

earlier in the immediate higher post/grade.

103. In view of the above two decisions

of the Hon'ble Apex Court in the cases of

Virpal Singh Chauhan (supra) and Ajit Singh-I

(supra), clause (4-A) of Article 16 was again

amended and benefit of “consequential

seniority” was given in addition to accelerated

promotion to the roster point promotees by the

Constitution (Eighty-Fifth Amendment) Act, 2001

on 4.1.2002 with effect from 17.6.1995. The

number of writ petitions were preferred in the

Hon'ble Apex court challenging the

constitutional validity of the the Constitution

(Seventy-Seventh Amendment ) Act, 1995 and the

Constitution (Eighty-Fifth Amendment) Act, 2001

including the writ petition (civil) No.61/2002

M.Nagaraj and writ petition (civil) no.234/2002

All India Equality Forum, wherein the State of

Rajasthan was also impleaded as party.As

mentioned above, while deciding the question

No.1, the interim orders were passed in both

97

the writ petitions.

104. In view of the Constitution

(Eighty-Fifth Amendment) Act, 2001 and the

interim orders passed in the writ petitions in

the Hon'ble Apex Court, the respondent-State of

Rajasthan further amended the Rajasthan Various

Service Rules on 28.12.2002 deleting the

'proviso' which was added on 1.4.1997 with

effect from 1.4.1997 and added new proviso with

effect from the date of issuance of the

notification, which is reproduced as under:-

“Provided that a candidate who has got

the benefit of proviso inserted vide

Notification No.F.7 (1) DOP/A-II/96 dated

01.04.1997 on promotion to an immediate

higher post shall not be reverted and his

seniority shall remain uneffected. This

proviso is subject to final decision of

the Hon'ble Supreme Court of India in

Writ Petition (Civil) No.234/2002 All

India Equality Forum V/s Union of India &

Others.”

105. The constitutional validity of the

Constitution (Seventy-Seventh Amendment ) Act,

1995 and the Constitution (Eighty-Fifth

Amendment) Act, 2001 was upheld by the Hon'ble

Apex Court in M.Nagaraj's case (supra) on

19.10.2006. However, individual cases were not

decided and were left open to be decided by the

appropriate Benches in accordance with the law

laid down in the said order. The first writ

petition (civil) no.234/2002 All India Equality

Forum Vs. Union of India & Ors., wherein the

State of Rajasthan is respondent No.4, is still

98

pending in the Hon'ble Apex Court. The State of

Rajasthan further amended the Various Service

Rules vide impugned Notification dated

25.4.2008 and with effect from 28.12.2002 and

the proviso which was added/inserted vide

Notification dated 28.12.2002 was deleted. In

pursuance of this amended provision, the

respondent State issued revised seniority list

of RAS offices and all the reserved promotees

were shown senior and placed above the senior

general candidates who got the benefit of

earlier amended rule by way of proviso with

effect from 1.4.1997 based on two judgments of

the Hon'ble Apex Court in the cases of Virpal

Singh Chauhan (supra) and Ajit Singh-I(supra).

The said Notifications dated 28.12.2002 and

25.4.2008 as well as seniority list issued in

pursuance thereof are under challenge in this

writ petition preferred on behalf of the senior

general candidates/members of the Rajasthan

Administrative Service.

106. The Hon'ble Apex Court, while

upholding the constitutional validity of the

Constitution (Seventy-Seventh Amendment ) Act,

1995 and the Constitution (Eighty-Fifth

Amendment) Act, 2001 in M.Nagaraj's case

(supra), in para 79 onwards, specifically laid

down that the concepts of “catch up” rule and

“consequential seniority” are judicially

evolved concepts to control the extent of

99

reservation. The source of these concepts is

service jurisprudence. These concepts cannot be

elevated to the status of an axiom like

secularism, constitutional sovereignty, etc. It

cannot be said that by insertion of the concept

of “consequential seniority” the structure of

Article 16(1) stands destroyed or abrogated. It

cannot be said that the “equality code” under

Articles 14, 15 and 16 of the Constitution is

violated by deletion of “catch-up” rule. These

concepts are based on practices. However, such

practices cannot be elevated to the status of a

constitutional principle so as to be beyond the

amending power of the Parliament. In para 80,

the Hon'ble Apex Court referred its earlier

judgment in the case of M.G. Badappanavar

(supra) and observed that the service rule

concerned did not contemplate computation of

seniority in respect of roster promotions. The

Hon'ble Apex Court also referred the earlier

judgments in the cases of Virpal Singh Chauhan

(supra) and Ajit Singh-I(supra) and held that

roster promotions were meant only for the

limited purpose of due representation of

backward classes at various levels of service

and, therefore, such roster promotion did not

confer consequential seniority to the rosterpoint

promotee. In the case of Ajit Singh II

(supra) the circular which gave seniority to

the roster-point promotees was held to be

100

violative of Articles 14 and 16. It was further

held in M.G. Badappanavar that equality is the

basic feature of the Constitution and any

treatment of equals as unequals or any

treatment of unequals as equals violated the

basic structure of the Constitution. For this

proposition, reliance was placed on the

judgment in the case of Indra Sawhney (supra)

while holding that if creamy layer among

Backward Classes were given some benefits as

Backward Classes, it will amount to equals

being treated unequals. Further in Para 81 of

M.Nagaraj case (supra), the Hon'ble Apex Court

observed that in the cases of M.G. Badappanavar

(supra) and Ajit Singh I(supra), the question

of validity of Constitutional Amendments was

not involved, and these cases were essentially

concerned with the “weightage”. Whether

weightage of earlier accelerated promotion with

consequential seniority should be given or not

to be given are matters which would fall within

the discretion of the appropriate Government,

keeping in mind the backwardness, inadequacy of

representation in public employment and overall

efficiency of services.

107. Article 16(4) provides for

reservation for Backward Classes in cases of

inadequate representation in public employment.

Article 16(4) is enacted as a remedy for the

past historical discriminations against a

101

social class. The object in enacting the

enabling provisions like Articles 16(4), 16

(4-A) and 16(4-B) is that the State is

empowered to identify and recognise the

compelling interests. If the State has

quantifiable data to show backwardness and

inadequacy then the State can make reservations

in promotions keeping in mind maintenance of

efficiency which is held to be a constitutional

limitation on the discretion of the State in

making reservation as indicated by Article 335.

The concept of efficiency, backwardness,

inadequacy of representation are required to be

identified and measured. That exercise depends

on availability of data. That exercise depends

on numerous factors. It is for this reason that

enabling provisions are required to be made

because each competing claim seeks to achieve

certain goals. How best one should optimise

these conflicting claims can only be done by

the administration in the context of local

prevailing conditions in public employment.

Therefore, there is a basic difference between

“equality in law” and “equality in fact”.

However, when the State fails to identify and

implement the controlling factors then

excessiveness comes in, which is to be decided

on the facts of each case. Efficiency in

administration is held to be a constitutional

limitation on the discretion vested in the

102

State to provide for reservation in public

employment. In Para 108 of M.Nagaraj case, the

Hon'ble Apex Court specifically opined that

even after insertion of proviso in Article 335,

the limitation of overall efficiency is not

obliterated. Reason is that “efficiency” is a

variable factor. It is for the State concerned

to decide in a given case, whether the overall

efficiency of the system is affected.

108. In Indra Sawhney's case, the

Hon'ble Apex Court considered the merit and

efficiency in administration with reference to

Articles 15 and 16 and it was observed that the

relevance and significance of merit at the

stage of initial recruitment cannot be ignored.

It cannot also be ignored that the very idea of

reservation implies selection of a less

meritorious person. At the same time, we

recognise that this much cost has to be paid,

if the constitutional promise of social justice

is to be redeemed. So far as Articles 16 and

335 are concerned, relevant paras No.836, 837

and 838 are reproduced as under:-

“836. We do not think it necessary

to express ourselves at any length

on the correctness or otherwise of

the opposing points of view

referred to above. (It is, however,

necessary to point out that the

mandate – if it can be called that

– of Article 335 is to take the

claims of members of SC/ST in

consideration, consistent with the

maintenance of efficiency of

administration. It would be a

misreading of the article to say

103

that the mandate is maintenance of

efficiency of administration.

Maybe, it is wrong to treat merit

as synonymous with efficiency in

administration and that merit is

but a component of the efficiency

of an administrator. Even so, the

relevance and significance of merit

at the stage of initial recruitment

cannot be ignored. It cannot also

be ignored that the very idea of

reservation implies selection of a

less meritorious person. At the

same time, we recognise that this

much cost has to be paid, if the

constitutional promise of social

justice is to be redeemed. We also

firmly believe that given an

opportunity, members of these

classes are bound to overcome their

initial disadvantages and would

compete with – and may, in some

cases, excel - members of open

competition. It is undeniable that

nature has endowed merit upon

members of backward classes as much

as it has endowed upon members of

other classes and that what is

required is an opportunity to prove

it. It may not, therefore, be said

that reservations are antimeritarian.

Merit there is even

among the reserved candidates and

the small difference, that may be

allowed at the stage of initial

recruitment is bound to disappear

in course of time. These members

too will compete with and improve

their efficiency along with others.

837. Having said this, we must

append a note of clarification. In

some cases arising under Article

15, this Court has upheld the

removal of minimum qualifying

marks, in the case of Scheduled

Caste/Scheduled Tribe candidates,

in the matter of admission to

medical courses. For example, in

State of M.P. Vs. Nivedita Jain,

admission to medical course was

regulated by an entrance test

(called Pre-Medical Test). For

general candidates, the minimum

qualifying marks were 50% in the

aggregate and 33% in each subject.

For Scheduled Caste/Scheduled Tribe

candidates, however, it was 40% and

30% respectively. On finding that

104

Scheduled Caste/Scheduled Tribe

candidates equal to the number of

the seats reserved for them did not

qualify on the above standard, the

Government did away with the said

minimum standard together. The

Government's action was challenged

in this Court but was upheld. Since

it was a case under Article 15,

Article 335 had no relevance and

was not applied. But in the case of

Article 16, Article 335 would be

relevant and any order on the lines

of the order of the Government of

Madhya Pradesh (in Nivedita Jain)

would not be permissible, being

inconsistent with the efficiency of

administration. To wit, in the

matter of appointment of Medical

Officers, the Government or the

Public Service Commission cannot

say that there shall be no minimum

qualifying marks for Scheduled

Caste/Scheduled Tribe candidates,

while prescribing a minimum for

others. It may be permissible for

the Government to prescribe a

reasonably lower standard for

Scheduled Castes/Scheduled

Tribes/Backward Classes –

consistent with the requirements of

efficiency of administration – it

would not be permissible not to

prescribe any such minimum standard

at all. While prescribing the lower

minimum standard for reserved

category, the nature of duties

attached to the post and the

interest of the general public

should also be kept in mind.

838. While on Article 335, we are

of the opinion that there are

certain services and positions

where either on account of the

nature of duties attached to them

or the level (in the hierarchy) at

which they obtain, merit as

explained hereinabove, alone

counts. In such situations, it may

not be advisable to provide for

reservations. For example,

technical posts in research

development organisations,

departments, institutions, in

specialities and super-specialties

in medicine, engineering and other

courses in physical sciences and

105

mathematics, in defence services

and in the establishments connected

therewith. Similarly, in the case

of posts at the higher echelon

e.g., Professors (in Education),

Pilots in Indian Airlines and Air

India, Scientists and Technicians

in nuclear and space application,

provision for reservation would not

be advisable.”

109. In H.P. Samanaya Varg Karamchari

Kalayan Mahasangh Vs. State of H.P. & Ors. CWPT

No.2628/2008 decided by the Division Bench of

the Himachal Pradesh High Court on 18.9.2009,

the State of Himachal Pradesh issued

instructions dated 7.9.2007 which makes

provision for reservation in the matter of

promotions with consequential seniority for all

classes of post in the service under the State

in favour of the SC/ST. The State instructions

were challenged by Himachal Pradesh Samanaya

Varg Karamchari Kalayan Mahasangh. The Division

Bench considered the judgment of the Hon'ble

Apex Court in the cases of Indra Sawhney

(supra), R.K. Sabharwal (supra) and M.Nagraj

(supra), and after quoting the relevant paras

of M.Nagraj's case, held that the State has not

carried out any exercise before issuing the

instructions to collect the quantifiable data

on the lines indicated in M.Nagaraj's case to

show backwardness, inadequacy of representation

and overall efficiency of State administration,

and therefore, allowed the writ petition and

106

quashed the instructions. The last operative

portion of the judgment reads as under:-

“ . . . . . . . . . . ..

In the present case, admittedly,

the State before issuing the

instructions has not carried out any

such exercise to collect such data.

The reason given by the State is

that in the State of Himachal

Pradesh there was already a

provision for reservation in

promotion prior to the judgment in

Indra Sawhney’s case and thus

collection of data as mandated in M.

Nagaraj’s case is not required. This

submission is totally without any

basis. In Himachal Pradesh

reservation was provided in

promotion prior to the judgment in

Indra Sawhney’s case. After Indra

Sawhney’s case such reservation

could not have been permitted beyond

the period of 5 years. To get over

this judgment the constitutional

amendments were enacted. The Apex

Court in no uncertain terms while

upholding the constitutional

amendments held that the collection

of quantifiable data to establish

backwardness and inadequacy of

representation keeping in view the

efficiency of administration of the

State is necessary before making

reservations. This requirement never

existed prior to the judgment.

According to the State it had after

due consideration decided to make

provision for reservations in

promotion much earlier. “Due

consideration” is totally different

from collecting quantifiable data.

This exercise has to be conducted

and no reservation in promotion can

be made without conducting such an

exercise. Therefore, the State

cannot be permitted to make

reservations till such exercise is

carried out and clear-cut

quantifiable data is collected on

the lines indicated in M. Nagaraj’s

case. We may also point out that

other than making vague reference to

“due consideration” having been

done, till date the State has not

produced before us any clear-cut

quantifiable data which could

107

establish the need for reservation.

Merely because the amended

provision of the Constitution enable

the State to make reservation is no

ground not to collect data.

Therefore, the instructions have to

be struck down as being violative of

the law laid down in M. Nagaraj’s

case by the Apex court.

No doubt under the provisions of

Article 16(4B) the State is entitled

to grant consequential seniority on

promotion to the members belonging

to the scheduled castes and

scheduled tribes but there must be

data available with the State

Government to show that the

scheduled castes and scheduled

tribes are inadequately represented

in the services or in the cadre to

which promotions have to be made.

Therefore, also these instructions

are illegal and liable to be setaside.

It has also been contended on

behalf of the petitioners that the

observations of the Apex Court in M.

Nagaraj’s case in para 121 introduce

the concept of creamy layer even

with regard to scheduled castes and

scheduled tribes. This argument

cannot be accepted. The observations

made in para 121 are general in

nature. It would be pertinent to

mention that in Indra Sawhney’s case

it was clearly stated that the

concept of creamy layer was only

applicable to OBCs. In M. Nagaraj’s

case the Apex Court has only stated

that the concept of creamy layer

should be kept in mind while making

reservations. It has nowhere

specifically held that the concept

of creamy layer is applicable to SCs

and STs also. The reference made to

the concept of creamy layer in para

121, appears to be a general

observation with regard to the

concept of reservation in respect of

all classes including OBCs and not

in respect of scheduled castes and

scheduled tribes only.

In view of the above discussion,

we allow the writ petition and hold

that until the State collects data

and material establishing the need

108

for reservation by collecting

quantifiable data to show

backwardness, inadequacy of

representation and keeping in mind

the overall efficiency of State

administration, the State is not

entitled to make reservation in

promotion for the scheduled castes

and scheduled tribes. The impugned

instructions are accordingly

quashed.

Since we have quashed the

impugned instructions on these

grounds we have not gone into the

other arguments raised with regard

to the challenge to different

portions of the instructions.”

110. In the case of Anil Chandra & Ors.

Vs. Radha Krishna Gaur & Ors., (2009) 9 SCC

454, the Government of Uttar Pradesh issued

notification on 14.9.2007 by which the U.P.

Government Servants Seniority (Third Amendment)

Rules, 2007 were issued. Rule 8-A of the said

Rules was relating to entitlement of

consequential seniority to a person belonging

to Scheduled Castes or Scheduled Tribes. The

said Rules were issued after upholding the

constitutional validity of the Constitution

(Eighty-Fifth Amendment) Act, 2001 by the

Hon'ble Apex Court in M.Nagaraj's case(supra).

The validity of the aforesaid Rule 8-A was

challenged by the engineers of the Irrigation

Department by way of writ petition before the

High Court of Allahabad, Lucknow Bench, Lucknow

and some other persons who were working on the

post of Superintending Engineer in U.P. Jal

109

Nigam. The High Court in the writ petition

filed by the Engineers of the Irrigation

Department passed an interim order by which the

seniority of the petitioners in that writ

petition and other promoted officers, which was

in existence prior to the enforcement of the

aforesaid Rules of 2007, shall not be disturbed

in pursuance of the said Rules and no reversion

shall be effected. Similarly, in another writ

petition, the Division Bench by an interim

order directed that the seniority of the

respondents which was in existence prior to the

enforcement of the aforesaid Rules of 2007

shall not be disturbed in pursuance of the

Rules. The said interim orders were challenged

before the Hon'ble Apex Court. The Hon'ble Apex

Court considered its earlier judgment in

M.Nagaraj's case (supra) wherein Constitution

Bench held that the provisions contained in

Article 16(4-A) of the Constitution of India is

the only enabling provision and the State is

not bound to make reservation for SCs/STs in

the matter of promotion. However, if they wish

to exercise their discretion and make such

provision, the State has to collect

quantifiable data showing backwardness of the

class and inadequacy of representation of that

class in public employment in addition to

compliance with Article 335 of the Constitution

of India. The Hon'ble Apex Court observed that

110

in the present case, neither any effort has

been made to identify the class or classes of

posts for which reservation is to be provided

in promotion nor any exercise has been done to

quantify the extent of reservation. The Hon'ble

Apex Court, therefore, dismissed the appeals

and upheld the interim order of the Division

Bench of the High Court of Allahabad. Para 17

and 20 of the judgment are reproduced as

under:-

“17. In the present case and in the

facts and circumstances stated

herein earlier, we are of the view

that it was the constitutional

obligation of the State, at the time

of providing reservation in the

matter of promotion to identify the

class or classes of posts in the

service for which reservation is

required, however, neither any

effort has been made to

identify the class or classes of

posts for which reservation is to be

provided in promotion nor any

exercise has been done to quantify

the extent of reservation. Adequate

reservation does not mean

proportional representation. Rule 8

(A) has been inserted mechanically

without taking into consideration

the perquisites for making such a

provision as required under Article

l6 (4-A) of the Constitution of

India. The ceiling limit of 50%, the

concept of creamy layer and the

compelling reasons, namely,

backwardness, inadequacy of

representation and overall

administrative efficiency are all

constitutional requirements without

which, the structure of equality of

opportunity in Article 16 would

collapse. However, in this case, as

stated, the main issue concerns the

"extent of reservation" and in this

regard, the State should have shown

the existence of the compelling

reasons, namely, backwardness,

inadequacy of representation and

111

overall administrative efficiency

before making provision for

reservation.

20. In the light of the reasons

above-mentioned, we are of the view

that the High Court was fully

justified in granting the present

interim order and there is no

infirmity in the same. Since the

interim order passed by the High

Court, which has not been

interfered with by us in this

judgment, we make it clear that the

grant of interim order and any

observation made by the High Court

while granting interim order and any

observations made by us in this

order shall not influence the High

Court to decide the writ petition on

merits and the High Court shall not

be influenced by any of the

observations made by us in this

order.”

111. The exercise by the State as per

M.Nagaraj's case in respect of three compelling

reasons by collecting quantifiable datas

showing backwardness of the class and

inadequacy of representation of that class in

public employment and compliance with regard to

Article 335 of the Constitution before making

any rule providing reservation in promotion

with consequential seniority for SCs and STs

candidates is necessary, otherwise as held by

the Hon'ble Apex Court in Ajit Singh Juneja-I's

case, “the result will be that majority of the

posts in the higher grade shall be held at one

stage by persons who have not only entered in

service on the basis of reservation and roster

but have excluded the general category

112

candidates from being promoted to the posts

reserved for general category candidates merely

on the ground of their initial accelerated

promotions and this will not be consistent with

the requirement of the spirit of Article 16(4)

or Article 335 of the Constitution.”

112. The above discussion makes it

clear that clause (4A) of Article 16 was only

an enabling provision and as held by the

Hon'ble Apex Court in M.Nagaraj's case (supra),

that “the State is not bound to make

reservation for the SCs and the STs in the

matters of promotion. However, if they wish to

exercise their discretion and make such

provision, the State has to collect

quantifiable data showing backwardness of the

class and inadequacy of representation of that

class in public employment in addition to

compliance with Article 335”. Admittedly, the

said exercise has not been done by the State

Government either before amending the Various

Service Rules including the RAS Rules vide

Notification dated 28.12.2002 or before issuing

Notification dated 25.4.2008.

113. The learned Advocate General, in

this regard, conceded while arguing the

application under Article 226(3) of the

Constitution in SBCWP No.8104/2008, before the

learned Single Judge. The said admission of

the learned Advocate General finds place in the

113

impugned order dated 9.7.2009 passed by the

learned Single Judge. The learned Advocate

General fairly and frankly admitted that the

required exercise as per M.Nagaraj's case

(supra) was not done by the State before

issuing Notifications dated 25.4.2008 or

28.12.2002. The State Government could not have

amended the Various Service Rules on 28.12.2002

only on the basis of the Constitution (Eighty-

Fifth Amendment) Act on 4.1.2002, as the same

was only an enabling provision, and in case

the State Government wanted to give effect to

the Constitution (Eighty-Fifth Amendment) Act,

then the three exercises, as mentioned in

M.Nagaraj's case (supra), was necessary, which

were admittedly not carried out before issuing

the impugned notification. Therefore, the

impugned Notification dated 28.12.2002 is

violative of Articles 14, 16 and 16(4A) of the

Constitution, and the same is liable to be

declared ultra vires to the Constitution.

114. Apart from the above, it is also

to be noted that the amendment in the Various

Service Rules vide Notification dated 1.4.1997

was upheld by the Division Bench of this Court

in B.K. Sharma's case (supra) and also by the

Hon'ble Apex Court in the case of Ram Prasad

Vs. D.K. Vijay (supra). Vide the aforesaid

two judgments, the right of seniority and

114

promotion had vested in the persons belonging

to general/OBC categories. Therefore, to

nullify the judgment of B.K. Sharma's case and

the Hon'ble Apex Court in the case of Ram

Prasad Vs. D.K. Vijay (supra), and to deprive

the petitioners from their accrued and vested

right under statute and above judgments, the

Various Service Rules including the RAS Rules,

could not have been amended vide Notification

dated 28.12.2002 with effect from 1.4.1997, as

held by the Hon'ble Supreme Court in Union of

India & Ors. Vs. Tushar Ranjan Mohan, (1994) 5

SCC 450 and Chairman, Railway Board Vs. C.R.

Rangadhamaiah, (1997) 6 SCC 623.

115. In view of above discussion, the

notification dated 28.12.2002 is liable to be

quashed, and the same is hereby quashed and set

aside.

116. In view of our findings on both

the questions, the writ petitions No.8104/2008,

6241/2008 and 7775/2009 are allowed and

Notifications dated 28.12.2002 and 25.4.2008

are declared ultra vires to the provisions of

Articles 14 and 16 of the Constitution, and the

same are hereby quashed and set aside. All

consequential orders or actions taken by

respondent-State including seniority list of

Super Time Scale as well as Selection Scale of

the Rajasthan Administrative Service officers,

on the basis of above notifications are also

115

quashed and set aside.

117. Special Appeal (Writ)

Nos.618/2009, 3/2010, 611/2009 and 610/2009

are directed against interim orders passed in

aforesaid writ petitions. Since the writ

petitions have been disposed off finally, the

special appeals are dismissed as infructuous.

118. The parties are directed to bear

their own costs.

(RAGHUVENDRA S.RATHORE),J. (NARENDRA KUMAR JAIN),J.

Skant/-

**REPORTABLE**

**IN THE SUPREME COURT OF INDIA**

**CIVIL APPELLATE JURISDICTION**

**SPECIAL LEAVE PETITION (CIVIL) NO.6385 OF 2010**

**SURAJ BHAN MEENA & ANR. … PETITIONERS**

**VERSUS**

**STATE OF RAJASTHAN & ORS. … RESPONDENTS**

**WITH**

**SLP(C)NOS.7716, 7717, 7826, 7838 of 2010**

**J U D G M E N T**

**ALTAMAS KABIR, J.**

1. Since common questions of fact and law are

involved, five Special Leave Petitions have been

taken up for hearing and final disposal together.

While SLP(C)No.6385 of 2010 has been filed by Suraj

Bhan Meena & Anr., SLP(C)Nos.7716, 7717, 7826 and

7838 of 2010, have all been filed by the State of

Rajasthan.

2. All the petitioners are aggrieved by the

judgment and order dated 5th February, 2010, passed

by the Jaipur Bench of the Rajasthan High Court in

D.B. Civil Special Appeal (Writ) No.618/2009 filed

by the State of Rajasthan & Anr. against Bajrang

Lal Sharma & Ors., D.B. Civil Special Appeal (Writ)

No.3/2010 filed by Suraj Bhan Meena against Bajrang

Lal Sharma & Ors., D.B. Civil Special Appeal (Writ)

No.611/2009 filed by the State of Rajasthan against

Gyan Prakash Shukla, D.B. Civil Special Appeal

(Writ) No.610/2009 filed by the State of Rajasthan

against M.M. Joshi, D.B. Civil Writ Petition

No.8104/2008 filed by Bajrang Lal Sharma & Ors.

against the State of Rajasthan & Ors., D.B. Civil

Writ Petition No.6241/2008 filed by Gyan Prakash

Shukla & Anr. against the State of Rajasthan & Ors.

2

and D.B. Civil Writ Petition No.7775/2009 filed by

M.M. Joshi against the State of Rajasthan & Ors.

As indicated hereinbefore, all the matters were

heard and disposed of by a common judgment passed

by the Division Bench on 5th February, 2010. While

considering the writ petitions along with the writ

appeals, the Division Bench referred to the facts

of D.B. Civil Writ Petition No.8104/2008, against

which SLP(C)No.6385/2010 has been filed by Suraj

Bhan Meena and SLP(C)No.7716/2010 has been filed by

the State of Rajasthan. The other Special Leave

Petitions have been filed against the orders passed

in the Writ Petitions filed by the private

respondents therein.

3. All the writ petitioners, as also the

Petitioners in SLP(C)No.6385/2010, are members of

the Rajasthan Administrative Service and are

governed by the Rajasthan Administrative Service

Rules, 1954. The writ petitioners in their

respective writ petitions challenged the

3

Notification dated 25th April, 2008, issued by the

State of Rajasthan in exercise of its powers

conferred by the proviso to Article 309 of the

Constitution of India amending the Rajasthan

“Various Service Rules” with effect from

28.12.2002.

4. According to the writ petitioners, they had

been inducted in the Rajasthan Administrative

Service in December, 1982, through selection by the

Rajasthan Public Service Commission. Vide notice

dated 26th June, 2000, the State Government issued a

Provisional Seniority List of Rajasthan

Administrative Service Selection Grade as on

1.4.1997, in which the Writ Petitioner No.1,

Bajrang Lal Sharma, was placed above Suraj Bhan

Meena (Scheduled Tribe) and Sriram Choradia

(Scheduled Caste). The said Seniority List was

published pursuant to the order of this Court dated

16.9.1999, passed in the case of Ajit Singh-II &

Ors. Vs. State of Punjab & Ors. [(1999) 7 SCC 209]

4

and another order of the same date in the case of

Ram Prasad vs. D.K. Vijay [(1999) 7 SCC 251]. Once

again Provisional Seniority Lists were published on

27.11.2003 and 12.5.2008. Subsequently, the State

of Rajasthan published the final Seniority Lists of

Super Time Scale and Selection Scale of the service

on 24.6.2008 as on 1.4.1997 and Provisional

Seniority List dated 2.7.2008 as on 1.4.2008,

wherein the name of Bajrang Lal Sharma was shown

below the names of both Suraj Bhan Meena and Sriram

Choradia.

5. The Notification dated 25.4.2008, which was the

subject matter of challenge in the Writ Petition

was challenged on two grounds. It was firstly

contended that the proviso dated 28.12.2002, which

had been added to the Various Service Rules was

subject to the final decision of this Court in Writ

Petition (Civil) No.234/2002 filed by the All India

Equality Forum against the Union of India & Ors.,

but the same was yet to be decided. Therefore,

5

during the pendency of the Writ Petition before

this Court, the Respondents had acted improperly in

deleting the above-mentioned proviso in the Various

Service Rules by the Notification dated 25.4.2008,

which amounted to giving a consequential seniority

to candidates belonging to the Scheduled Castes and

Scheduled Tribes, which could not have been given

without quantifying the figures of Scheduled Castes

and Scheduled Tribes candidates to enable a

decision to be arrived at that reservation was

required in promotion and also to show that the

State had to pass such orders for compelling

reasons, such as, backwardness, inadequacy of

representation, as held by this Court in the case

of M. Nagaraj & Ors. vs. Union of India & Ors.

[(2006) 8 SCC 212]. It was contended that since

the State Government had not complied with the

directions given by this court in M. Nagaraj’s case

(supra), the Notification in question was liable to

be quashed. It was further urged on behalf of the

6

Writ Petitioner, Bajrang Lal Sharma, that in the

case of Indra Sawhney & Ors. Vs. Union of India &

Ors. [(1992) Supp.(3) SCC 217], this Court had held

that Article 16(4) of the Constitution of India did

not permit reservations in the matter of promotion.

Thereafter, the Constitution (77th Amendment) Act,

1995, was enacted and came into force on 17.6.1995.

The subsequent Special Leave Petitions filed by the

Union of India & Ors. against Virpal Singh Chauhan

& Ors. [(1995) 6 SCC 684], Ajit Singh Januja & Ors.

Vs. State of Punjab & Ors. [(1996) 2 SCC 715] and

Ajit Singh-II & Ors. Vs. State of Punjab & Ors.

[(1999) 7 SCC 209)], introduced the “catch-up” rule

and held that if a senior general candidate was

promoted after candidates from the Scheduled Castes

and Scheduled Tribes have been promoted to a

particular cadre, the senior general candidate

would regain his seniority on promotion in

relation to the juniors who had been promoted

against reserved vacancies.

7

6. The Parliament on 4.1.2002 amended the

Constitution by the Constitution (85th Amendment)

Act, 2001, in order to give the benefit of

consequential seniority to the reserved category

candidates with effect from 17.6.1995. The

constitutional validity of both the said

Constitution Amendment Acts was challenged before

this court in other writ petitions, including the

writ petition filed by M. Nagaraj and All India

Equality Forum. During the pendency of the writ

petitions, this Court passed an interim order

protecting the promotion and seniority of

general/OBC candidates. The Government of

Rajasthan, thereafter, deleted the proviso added

vide Notification dated 1.4.1997.

7. In M. Nagaraj’s case (supra), this Court while

upholding the constitutional validity of the

Constitution (77th Amendment) Act, 1995 and the

Constitution (85th Amendment) Act, 2001, clarified

8

the position that it would not be necessary for the

State Government to frame rules in respect of

reservation in promotion with consequential

seniority, but in case the State Government wanted

to frame such rules in this regard, then it would

have to satisfy itself by quantifiable data, that

there was backwardness, inadequacy of

representation in public employment and overall

administrative inefficiency and unless such an

exercise was undertaken by the State Government,

the rule relating to reservation in promotion with

consequential seniority could not be introduced.

8. Despite the decision in M. Nagaraj’s case, the

State Government by deleting the proviso, which had

been inserted vide notification dated 1.4.1997 on

the basis of the “catch-up” rule and further

deleting the new proviso added on 28.12.2002 in the

Various Service Rules of the State, had in effect

provided consequential seniority to the Scheduled

Castes and Schedule Tribes candidates, without

9

undertaking the exercise indicated in M. Nagaraj’s

case in respect of the three conditions laid down

in the said judgment. It was the case of the

Petitioners that the impugned notification dated

25.4.2008 was liable to be declared ultra vires to

the provisions of the Constitution being contrary

to the decision of this Court in M. Nagaraj’s case.

9. As indicated hereinbefore, it was also the case

of the Writ Petitioners that nowhere in Rule 33 of

the Rajasthan Administrative Service Rules has any

provision been made for consequential seniority to

reserved category promotees. As a result, after

the judgment in B.K. Sharma & Anr. Vs. State of

Rajasthan & Ors. [WLC (Raj.) 1998 (2) 583] and in

Ram Prasad’s case (supra), consequential seniority

could not have been assigned to reserve promotees

above the senior General/OBC candidates.

10. This was the view which had been taken by this

Bench in the cases of Virpal Singh Chauhan (supra)

10

and Ajit Singh-I (supra) to the effect that reserve

promotees would be entitled for accelerated

promotion, but not accelerated seniority. The same

view was reiterated by a Constitution Bench of this

Court on 16th September, 1999, while deciding Ajit

Singh-II’s case (supra). It is only on account of

the judgment in Virpal Singh Chauhan’s case (supra)

and in the case of Ajit Singh-I (supra), the State

Government vide notification dated 1.4.1997

inserted the new proviso in the Various Service

Rules.

11. The Constitution (85th Amendment) Act, 2001 was

thereafter passed on 4th January, 2002, with

retrospective effect from 16th September, 1995, with

regard to consequential seniority to reserve

promotees. It was the said amendments which were

the subject matter of challenge in several writ

petitions, including in M. Nagaraj’s case and in

the case of All India Equality Forum.

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12. On behalf of the Petitioners, it was submitted

by Dr. Krishan Singh Chauhan, that the insertion of

the words “with consequential seniority” in clause

IVA of Article 16 of the Constitution after the

words “reservation in promotion”, was only an

enabling provision which was under challenge before

this Court and while the matter was sub-judice,

without waiting for the decision of this Court in

M. Nagaraj’s case and All India Equality Forum, the

State Government withdrew its earlier notification

dated 1st April, 1997 vide notification dated

28.12.2002. It has to be kept in mind that as in

M. Nagaraj’s case (supra), this Court has made it

mandatory on the part of the State Government to

undertake the three exercises in case any rule was

required to be framed by the State for reservation

in promotion with consequential seniority. It was

submitted that the withdrawal of the notification

dated 1.4.1997 by notification dated 28.12.2002

amounted to negating the judgment of this Court in

12

Ram Prasad’s case (supra) and, accordingly, the

notification dated 28.12.2002 was also liable to be

quashed by the Court. In short, the question to be

decided in this case is whether the State

Government was reintroducing a concept which had

been replaced pursuant to the orders passed by this

Court, which had been found to be *ultra vires* the

provisions of the Constitution.

13. It was urged on behalf of the Petitioners,

Suraj Bhan Meena and Sriram Choradia, that till the

decision of this Court in the case of Indra Sawhney

vs. Union of India [(1992) Supp. (3) SCC 217], this

Court had almost uniformly applied the rule of

reservation in promotion with consequential

seniority. In Indra Sawhney’s case (supra), this

Court had held that reservation in promotion was

unconstitutional, but permitted such reservation to

continue for a period of five years. It is

pursuant to the said decision in Indra Sawhney’s

case (supra), that the Parliament enacted the

13

Constitution (77th Amendment) Act, 1995. A contrary

view was taken in Union of India vs. Virpal Singh

Chauhan [(1995) 6 SCC 684], wherein it was laid

down that the grant of consequential seniority in

cases of reservation in promotion was illegal. The

issue was taken further in the case of Ajit Singh

Januja Vs. State of Punjab [(1996) 2 SCC 715]

holding that the grant of consequential seniority

to reserve category employees, who had got

promotion on the basis of reservation, was

unconstitutional.

14. On 7th May, 1997, another Bench of this Court in

the case of Jagdish Lal Vs. State of Haryana

[(1997) 6 SCC 538] took a diametrically opposite

view upon holding, inter alia, that equality should

not remain mere idle incantation, but it had to

become a vibrant living reality since equality of

opportunity could not simply be judged on the merit

of the marks obtained by him but by taking into

account de facto inequalities which exist in

14

society and to give preference to the socially and

economically disadvantaged persons by inflicting

handicaps on those more disadvantageously placed.

Although such affirmative action might appear to be

discriminatory, it was calculated to bring about

equality on a broader basis by eliminating the de

facto inequalities between the weaker sections and

the stronger sections of the community and placing

them on a footing of equality in relation to public

employment.

15. In view of the opposite stands taken in Jagdish

Lal’s case (supra) and in Ajit Singh-I’s case

(supra), the matters were referred to the

Constitution Bench which approved the decision in

Ajit Singh Januja’s case (supra) and Virpal Singh

Chauhan’s case (supra), upon holding that the case

of Jagdish Lal had not been correctly decided. As

a result, the rule of “regain” and “catch-up” was

explained as the correct interpretation of the

rules. As mentioned hereinbefore, by enacting the

15

Constitution (85th Amendment) Act, 2001, the

Parliament constitutionally nullified the principle

of “regain” and “catch-up” by enacting the

Constitution (77th Amendment) Act, 1995 under its

constituent power under Article 368 of the

Constitution. It was sought to be urged by Dr.

Krishan Singh Chauhan, learned Advocate, that the

power which was existing in the Government to make

provision for consequential seniority in promotion

of reservation, which had been eclipsed on account

of the decision of this Court in Virpal Singh

Chauhan’s case (supra), stood revived by the

enactment of the Constitution (85th Amendment) Act,

2001, with retrospective effect.

16. Learned counsel for the Petitioners referred to

various decisions on the doctrine of eclipse, which

we will refer to, if necessary.

17. Learned counsel, in addition, contended that

the Respondents had not acquired any vested right

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since the Constitution Amendment Acts had been

enacted by the Parliament only with the intention

of nullifying the effects of the judgments of this

Court in Virpal Singh Chauhan’s case (supra) and

Ajit Singh-II’s case (supra). Dr. Chauhan

submitted that the Constitution (85th Amendment)

Act, 2001, given effect to from 17th June, 1995, had

constitutionally nullified the principle of “regain

of seniority” and the principle of “catch-up” which

had been explained by this Court in Virpal Singh

Chauhan’s case (supra).

18. Mr. P.P. Rao, learned Senior Advocate,

appearing for the State of Rajasthan, submitted at

the very outset that the reliefs prayed for in the

several writ petitions, which are common in the

Special Leave Petitions, praying for a direction

that the benefit of reservation in promotion with

consequential seniority, should not be given unless

the three compelling conditions as indicated in M.

Nagaraj’s case (supra), were fulfilled, was totally

17

misconceived in the absence of any challenge to the

order dated 10th February, 1975, passed by the State

of Rajasthan providing for reservations in favour

of Scheduled Castes and Scheduled Tribes candidates

in promotion. Furthermore, no such prayer had been

granted by the High Court. Mr. Rao submitted that

the reliefs prayed for was based on a complete

misreading of the decision in M. Nagaraj’s case

(supra).

19. Mr. Rao urged that the High Court took an

erroneous view that seniority is a vested right in

view of the observations made in paragraph 123 in

M. Nagaraj’s case that the State was not bound to

provide for reservation for Scheduled

Castes/Scheduled Tribes candidates in matters of

promotions, but that if it intended to exercise its

discretion and make such provision, it had to

collect quantifiable data showing backwardness of

the class and inadequacy of representation of that

class in public employment in addition to

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compliance of Article 335 of the Constitution. Mr.

Rao submitted that the High Court, however,

overlooked the opening part of the judgment which

indicated that the main issue involved the extent

of reservation. Mr. Rao submitted that the High

Court erred in proceeding on the basis that

seniority in Government service is a vested right,

since it is now well settled that the seniority of

a Government servant can be interfered with by the

State by making a Rule under the Proviso to Article

309 of the Constitution. In this regard, Mr. Rao

referred to and relied on the decision of this

Court in S.S. Bola & Ors. Vs. B.D. Saldana & Ors.

[(1997) 8 SCC 522], and T. Narasimhulu & Ors. Vs.

State of A.P. & Ors. [(2010) 5 SCALE 730], where

the aforesaid principle was enunciated. It was

urged that even otherwise, a right would accrue

only when an order is issued to a Government

servant. It was further urged that the High

Court’s reliance on the observations in M.

19

Nagaraj’s case (supra), and the statement of the

Advocate General that the exercise of collection of

quantifiable data was not undertaken, is without

basis on the ground that the collection of

quantifiable data showing backwardness and

inadequacy of representation would only arise when

the State wished to exercise its discretion in

making reservation for Scheduled Tribes and

Scheduled Castes candidates in matters of promotion

and not in a case where reservation had already

been made as far back as on 10.2.1975 and was

allowed to continue uninterruptedly.

20. Mr. Rao submitted that as far as the “Catch-up

Principle” is concerned, the same had been deleted

by the impugned notification dated 25.4.2008. The

first Notification deleted the said rule with

effect from 1.4.1997, while retaining some

reservation in the form of a Proviso which too was

ultimately deleted by the second Notification with

effect from 28.12.2002. Mr. Rao also referred to

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the observation made in M. Nagaraj’s case that it

could not be said that the equality code under

Articles 14, 15 and 16 was violated by the deletion

of the “Catch-up” Rule. Mr. Rao submitted that

this declaration of the Constitution Bench had not

been noticed by the High Court when it held that

the two impugned notifications violated Articles 14

and 16 of the Constitution.

21. Mr. Rao also submitted that the doctrine of

eclipse, as urged on behalf of the Petitioners, was

not applicable to the facts of the case since after

over-ruling the decision in General Manager,

Southern Railway Vs. Rangachari [(1962) 2 SCR 586],

this Court had extended the life of the existing

reservations for a period of five years.

Accordingly, the Government Order dated 10.2.1975

survived the decision in Indra Sawhney’s case

(supra) and during the period of extension of five

years, Parliament intervened and inserted Clause

(4-A) in Article 16 empowering the State to

21

continue reservations in promotions already made or

to make such reservations, if not already made.

Mr. Rao urged that the 85th Amendment was enacted

not merely to withdraw the Office Memorandum dated

31.1.1997, which gave effect to the catch-up rule,

but to restore the benefit of consequential

seniority with retrospective effect from 17.6.1995

as if there never was any Catch-up Rule at all in

the eye of law. Mr. Rao submitted that the

contention of the Petitioners that for the purpose

of giving the benefit of consequential seniority,

the State would have to undertake the collection of

quantifiable data in regard to backwardness,

inadequacy of representation and non-impairment of

efficiency, was based on a misunderstanding of the

law declared in M. Nagaraja’s case (supra), since

it defeats the intent of Parliament to give

retrospective effect to the Constitution (85th

Amendment) Act.

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22. In addition, it was pointed out that in

M. Nagaraj’s case (supra) it had been categorically

indicated that the concept of consequential

seniority did not violate the equality code under

Articles 14, 15 and 16 by deleting the Catch-up

Principle , as was held in Virpal Singh Chauhan’s

case (supra). It was submitted that the instant

case is a simple case of deletion of the Catch-up

Principle in view of the Constitution (85th

Amendment) Act. It was contended that the

provisional seniority list which was quashed by the

High Court could never become the ground for any

accrued right to seniority.

23. Appearing for the Intervenor, Rajasthan Vanijik

Kar Anusuchit Jati-Janjati Mahasangh, hereinafter

referred to as “Mahasangh”, Mr. Pallav Shishodia,

learned Senior Advocate, reiterated Mr. Rao’s

submissions regarding the observations made by this

Court in paragraph 79 of M. Nagaraj’s case that the

concept of “Catch-up Rule” and “consequential

23

seniority” are judicially evolved concepts not

implicit in Clauses (1) and (4) of Article 16 of

the Constitution and with the concept of equality

contained in Articles 14, 15 and 16 stood violated

by the deletion of the “Catch-up Rule”. The

Constitution Bench also observed that such concepts

were based on principles which could not be

elevated to the status of constitutional principles

or constitutional limitations. Mr. Shishodia urged

that the deletion of the Proviso added by the

Amendment of 1997 by way of the impugned

Notification of 28.12.2002 and 25.4.2008, merely

gave a quietus to the Catch-up Rule in harmony with

the Constitution (85th Amendment) Act, which was

introduced with the specific object of negating the

effect of the decisions of this Court in Virpal

Singh Chauhan’s case (supra), Ajit Singh-I’s case

(supra) and in Ajit Singh-II’s case (supra). It

was submitted that since the 85th Amendment had been

upheld by the constitution Bench in M. Nagaraj’s

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case (supra) the State was duty bound to restore

the original practice of giving seniority from the

date of substantive appointment, without reference

to the Catch-up Principle.

24. Mr. Shishodia concluded on the note that just

as the repealing of an enactment would not

automatically revive the original Act, on the same

analogy, mere setting aside or quashing of the

impugned Notification dated 28.12.2002 and

25.4.2008 would not revive the “Catch-up” Rule

introduced by Notification dated 1.4.1997. While

the repeal of the two Notifications dated

28.12.2002 and 25.4.2008 removed the eclipse caused

by the judgment in Ajit Singh-I’s case (supra), Ram

Prasad’s case (supra) and Ajit Singh-II’s case

(supra), no fresh right of consequent seniority was

conferred.

25. Mr. M.L. Lahoti, learned Senior Advocate,

appearing for Respondent No.13 in SLP(C)No.6385 of

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2010, while reiterating the submissions made on

behalf of the other Respondents, submitted that the

question of reservation had been gone into in

detail in Indra Sawhney’s case (supra) and it had

been held that if a feeling of complacency relating

to promotion was allowed to prevail amongst

candidates from the reserved categories, it was

bound to generate a feeling of despondency among

candidates from the open categories which would

affect the efficiency of administration. It was

also held that putting the members of the Backward

Class on a fast track would lead to leap-frogging

which could have disastrous effects on the moral of

the candidates from the general candidates.

Learned counsel went on to submit that the 77th and

85th Constitutional Amendments were brought about in

the Constitution after the judgment in Indra

Sawhney’s case and provided the Government with

power to provide reservation in promotion and

consequential seniority. Although, the same was

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challenged in the All India Equality Forum’s case,

as also in M. Nagaraja’s case, this Court upheld

the constitutional validity of all the amendments,

subject to compelling circumstances being fulfilled

by the States. Mr. Lahoti also referred to the

contents of paragraph 123 of the judgment in M.

Nagaraja’s case (supra) which has been referred to

hereinbefore, relating to the “extent of

reservation” to be made by the State Government.

26. Mr. Lahoti submitted that in response to

several applications made under the Right to

Information Act, 2005, little or no information was

supplied with regard to the population, education,

public employment, private employment, selfemployment,

below poverty line population and percapita

income of Scheduled Tribes and Scheduled

Castes for the years 1951, 2001 and 2009. In fact,

the response of the National Commission for

Scheduled Tribes was that they did not have the

requisite data for all the information sought for.

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27. Mr. Lahoti lastly contended that in the absence

of any data in relation to Scheduled Castes and

Scheduled Tribes, the parameters laid down in M.

Nagaraja’s case were not fulfilled and Rule 33 of

the Rajasthan Administrative Service Rules, 1954

providing for consequential seniority, was

unconstitutional as no exercise had been undertaken

by the State pursuant to Article 16(4-A) of the

Constitution, and, as such it was not entitled to

provide consequential seniority to Scheduled Castes

and Scheduled Tribes employees.

28. Mr. M.R. Calla, learned Senior Advocate, who

appeared for the sole Respondent, Mr. O.P. Harsh,

in Special Leave Petition (Civil) No.7838 of 2010,

contended that as far as his client was concerned,

he was the Selection Scale promotee of the year

1991-92 and the judicial decision upholding his

position had attained finality and had nothing to

do with the amendment of the rules or the

28

constitutional amendment with retrospective effect

from 17th June, 1995. It was submitted that in his

case there was no question of any general category

candidate gaining seniority over him once he had

superseded them on the basis of merit in the year

1991-92. In other words, once a general category

candidate, though initially senior to him, failed

to compete against him in merit in the year 1991-

92, he could not regain seniority over his client

even if he had been promoted in any subsequent

year. Mr. Calla urged that when Shri Harsh had

been given the benefit of the “catch-up” rule in

terms of the notification dated 1.4.1997, the

general category candidates, who were senior to him

but had been superseded by him on the basis of

merit in the year 1991-92 for the selection scale,

had been wrongly placed above him. Mr. Calla

further submitted that such an act on the part of

the Respondents having been challenged by Shri

Harsh in Writ Petition No.3136 of 2000, which was

29

allowed on 30th May, 2001 and the subsequent

challenge thereto before the Division Bench having

been dismissed, the order dated 12.9.2001 of the

learned Single Judge had attained finality.

29. Mr. Calla also referred to the decision of this

Court in M. Nagaraj’s case (supra) and submitted

that despite the constitutional mandate to the

Government as per the 77th and 85th amendments, to

form an opinion relating to adequate representation

for exercise of the powers under Articles 16(4) and

16(4-A) of the Constitution, no such exercise had

been undertaken by the State before exercising the

enabling power. It was submitted that adequate

representation of candidates cannot be a constant

factor for ever, but was variable for the purpose

of providing adequate representation in the

services, as circumstances had changed after 1975.

Mr. Calla submitted that the exercise for adequate

representation was the most important factor for

the Government to exercise its powers under Article

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16(4) and 16(4-A) of the Constitution and the same

could not be avoided by the Government and the

failure to follow the said mandate rendered the

exercise of the enabling power invalid. Mr. Calla

submitted that the various data which came to be

disclosed during the hearing of the matter, clearly

show that Scheduled Castes and Scheduled Tribes

candidates were adequately represented and had at

times even exceeded the quota and as such it was

necessary for an exercise to be undertaken to

ascertain the representation of such candidates.

Mr. Calla submitted that, in any event, since no

injustice had been done to Scheduled Castes and

Scheduled Tribes candidates, the petitioners could

have no legitimate cause for grievance with the

order of the High Court.

30. Dr. Rajeev Dhawan, learned Senior Advocate who

appeared for the Respondent No.10 in Special Leave

Petition (Civil) No.7716 of 2010, firstly contended

that the main issue for decision in this case is

31

whether the conditions enumerated in M. Nagaraj’s

case (supra) applied to cases of seniority and

promotion after 17th June, 1995, from which date the

amendments were declared to be valid in M.

Nagaraj’s case (supra). Dr. Dhawan submitted that

in M. Nagaraj’s case (supra) this Court was called

upon to consider the provisions of the Constitution

(77th, 81st, 82nd and 85th Amendment) Acts relating to

reservation in promotion, the principle of carry

over, enabling preservation of principles of

efficiency and providing for consequential

seniority by amending Article 16(4-A) by

substituting the words “in matters of promotion,

with consequential seniority, to any class”, in

place of the words “in matters of promotion to any

class”. Dr. Dhawan submitted that by the

Constitution (85th Amendment) Act, 2001, the

legislature reintroduced the concept of

consequential seniority to any class in matters of

promotion.

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31. It was submitted that after the decision in

Virpal Singh Chauhan’s case (supra), the provisions

relating to “catch-up” were discontinued and the

protection which had been given against disputes of

seniority by juniors by the notification dated

1.4.1997 was withdrawn, but with a proviso of

maintaining the status-quo that was existing as on

that date.

32. Dr. Dhawan contended that the exercise to be

undertaken as per the directions in M. Nagaraj’s

case (supra) was mandatory and admittedly such an

exercise had not been undertaken before grant of

promotion. The Division Bench also held that the

rights which had been preserved by virtue of the

notifications dated 1.4.1997 and 28.12.2002 were

vested rights in favour of the writ petitioners and

by the impugned judgment, the notifications dated

28.12.2002 and 25.4.2008 had been rightly quashed.

Dr. Dhawan urged that by the notifications dated

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1.4.1997 and 28.12.2002, the Government of

Rajasthan had protected the seniority and merit of

candidates. The decision in M. Nagaraj’s case made

a distinction between the existence and the width

of the exercise of power under the amendments and

validates the amendments subject to the exercise

emanating from the above-mentioned principles. Dr.

Dhawan submitted that the decision in M. Nagaraj’s

case did not automatically invalidate or validate

any exercise between when the amendments were held

to be valid, and 4.1.2000 from when consequential

seniority was required to be considered in terms of

such amendment.

33. It was submitted that since the State had not

undertaken the exercise which was mandatory in

terms of the judgment in M. Nagaraj’s case (supra),

the State could not, either directly or indirectly,

circumvent or ignore or refuse to undertake the

exercise by taking recourse to the Constitution

34

(85th Amendment) Act providing for reservation in

promotion with consequential seniority.

34. Dr. Dhawan urged that the powers conferred on

the State under Articles 16(4), 16(4-A) and 16(1-B)

of the Constitution are enabling in nature and the

expression “consequential seniority” was optional

and not a requirement. Dr. Dhawan also urged that

what was restored by the decision in M. Nagaraj’s

case (supra) was merely the enabling power of the

Government and exercise of such power in relation

to consequential seniority by the State of

Rajasthan would still have to be reconsidered in

accordance with the decision in M. Nagaraj’s case

(supra).

35. Dr. Dhawan submitted that the seniority of the

candidates who had been promoted on merit was

protected by the notification dated 1.4.1997 and

the same was required to be retained and the

contingent protection given by the notification of

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28.12.2002 was also required to be retained, though

the contingency in the last sentence of the

notification was liable to be struck down. Dr.

Dhawan also urged that the restoration of

consequential seniority in the notification of

25.4.2002, without conducting the exercise as

contemplated in M. Nagaraj’s case (supra), was

liable to be struck down and if the State wanted to

introduce a provision for consequential seniority,

it would have to follow the procedure indicated in

M. Nagaraj’s case (supra).

36. The primary question which we are called upon

to answer in these five Special Leave Petitions is

whether the amended provisions of Article 16(4-A)

of the Constitution intended that those belonging

to the Scheduled Castes and Schedule Tribes

communities, who had been promoted against reserved

quota, would also be entitled to consequential

seniority on account of such promotions, or would

the “catch-up” rule prevail.

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37. The said question has been the subject matter

of different decisions of this Court, but the

discordant note was considered and explained by the

Constitution Bench in M. Nagaraj’s case (supra). On

account of reservation those who were junior to

their seniors, got the benefit of accelerated

promotions without any other consideration,

including performance. Those who were senior to the

persons who were promoted from the reserved

category were not overlooked in the matter of

promotion on account of any inferiority in their

work performance. It is only on account of

fortuitous circumstances that juniors who belong to

the reserve category were promoted from that

category before their seniors could be

accommodated.

38. The question relating to reservation in

promotional posts fell for the consideration of

this Court in Indra Sawhney’s case (supra) for

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construction of Article 16(4) of the Constitution

relating to the State’s powers for making provision

for reservation of appointments or posts in favour

of any backward class of citizens, which in the

opinion of the State, was not adequately

represented in services under the State. The

further question for determination was whether such

power extended to promotional posts. This Court

answered the questions by holding that Article

16(4) does not permit provision for reservation in

the matter of promotion. Further, such rule was to

be given effect to only prospectively and would not

affect the promotions already made, whether made on

regular basis or on any other basis. Accordingly,

apart from holding that Article 16(4) does not

permit provision for reservation in the matter of

promotion, this Court also protected the promotees

who had been appointed against reserved quotas and

a direction was also given that wherever

reservations are provided in the matter of

38

promotion, such reservation would continue in

operation for a period of five years from the date

of the judgment. In other words, the right of

promotion was protected only for a period of 5

years from the date of the judgment and would cease

to have effect thereafter.

39. The matter did not end there. The Constitution

(77th Amendment) Act, 1995, came into force on 17th

June, 1995. A subsequent question arose in the

case of Union of India vs. Virpal Singh Chauhan,

[(1995) 6 SCC 684], as to whether the benefit of

accelerated promotion through reservation or the

roster system would give such promotees seniority

over general category promotees who were promoted

subsequently. The said question arose in regard to

promotion of Railway Guards in non-selection posts

by providing concession to Scheduled Castes and

Scheduled Tribes candidates and it was sought to be

contended that the reservation provided was not

only at the stage of initial appointment, but at

39

every stage of subsequent promotions. In the said

case, the Petitioners, who were general category

candidates and the Respondents who were members of

the Scheduled Castes and Scheduled Tribes were in

the grade of Guards Grade ‘A’ in the Northern

Railway. On 1st August, 1986, the Chief

Controller, Tundla, promoted certain general

category candidates on ad-hoc basis to Grade ‘A’

Special. Within less then three months, however,

they were reverted and in their place members of

the Scheduled Castes and Scheduled Tribes were

promoted. Complaining of such action as being

illegal, arbitrary and unconstitutional, Virpal

Singh Chauhan and others moved the High Court, but

the petition was transferred to the Central

Administrative Tribunal. The Tribunal, inter alia,

held that persons who had been promoted by virtue

of the application of roster would be given

accelerated promotion but not seniority, and that

the seniority in a particular grade amongst the

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incumbents available for promotion to the next

grade would be re-cast each time new incumbents

entered from the lower grade on the basis of

initial Grade ‘C’ seniority. This came to be

recognized as the “catch-up” rule. The matter was

brought to this Court by the Union of India and

this Court confirmed the view taken by the

Tribunal.

40. The same view was reiterated in the case of

Ajit Singh Januja’s case (supra) wherein it was

held further that by accelerated promotion

Scheduled Castes/Scheduled Tribes and Backward

Class candidates could not supersede their seniors

in the general category by accelerated promotion,

simply because that their seniors in the general

category had been promoted subsequently. It was

observed that balance has to be maintained vis-àvis

reservation.

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41. After the decision rendered in Virpal Singh

Chauhan’s case (supra) and in Ajit Singh-I’s case

(supra), in which the claim of reserved category

candidates in promotional posts with consequential

seniority was negated, the question surfaced once

again in the case of Jagdish Lal & Ors. Vs. State

of Hayrana & Ors. [(1997) 6 SCC 538], where a Bench

of Three Judges took a different view. Their

Lordships held that the recruitment rules had

provided for fixation of seniority according to

length of continuous service on a post in the

service. Interpreting the said provisions, Their

Lordships held that in view of the said rules those

Scheduled Castes and Scheduled Tribes candidates,

who though junior to others in the general

category, had got promotion earlier than their

seniors in the general category candidates and

would, therefore, be entitled to get seniority with

reference to the date of their promotion. Their

Lordships held that the general candidates by

42

relying on Virpal Singh Chauhan’s case (supra) and

Ajit Singh Januja’s case (supra) could not derive

any benefit therefrom.

42. This resulted in the vexed question being

referred to the Constitution Bench. Of the several

cases taken up by the Constitution Bench, we are

concerned with the decision rendered in the case of

Ram Prasad vs. D.K. Vijay [(1999) 7 SCC 251] and

Ajit Singh-II & Ors. Vs. State of Punjab & Ors.

[(1999) 7 SCC 209]. Differing with the views

expressed in Jagdish Lal’s case (supra), the

Constitution Bench in Ajit Singh-II’s case (supra)

affirmed the earlier decision in Virpal Singh

Chauhan’s case (supra) and Ajit Singh Januja’s case

(supra) and overruled the views expressed in

Jagdish Lal’s case (supra). The constitution Bench

reiterated the views expressed in Ajit Singh-I’s

case (supra) that those who had obtained the

benefit of accelerated promotion should not be

reverted as that would cause hardship to them, but

43

they would not be entitled to claim seniority in

the promotional cadre. Quite naturally, the same

view was expressed in Ram Prasad’s case (supra)

which was also decided on the same day. In the

said case, while affirming the decision in Ajit

Singh-I’s case (supra), this Court directed

modification of the seniority lists which had been

prepared earlier, to fall in line with the decision

rendered in Ajit Singh-I’s case (supra) and Virpal

Singh Chauhan’s case (supra).

43. Thereafter, as mentioned hereinbefore, on 4th

January, 2002, the Parliament amended the

Constitution by the Constitution (85th Amendment)

Act, 2001, in order to restore the benefit of

consequential seniority to the reserved category

candidates with effect from 17th June, 1995. The

constitutional validity of both the Constitution

Amendment Acts was challenged in this Court in

several Writ Petitions, including the Writ

Petitions filed by M. Nagaraj and the All India

44

Equality Forum. The Constitution Bench while

considering the validity and interpretation as also

the implementation of the Constitution (77th, 81st,

82nd and 85th Constitutional Amendment) Acts and the

effect thereof on the decisions of this Court in

matters relating to promotion in public employment

and their application with retrospective effect,

answered the reference by upholding the

constitutional validity of the amendments, but with

certain conditions.

44. The vital issue which fell for determination

was whether by virtue of the implementation of the

Constitutional Amendments, the power of Parliament

was enlarged to such an extent so as to ignore all

constitutional limitations and requirements.

Applying the “width” test and “identity” test, the

Constitution Bench held that firstly it is the

width of the power under the impugned amendments

introducing amended Articles 16(4-A) and 16(4-B)

that had to be tested. Applying the said tests,

45

the Constitution Bench, after referring to the

various decisions of this Court on the subject,

came to the conclusion that the Court has to be

satisfied that the State had exercised its power in

making reservation for Scheduled Castes and

Scheduled Tribes candidates in accordance with the

mandate of Article 335 of the Constitution, for

which the State concerned would have to place

before the Court the requisite quantifiable data in

each case and to satisfy the Court that such

reservation became necessary on account of

inadequacy of representation of Scheduled Castes

and Scheduled Tribes candidates in a particular

class or classes of posts, without affecting the

general efficiency of service. The Constitution

Bench went on to observe that the Constitutional

equality is inherent in the rule of law. However,

it’s reach is limited because its primary concern

is not with efficiency of the public law, but with

its enforcement and application. The Constitution

46

Bench also observed that the width of the power and

the power to amend together with its limitations,

would have to be found in the Constitution itself.

It was held that the extension of reservation would

depend on the facts of each case. In case the

reservation was excessive, it would have to be

struck down. It was further held that the impugned

Constitution Amendments, introducing Article 16(4-

A) and 16(4-B), had been inserted and flow from

Article 16(4), but they do not alter the structure

of Article 16(4) of the Constitution. They do not

wipe out any of the Constitutional requirements

such as ceiling limit and the concept of creamy

layer on one hand and Scheduled Castes and

Scheduled Tribes on the other hand, as was held in

Indra Sawhney’s case (supra). Ultimately, after

the entire exercise, the Constitution Bench held

that the State is not bound to make reservation for

Scheduled Castes and Scheduled Tribes candidates in

matters of promotion but if it wished, it could

47

collect quantifiable data touching backwardness of

the applicants and inadequacy of representation of

that class in public employment for the purpose of

compliance with Article 335 of the Constitution.

45. In effect, what has been decided in M.

Nagaraj’s case (supra) is part recognition of the

views expressed in Virpal Singh Chauhan’s case

(supra), but at the same time upholding the

validity of the 77th, 81st, 82nd and 85th amendments on

the ground that the concepts of “catch-up” rule and

“consequential seniority” are judicially evolved

concepts and could not be elevated to the status of

a constitutional principle so as to place them

beyond the amending power of the Parliament.

Accordingly, while upholding the validity of the

said amendments, the Constitution Bench added that,

in any event, the requirement of Articles 16(4-A)

and 16(4-B) would have to be maintained and that in

order to provide for reservation, if at all, the

tests indicated in Article 16(4-A) and 16(4-B)

48

would have to be satisfied, which could only be

achieved after an inquiry as to identity.

46. The position after the decision in M. Nagaraj’s

case (supra) is that reservation of posts in

promotion is dependent on the inadequacy of

representation of members of the Scheduled Castes

and Scheduled Tribes and Backward Classes and

subject to the condition of ascertaining as to

whether such reservation was at all required. The

view of the High Court is based on the decision in

M. Nagaraj’s case (supra) as no exercise was

undertaken in terms of Article 16(4-A) to acquire

quantifiable data regarding the inadequacy of

representation of the Schedule Castes and Scheduled

Tribes communities in public services. The

Rajasthan High Court has rightly quashed the

notifications dated 28.12.2002 and 25.4.2008 issued

by the State of Rajasthan providing for

consequential seniority and promotion to the

members of the Scheduled Castes and Scheduled

49

Tribes communities and the same does not call for

any interference. Accordingly, the claim of

Petitioners Suraj Bhan Meena and Sriram Choradia in

Special Leave Petition (Civil) No.6385 of 2010 will

be subject to the conditions laid down in M.

Nagaraj’s case (supra) and is disposed of

accordingly. Consequently, Special Leave Petition

(C) Nos. 7716, 7717, 7826 and 7838 of 2010, filed

by the State of Rajasthan, are also dismissed.

47. Having regard to the nature of the facts

involved, each party will bear its own cost.

…………………………………………J.

**(ALTAMAS KABIR)**

**…………………………………………J.**

**(A.K. PATNAIK)**

**New Delhi**

**Dated: December 7, 2010**

**REPORTABLE**

**IN THE SUPREME COURT OF INDIA**

**CIVIL APPELLATE JURISDICTION**

**SPECIAL LEAVE PETITION (CIVIL) NO.6385 OF 2010**

**SURAJ BHAN MEENA & ANR. … PETITIONERS**

**VERSUS**

**STATE OF RAJASTHAN & ORS. … RESPONDENTS**

**WITH**

**SLP(C)NOS.7716, 7717, 7826, 7838 of 2010**

**J U D G M E N T**

**ALTAMAS KABIR, J.**

1. Since common questions of fact and law are

involved, five Special Leave Petitions have been

taken up for hearing and final disposal together.

While SLP(C)No.6385 of 2010 has been filed by Suraj

Bhan Meena & Anr., SLP(C)Nos.7716, 7717, 7826 and

7838 of 2010, have all been filed by the State of

Rajasthan.

2. All the petitioners are aggrieved by the

judgment and order dated 5th February, 2010, passed

by the Jaipur Bench of the Rajasthan High Court in

D.B. Civil Special Appeal (Writ) No.618/2009 filed

by the State of Rajasthan & Anr. against Bajrang

Lal Sharma & Ors., D.B. Civil Special Appeal (Writ)

No.3/2010 filed by Suraj Bhan Meena against Bajrang

Lal Sharma & Ors., D.B. Civil Special Appeal (Writ)

No.611/2009 filed by the State of Rajasthan against

Gyan Prakash Shukla, D.B. Civil Special Appeal

(Writ) No.610/2009 filed by the State of Rajasthan

against M.M. Joshi, D.B. Civil Writ Petition

No.8104/2008 filed by Bajrang Lal Sharma & Ors.

against the State of Rajasthan & Ors., D.B. Civil

Writ Petition No.6241/2008 filed by Gyan Prakash

Shukla & Anr. against the State of Rajasthan & Ors.

2

and D.B. Civil Writ Petition No.7775/2009 filed by

M.M. Joshi against the State of Rajasthan & Ors.

As indicated hereinbefore, all the matters were

heard and disposed of by a common judgment passed

by the Division Bench on 5th February, 2010. While

considering the writ petitions along with the writ

appeals, the Division Bench referred to the facts

of D.B. Civil Writ Petition No.8104/2008, against

which SLP(C)No.6385/2010 has been filed by Suraj

Bhan Meena and SLP(C)No.7716/2010 has been filed by

the State of Rajasthan. The other Special Leave

Petitions have been filed against the orders passed

in the Writ Petitions filed by the private

respondents therein.

3. All the writ petitioners, as also the

Petitioners in SLP(C)No.6385/2010, are members of

the Rajasthan Administrative Service and are

governed by the Rajasthan Administrative Service

Rules, 1954. The writ petitioners in their

respective writ petitions challenged the

3

Notification dated 25th April, 2008, issued by the

State of Rajasthan in exercise of its powers

conferred by the proviso to Article 309 of the

Constitution of India amending the Rajasthan

“Various Service Rules” with effect from

28.12.2002.

4. According to the writ petitioners, they had

been inducted in the Rajasthan Administrative

Service in December, 1982, through selection by the

Rajasthan Public Service Commission. Vide notice

dated 26th June, 2000, the State Government issued a

Provisional Seniority List of Rajasthan

Administrative Service Selection Grade as on

1.4.1997, in which the Writ Petitioner No.1,

Bajrang Lal Sharma, was placed above Suraj Bhan

Meena (Scheduled Tribe) and Sriram Choradia

(Scheduled Caste). The said Seniority List was

published pursuant to the order of this Court dated

16.9.1999, passed in the case of Ajit Singh-II &

Ors. Vs. State of Punjab & Ors. [(1999) 7 SCC 209]

4

and another order of the same date in the case of

Ram Prasad vs. D.K. Vijay [(1999) 7 SCC 251]. Once

again Provisional Seniority Lists were published on

27.11.2003 and 12.5.2008. Subsequently, the State

of Rajasthan published the final Seniority Lists of

Super Time Scale and Selection Scale of the service

on 24.6.2008 as on 1.4.1997 and Provisional

Seniority List dated 2.7.2008 as on 1.4.2008,

wherein the name of Bajrang Lal Sharma was shown

below the names of both Suraj Bhan Meena and Sriram

Choradia.

5. The Notification dated 25.4.2008, which was the

subject matter of challenge in the Writ Petition

was challenged on two grounds. It was firstly

contended that the proviso dated 28.12.2002, which

had been added to the Various Service Rules was

subject to the final decision of this Court in Writ

Petition (Civil) No.234/2002 filed by the All India

Equality Forum against the Union of India & Ors.,

but the same was yet to be decided. Therefore,

5

during the pendency of the Writ Petition before

this Court, the Respondents had acted improperly in

deleting the above-mentioned proviso in the Various

Service Rules by the Notification dated 25.4.2008,

which amounted to giving a consequential seniority

to candidates belonging to the Scheduled Castes and

Scheduled Tribes, which could not have been given

without quantifying the figures of Scheduled Castes

and Scheduled Tribes candidates to enable a

decision to be arrived at that reservation was

required in promotion and also to show that the

State had to pass such orders for compelling

reasons, such as, backwardness, inadequacy of

representation, as held by this Court in the case

of M. Nagaraj & Ors. vs. Union of India & Ors.

[(2006) 8 SCC 212]. It was contended that since

the State Government had not complied with the

directions given by this court in M. Nagaraj’s case

(supra), the Notification in question was liable to

be quashed. It was further urged on behalf of the

6

Writ Petitioner, Bajrang Lal Sharma, that in the

case of Indra Sawhney & Ors. Vs. Union of India &

Ors. [(1992) Supp.(3) SCC 217], this Court had held

that Article 16(4) of the Constitution of India did

not permit reservations in the matter of promotion.

Thereafter, the Constitution (77th Amendment) Act,

1995, was enacted and came into force on 17.6.1995.

The subsequent Special Leave Petitions filed by the

Union of India & Ors. against Virpal Singh Chauhan

& Ors. [(1995) 6 SCC 684], Ajit Singh Januja & Ors.

Vs. State of Punjab & Ors. [(1996) 2 SCC 715] and

Ajit Singh-II & Ors. Vs. State of Punjab & Ors.

[(1999) 7 SCC 209)], introduced the “catch-up” rule

and held that if a senior general candidate was

promoted after candidates from the Scheduled Castes

and Scheduled Tribes have been promoted to a

particular cadre, the senior general candidate

would regain his seniority on promotion in

relation to the juniors who had been promoted

against reserved vacancies.

7

6. The Parliament on 4.1.2002 amended the

Constitution by the Constitution (85th Amendment)

Act, 2001, in order to give the benefit of

consequential seniority to the reserved category

candidates with effect from 17.6.1995. The

constitutional validity of both the said

Constitution Amendment Acts was challenged before

this court in other writ petitions, including the

writ petition filed by M. Nagaraj and All India

Equality Forum. During the pendency of the writ

petitions, this Court passed an interim order

protecting the promotion and seniority of

general/OBC candidates. The Government of

Rajasthan, thereafter, deleted the proviso added

vide Notification dated 1.4.1997.

7. In M. Nagaraj’s case (supra), this Court while

upholding the constitutional validity of the

Constitution (77th Amendment) Act, 1995 and the

Constitution (85th Amendment) Act, 2001, clarified

8

the position that it would not be necessary for the

State Government to frame rules in respect of

reservation in promotion with consequential

seniority, but in case the State Government wanted

to frame such rules in this regard, then it would

have to satisfy itself by quantifiable data, that

there was backwardness, inadequacy of

representation in public employment and overall

administrative inefficiency and unless such an

exercise was undertaken by the State Government,

the rule relating to reservation in promotion with

consequential seniority could not be introduced.

8. Despite the decision in M. Nagaraj’s case, the

State Government by deleting the proviso, which had

been inserted vide notification dated 1.4.1997 on

the basis of the “catch-up” rule and further

deleting the new proviso added on 28.12.2002 in the

Various Service Rules of the State, had in effect

provided consequential seniority to the Scheduled

Castes and Schedule Tribes candidates, without

9

undertaking the exercise indicated in M. Nagaraj’s

case in respect of the three conditions laid down

in the said judgment. It was the case of the

Petitioners that the impugned notification dated

25.4.2008 was liable to be declared ultra vires to

the provisions of the Constitution being contrary

to the decision of this Court in M. Nagaraj’s case.

9. As indicated hereinbefore, it was also the case

of the Writ Petitioners that nowhere in Rule 33 of

the Rajasthan Administrative Service Rules has any

provision been made for consequential seniority to

reserved category promotees. As a result, after

the judgment in B.K. Sharma & Anr. Vs. State of

Rajasthan & Ors. [WLC (Raj.) 1998 (2) 583] and in

Ram Prasad’s case (supra), consequential seniority

could not have been assigned to reserve promotees

above the senior General/OBC candidates.

10. This was the view which had been taken by this

Bench in the cases of Virpal Singh Chauhan (supra)

10

and Ajit Singh-I (supra) to the effect that reserve

promotees would be entitled for accelerated

promotion, but not accelerated seniority. The same

view was reiterated by a Constitution Bench of this

Court on 16th September, 1999, while deciding Ajit

Singh-II’s case (supra). It is only on account of

the judgment in Virpal Singh Chauhan’s case (supra)

and in the case of Ajit Singh-I (supra), the State

Government vide notification dated 1.4.1997

inserted the new proviso in the Various Service

Rules.

11. The Constitution (85th Amendment) Act, 2001 was

thereafter passed on 4th January, 2002, with

retrospective effect from 16th September, 1995, with

regard to consequential seniority to reserve

promotees. It was the said amendments which were

the subject matter of challenge in several writ

petitions, including in M. Nagaraj’s case and in

the case of All India Equality Forum.

11

12. On behalf of the Petitioners, it was submitted

by Dr. Krishan Singh Chauhan, that the insertion of

the words “with consequential seniority” in clause

IVA of Article 16 of the Constitution after the

words “reservation in promotion”, was only an

enabling provision which was under challenge before

this Court and while the matter was sub-judice,

without waiting for the decision of this Court in

M. Nagaraj’s case and All India Equality Forum, the

State Government withdrew its earlier notification

dated 1st April, 1997 vide notification dated

28.12.2002. It has to be kept in mind that as in

M. Nagaraj’s case (supra), this Court has made it

mandatory on the part of the State Government to

undertake the three exercises in case any rule was

required to be framed by the State for reservation

in promotion with consequential seniority. It was

submitted that the withdrawal of the notification

dated 1.4.1997 by notification dated 28.12.2002

amounted to negating the judgment of this Court in

12

Ram Prasad’s case (supra) and, accordingly, the

notification dated 28.12.2002 was also liable to be

quashed by the Court. In short, the question to be

decided in this case is whether the State

Government was reintroducing a concept which had

been replaced pursuant to the orders passed by this

Court, which had been found to be *ultra vires* the

provisions of the Constitution.

13. It was urged on behalf of the Petitioners,

Suraj Bhan Meena and Sriram Choradia, that till the

decision of this Court in the case of Indra Sawhney

vs. Union of India [(1992) Supp. (3) SCC 217], this

Court had almost uniformly applied the rule of

reservation in promotion with consequential

seniority. In Indra Sawhney’s case (supra), this

Court had held that reservation in promotion was

unconstitutional, but permitted such reservation to

continue for a period of five years. It is

pursuant to the said decision in Indra Sawhney’s

case (supra), that the Parliament enacted the

13

Constitution (77th Amendment) Act, 1995. A contrary

view was taken in Union of India vs. Virpal Singh

Chauhan [(1995) 6 SCC 684], wherein it was laid

down that the grant of consequential seniority in

cases of reservation in promotion was illegal. The

issue was taken further in the case of Ajit Singh

Januja Vs. State of Punjab [(1996) 2 SCC 715]

holding that the grant of consequential seniority

to reserve category employees, who had got

promotion on the basis of reservation, was

unconstitutional.

14. On 7th May, 1997, another Bench of this Court in

the case of Jagdish Lal Vs. State of Haryana

[(1997) 6 SCC 538] took a diametrically opposite

view upon holding, inter alia, that equality should

not remain mere idle incantation, but it had to

become a vibrant living reality since equality of

opportunity could not simply be judged on the merit

of the marks obtained by him but by taking into

account de facto inequalities which exist in

14

society and to give preference to the socially and

economically disadvantaged persons by inflicting

handicaps on those more disadvantageously placed.

Although such affirmative action might appear to be

discriminatory, it was calculated to bring about

equality on a broader basis by eliminating the de

facto inequalities between the weaker sections and

the stronger sections of the community and placing

them on a footing of equality in relation to public

employment.

15. In view of the opposite stands taken in Jagdish

Lal’s case (supra) and in Ajit Singh-I’s case

(supra), the matters were referred to the

Constitution Bench which approved the decision in

Ajit Singh Januja’s case (supra) and Virpal Singh

Chauhan’s case (supra), upon holding that the case

of Jagdish Lal had not been correctly decided. As

a result, the rule of “regain” and “catch-up” was

explained as the correct interpretation of the

rules. As mentioned hereinbefore, by enacting the

15

Constitution (85th Amendment) Act, 2001, the

Parliament constitutionally nullified the principle

of “regain” and “catch-up” by enacting the

Constitution (77th Amendment) Act, 1995 under its

constituent power under Article 368 of the

Constitution. It was sought to be urged by Dr.

Krishan Singh Chauhan, learned Advocate, that the

power which was existing in the Government to make

provision for consequential seniority in promotion

of reservation, which had been eclipsed on account

of the decision of this Court in Virpal Singh

Chauhan’s case (supra), stood revived by the

enactment of the Constitution (85th Amendment) Act,

2001, with retrospective effect.

16. Learned counsel for the Petitioners referred to

various decisions on the doctrine of eclipse, which

we will refer to, if necessary.

17. Learned counsel, in addition, contended that

the Respondents had not acquired any vested right

16

since the Constitution Amendment Acts had been

enacted by the Parliament only with the intention

of nullifying the effects of the judgments of this

Court in Virpal Singh Chauhan’s case (supra) and

Ajit Singh-II’s case (supra). Dr. Chauhan

submitted that the Constitution (85th Amendment)

Act, 2001, given effect to from 17th June, 1995, had

constitutionally nullified the principle of “regain

of seniority” and the principle of “catch-up” which

had been explained by this Court in Virpal Singh

Chauhan’s case (supra).

18. Mr. P.P. Rao, learned Senior Advocate,

appearing for the State of Rajasthan, submitted at

the very outset that the reliefs prayed for in the

several writ petitions, which are common in the

Special Leave Petitions, praying for a direction

that the benefit of reservation in promotion with

consequential seniority, should not be given unless

the three compelling conditions as indicated in M.

Nagaraj’s case (supra), were fulfilled, was totally

17

misconceived in the absence of any challenge to the

order dated 10th February, 1975, passed by the State

of Rajasthan providing for reservations in favour

of Scheduled Castes and Scheduled Tribes candidates

in promotion. Furthermore, no such prayer had been

granted by the High Court. Mr. Rao submitted that

the reliefs prayed for was based on a complete

misreading of the decision in M. Nagaraj’s case

(supra).

19. Mr. Rao urged that the High Court took an

erroneous view that seniority is a vested right in

view of the observations made in paragraph 123 in

M. Nagaraj’s case that the State was not bound to

provide for reservation for Scheduled

Castes/Scheduled Tribes candidates in matters of

promotions, but that if it intended to exercise its

discretion and make such provision, it had to

collect quantifiable data showing backwardness of

the class and inadequacy of representation of that

class in public employment in addition to

18

compliance of Article 335 of the Constitution. Mr.

Rao submitted that the High Court, however,

overlooked the opening part of the judgment which

indicated that the main issue involved the extent

of reservation. Mr. Rao submitted that the High

Court erred in proceeding on the basis that

seniority in Government service is a vested right,

since it is now well settled that the seniority of

a Government servant can be interfered with by the

State by making a Rule under the Proviso to Article

309 of the Constitution. In this regard, Mr. Rao

referred to and relied on the decision of this

Court in S.S. Bola & Ors. Vs. B.D. Saldana & Ors.

[(1997) 8 SCC 522], and T. Narasimhulu & Ors. Vs.

State of A.P. & Ors. [(2010) 5 SCALE 730], where

the aforesaid principle was enunciated. It was

urged that even otherwise, a right would accrue

only when an order is issued to a Government

servant. It was further urged that the High

Court’s reliance on the observations in M.

19

Nagaraj’s case (supra), and the statement of the

Advocate General that the exercise of collection of

quantifiable data was not undertaken, is without

basis on the ground that the collection of

quantifiable data showing backwardness and

inadequacy of representation would only arise when

the State wished to exercise its discretion in

making reservation for Scheduled Tribes and

Scheduled Castes candidates in matters of promotion

and not in a case where reservation had already

been made as far back as on 10.2.1975 and was

allowed to continue uninterruptedly.

20. Mr. Rao submitted that as far as the “Catch-up

Principle” is concerned, the same had been deleted

by the impugned notification dated 25.4.2008. The

first Notification deleted the said rule with

effect from 1.4.1997, while retaining some

reservation in the form of a Proviso which too was

ultimately deleted by the second Notification with

effect from 28.12.2002. Mr. Rao also referred to

20

the observation made in M. Nagaraj’s case that it

could not be said that the equality code under

Articles 14, 15 and 16 was violated by the deletion

of the “Catch-up” Rule. Mr. Rao submitted that

this declaration of the Constitution Bench had not

been noticed by the High Court when it held that

the two impugned notifications violated Articles 14

and 16 of the Constitution.

21. Mr. Rao also submitted that the doctrine of

eclipse, as urged on behalf of the Petitioners, was

not applicable to the facts of the case since after

over-ruling the decision in General Manager,

Southern Railway Vs. Rangachari [(1962) 2 SCR 586],

this Court had extended the life of the existing

reservations for a period of five years.

Accordingly, the Government Order dated 10.2.1975

survived the decision in Indra Sawhney’s case

(supra) and during the period of extension of five

years, Parliament intervened and inserted Clause

(4-A) in Article 16 empowering the State to

21

continue reservations in promotions already made or

to make such reservations, if not already made.

Mr. Rao urged that the 85th Amendment was enacted

not merely to withdraw the Office Memorandum dated

31.1.1997, which gave effect to the catch-up rule,

but to restore the benefit of consequential

seniority with retrospective effect from 17.6.1995

as if there never was any Catch-up Rule at all in

the eye of law. Mr. Rao submitted that the

contention of the Petitioners that for the purpose

of giving the benefit of consequential seniority,

the State would have to undertake the collection of

quantifiable data in regard to backwardness,

inadequacy of representation and non-impairment of

efficiency, was based on a misunderstanding of the

law declared in M. Nagaraja’s case (supra), since

it defeats the intent of Parliament to give

retrospective effect to the Constitution (85th

Amendment) Act.

22

22. In addition, it was pointed out that in

M. Nagaraj’s case (supra) it had been categorically

indicated that the concept of consequential

seniority did not violate the equality code under

Articles 14, 15 and 16 by deleting the Catch-up

Principle , as was held in Virpal Singh Chauhan’s

case (supra). It was submitted that the instant

case is a simple case of deletion of the Catch-up

Principle in view of the Constitution (85th

Amendment) Act. It was contended that the

provisional seniority list which was quashed by the

High Court could never become the ground for any

accrued right to seniority.

23. Appearing for the Intervenor, Rajasthan Vanijik

Kar Anusuchit Jati-Janjati Mahasangh, hereinafter

referred to as “Mahasangh”, Mr. Pallav Shishodia,

learned Senior Advocate, reiterated Mr. Rao’s

submissions regarding the observations made by this

Court in paragraph 79 of M. Nagaraj’s case that the

concept of “Catch-up Rule” and “consequential

23

seniority” are judicially evolved concepts not

implicit in Clauses (1) and (4) of Article 16 of

the Constitution and with the concept of equality

contained in Articles 14, 15 and 16 stood violated

by the deletion of the “Catch-up Rule”. The

Constitution Bench also observed that such concepts

were based on principles which could not be

elevated to the status of constitutional principles

or constitutional limitations. Mr. Shishodia urged

that the deletion of the Proviso added by the

Amendment of 1997 by way of the impugned

Notification of 28.12.2002 and 25.4.2008, merely

gave a quietus to the Catch-up Rule in harmony with

the Constitution (85th Amendment) Act, which was

introduced with the specific object of negating the

effect of the decisions of this Court in Virpal

Singh Chauhan’s case (supra), Ajit Singh-I’s case

(supra) and in Ajit Singh-II’s case (supra). It

was submitted that since the 85th Amendment had been

upheld by the constitution Bench in M. Nagaraj’s

24

case (supra) the State was duty bound to restore

the original practice of giving seniority from the

date of substantive appointment, without reference

to the Catch-up Principle.

24. Mr. Shishodia concluded on the note that just

as the repealing of an enactment would not

automatically revive the original Act, on the same

analogy, mere setting aside or quashing of the

impugned Notification dated 28.12.2002 and

25.4.2008 would not revive the “Catch-up” Rule

introduced by Notification dated 1.4.1997. While

the repeal of the two Notifications dated

28.12.2002 and 25.4.2008 removed the eclipse caused

by the judgment in Ajit Singh-I’s case (supra), Ram

Prasad’s case (supra) and Ajit Singh-II’s case

(supra), no fresh right of consequent seniority was

conferred.

25. Mr. M.L. Lahoti, learned Senior Advocate,

appearing for Respondent No.13 in SLP(C)No.6385 of

25

2010, while reiterating the submissions made on

behalf of the other Respondents, submitted that the

question of reservation had been gone into in

detail in Indra Sawhney’s case (supra) and it had

been held that if a feeling of complacency relating

to promotion was allowed to prevail amongst

candidates from the reserved categories, it was

bound to generate a feeling of despondency among

candidates from the open categories which would

affect the efficiency of administration. It was

also held that putting the members of the Backward

Class on a fast track would lead to leap-frogging

which could have disastrous effects on the moral of

the candidates from the general candidates.

Learned counsel went on to submit that the 77th and

85th Constitutional Amendments were brought about in

the Constitution after the judgment in Indra

Sawhney’s case and provided the Government with

power to provide reservation in promotion and

consequential seniority. Although, the same was

26

challenged in the All India Equality Forum’s case,

as also in M. Nagaraja’s case, this Court upheld

the constitutional validity of all the amendments,

subject to compelling circumstances being fulfilled

by the States. Mr. Lahoti also referred to the

contents of paragraph 123 of the judgment in M.

Nagaraja’s case (supra) which has been referred to

hereinbefore, relating to the “extent of

reservation” to be made by the State Government.

26. Mr. Lahoti submitted that in response to

several applications made under the Right to

Information Act, 2005, little or no information was

supplied with regard to the population, education,

public employment, private employment, selfemployment,

below poverty line population and percapita

income of Scheduled Tribes and Scheduled

Castes for the years 1951, 2001 and 2009. In fact,

the response of the National Commission for

Scheduled Tribes was that they did not have the

requisite data for all the information sought for.

27

27. Mr. Lahoti lastly contended that in the absence

of any data in relation to Scheduled Castes and

Scheduled Tribes, the parameters laid down in M.

Nagaraja’s case were not fulfilled and Rule 33 of

the Rajasthan Administrative Service Rules, 1954

providing for consequential seniority, was

unconstitutional as no exercise had been undertaken

by the State pursuant to Article 16(4-A) of the

Constitution, and, as such it was not entitled to

provide consequential seniority to Scheduled Castes

and Scheduled Tribes employees.

28. Mr. M.R. Calla, learned Senior Advocate, who

appeared for the sole Respondent, Mr. O.P. Harsh,

in Special Leave Petition (Civil) No.7838 of 2010,

contended that as far as his client was concerned,

he was the Selection Scale promotee of the year

1991-92 and the judicial decision upholding his

position had attained finality and had nothing to

do with the amendment of the rules or the

28

constitutional amendment with retrospective effect

from 17th June, 1995. It was submitted that in his

case there was no question of any general category

candidate gaining seniority over him once he had

superseded them on the basis of merit in the year

1991-92. In other words, once a general category

candidate, though initially senior to him, failed

to compete against him in merit in the year 1991-

92, he could not regain seniority over his client

even if he had been promoted in any subsequent

year. Mr. Calla urged that when Shri Harsh had

been given the benefit of the “catch-up” rule in

terms of the notification dated 1.4.1997, the

general category candidates, who were senior to him

but had been superseded by him on the basis of

merit in the year 1991-92 for the selection scale,

had been wrongly placed above him. Mr. Calla

further submitted that such an act on the part of

the Respondents having been challenged by Shri

Harsh in Writ Petition No.3136 of 2000, which was

29

allowed on 30th May, 2001 and the subsequent

challenge thereto before the Division Bench having

been dismissed, the order dated 12.9.2001 of the

learned Single Judge had attained finality.

29. Mr. Calla also referred to the decision of this

Court in M. Nagaraj’s case (supra) and submitted

that despite the constitutional mandate to the

Government as per the 77th and 85th amendments, to

form an opinion relating to adequate representation

for exercise of the powers under Articles 16(4) and

16(4-A) of the Constitution, no such exercise had

been undertaken by the State before exercising the

enabling power. It was submitted that adequate

representation of candidates cannot be a constant

factor for ever, but was variable for the purpose

of providing adequate representation in the

services, as circumstances had changed after 1975.

Mr. Calla submitted that the exercise for adequate

representation was the most important factor for

the Government to exercise its powers under Article

30

16(4) and 16(4-A) of the Constitution and the same

could not be avoided by the Government and the

failure to follow the said mandate rendered the

exercise of the enabling power invalid. Mr. Calla

submitted that the various data which came to be

disclosed during the hearing of the matter, clearly

show that Scheduled Castes and Scheduled Tribes

candidates were adequately represented and had at

times even exceeded the quota and as such it was

necessary for an exercise to be undertaken to

ascertain the representation of such candidates.

Mr. Calla submitted that, in any event, since no

injustice had been done to Scheduled Castes and

Scheduled Tribes candidates, the petitioners could

have no legitimate cause for grievance with the

order of the High Court.

30. Dr. Rajeev Dhawan, learned Senior Advocate who

appeared for the Respondent No.10 in Special Leave

Petition (Civil) No.7716 of 2010, firstly contended

that the main issue for decision in this case is

31

whether the conditions enumerated in M. Nagaraj’s

case (supra) applied to cases of seniority and

promotion after 17th June, 1995, from which date the

amendments were declared to be valid in M.

Nagaraj’s case (supra). Dr. Dhawan submitted that

in M. Nagaraj’s case (supra) this Court was called

upon to consider the provisions of the Constitution

(77th, 81st, 82nd and 85th Amendment) Acts relating to

reservation in promotion, the principle of carry

over, enabling preservation of principles of

efficiency and providing for consequential

seniority by amending Article 16(4-A) by

substituting the words “in matters of promotion,

with consequential seniority, to any class”, in

place of the words “in matters of promotion to any

class”. Dr. Dhawan submitted that by the

Constitution (85th Amendment) Act, 2001, the

legislature reintroduced the concept of

consequential seniority to any class in matters of

promotion.

32

31. It was submitted that after the decision in

Virpal Singh Chauhan’s case (supra), the provisions

relating to “catch-up” were discontinued and the

protection which had been given against disputes of

seniority by juniors by the notification dated

1.4.1997 was withdrawn, but with a proviso of

maintaining the status-quo that was existing as on

that date.

32. Dr. Dhawan contended that the exercise to be

undertaken as per the directions in M. Nagaraj’s

case (supra) was mandatory and admittedly such an

exercise had not been undertaken before grant of

promotion. The Division Bench also held that the

rights which had been preserved by virtue of the

notifications dated 1.4.1997 and 28.12.2002 were

vested rights in favour of the writ petitioners and

by the impugned judgment, the notifications dated

28.12.2002 and 25.4.2008 had been rightly quashed.

Dr. Dhawan urged that by the notifications dated

33

1.4.1997 and 28.12.2002, the Government of

Rajasthan had protected the seniority and merit of

candidates. The decision in M. Nagaraj’s case made

a distinction between the existence and the width

of the exercise of power under the amendments and

validates the amendments subject to the exercise

emanating from the above-mentioned principles. Dr.

Dhawan submitted that the decision in M. Nagaraj’s

case did not automatically invalidate or validate

any exercise between when the amendments were held

to be valid, and 4.1.2000 from when consequential

seniority was required to be considered in terms of

such amendment.

33. It was submitted that since the State had not

undertaken the exercise which was mandatory in

terms of the judgment in M. Nagaraj’s case (supra),

the State could not, either directly or indirectly,

circumvent or ignore or refuse to undertake the

exercise by taking recourse to the Constitution

34

(85th Amendment) Act providing for reservation in

promotion with consequential seniority.

34. Dr. Dhawan urged that the powers conferred on

the State under Articles 16(4), 16(4-A) and 16(1-B)

of the Constitution are enabling in nature and the

expression “consequential seniority” was optional

and not a requirement. Dr. Dhawan also urged that

what was restored by the decision in M. Nagaraj’s

case (supra) was merely the enabling power of the

Government and exercise of such power in relation

to consequential seniority by the State of

Rajasthan would still have to be reconsidered in

accordance with the decision in M. Nagaraj’s case

(supra).

35. Dr. Dhawan submitted that the seniority of the

candidates who had been promoted on merit was

protected by the notification dated 1.4.1997 and

the same was required to be retained and the

contingent protection given by the notification of

35

28.12.2002 was also required to be retained, though

the contingency in the last sentence of the

notification was liable to be struck down. Dr.

Dhawan also urged that the restoration of

consequential seniority in the notification of

25.4.2002, without conducting the exercise as

contemplated in M. Nagaraj’s case (supra), was

liable to be struck down and if the State wanted to

introduce a provision for consequential seniority,

it would have to follow the procedure indicated in

M. Nagaraj’s case (supra).

36. The primary question which we are called upon

to answer in these five Special Leave Petitions is

whether the amended provisions of Article 16(4-A)

of the Constitution intended that those belonging

to the Scheduled Castes and Schedule Tribes

communities, who had been promoted against reserved

quota, would also be entitled to consequential

seniority on account of such promotions, or would

the “catch-up” rule prevail.

36

37. The said question has been the subject matter

of different decisions of this Court, but the

discordant note was considered and explained by the

Constitution Bench in M. Nagaraj’s case (supra). On

account of reservation those who were junior to

their seniors, got the benefit of accelerated

promotions without any other consideration,

including performance. Those who were senior to the

persons who were promoted from the reserved

category were not overlooked in the matter of

promotion on account of any inferiority in their

work performance. It is only on account of

fortuitous circumstances that juniors who belong to

the reserve category were promoted from that

category before their seniors could be

accommodated.

38. The question relating to reservation in

promotional posts fell for the consideration of

this Court in Indra Sawhney’s case (supra) for

37

construction of Article 16(4) of the Constitution

relating to the State’s powers for making provision

for reservation of appointments or posts in favour

of any backward class of citizens, which in the

opinion of the State, was not adequately

represented in services under the State. The

further question for determination was whether such

power extended to promotional posts. This Court

answered the questions by holding that Article

16(4) does not permit provision for reservation in

the matter of promotion. Further, such rule was to

be given effect to only prospectively and would not

affect the promotions already made, whether made on

regular basis or on any other basis. Accordingly,

apart from holding that Article 16(4) does not

permit provision for reservation in the matter of

promotion, this Court also protected the promotees

who had been appointed against reserved quotas and

a direction was also given that wherever

reservations are provided in the matter of

38

promotion, such reservation would continue in

operation for a period of five years from the date

of the judgment. In other words, the right of

promotion was protected only for a period of 5

years from the date of the judgment and would cease

to have effect thereafter.

39. The matter did not end there. The Constitution

(77th Amendment) Act, 1995, came into force on 17th

June, 1995. A subsequent question arose in the

case of Union of India vs. Virpal Singh Chauhan,

[(1995) 6 SCC 684], as to whether the benefit of

accelerated promotion through reservation or the

roster system would give such promotees seniority

over general category promotees who were promoted

subsequently. The said question arose in regard to

promotion of Railway Guards in non-selection posts

by providing concession to Scheduled Castes and

Scheduled Tribes candidates and it was sought to be

contended that the reservation provided was not

only at the stage of initial appointment, but at

39

every stage of subsequent promotions. In the said

case, the Petitioners, who were general category

candidates and the Respondents who were members of

the Scheduled Castes and Scheduled Tribes were in

the grade of Guards Grade ‘A’ in the Northern

Railway. On 1st August, 1986, the Chief

Controller, Tundla, promoted certain general

category candidates on ad-hoc basis to Grade ‘A’

Special. Within less then three months, however,

they were reverted and in their place members of

the Scheduled Castes and Scheduled Tribes were

promoted. Complaining of such action as being

illegal, arbitrary and unconstitutional, Virpal

Singh Chauhan and others moved the High Court, but

the petition was transferred to the Central

Administrative Tribunal. The Tribunal, inter alia,

held that persons who had been promoted by virtue

of the application of roster would be given

accelerated promotion but not seniority, and that

the seniority in a particular grade amongst the

40

incumbents available for promotion to the next

grade would be re-cast each time new incumbents

entered from the lower grade on the basis of

initial Grade ‘C’ seniority. This came to be

recognized as the “catch-up” rule. The matter was

brought to this Court by the Union of India and

this Court confirmed the view taken by the

Tribunal.

40. The same view was reiterated in the case of

Ajit Singh Januja’s case (supra) wherein it was

held further that by accelerated promotion

Scheduled Castes/Scheduled Tribes and Backward

Class candidates could not supersede their seniors

in the general category by accelerated promotion,

simply because that their seniors in the general

category had been promoted subsequently. It was

observed that balance has to be maintained vis-àvis

reservation.

41

41. After the decision rendered in Virpal Singh

Chauhan’s case (supra) and in Ajit Singh-I’s case

(supra), in which the claim of reserved category

candidates in promotional posts with consequential

seniority was negated, the question surfaced once

again in the case of Jagdish Lal & Ors. Vs. State

of Hayrana & Ors. [(1997) 6 SCC 538], where a Bench

of Three Judges took a different view. Their

Lordships held that the recruitment rules had

provided for fixation of seniority according to

length of continuous service on a post in the

service. Interpreting the said provisions, Their

Lordships held that in view of the said rules those

Scheduled Castes and Scheduled Tribes candidates,

who though junior to others in the general

category, had got promotion earlier than their

seniors in the general category candidates and

would, therefore, be entitled to get seniority with

reference to the date of their promotion. Their

Lordships held that the general candidates by

42

relying on Virpal Singh Chauhan’s case (supra) and

Ajit Singh Januja’s case (supra) could not derive

any benefit therefrom.

42. This resulted in the vexed question being

referred to the Constitution Bench. Of the several

cases taken up by the Constitution Bench, we are

concerned with the decision rendered in the case of

Ram Prasad vs. D.K. Vijay [(1999) 7 SCC 251] and

Ajit Singh-II & Ors. Vs. State of Punjab & Ors.

[(1999) 7 SCC 209]. Differing with the views

expressed in Jagdish Lal’s case (supra), the

Constitution Bench in Ajit Singh-II’s case (supra)

affirmed the earlier decision in Virpal Singh

Chauhan’s case (supra) and Ajit Singh Januja’s case

(supra) and overruled the views expressed in

Jagdish Lal’s case (supra). The constitution Bench

reiterated the views expressed in Ajit Singh-I’s

case (supra) that those who had obtained the

benefit of accelerated promotion should not be

reverted as that would cause hardship to them, but

43

they would not be entitled to claim seniority in

the promotional cadre. Quite naturally, the same

view was expressed in Ram Prasad’s case (supra)

which was also decided on the same day. In the

said case, while affirming the decision in Ajit

Singh-I’s case (supra), this Court directed

modification of the seniority lists which had been

prepared earlier, to fall in line with the decision

rendered in Ajit Singh-I’s case (supra) and Virpal

Singh Chauhan’s case (supra).

43. Thereafter, as mentioned hereinbefore, on 4th

January, 2002, the Parliament amended the

Constitution by the Constitution (85th Amendment)

Act, 2001, in order to restore the benefit of

consequential seniority to the reserved category

candidates with effect from 17th June, 1995. The

constitutional validity of both the Constitution

Amendment Acts was challenged in this Court in

several Writ Petitions, including the Writ

Petitions filed by M. Nagaraj and the All India

44

Equality Forum. The Constitution Bench while

considering the validity and interpretation as also

the implementation of the Constitution (77th, 81st,

82nd and 85th Constitutional Amendment) Acts and the

effect thereof on the decisions of this Court in

matters relating to promotion in public employment

and their application with retrospective effect,

answered the reference by upholding the

constitutional validity of the amendments, but with

certain conditions.

44. The vital issue which fell for determination

was whether by virtue of the implementation of the

Constitutional Amendments, the power of Parliament

was enlarged to such an extent so as to ignore all

constitutional limitations and requirements.

Applying the “width” test and “identity” test, the

Constitution Bench held that firstly it is the

width of the power under the impugned amendments

introducing amended Articles 16(4-A) and 16(4-B)

that had to be tested. Applying the said tests,

45

the Constitution Bench, after referring to the

various decisions of this Court on the subject,

came to the conclusion that the Court has to be

satisfied that the State had exercised its power in

making reservation for Scheduled Castes and

Scheduled Tribes candidates in accordance with the

mandate of Article 335 of the Constitution, for

which the State concerned would have to place

before the Court the requisite quantifiable data in

each case and to satisfy the Court that such

reservation became necessary on account of

inadequacy of representation of Scheduled Castes

and Scheduled Tribes candidates in a particular

class or classes of posts, without affecting the

general efficiency of service. The Constitution

Bench went on to observe that the Constitutional

equality is inherent in the rule of law. However,

it’s reach is limited because its primary concern

is not with efficiency of the public law, but with

its enforcement and application. The Constitution

46

Bench also observed that the width of the power and

the power to amend together with its limitations,

would have to be found in the Constitution itself.

It was held that the extension of reservation would

depend on the facts of each case. In case the

reservation was excessive, it would have to be

struck down. It was further held that the impugned

Constitution Amendments, introducing Article 16(4-

A) and 16(4-B), had been inserted and flow from

Article 16(4), but they do not alter the structure

of Article 16(4) of the Constitution. They do not

wipe out any of the Constitutional requirements

such as ceiling limit and the concept of creamy

layer on one hand and Scheduled Castes and

Scheduled Tribes on the other hand, as was held in

Indra Sawhney’s case (supra). Ultimately, after

the entire exercise, the Constitution Bench held

that the State is not bound to make reservation for

Scheduled Castes and Scheduled Tribes candidates in

matters of promotion but if it wished, it could

47

collect quantifiable data touching backwardness of

the applicants and inadequacy of representation of

that class in public employment for the purpose of

compliance with Article 335 of the Constitution.

45. In effect, what has been decided in M.

Nagaraj’s case (supra) is part recognition of the

views expressed in Virpal Singh Chauhan’s case

(supra), but at the same time upholding the

validity of the 77th, 81st, 82nd and 85th amendments on

the ground that the concepts of “catch-up” rule and

“consequential seniority” are judicially evolved

concepts and could not be elevated to the status of

a constitutional principle so as to place them

beyond the amending power of the Parliament.

Accordingly, while upholding the validity of the

said amendments, the Constitution Bench added that,

in any event, the requirement of Articles 16(4-A)

and 16(4-B) would have to be maintained and that in

order to provide for reservation, if at all, the

tests indicated in Article 16(4-A) and 16(4-B)

48

would have to be satisfied, which could only be

achieved after an inquiry as to identity.

46. The position after the decision in M. Nagaraj’s

case (supra) is that reservation of posts in

promotion is dependent on the inadequacy of

representation of members of the Scheduled Castes

and Scheduled Tribes and Backward Classes and

subject to the condition of ascertaining as to

whether such reservation was at all required. The

view of the High Court is based on the decision in

M. Nagaraj’s case (supra) as no exercise was

undertaken in terms of Article 16(4-A) to acquire

quantifiable data regarding the inadequacy of

representation of the Schedule Castes and Scheduled

Tribes communities in public services. The

Rajasthan High Court has rightly quashed the

notifications dated 28.12.2002 and 25.4.2008 issued

by the State of Rajasthan providing for

consequential seniority and promotion to the

members of the Scheduled Castes and Scheduled

49

Tribes communities and the same does not call for

any interference. Accordingly, the claim of

Petitioners Suraj Bhan Meena and Sriram Choradia in

Special Leave Petition (Civil) No.6385 of 2010 will

be subject to the conditions laid down in M.

Nagaraj’s case (supra) and is disposed of

accordingly. Consequently, Special Leave Petition

(C) Nos. 7716, 7717, 7826 and 7838 of 2010, filed

by the State of Rajasthan, are also dismissed.

47. Having regard to the nature of the facts

involved, each party will bear its own cost.

…………………………………………J.

**(ALTAMAS KABIR)**

**…………………………………………J.**

**(A.K. PATNAIK)**

**New Delhi**

**Dated: December 7, 2010**

5050

CENTRAL ADMINISTRATIVE TRIBUNAL

PRINCIPAL BENCH

NEW DELHI

Original Application No.2211/2008

This the 2nd day of December, 2010

HONBLE SHRI JUSTICE V. K. BALI, CHAIRMAN

HONBLE SHRI L. K. JOSHI, VICE-CHAIRMAN (A)

HONBLE SMT. MEERA CHHIBBER, MEMBER (J)

1. All India Equality Forum

having its registered office at

C-51, Fateh Nagar, Jail Road,

Tilak Nagar, New Delhi-110018

through its President, Shri J. R. Agarwal

S/o Atma Ram Agarwal,

R/o II B-4, J.N.Vyas Colony,

Shiv Bari Road, Bikaner-334003.

2. Jagmohan Singh S/O tirath Singh,

working as Office Superintendent,

General Branch, Northern Railway,

Headquarters Office, Baroda House,

New Delhi.

3. Rajendra Kumar Bhatnagar S/O Durga Prasad,

working as Chief Office Superintendent,

Mech. Branch, DRMs Office,

North Western Railway,

Bikaner. Applicants

( By Shri Puneet Jain, Advocate )

Versus

1. Union of India through

Secretary, Department of Personnel & Training,

North Block, New Delhi.

2. Chairman, Railway Board,

Rail Bhawan, New Delhi.

3. Director (Estt) (NG),

Railway Board,

Rail Bhawan, New Delhi.

4. General Manager,

Northern Railway,

Headquarters Office,

Baroda House, New Delhi.

5. General Manager,

North Western Railway,

Headquarters Office, Jaipur.

6. Divisional Railway Manager,

North Western Railway, Bikaner.

7. All India SC/ST Railway Employees Association,

171-B Basant Lane, Railway Colony,

New Delhi-110055. Respondents

( By Shri Parag P. Tripathi, ASG and with him Shri Kunal Bhati, Shri V. S. R. Krishna and Shri Shailendra Tiwar, Advocates )

O R D E R

Justice V. K. Bali, Chairman:

This country has witnessed marathon litigation on reservation for Scheduled Castes (SC), Scheduled Tribes (ST) and Other Backward Classes (OBC) categories in the matter of public employment. Insofar as, litigation as regards reservation in the initial appointments may have received a quietus on the litigation front, one would have thought that reservation in promotion, in view of insertion of Article 16(4A) in the Constitution of India and the judgment of the Honble Supreme Court in M. Nagaraj v Union of India [(2006) 8 SCC 212] may have also received a quietus, but that is not so. The facts of the present case, as enumerated hereinafter, would illustrate what we have said above.

2. Applicant no.1 is an association registered under the Societies Registration Act, 1860. This forum is stated to be fighting for redressal of the grievances having common cause and relief of all employees of the Indian railways. The association has filed this Original Application under Section 19 of the Administrative Tribunals Act, 1985 for redressal of grievances of all employees of the railways in each category and grade belonging to groups B, C and D. Applicant nos. 2 and 3 have joined the applicant no.1 association being aggrieved by one and the same cause of action, as the relief claimed is common, as also to avoid multiplicity of litigation and enormity of expenses. The challenge posed by the applicants in the present Application is to circulars dated 29.2.2008 (Annexure A-1), 8.3.2002 (Annexure A-2) and 13.1.2005 (Annexure A-3). In consequences of setting aside the impugned circulars as mentioned above, the applicants seek a direction to be issued to the respondents to re-cast the seniority list of all railway employees in each category and grade in groups B, C and D on the Indian railways on the basis of original date of appointment and that no benefit of consequential seniority to earlier promoted SC/ST employees be allowed. The applicants seek a further direction to be issued to the respondents to review all promotions made in the past on the basis of revised seniority list to be prepared on the basis of original date of appointment with consequential benefits of fixation of pay and payment of arrears. We may straightway refer to circulars as mentioned above, as the controversy in issue will become clear from the reading of the same. We may, however, first make a mention of the circulars dated 8.3.2002 and 13.1.2005 which came into being before the decision recorded by the Honble Supreme Court in M. Nagaraj (supra). Circular dated 29.2.2008 has come into being after the decision in the case aforesaid. The first circular challenged dated 8.3.2002 deals with principles for determining the seniority of staff belonging to SC/ST promoted earlier vis-`-vis General/OBC staff promoted later. Reading of the circular aforesaid would reveal that in pursuance of the Constitution (Eighty-fifth Amendment) Act, 2001 (hereinafter to be referred as the Act of 2001), amending Article 16 (4A) of the Constitution, right from the date of its inclusion in the Constitution, i.e., 17.6.1995, the Government through the Department of Personnel and Training (DOP&T), had decided to negate the effects of the DOP&Ts OM dated 30.1.1997 with a view to allow the SC/ST employees to retain the seniority in the case of promotion by virtue of rule of reservation. That being the position, it has further been observed in the impugned circular that the Ministry of Railways had also considered the matter and decided to negate the effects of para 319 A of the Indian Railway Establishment Manual (IREM) Volume-I, 1989. The instructions contained in para 319 A of IREM Volume-I, it appears, came into being pursuant to the judgment of the Honle Supreme Court in Union of India v Virpal Singh Chauhan [JT 1995 (7) SC 231], according to which, a general category employee, as and when promoted, would catch up in the matter of seniority with the junior, who was promoted earlier only because of reservation. The Ministry of Railways decided as follows:

a) SC/ST Railway Servants shall on their promotion by virtue of rule of reservation/roster, be entitled to consequential seniority also; and

b) The above decision shall be effective from 17th June 1995.

Inasmuch as, the provisions contained in [para 319 A of IREM, volume-I, as introduced vide ACS nos. 25 and 44 under Ministrys letters dated 28.2.1997 and 15.5.1998 respectively, were withdrawn, it was also observed that seniority of the railway servants determined in the light of para 319 A would be revised as if this para never existed. It was further observed that inasmuch as, the earlier instructions issued pursuant to the judgment in Virpal Singh Chauhans case (supra), as incorporated in para 319 A, were effective from 10.2.1995, and in the light of revised instructions being made effective from 17.6.1995, the question as to how the cases falling between 10.2.1995 and 16.6.1995 should be regulated, was under consideration in consultation with DOP&T, and, therefore, separate instructions in that regard would follow. The remaining part of the circular aforesaid may not be relevant for determination of the controversy in issue. The circular dated 13.1.2005 deals with the period between 10.2.1995 and 16.6.1995. In that regard, it has been stated in the circular aforesaid that since the Constitution (Eighty-fifth) Amendment Act, 2001, has been made effective from 17.6.1995, promotions, if any, of railway servants which had taken place during the period from 10.2.1995 to 16.6.1995, as per the principles of regaining seniority by General/OBC staff in terms of procedure in force at that point of time in implementation of the judgments of the Honble Supreme Court in R. K. Sabharwal v State of Punjab [(1995) 2 SCC 745] and Virpal Singh Chauhan (supra), vide Ministrys letters dated 28.2.1997 and 15.5.1998, may be protected as personal to them. Existing para 3 (iii) of circular dated 8.3.2002 was to be substituted as follows:

Seniority of Railway servants determined in the light of para 319A shall be revised as if this para did not exist on and after 17.6.95. However, seniority determined and promotion effected in between the period 10.2.95 and 16.6.95 (both days inclusive) in terms of para 319A in force during the period in question shall be protected as personal to the incumbents.

Circular dated 29.2.2008 deals with principles for determining seniority of staff belonging to SC/ST promoted earlier vis-`-vis General/OBC staff promoted later. It is mentioned in the circular aforesaid that in pursuance of the Act of 2001, instructions had been issued vide Ministrys letter dated 8.3.2002 that with effect from 17.6.1995 SC/ST railway servants would, on their promotion by virtue of rule of reservation/roster, be entitled to consequential seniority also. These instructions were reiterated vide letter dated 21.11.2002 for implementation subject to final outcome of the writ petitions pending before the Honble Supreme Court. It is then mentioned that the Honble Supreme Court in its order dated 19.10.2006 in the case of M. Nagaraj (supra), inter alia, upheld the validity of the Act of 2001, and insofar as, other issues discussed in the judgment of the Apex Court, relevant clarifications had since been issued by DOP&T vide OM dated 29.3.2007, circulated vide Ministry of Railways OM dated 29.5.2007. It is then stated that in the light of the decision of the Honble Supreme Court in M. Nagarajs case, seniority of the SC/ST railway servants promoted by virtue of rule of reservation/roster would be regulated in terms of instructions contained in Railway Boards letters dated 8.3.2002 and 13.1.2005 referred to above.

3. What appears from the circulars aforesaid is that the railways for the purpose of conferment of accelerated seniority had bifurcated the period prior to 10.2.1995, the period between 10.2.1995 and 17.6.1995 and the period after 17.6.1995. As per the case set up by the applicants, for the period prior to 10.2.1995, since the judgment of the Honble Supreme Court in the case of Virpal Singh Chauhan (supra) is prospective from the date of judgment in the case of R. K. Sabharwal (supra), the persons promoted earlier would continue to enjoy the benefits of accelerated seniority. In other words, a person would not be pushed down in the matter of seniority when his admitted senior in the feeder post may also be promoted to the higher post. For the period between 10.2.1995 and 17.6.1995, the railways had accepted the judgment of Virpal Singh Chauhan and it was decided that no accelerated seniority would be conferred to any person who has been promoted during the said period. It is, however, further stated that promotion to the reserved category candidates would be personal to them. It is the case of the railways that since no promotions had been made during the said period of any SC/ST employees, the general category employees had nothing to be concerned about. Insofar as, the period after 17.6.1995 is concerned, it has been stated by the railways that since the Act of 2001 has been made effective retrospectively from 17.6.1995, and since the Railway Board letter dated 8.3.2002 has also been made retrospectively effective from 17.6.1995, the reserved category candidates promoted after 17.6.1995 would be entitled to accelerated seniority as well.

4. There would be no need to make mention of the detailed pleadings as made in the Original Application, as the most part of the Application deals with the legal position as envisaged by judicial precedents on the issue, which, in any case, would be referred to by us hereinafter. All that we may mention on facts is that the applicant no.2, Jagmohan Singh, was appointed as clerk in the Ministry of Railways on 16.6.1972, whereas, Vijay Laxmi, Veena Rani, Mohan Lal Meena, S. N. Raut and Pyare Lal joined much later, i.e., on 13.8.1976, 30.9.1974, 19.3.1980, 16.2.1976 and 20.2.1978 respectively. They all belong to SC/ST categories. They have been further promoted on the posts of senior clerk, head clerks, OS-II and OS-1 under the policy of reservation prior to 17.6.1995, and also prior to promotion of the applicant no.2. The said employees were allowed benefit of consequential seniority from the date of earlier promotion on reserved posts. Applicant no.3, Rajendra Kumar Bhatnagar, joined the railways as clerk on 1.6.1974, whereas Ratan Lal, Rati Ram and Suraj Mal Meena, who belong to SC/ST categories, joined service on 18.5.1975, 16.11.1975 and 8.4.1982. They have been further promoted as senior clerk, head clerk, OS-II, OS-I and COS prior to the promotion of the 3rd applicant and also prior to 17.6.1995. They have been allowed consequential seniority from the date of promotion on reserved posts and given further promotion on the basis of accelerated seniority. The grievance of the applicants is that the bifurcation made by the railways, as stated above, is not in consonance with the constitutional scheme and the judgment of the Honble Supreme Court has not been properly implemented. It is urged that the entire basis of the interpretation taken by the railways is based on an erroneous interpretation of the judgment of the Honble Supreme Court in Virpal Singh Chauhan (supra). It is also the case of the applicants that the judgment of the Honble Supreme Court in Indra Sawhney v Union of India [1992 Supp (3) SCC 217] is a good law, and inasmuch as, it has been held in the said judgment that the power to make reservation in promotion cannot be traced to Article 16(4), or in other words, Article 16(4) does not permit reservation in promotion, all promotions given to reserved category candidates prior to 17.6.1995 ought to be treated as ad hoc in terms of the judgment in Ajit Singh v State of Punjab [(1999) 7 SCC 209]. The promotees, it is urged, would not be entitled to the additional benefit of seniority on the basis of such promotions against reserved post on the roster. The period prior to 17.6.1995 is before the Seventy-seventh Constitution Amendment. It is the case of the applicants that the Seventy-seventh amendment brought about a new regime of empowering the State to provide for reservation in promotions for the first time, and, therefore, promotions in reservations prior to the said period ought to be considered as promotions individually made, and such additional benefit of accelerated seniority could not be given to such employees. Insofar as, the period from 17.6.1995 to 8.3.2002 is concerned, the plea of the applicants is that during the said period, though the power subsisted (in view of the retrospective amendment by the 85th Constitution Amendment), the power being an enabling power was never exercised and, therefore, even where promotions are made during the said period, consequential seniority cannot be conferred. It is the case of the applicants that letter dated 8.3.2002 cannot be permitted to operate retrospectively from 17.6.1995 so as to confer the benefit retrospectively, and in any case, since the 77th Constitution Amendment as well as the 85th Constitution Amendment have been upheld by the Honble Supreme Court in the case of M. Nagaraj (supra) subject to conditions laid down therein, unless the State can show existence of compelling reasons, i.e., backwardness and inadequacy of representation, the enabling power cannot be exercised and that too, retrospectively. It is the case of the applicants that the letter dated 8.3.2002 is without complying with the conditions laid down in M. Nagarajs case and, therefore, the said order cannot be sustained. Insofar as, the period after 8.3.2002 is concerned, it is the case of the applicants that the conditions precedent for applicability of accelerated promotion, which has been held to be intra vires, have not been complied with, and, therefore, accelerated promotion cannot be conferred upon the reserved category candidates.

5. The respondents pursuant to notice issued by this Tribunal have entered appearance and filed replies hotly contesting the cause of the applicants. We may mention at this stage that when this matter came up before the Division Bench then seized of the matter, vide order dated 1.5.2009, in view of the importance of the issues raised and their wide ramifications, the Bench referred the matter to a larger Bench for authoritative pronouncement on the issues. That is how the matter is before us. We may also mention that when the matter came up before us on 9.12.2009, while observing that the primary challenge in the present OA is to circulars referred to above, which, we were informed during the course of arguments, are based upon suggestion/circulars issued by DOP&T, the first respondent, and since no one had chosen to appear on behalf of the first respondent, we desired to have the view point of the said respondent, the issue being important having far reaching consequences. We thus ordered service upon the first respondent through Secretary, DOP&T by the next date of hearing. Shri V.S.R. Krishna, the learned counsel stated during hearing that he would ensure filing of reply by the first respondent by the next date of hearing. Vide order dated 22.3.2010, while mentioning that the controversy involved in the present case has far reaching consequences and the issues involved are of importance, we expected assistance of the Additional Solicitor General of India. The learned ASG has appeared and addressed arguments.

6. We may now make mention of the respective replies filed by the respondents and rejoinders of the applicant, insofar as they may be relevant to comment and adjudicate upon the controversy involved in the case. We are not making an elaborate mention of the pleadings in the replies and rejoinders inasmuch as, the issues raised in this case are purely legal and, be it the applicants or the respondents, while making their respective contentions, the learned counsel representing them have by and large relied upon the instructions issued from time to time and judicial precedents touching upon the issues involved in the case. The first reply available on records is filed by respondents 1 to 6. By way of preliminary objections, it is pleaded that the applicants have challenged Railway Boards circulars referred to above, which were issued by the Board regarding revision/assignment of seniority of Government servants by applying the 85th Constitution Amendment and judgments of the Honble Supreme Court in that regard. As per the 85th Constitution Amendment, it is pleaded, the seniority of SC/ST railway servants is to be determined from the date of entry into the grade, however, in regard to the seniority in non-selection posts, seniority is being determined on the basis of Boards instructions contained in its letter dated 6.5.2005. It has been averred that in the matter of Union of India v Pushpa Rani [(2008) 9 SCC 42], the Honble Supreme Court has upheld the validity of reservation in the cadre restructuring. In view of the averments as stated above, it is pleaded that the OA needs outright dismissal. It is then pleaded that no cause of action has accrued in favour of the applicants and the OA is totally devoid of merits, and that the OA is misconceived and not maintainable under law. While giving reply on merits, it has been reiterated that the impugned circulars have been issued by applying the 85th Constitution Amendment and the judgments of the Honble Supreme Court in that behalf. The 85th Constitution Amendment Act, 2001, it is pleaded, would require seniority of SC/ST railway servants to be determined from the date of entry into the grade. However, seniority in the non-selection posts is being determined on the basis of Boards instructions contained in letter dated 6.5.2005. It is denied that the applicants have a common cause of action. The applicants, it is stated, have no common grievance. The judgment of the Honble Supreme Court in Virpal Singh Chauhan (supra), it is stated, would not be applicable after the 85th Constitution Amendment. It is then pleaded that the position was reviewed subsequent to the judgment of the Honble Supreme Court in Virpal Singh Chauhan, and it was decided vide DOP&T OM dated 30.1.1997 to modify the existing policy by addition of the proviso to general principle 5(i) contained in MHA (now DOP&T) OM dated 22.12.1959 and para 2.2 in DOP&T OM dated 3.7.1986, which stipulated that if an employee belonging to the SC or ST is promoted to an immediate higher post/grade against a reserved vacancy earlier than his senior general/OBC employee who is promoted later to the said immediate higher post/grade, the general/OBC employee would regain his seniority, over such earlier promoted employee of SC/ST in immediate higher post/grade. It is, however, further stated that the Government has now decided to negate the effect of DOP&T OM dated 30.1.1997 by amending Article 16(4A) of the Constitution right from the date of its inclusion in the Constitution, i.e., 17.6.1995, with a view that Government servants belonging to SC/ST would maintain their seniority in case of promotion by virtue of rule of reservation. In other words, the employees belonging to general/OBC categories promoted later will be placed junior to SC/ST employees promoted earlier, even though by virtue of rule of reservation. Therefore, in pursuance of the 85th Amendment, it has been decided as follows:

(i) (a) SC/ST Govt. servants shall on their promotion by virtue of rule of reservation/roster be entitled to consequential seniority also and

(b) the above decision shall be effective from 17.06.95.

(ii) The instructions contained in DOPT O.M. No.20011/1/96-Estt.(D) dated 30.01.97 as well as the clarifications contained in DOPT O.M. No.2011/2/97-Estt.(D) dated 21.03.97 shall stand withdrawn w.e.f. 30.01.1997 itself.

(iii) Seniority of Govt. servants determined in the light of O.M. dated 30.01.1997 shall be revised as if that O.M. was never issued.

(iv) (a) On the basis of revised seniority consequential benefits like promotion, pay, pension etc. should be allowed to the concerned SC/ST Govt. servants (but without arrear by applying principles of no work no pay).

(b) For this purpose senior SC/ST Govt. servants may be granted promotion w.e.f. the date of their immediate junior general/OBC Govt. servants.

(c) Such promotion of SC/ST Govt. servants may be ordered with the approval of Appointing Authority of the post to which the Govt. servant is to be promoted at each level after following normal procedure of DPC.

(v) Except seniority other consequential benefits like promotion, pay etc. (including retiral benefits in respect of those who have already retired allowed to general/OBC govt. servants by virtue of O.M. dated 30.01.1997 and/or in pursuance of the directions of CAT/Court should be protected as personal to them.

(vi) All Ministries/Departments are requested to bring the above decision to the notice of all concerned for guidance and compliance. Necessary action to implement the decisions contained in para 4(iii) above may be completed within three months from the date of issue of these instructions and necessary action to implement the decision at para (iv) above may be completed within 6 months from the date of issue of these instructions.

It is pleaded that para 3(iii) of the letter dated 8.3.2002would indicate that since the earlier instructions issued pursuant to the judgment of the Honble Supreme Court in Virpal Singh Chauhan (supra) as incorporated in para 319A of IREM Vol.I were effective from 10.2.1995 and the revised instructions issued pursuant to the 85th Constitutional Amendment were being made effective from 17.6.1995, the question as to how the cases falling between 10.2.1995 and 16.6.1995 should be regulated was under consideration in consultation with DOP&T, and that separate instructions in that regard would be issued. The matter has since been considered and it has been decided vide Boards letter dated 13.1.2005 that since the 85th Amendment Act, 2001 has been made effective from 17.6.1995, promotions, if any, or railway servants which had taken place during the period from 10.2.1995 to 16.6.1995 as per the principle of regaining seniority by general/OBC staff in terms of procedure in force at that point of time in implementation of Honble Supreme Courts judgment in R.K. Sabharwal (supra) and Virpal Singh Chauhan (supra) vide Railway Boards letter dated 28.2.1997 and 15.5.1998 may be protected as personal to them. Accordingly, the existing para-3 (iii) of Railway Boards letter dated 08.03.2002 has been substituted, of which we have already made a mention hereinbefore. All orders passed by the Tribunal regarding seniority dispute, it is stated, have been superseded by the 85th Constitutional Amendment. However, seniority determined and promotions effected in between the period 10.2.1995 and 16.6.1995 (both days inclusive) in terms of para 319A IREM in force during the said period, would be protected as personal to the incumbents as per Boards letter dated 13.1.2005. It is denied that instructions have been issued by the Board that staff of general category who were promoted between 10.2.1995 and 16.6.1995 would regain their seniority over SC/ST employees who were promoted earlier. The applicant has filed rejoinder to the written statement filed on behalf of respondents 1 to 6.

7. Another reply on behalf of respondents 5 and 6 has been filed, to which the applicants have filed rejoinder. An additional reply has also been filed by respondents 1 to 4 stating that the applicants have introduced some new facts in their rejoinder, which would need a reply. The applicants have filed rejoinder to this additional reply filed on behalf of respondents 1 to 4. Yet another additional reply has been filed on behalf of respondents 5 and 6. The 1st respondent has filed an independent reply as well, which, it appears, has been filed as the Tribunal wanted DOP&T to respond to the OA. It is pleaded therein that Scheduled Castes and Scheduled Tribes constitute the backward class of society, and while discussing the meaning of the expression Backward Class of citizens in Article 16(4), the Supreme Court in the matter of Indra Sawhney (supra) made some observations. Such observations have been reproduced in the reply. The observations made by the Supreme Court in depicting the condition of SC/ST have also been reproduced in the reply. It is pleaded that the Scheduled Castes constitute backward class of society and there would be no need of further inquiry to establish this fact, and that the position with regard to Scheduled Tribes is no better. While referring to concept of creamy layer, it is pleaded that the Honble Supreme Court in the matter of Indra Sawhney has made it clear that the discussion about creamy layer is confined to Other Backward Classes (OBCs) and has no relevance in the case of SC/ST. It is then pleaded that the inadequacy of representation is an essential condition for making provision of reservation for any backward class. Adequacy of representation in service is, however, subjective to the satisfaction of the State. In that regard, some observations made in Indra Sawhneys case have been reproduced. It is then pleaded that data has been collected regarding representation of SC/ST in the Central Government services as on 1.1.2006. The same has been given in a tabulated form and reads as follows:

Group Total number of employees SCs % STs %

A 114256 14719 12.9 4408 3.9

B 174965 26256 15.0 9939 5.7

C 2078929 340691 16.4 142724 6.9

D (Excluding Sweepers) 825279 153286 18.6 58377 7.1

Sweepers 83061 49279 59.3 4560 5.5

Total (Excluding Sweepers) 3193429 534952 16.75 215448 6.75

Total (Including Sweepers) 3276490 584231 17.83 220008 6.71

It is the case of the 1st respondent that according to the 2001 Census, there are 16.2% Scheduled Castes and 8.2% Scheduled Tribes in the population of the country. The table as given by them, it is stated, would show that representation of the SC in Group A and Group B posts and ST in all groups of posts is less than the percentage of their population. The reservation for SC and ST in the Central Government services is 15% and 7.5% respectively, and it is implemented post-based, which means that if representation of SC in a grade becomes 15% they are not given any reservation. Thus the Government, for the purpose of reservation, treats 15% representation of SC as adequate and whenever such adequacy is arrived at, no reservation is provided to that class. The same is true as regards the ST as well. Thus there is an inbuilt system to ensure that reservation to the SC and ST is not given when their representation in a service becomes adequate. Instructions contained in DOP&T OM dated 21.1.1977, as amended from time to time, provide that an unfit person would not be appointed even by reservation. Officers occupying higher positions in services have to perform higher duties and responsibilities. Reservation in promotion is applicable only up to the lowest rung of Group A. There is no reservation in promotion in higher posts. Thus only competent persons are promoted to higher grades, where any relaxation may affect the efficiency of administration, which ensures that efficiency of administration is not compromised. Instructions issued by the government introducing post-based reservation rosters provide that total reservation shall in no case exceed 50%. Reservation for SC, ST and OBC in case of direct recruitment on all India basis by open competition is 15%, 7.5% and 27% respectively, while in case of direct recruitment on all India basis otherwise than by open competition, the reservation is 16.66%, 7.5% and 25.84% respectively. In case of direct recruitment to Groups C and D posts which normally attract candidates from a locality or a region, while percentage of reservation for SC/ST is generally fixed in promotion to the population of SC and ST in the respective States/Union Territories, for OBCs it is fixed keeping in view the proportion of their population in the concerned States/UTs, and the fact that total reservation for SC/ST/OBC remains within the limit of 50%, and reservation for OBC remains within the limit of 27%. Reservation in promotion is available to SC and ST at the ratio of 15% and 7.5% respectively. Thus, reservation does not exceed 50% in any case. The 1st respondent on the basis of the judgment of the Honble Supreme Court in the matter of M. Nagaraj (supra) issued instructions vide letter dated 29.3.2007 clarifying that the observations made in the said case regarding creamy layer amongst the SC/ST are mere obiter dicta, per incurium and would not flow from, and cannot be reconciled with the nine-Judge Bench judgment of the supreme Court in the matter of Indra sawhney (supra), and that these instructions are based on the judgment of the Supreme court in Indra Sawhnays case, which makes it clear that the concept of creamy layer does not apply to the SC/ST.

8. The applicants have filed rejoinder to the counter reply filed by the 1st respondent, wherein it is stated that the present Application is related to reservation in promotion and consequential seniority thereof. It is pleaded that in the case of reservation in promotion the 9-Judge Constitutional Bench of the Honble Supreme Court in the case of Indra Sawhney (supra) observed that the backwardness of a class has no role to play, because promotions are made of individuals and not of the class, and that after joining service the employees of backward class come at par with the general category employees, and further discrimination between general and reserved category employees would amount to treating equals unequally. Insofar as, the judgment of the Supreme Court in M. Nagaraj (supra) is concerned, it is the case of the applicants that the same is related to reservation of SC/ST in the matter of appointments in posts, and, therefore, the findings of the Apex Court on the concept of creamy layer are also confined to SC/ST candidates, and further that in the later judgments in Nair Service Society v State of Kerala [(2007) 4 SCC 1] and R. S. Garg v State of Uttar Pradesh [(2006) 6 SCC 106], the Supreme Court has clearly held that the concept of creamy layer is equally applicable in the case of SC/ST and that they have to be excluded for reservation in view of command of Article 14 of the Constitution. As regards adequate representation of backward classes in service, it is the case of the applicants, that it would mean appointments as per prescribed percentages fixed by the State/Central Governments, and once, the prescribed percentages are achieved, no further reservation would be permissible, and that the opinion of the State to allow reservation must be supported by quantifiable data in regard to short-fall of the backward class in the cadre along with compelling reasons to allow reservation in services, and that this process has not been followed by the respondents before making reservations, and, therefore, all the appointments made under the policy of reservation are bad in the eye of law. It is then pleaded that the respondents have shown figures of all Central Government employees, whereas the applicants are concerned with railway employees only, for whom no data has been given in the reply filed by the respondents, and even otherwise, in the data produced by the respondents, it has been stated that the representation of SC employees in the Central services including railway department, has already been achieved as 15%, 16.4% and 19.6% in groups B, C and D respectively (excluding sweepers), which would clearly indicate that the requisite representation of 15% prescribed for SCs has already been achieved, and even more than that, and, therefore, there is no question of allowing reservation in groups B, C and D services. It is also the case of the applicants that adequate representation does not mean proportionate representation, and that the population of SC/ST has no role to play in the matter of reservation. In the additional affidavit dated 26.4.2010 filed on behalf of the applicants, it has also been stated that the respondents have not carried out any exercise to find out:

(a) the parameters to determine backwardness which has to be based on objective and quantifiable criteria;

(b) identification of persons who satisfy the above parameters and also excluding persons or class of persons who form part of the creamy layer;

(c) laying down benchmarks providing the maximum reservation that can be provided which when achieved would trigger a discontinuation of reservation (either in direct recruitment or in promotions);

(d) factors to be taken into consideration to maintain overall administrative efficiency i.e. the maximum posts that can be reserved and also identification of areas and avenues which are critical to the working of the organisation and where no reservation could be provided or else the efficiency and the manner of working of the organisation as a whole would suffer;

(e) the actual representation of such class of persons in the matter of public employment and a comparison with the benchmarks to show compelling state need to exercise powers under Article 16(4) or Article 16(4A);

(f) setting up a continuous mechanism to see that the benchmarks and thresholds laid down are not breached and as soon as the targets are achieved, reservation is discontinued so as not to cause reverse discrimination and a breach of constitutional requirements.

It is pleaded that these are necessary requirements in view of the law laid down by the Supreme Court, which the respondents were required to carry out before providing for, or for that matter, continuation with the policy of reservation in promotions, conferring consequential seniority, etc. It is then pleaded that despite the decision of the Supreme Court, the respondents have not carried out any of the above exercises which would justify the exercise of the enabling power by the authorities, and that the burden to establish the existence of compelling need is on the State, and if the State fails to satisfy the compelling need, it would necessarily mean absence of jurisdictional facts and as such the exercise of power under the enabling provisions would be unsustainable. Insofar as, reliance by the respondents on the circular dated 2.3.2007 is concerned, it is the case of the applicants that the same is purported to have been issued in compliance of the judgment of the Apex Court in M. Nagaraj (supra). It is the case of the applicants that the said circular is not a compliance of the judgment of the Supreme Court, but is merely communication of the operative directions contained therein. No exercise as mentioned above, it is pleaded, has been carried out, which ought to have been carried out as per the directions of the Apex Court before the power could have been exercised, but the State has failed to carry out the exercise even after the judgment.

9. From the pleadings of the parties, as mentioned above, what appears is that the applicants have challenged the circulars dated 8.3.2002, 13.1.2005 and 29.2.2008, which confer accelerated seniority to the members of the Scheduled Castes and Scheduled Tribes automatically as a consequence of their promotion to a higher post against a roster point reserved for such candidates. The identifiable issues for determination appears to be whether the consequential seniority can be conferred to the roster points meant to be occupied by the reserved category candidates for the period even prior to 17.6.1995, i.e., before Article 16(4A) came to be inserted by way of Constitution (Seventy-seventh Amendment) Act, 1995. The other issue would be as regards the effect of the judgment of the Honble Supreme Court in the case of Virpal Singh Chauhan (supra) with reference to prospectivity and the fact that the said judgment has been made prospectively from 10.2.1995. Yet another question to be answered would be whether the exercise of the enabling power vested with the Government on 8.3.2002 under Article 16(4A), substituted by the Constitution (Eighty-fifth Amendment) Act, 2001, could be exercised retrospectively from 17.6.1995. Yet another question that arises for consideration is that whether there are any pre-conditions necessary for exercise of the enabling power under Article 16(4A), as it now stands, and if at all there are pre-conditions for exercise of such a power, whether they have been complied with, as also as to whether the benefit of accelerated seniority can be given to those who are covered under creamy layer.

10. Before we may take into consideration the rival contentions of the learned counsel representing the parties, it would be appropriate to mention as to how and why Article 16(4A) as inserted by the Constitution (Seventy-seventh Amendment) Act, 1995, and substituted by the Constitution (Eighty-fifth Amendment) Act, 2001, came into being, and also as to what were, before such insertion and substitution, the provisions dealing with reservation in public employment. Preceding Article 16 are Articles 14 and 15. By virtue of Article 14, the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India, whereas Article 15 commands the State that it shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them, and that no citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subjected to any disability, liability, restriction or condition with regard to matters enumerated in sub-clauses (a) and (b) of clause (2) of Article 15. The state can, however, not be prevented from making any special provision for women and children, as also 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, as also for advancement of any socially and educationally backward classes of citizens or for Scheduled Castes or Scheduled Tribes, insofar as such special provisions relate to their admission to educational institutions, including private educational institutions, whether aided or unaided by the State, other than the minority educational institutes. Article 16 recognizes equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State, and no citizen, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, shall be ineligible for, or discriminated against in respect of any office under the State. The parliament has, however, power to make any law prescribing, in regard to a class or classes of employment or appointment to an office, any requirement as to residence within a particular State or Union Territory prior to such employment or appointment. Article 16(4) reads as follows:

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

It appears that initially when Article 16(4) alone was in existence and clause (4A) had not been inserted, there was no provision for reservation in promotion. Reservation was subject to the power under the Constitution only through Article 16(4), but despite there being no source of power available under Constitution for providing reservation in promotions, the State resorted to the same. Litigation in that context surfaced. The Honble Supreme Court in G. M. Southern Railway v Rangachari [(1962) 2 SCR 586] repelled the plea raised by the general category candidates that Government would have no power to make reservation in promotions. The law laid down by the Supreme Court in Rangacharis case was overruled by a constitutional Bench comprising the Honble Chief Justice of India and eight Judges in Indra Sawhney (supra). The policy of the Government being such so as to provide reservation in promotions as well, the Parliament inserted clause (4A) creating the source of power which enabled the State to make provision for reservation to any class or classes of posts in the services under the State. Once, the source of power was created under the Constitution by virtue of the Seventy-seventh Amendment to provide reservation in promotion, yet another facet of reservation known as accelerated promotion came to fore when roster points were reserved for the reserved category. Conferment of seniority to the roster point promotees is considered in normal service jurisprudence as accelerated seniority. To illustrate, if, for instance, the Government may make a 40-point roster and the slots at numbers 1, 7, 10, 35 and 40 may be reserved for reserved category candidates, such roster point employees belonging to reserved categories would secure promotion before their seniors could be promoted. This was obviously not to the liking of the general category candidates and thus, as mentioned above, litigation came into being on that score, which culminated into the judgment of the Honble Supreme Court in Virpal Singh Chauhan (supra). While, however, approving promotion of reserved category candidates on the roster points, the Honble Supreme Court evolved the principle known as catch up rule, and it was held that as and when a general category candidate who was senior in the feeder category is promoted, he shall re-gain his seniority and would thus become senior to his erstwhile junior of reserved category who was promoted earlier to him because of reservation/roster point. This judgment, it appears, led to substitution of clause (4A) of Article 16, which, as it stands today, reads as follows:

(4A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

11. In the present case, we are concerned only with reservation insofar as, it relates to promotion, and, therefore, we may touch upon only that aspect of the case in the two judgments of the Honble Supreme Court in Indra Sawhney (supra) and Virpal Singh Chauhan (supra). The matter as regards Indra Sawhney (supra) for its importance and wide ramifications, came up for hearing before a Constitutional Bench of five Judges. A larger Bench of nine Judges had to be constituted considering the nature of the controversy and its ramifications. There are six different opinions expressed by the Honble Judges constituting the Bench. One of the judgments was recorded by Honble Justice B. P. Jeevan Reddy, as he then was, speaking for himself as also for Honble Justice M. H. Kania, CJI, Honble Justice M. N. Venkatachaliah and Honble Justice A. M. Ahmadi, as they then were. Honble Justice S. Ratnavel Pandian, recorded a concurring and separate judgment. Honble (Dr.) Justice T. K. Thommen recorded a separate dissenting judgment. Honble Justice Kuldip Singh also recorded a dissenting judgment separately. Honble Justice P. B. Sawant recorded a concurring and separate judgment. Honble Justice R. M. Sahai recorded a dissenting and separate judgment. The judgment of the Honble Supreme Court as prepared and as has been mentioned above, needs to be touched upon only as regards the aspect of the case involved in the present case, which, as mentioned above, is reservation in promotion and accelerated seniority. We shall deal only with the said aspect of the case from all the separate judgments. The concurrence or dissent also, therefore, shall have to be considered only as regards the aspect of the case as mentioned above. The judgment in the said case came in the backdrop of the report submitted by B. P. Mandal. Initially, by a Presidential order under Article 340 of the constitution, the first Backward Class Commission known as Kaka Kalekar Commission was set up on January 29. 1953, which submitted its report on March 30, 1955 listing out 2399 castes as socially and educationally backward on the basis of criteria evolved by it, but the Central Government did not accept that report and shelved it. Twenty-four years later after the first Backward Class Commission submitted its report in 1955, the President pursuant to the resolution of the Parliament appointed the second Backward Class Commission on January 1, 1979 under the chairmanship of Shri B. P. Mandal to investigate the conditions of Socially and Economically Backward Classes (SEBCs) within the territory of India. The Commission submitted its report on December 31, 1980, identifying as many as 3743 castes as SEBCs and made its recommendations under chapter XIII of volume I of its report and finally suggested regarding the period of operation of Commissions recommendations, the entire scheme should be reviewed after twenty years. The Commission concluded that excluding Scheduled Castes and Scheduled Tribes, Other Backward Classes (OBCs) constitute nearly 52 per cent of the Indian population. On the basis of the report of the Commission, two office memoranda dated August 13, 1990 and September 25, 1991 came to be issued by the Government of India. The report of the Mandal Commission, as we all know, led to wide-spread agitations throughout the country. Open or general category candidates resorted to number of public protests, strikes, and some of them even committed suicide. Counter rallies and strikes were also carried out by OBC category candidates. It is in this background, when feelings were running high on both sides and the country was on the boil, that the memoranda issued by the Government on the basis of recommendations made by the Mandal Commission, came up for discussion and adjudication by one of the largest Benches constituted in the History of the Indian judiciary. The first memorandum dated 13.8.1990 issued by the Government of India, Ministry of Personnel, Public Grievances & Pensions (Department of Personnel & Training) reads as follows:

Subject: Recommendation of the Second Backward Classes Commission (Mandal Report) Reservation for Socially and Educationally Backward Classes in Services under the Government of India.

In a Multiple undulating society like ours, early achievement or the objective of social justice as enshrined in the Constitution is a must. The second Backward Classes Commission called the Mandal Commission was established by the then Government with this purpose in view, which submitted its report to the Government of India on 31.12.1980.

2. Government have carefully considered the report and the recommendations of the Commission in the present context responding the benefits to be extended to the socially and educationally backward classes as opined by the Commission and are of the clear view that at the outset certain weightage has to be provided to such classes in the services of the Union and their Public Undertakings. Accordingly orders are issued as follows:

(i) 27 per cent of the vacancies in civil posts and services under the Government of India shall be reserved for SEBC.

(ii) The aforesaid reservation shall apply to vacancies to be filled by direct recruitment. Detailed instructions relating to the procedure to be followed for enforcing reservation will be issued separately.

(iii) Candidates belonging to SEBC recruited on the basis of merit in an open competition on the same standards prescribed for the general candidates shall not be adjusted against the reservation quota of 27 per cent.

(iv) The SEBC would comprise in the first phase the castes and communities which are common to both, the list in the report of the Mandal Commission and the State Governments lists. A list of such castes/ communities is being issued separately.

(v) The aforesaid reservation shall take effect from 7.8.1990. However, this will not apply to vacancies where the recruitment process has already been initiated prior to the issue of these orders.

Similar instructions in respect of public sector undertakings and financial institutions including public sector banks will be issued by the Department of Public Enterprises and Ministry of Finance respectively.

The second memorandum which is an amended one dated 25.9.1991, reads as follows:

Subject: Recommendation of the Second Backward Classes Commission (Mandal Report) Reservation for Socially and Educationally Backward Classes in Services under the Government of India.

The undersigned is directed to invite the attention to O.M. of even number dated the 13th August 1990, on the above sections of the SEBCs to receive the benefits of reservation on a preferential basis and to provide reservation for other economically backward sections of the people not covered by any of the existing schemes of reservation, Government have decided to amend the said Memorandum with immediate effect as follows:-

2.(i) Within the 27 per cent of the vacancies in civil posts and services under the Government of India reserved for SEBCs, preference shall be given to candidates belonging to the poorer sections of the SEBCs. In case sufficient number of such candidates are not available, unfilled vacancies shall be filled by the other SEBC candidates.

(ii) 10 per cent of the vacancies in civil posts and services under the Government of India shall be reserved for other economically backward sections of the people who are not covered by any of the existing schemes of reservation.

(iii) The criteria for determining the poorer sections of the SEBCs or the other economically backward sections of the people who are not covered by any of the existing schemes of reservations are being issued separately.

3. The O.M. of even number dated the 13th August 1990, shall be deemed to have been amended to the extent specified above.

In the judgment authored by Justice B. P. Jeevan Reddy, for self and others, as mentioned above, the learned counsel for parties had framed eight questions, which have been mentioned in para 681 of the judgment. For the sake of convenient discussion and in the interest of clarity, the Honble Judge, however, framed eleven questions in para 682 of the judgment. The question as may be relevant for this case would be question number 7. The same reads as follows:

7. Whether Article 16 permits reservations being provided in the matter of promotions?

The conclusion arrived at on the question aforesaid in paragraph 859(7) of the judgment reads as follows:

(7) Article 16(4) does not permit provision for reservations in the matter of promotion. This rule shall, however, have only prospective operation and shall not affect the promotion already made, whether made on regular basis or on any other basis. We direct that our decision on this question shall operate only prospectively and shall not affect promotions already made, whether on temporary, officiating or regular/permanent basis. It is further directed that wherever reservations are already provided in the matter of promotion be it Central Services or State Services, or for that matter services under any Corporation, authority or body falling under the definition of State in Article 12 such reservations may continue in operation for a period of five years from this day. Within this period it would be open to the appropriate authorities to revise, modify or re-issue the relevant rules to ensure the achievement of the objective of Article 16 (4). If any authority thinks that for ensuring adequate representation of backward class of citizens in any service, class or category, it is necessary to provide for direct recruitment therein, it shall be open to it to do so. (Ahmedi, J expresses no opinion on this question upholding the preliminary objection of Union of India). It would not be permissible for the State to extend concession and relaxation to the members of reserved categories in the matter of promotion without compromising the efficiency of the administration.

Honble Justice S. Ratnavel Pandian, in summation of his opinion, in para 243, on the question in controversy at serial number (10) on the said summation, observed as follows:

(10) As regards the reservation in the matter of promotion under Article 16(4), I am in agreement with conclusion No.(7) made in paragraph 859 in Part VII of the judgment of my learned brother, B.P. Jeevan Reddy, J.

Honble Justice Thommen, in the summary of his opinion contained in para 323, as regards reservation in promotion at serial number (9) of the summary, observed as follows:

(9) Reservation has no application to promotion. It is confined to initial appointment, whichever be the level or grade at which such appointment is made in the administrative hierarchy, and whether or not the post in question is borne on the cadre of the service.

In the conclusion arrived at by the Honble Judge in para 324(D), it was observed, thus:

(D) Reservation is confined to initial appointment to a post and has no application to promotion.

Honble Justice Kuldip Singh framed question (D) for answer in para 329, as follows:

D. Whether Article 16(4) permits reservation of appointments or posts at the stage of initial entry into government services or even in the process of promotion?

The said question was answered in para 381 by observing as follows:

381. For the reasons indicated above I hold that the interpretation given by the majority in Rangachari\* case to Article 16(4), to the effect that it permits reservations in the process of promotion, is not permissible and as such cannot be sustained. Rangachari case to that extent is overruled. I hold that Article 16(4) permits reservation of appointments or posts in favour of any backward class of citizens only at the initial stage of entry into the State services. Article 16(4) does not permit reservation either to the selection posts or in any other manner in the process of promotion. (\*General Manager, S.Rly v Rangachari, (1962) 2 SCR 586: AIR 1962 SC 36).

Honble Justice Sawant dealt with the matter in question No.VIII, which reads as follows:

Would reservation of appointments or posts in favour of any Backward Class be restricted to the initial appointment to the post or would it extend to promotions as well?

The question was answered by observing as follows:

549. There is no doubt that the meaning of the various expressions used in Article 16, viz., matters relating to employment or appointment to any office, any employment or office and appointments or posts cannot be whittled down to mean only initial recruitment and hence the normal rule of the service jurisprudence of the loss of the birth marks cannot be applied to the appointments made under the article. However, as pointed out earlier, the exclusive quota is not the only form of reservation and where the resort to it such as in the promotions, results in the inefficiency of the administration, it is illegal. But that is not the end of the road nor is a backward class employee helpless on account of its absence. Once he gets an equal opportunity to show his talent by coming into the mainstream, all he needs is the facility to achieve equal results. The facilities can be and must be given to him in the form of concessions, exemptions etc. such as relaxation of age, extra attempts for passing the examinations, extra training period etc. along with the machinery for impartial assessment as stated above. Such facilities when given are also a part of the reservation programme and do not fall foul of the requirement of the efficiency of the administration. Such facilities, however, are imperative if, not only the equality of opportunity but also the equality of results is to be achieved which is the true meaning of the right to equality.

Honble Justice R. M. Sahai, in his conclusions at serial number (6) in paragraph 635 of the judgment held as follows:

(6) Reservation in promotion is constitutionally impermissible as, once the advantaged and disadvantaged are made equal and are brought in one class or group then any further benefit extended for promotion on the inequality existing prior to be brought in the group would be treating equals unequally. It would not be eradicating the effects of past discrimination but perpetuating it.

From the observations and findings of the Honble Judges as reproduced above, it is absolutely clear and there is no dispute either on the point that reservation in promotion is not permissible having not been contemplated under Article 16(4) of the Constitution. We may briefly touch upon the reasons for the conclusions as reproduced above. The main reason recorded for the conclusions as mentioned above is that a conjoint reading of Article 16(4) with Article 335, which deals with requirement of maintenance of efficiency of administration, would necessitate exclusion of reservation in promotion, and that providing reservation in promotions would amount to unduly and unfairly discriminating persons who are already in the service and are senior and no less meritorious in comparison to the reserved candidates, as also that once a person gets into service, he comes at par with other general category candidates and thereafter there cannot be further discrimination among equals. In the reasons, it is also mentioned that right of promotion or being considered for promotion is not a class right or a group right, but promotion is of an individual and, therefore, group backwardness or class backwardness would have no role in matters of promotion.

12. The wish of the Parliament, however, being that reservation in promotion was need of the hour, it resorted to the power vested in it under Article 368 of amending the Constitution by inserting Article 16(4A), which has since already been reproduced hereinbefore. Perusal of Article 16(4A) would clearly manifest that the same is an enabling provision empowering the State for providing reservation in matters of promotion in favour of Scheduled Castes and Scheduled Tribes, which may be exercised only when the State may be of the opinion that the reserved class is not adequately represented in the services under it. Article 16(4A) as inserted vide 77th Constitutional Amendment came in for debate before the Honble Supreme Court in the matter of Virpal Singh Chauhan (supra). The facts of the case aforesaid reveal that a writ came to be filed by general category candidates before the High Court which was transferred to the Central Administrative Tribunal, Allahabad Bench. The railway administration as well as the employees belonging to reserved categories, i.e., SC/ST employees were employed as respondents. The pleadings in the writ petition would reveal that amongst the categories of Guards in the railway service, there were four categories, viz., Grade C, Grade B, Grade A and Grade A Special. Initial recruitment was made to Grade C and they had to ascend rung after rung to go upwards. The promotion from one grade to another in this category was by seniority-cum-suitability. The rule of reservation was being applied not only at the initial stage of appointment to Grade C but at every stage of promotion, the percentage reserved for SC being 15% and for ST 7.5%, i.e., total of 22.5%. To give effect to the rule of reservation, a forty-point roster was prepared in which certain points were reserved for SC and ST respectively, commensurate with the percentage of reservation in their favour. In the year 1986, the position was that both the petitioners in the Original Application (general candidates) and the party-respondents (members of SC/ST) were in the grade of Guards Grade A in the railways. On 1.8.1986 the Chief Controller passed orders promoting certain general candidates on ad hoc basis to Grade A Special. Within less than three months, however, they were sought to be reverted and in their place, members of SC/ST were sought to be promoted. Complaining that such a course of action was illegal, arbitrary and unconstitutional, the general candidates approached the High Court, which petition, as mentioned above, came to be transferred to the Tribunal. The general candidates asked reliefs such as to restrain the railway authorities from filling up the posts in higher grades by applying the rule of reservation, as also from acting upon the illegal seniority list prepared by them, and to declare that the petitioners (general candidates) were entitled to be promoted and confirmed in Grade A Special on the strength of their seniority earlier to the reserved category employees. It was urged on their behalf that once the quota prescribed for a reserved category is satisfied, the rule of reservation or the forty-point roster prepared to give effect to the said rule could not be applied or followed any longer, and that the forty-point roster is prepared only to give effect to the rule of reservation, and that it may provide for accelerated promotion but it could not give seniority also to a reserved category candidate in the promoted category. It was further urged that seniority in Grade C should govern and should be reflected in all subsequent grades notwithstanding the earlier promotion of the members of reserved categories. In other words, even if a reserved category member was to be promoted from Grade C to Grade B earlier than his senior general candidate, the position should be that when the general candidate also gets promoted later to Grade B, he should regain his seniority over the reserved candidate in Grade B, which would mean that in Grade B the general candidate again becomes senior to the reserved category candidate. It was submitted that this should be the rule to be followed to ensure that command of Articles 14 and 16 of the Constitution prevails. The contention raised on behalf of the general candidates was accepted. The term consequential seniority, it was held, is used interchangeably with accelerated seniority. We may reproduce the relevant observations in that regard. The same read as follows:

It is the seniority in this panel which must be reflected in each of the higher grades. This means that while the rule of reservation gives accelerated promotion, it does not give the accelerated or what may be called, the consequential seniority

In short, it is open to the State, if it is so advised, to say that while the rule of reservation shall be applied and the roster followed in the matter of promotions to or within a particular service, class or category, the candidate promoted earlier by virtue of rule of reservation/roster shall not be entitled to seniority over his senior in the feeder category and that as and when a general candidate who was senior to him in the feeder category is promoted, such general candidate will regain his seniority over the reserved candidate notwithstanding that he is promoted subsequent to the reserved candidate. There is no unconstitutionality involved in this.

The Honble Supreme Court thus evolved the rule known as catch up rule. In Ajit Singh Januja (II) v State of Punjab [(1999) 7 SCC 209], the issue was finally decided. It was held therein that the roster point promotees are not entitled to seniority when they are promoted earlier than their senior general category counterparts, and as per the catch up rule, when senior general category candidate is also promoted subsequently to the same level as the roster point promotee, the general category candidate would regain his seniority. It appears that the Parliament wished to give accelerated seniority to reserved category candidates, and that being so, it resorted to amendment in the Constitution by the 85th Amendment, by inserting the words in matters of promotion, with consequential seniority in the existing Article 16(4A) w.e.f. 17.6.1995. Article 16(4A) as it stands today, has already been reproduced hereinbefore. This amendment was challenged before the Honble Supreme Court in M. Nagarajs case (supra). We shall make a mention of the facts of the case in M. Nagaraj and the conditions subject to which the provision under challenge was protected, in the later part of the judgment.

13. The issues raised by the learned counsel representing the applicants for the reliefs asked for in the present Application have since already been indicated. We may, however, deal first with the main plea raised by the learned counsel that unless the parameters as culled out by the Honble Supreme Court in M. Nagaraj (supra), subject to which only the constitutional amendments have been upheld, are taken care of, the reserved category candidates cannot be given accelerated promotion.

14. Mr. Tripathi, learned ASG states that the question posed by the applicants to be answered by this Tribunal is that whether while providing reservation for Scheduled Castes/Scheduled Tribes in promotional avenues in a manner so as to take away the benefit of catch up rule from eligible and successful candidates of general category the requirements of paras 110, 117 and 121 to 123 of the judgment of Honble Supreme Court in M. Nagarajs case (supra) have been fulfilled or not? He, at the very outset, contends that insofar as exclusion of creamy layer for reservation in promotion is concerned, the same would not be applicable to scheduled castes/scheduled tribes which category alone has been referred to in Article 16(4A) of the Constitution. It is urged that this Tribunal may examine various parameters provided by Honble Supreme Court in M.Nagarajs case (supra) for providing accelerated promotion by reservation, but such tests or pre-conditions would not be applicable insofar as scheduled castes/scheduled tribes are concerned. Learned counsel for the applicant would join serious issues with the learned ASG on the plea raised by him as mentioned above and would contend that vires of Article 16(4A) were specifically in question before the Honble Supreme Court in M.Nagarajs case (supra), and, therefore, the pre-conditions laid down in the judgment cannot be said to be inapplicable to scheduled castes/scheduled tribes categories.

15. The question raised by learned ASG being a sort of preliminary objection, we may deal with the same in the first instance before we may advert to the main controversy as regards fulfilling the conditions subject to which alone the challenged provisions of the Constitution before the Honble Supreme Court in M.Nagarajs case(supra) were protected.

16. The question raised by learned ASG, as mentioned above, has been canvassed on the basis of judicial precedents and provisions of Articles 341 and 342 of the Constitution of India. Before we may, however, refer to the same, it would be appropriate to find out as to what were the issues that came to be framed by the Honble Supreme Court in M.Nagrajs case, and what decision has been rendered on the said issues. In a writ that came to be filed in Honble Supreme Court seeking to quash the Constitution (85th Amendment) Act, 2001 inserting Article 16(4A) retrospectively from 17.06.1995 providing for reservation in promotion with consequential seniority as being unconstitutional and violative of basic structure, one of the arguments raised in challenging the said amendment was that it seeks to alter the fundamental right of equality which is a part of basic structure of the Constitution. It was urged that equality in the context of Article 16(1) connotes accelerated promotion which was not to include consequential seniority, and thereby attaching of consequential seniority to accelerated promotion would violate the equality in Article 14 read with Article 16(1) of the Constitution. It was also urged that the same would impair efficiency. The challenge was also to Constitution (77th Amendment) Act, 1995. It was urged that if accelerated seniority is given to the roster point promotees, the consequences would be disastrous. The consequences of the impugned 85th Amendment which provides for reservation in promotion with consequential seniority would result in reverse discrimination in the percentage of representation of the reserved category officers in the higher cadre.

16. While considering the contentions as mentioned above on the basis of Article 16 (1), 16(4) and 335 of the Constitution of India, in the context of challenge to the 85th amendment of the Constitution and in view of the provisions contained in Article 14, it was observed that, enabling provisions are permissive in nature. These are enacted to balance equality with positive discrimination. The constitutional law is the law of evolving concepts. Some of them are generic, others have to be identified and valued. The enabling provisions deal with the concept, which has to be identified and valued as in the case of access vis-a-vis efficiency, which depend on the fact situation only and not abstract principle of equality in Article 14 as spelt out in detail in Articles 15 & 16. Equality before the law, guaranteed by the first part of Article 14, is a negative concept while the second part is a positive concept which is enough to validate equalizing measures depending upon the fact situation. While dealing with the test to judge the validity of the impugned State Acts, it was observed as follows:-

As stated above, the boundaries of the width of the power, namely the ceiling limit of 50% (the numerical benchmark), the principle of creamy layer, the compelling reasons, namely, backwardness, inadequacy of representation and the overall administrative efficiency are not obliterated by the impugned amendments.

The other pertinent observations read as follows:-

Therefore, in our view, equality as a concept is retained even under Article 16(4A) which is carved out of Article 16(4).

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The test for judging the width of the power and the test for adjudicating the exercise of power by the concerned State are two different tests which warrant two different judicial approaches. In the present case, as stated above, we are required to test the width of the power under the impugned amendments. Therefore, we have to apply the width test. In applying the the width test we have to see whether the impugned amendments obliterate the constitutional limitations mentioned in Article 16(4), namely, backwardness and inadequacy of representation. As stated above, these limitations are not obliterated by the impugned amendments. However, the question still remains whether the concerned States has identified and valued the circumstances justifying it to make reservation. This question has to be decided case-wise. There are numerous petitions pending in this Court in which reservations made under State enactments have been challenged as excessive. The extent of reservation has to be decided on facts of each case. The judgment in Indra Sawhney does not deal with constitutional amendments. In our present judgment, we are upholding the validity of the constitutional amendments subject to the limitations. Therefore, in each case, the Court has got to be satisfied that the State has exercised its opinion in making reservations in promotions for SCs and STs and for which the concerned State will have to place before the Court the requisite quantifiable data in each case and satisfy the Court that such reservations became necessary on account of inadequacy of representation of SCs/STs in a particular class or clauses of posts without affecting general efficiency of service as mandated under Article 335 of the Constitution (emphasis supplied).

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Reservation is not in issue. What is in issue is the extent of reservation. If the extent of reservation is excessive, then it makes an inroad into the principles of equality in Article 16(1). Extent of reservation, as stated above, will depend on the facts of each case. Backwardness and inadequacy of representation are compelling reasons for the State Governments to provide representation in public employment. Therefore, if in a given case, the court finds excessive reservation under the State enactment, then such an enactment would be liable to be struck down since it would amount to derogation of the above constitutional requirements.

While concluding the judgment, it was observed thus:

The impugned constitutional amendments by which Articles 16(4A) and 16 (4B) have been inserted flow from Article 16(4). They do not alter the structure of Article 16(4). They retain the controlling factors or the compelling reasons, namely, backwardness and inadequacy of representation which enables the States to provide for reservation keeping in mind the overall efficiency of the State administration under Article 335. These impugned amendments are confined only to SCs and STs. They do not obliterate any of the constitutional requirements, namely, ceiling limit of 50% (quantitative limitation), the concept of creamy layer (qualitative exclusion), the sub-classification between OBC on one hand and SCs and STs on the other hand as held in Indra Sawhney, the concept of post-based Roster with in-built concept of replacement as held in R.K. Sabharwal.(Emphasis supplied).

17. In the context of the question involved, debated and determined by Honble Supreme Court and the law laid down as mentioned and reproduced above, it does not appear as if there are general observations for exclusion of the creamy layer as may pertain to SCs and STs categories as is the contention of learned ASG. The vires of Article 16(4A) were specifically in question and a clear finding has been recorded that the impugned amendments are confined to SCs and STs and they do not obliterate any of the constitutional requirements, namely, ceiling limit of 50% (quantitative limitation), the concept of creamy layer (qualitative exclusion), the sub-classification between OBC on one and SCs and STs on the other hand. Learned ASG, however, in his endeavour to show that observations as mentioned above are only general in nature without there being a specific question in that regard before Honble Supreme Court in M. Nagarajs case (supra), places reliance on a judgment of Constitution Bench of Honble Supreme Court in Ashoka Kumar Thakur v Union of India & Others, 2008 (6) SCC p.1. The facts of the case aforesaid reveal that challenge therein was to the Constitution (Ninety-third Amendment) Act, 2005 by which Article 15 (5) was inserted in the Constitution. The same reads as follows:-

15(5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.

18. The Parliament, after the Constitution (Ninety-third Amendment) Act, 2005, passed Central Educational Institutions (Reservation in Admission) Act, 2006. The challenge was also to some of the provisions of the Act (5 of 2007). The Constitution Bench consisting of five Honble Judges delivered the judgment which contained a separate judgment recorded by the then Honble Chief Justice, a separate judgment of Honble Justice Arijit Pasayat for self and Honble Justice C. K. Thakkar, a separate judgment by Honble Justice Dalveer Bhandari, and a separate judgment of Honble R.V. Raveendran. In the judgment authored by the Honble Chief Justice, it has been observed that even though reservation in favour of SCs and STs was not opposed by the petitioners, reservation of 27% in favour of Other Backward Classes/Socially and Educationally Backward Classes was strongly opposed by various petitioners in the cases. Challenge to the 93rd Amendment of the Constitution was on variety of grounds which have been mentioned by the Honble Chief Justice. The only ground as may be relevant for the purpose of the present case was whether creamy layer principle would be applicable to SCs and STs, which was framed as question number 8. On the question aforesaid, after making mention of the judgments in State of Kerala v N. M. Thomas [(1976) 2 SCC 310], Indra Sawhney (supra), Virpal Singh Chauhan (supra), and Ajit Singh (II) (supra), it has been observed in para 182 of the judgment as follows:

182. In none of these decisions it is stated that the creamy layer principle would apply to SCs and STs. In Indra Sawhney case it is specifically stated that the creamy layer principle will not apply to STs and SCs. In Nagaraj case in paras 110 and 120 and finally in paras 121, 122 and 123, it is only stated that when considering questions of affirmative action, the larger principle of equality such as 50% ceiling (quantitative limitation) and creamy layer (quantitative exclusion) may be kept in mind. In Nagaraj case it has not been discussed or decided that the creamy layer principle would be applicable to SCs/STs. Therefore, it cannot be said that the observations made in Nagaraj case are contrary to the decision in Indra Sawhney case.

In para 184 it has been observed that So far, this Court has not applied the creamy layer principle to the general principle of equality for the purpose of reservation. The creamy layer so far has been applied only to identify the backward class, as it required certain parameters to determine the backward classes. In the conclusion arrived at in para 228, it has been observed that creamy layer principle is not applicable to the Scheduled Castes and Scheduled Tribes. Honble Justice Pasayat while authoring the judgment for self and Honble Justice Thakkar, while referring to the judgment in M. Nagaraj (supra) observed as follows:

293. Though in M. Nagaraj case some observations of general nature have been made so far as the applicability of the principles to the Scheduled Caste and Scheduled Tribes are concerned, really that case did not concern with the Scheduled Castes and Scheduled Tribes. Similar is the position here. The focus on the identity test in M. Nagaraj case is unexceptionable

Paras 80 and 110 of M. Nagarajs case (supra) have been reproduced. Honble Justice Dalveer Bhandari in his separate judgment after reproducing para 122 of the judgment in M. Nagarajs case, wherein the ceiling limit of 50%, the concept of creamy layer and the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiencies are held to be constitutional requirements without which the structure of equality of opportunity enshrined in Article 16 would collapse, proceeded to observe as follows:

It was contended that Nagaraj is obiter in regard to creamy layer exclusion. According to Nagaraj reservation in promotion for SC/ST is contingent on exclusion of the creamy layer (paras 122, 123 and 124). The contention of the Union of India cannot be accepted. The discussion regarding creamy layer is far from obiter in Nagaraj. If the State fails to exclude the SC/ST creamy layer, the reservation must fall. Placing this contingency in the conclusion makes the discussion of creamy layer part of the ratio.

It appears that Justice Bhandari expressed no opinion with regard to applicability of exclusion of creamy layer to SC/ST, but as mentioned above, it was clearly observed in para 389 that the Supreme Court had dealt with the issue of creamy layer as applicable to SCs/STs in M. Nagaraj (supra). What clearly emerges from the separate judgments authored by the Honble Judges is that whereas, the Honble Chief Justice observed that the creamy layer would not apply to SCs/STs, and the observations in that regard in M. Nagaraj were only general, Justice Bhandari has clearly observed that the judgment in the said case as regards applicability of creamy layer to SCs/STs is not obiter. Insofar as, the judgment authored by Justice Pasayat for self and Justice Thakkar is concerned, the same in the first sentence of para 293, as reproduced above, would observe that the observations in M. Nagaraj were general in nature, but in the very next sentence it has been mentioned that the focus on identity test in the said case is unexceptionable. Justice Raveendran, as mentioned above, did not express any opinion on the issue. Judicial precedents guide us not to place reliance upon any of the observations as made by the Honble Judges as mentioned above, as that was not a point involved, as said by the Honble Chief Justice in the very beginning of the judgment. It would, therefore, be appropriate not to place reliance upon the same. It is too well settled a proposition of law laid down by the Honble Supreme Court under Article 141 is binding upon all courts and tribunals, but a binding precedent would be ratio deci dendi and that would come on issues involved in the case, or where there is a debate and a finding. Once, the issue as to whether the creamy layer would be applicable to SCs/STs was not a question debated, any observation made by any of the Honble Judges would be sub silentio and would not be a binding precedent under Article 141. We are of the considered view that to find out as to whether the question of exclusion of creamy layer as regards SCs/STs was involved in M. Nagaraj (supra), we should see the judgment in M. Nagaraj itself. We reiterate that vires of Article 16(4A) which only deals with SCs/STs was under challenge, and the parameters of pre-conditions on which the said provision was protected include exclusion of creamy layer of SCs/STs. Observations in that regard have since already been reproduced in the earlier part of the judgment.

18. The Honble Supreme Court has focused on the issue as mentioned above after the judgment in M. Naaraj (supra). We may make a pertinent mention of the judgment of the Honble Supreme Court in Nair Service Society v State of Kerala [(2007) 4 SCC 1]. The facts of the case aforesaid reveal that a writ came to be filed in the Kerala High Court questioning the validity of the report commonly known as Mandal Commission Report. The writ was later transferred to the Supreme Court. In Indra Sawhney (supra) the States were directed to identify creamy layer amongst the backward classes and exclude them from the purview of reservation. Pursuant to directions aforesaid, the Union of India appointed a Commission, which issued a memorandum dated 8.9.1993 laying down guidelines for identifying creamy layer, inter alia stipulating that the sons and daughters of persons having gross annual income of Rs.1 lakh or above would be excluded. The State of Kerala did not comply with the said directions. The legislature of the State of Kerala enacted the Kerala Backward Classes (Reservation of Appointments or Posts in the Services under the State) Act, 1995, in terms whereof it was declared that there was no socially advanced section in the State. The petitioner society filed a petition questioning the validity of the said Act. In para 51 of the judgment, the Court while making reference of its decision in M. Nagaraj (supra), reproduced paras 110, 122 and 123 of the judgment. In para 53, it was held as follows:

53. This Court rationalised the creamy layer rule as a necessary bargain between the competing ends of caste based reservations and the principle of secularism

In the context of the judgment in Indra Sawhneys case (supra), it was held that This Court, thus, has categorically laid down the law that determination of creamy layer is a part of the constitutional scheme. If determination of creamy layer is a part of the constitutional scheme, it appears to us that those who may be covered under the creamy layer criteria, which has to be determined by each State, whether they belong to OBC or SC/ST categories, would not make any difference.

19. In Anil Chandra & Others v Radha Krishna Gaur & Others [(2009) 9 SCC 454], the Supreme Court was directly dealing with reservation in promotion to SCs/STs. The facts of the case reveal that in the year 1973, the Government provided reservation in the matter of promotion for SCs and STs. Subsequently U.P. Jal Nigam adopted the U.P. Government Servants Seniority Rules, 1991. The said rules were notified on 20.3.1991. The service conditions of employees of the Nigam were governed by U.P. Jal Nigam Engineers (Public Health Branch) Service Regulations, 1978. The said regulations were made in exercise of the powers conferred on the Nigam under Sections 97(2) and 98(1) of the U.P. Water Supply and Sewerage Act, 1975. In the year 1994, the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 was promulgated, and Section 3(7) of the said Act stated that if on the case of commencement of the Act, reservation was in force under government orders for appointment to posts to be filled up by promotion, such government orders would continue to be applicable till they are modified or revoked. On 10.10.1994 the percentage of reservation in the matter of SCs was enhanced from 18% to 21% by means of government order referring to Section 3(7) of the Act of 1994. Article 16(4A), as mentioned above, was introduced by way of amendment in the Constitution w.e.f. 17.6.1995. The respondents before the Supreme Court who were working on the posts of Superintending Engineers, Executive Engineers and Assistant Engineers in U.P. Jal Nigam, aggrieved by the seniority list which came into being by giving benefit of reservation to SC/ST in promotion, filed a writ petition assailing the validity of the U.P. Government Servants Seniority (Third Amendment) Rules, 2007, by virtue of which rule 8-A was inserted in the U.P. Government Servants Seniority Rules, 1991, whereby government servants belonging to SCs and STs were to be entitled to consequential seniority on accelerated promotion given to them through roster/rule of reservation. The matter came up before a Division Bench of the High Court of Allahabad at Lucknow Bench, and by way of interim directions, the court directed that seniority of the respondents as existing prior to the enforcement of the Rules of 2007 would not be disturbed in pursuance of the Rules. In yet another writ petition, similar interim directions were issued. It was a case where against the interim orders passed by the High Court, SLP came to be filed before the Supreme Court. The interim directions made by the High Court were set aside. The High Court was asked to dispose of the writ petition preferably within two months. The appellants before the Supreme Court moved an application before the High Court for their impleadment, which was allowed. When the appellants were impleaded as party respondents, it appears that they filed SLP before the Honble Supreme Court. The Supreme Court observed that in the facts and circumstances of the case, it was of the view that it was the constitutional obligation of the State, at the time of providing reservation in the matter of promotion to identify the class or classes of posts in the service for which reservation is required, but neither any effort had been made to identify the class or classes of posts nor any exercise had been done to quantify the extent of reservation. It was also observed that adequate representation does not mean proportional representation. Para 123 of the judgment in M. Nagaraj (supra) was reproduced, wherein it has been specifically held that the State is not bound to make reservation for SCs/STs in matters of promotions, however, if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance with Article 335 of the Constitution. M. Nagarajs case was thus made applicable to SC/ST candidates as well.

20. A Division Bench of the High court of Himachal Pradesh in the matter of H. P. Samanya Varg Karamchari Kalyan Mahasangh v State of H.P. and others [CWP-T No.2628 of 2008, decided on 18.9.2009] dealt with the very question involved in the present case. Brief facts of the case reveal that challenge in the writ petition was posed to the validity of instructions dated 7.9.2007 issued by the State of Himachal Pradesh providing for reservation in the matter of promotions with consequential seniority in all classes of posts in the services under the State in favour of the SCs and STs. By the said instructions the State had taken a decision to make reservation in promotion for SCs and STs in terms of the provisions contained in Articles 16(4), 16(4A) and 16(4B) of the Constitution. While issuing the instructions aforesaid, the State had referred to various judgments of the Apex Court, including the judgments in M. Nagaraj (supra), and despite that decided that there was no need to collect data as mandated in the said case. While dealing with the concept of creamy layer, the State had issued following directions:

(a) Scheduled Castes/Scheduled Tribes Government servants shall, on their promotion by virtue of rule of reservation/roster, be entitled to consequential seniority with effect from 17.6.1995 retrospectively without introduction of concept of creamy layer as per policy decision of Central Government, contained in Government of India Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training, letter No.36036/2/2007-Estt.(Res.), dated 29.3.2007.

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The matter was contested by the State Government as also associations representing SCs, STs and OBCs. The contention raised on behalf of the petitioners was that instructions dated 7.9.2007 would be totally illegal since the State had not collected any data as is mandated by the Apex Court in M. Nagaraj (supra). It was also urged that in terms of the conclusion in M. Nagarajs case, the concept of creamy layer would also be applicable to SCs and STs. After making mention of the judgments of the Supreme Court in Indra Sawhney (supra), Virpal Singh Chauhan (supra), Ajit Singh Januja (supra) and R. K. Sabharwal (supra), tracing briefly the history of relevant amendments brought about in the Constitution, and quoting paras 33, 86, 102, 104, 110, 121, 122 and 123 of the judgment in M. Nagarajs case, the Division Bench held as follows:

From the law laid down by the Apex Court in extenso hereinabove, it is clear that the Apex Court has upheld the constitutional amendments but has laid down that this does not obliterate the constitutional requirements of ceiling limit of 50%, the concept of creamy layer, the sub classification between OBCs on the one hand and SCs and STs on the other hand, and the concept of post based roster with inbuilt concept of replacements. It has also been clearly laid down that the State is not bound to make reservations for scheduled castes and scheduled tribes. However, if it chooses to exercise the powers vested in it to make such reservations, the State must collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment. In addition thereto Article 335 relating to efficiency must be also complied with. It is subject to these guidelines that the constitutional validity of the amendments was upheld.

In the next paragraph, the court in its opinion held that the instructions were totally violative of law laid down by the Apex Court, and that as per the judgment in M. Nagaraj the State is bound to collect data to show that the so called backward classes are actually backward and they are inadequately represented in the services under the State. While further dealing with the contention raised on behalf of the petitioners that the observations of the Apex Court in M. Nagaraj in para 121 introduced the concept of creamy layer even with regard to SCs and STs, it was observed that the observations made in the said para are general in nature. It was further observed that in Indra Sawhneys case it was clearly stated that the concept of creamy layer was only applicable to OBCs, and in M. Nagarajs case the Apex Court only stated that the concept of creamy layer should be kept in mind while making reservations, and that it has nowhere been specifically held that the concept of creamy layer would be applicable to SCs and STs as well. The court also observed that the reference made to the concept of creamy layer in para 121 appears to be general observation with regard to the concept of reservation in respect of all classes including OBCs and not in respect of SCs and STs only. The observations as mentioned above would clearly suggest that the reference to general observations made in M. Nagarajs case is as regards applicability of creamy layer concept with regard to all reserved categories, and not only SCs and STs. In the operative part of the order, it has been held that the State is not entitled to make reservation in promotion for SCs and STs. The impugned instructions have been quashed. Once, the very instructions dealing with non-applicability of creamy layer concept to SCs and STs have been held to be illegal, the observations mentioned above as general in nature have to mean that the creamy layer bar is not applicable to SCs and STs only, but is applicable to all reserved categories, as otherwise there was no reason whatsoever to strike down the instructions specifically dealing with non-bar of creamy layer to SCs and STs categories.

21. A single Bench of the Punjab & Haryana High Court in the matter of Pritpal Singh v State of Punjab and others [CWP No.1960 of 2008] decided on 9.9.2009, held that inter se seniority among the general category candidates and reserved category candidates would continue to be determined in view of the judgment in Ajit Singh Januja (supra). Brief facts of the case aforesaid reveal that contest for promotion was between the general category and reserved category of SC candidates. The petitioner who belonged to general category was seeking application of catch-up rule because reserved category employees came to be promoted earlier, even though junior to general category candidates. The Bench after quoting paras 120, 121 and 122 from the judgment in M. Nagarajs case, held as mentioned above. It is no doubt true that the question as to whether creamy layer bar would apply to SCs and STs was not specifically gone into. All that, therefore, we may mention is that the contest was between general and SC candidates, and the judgment of the Supreme Court in M. Nagaraj was held applicable, and if the parameters as pre-conditions mentioned in M. Nagaraj were not gone into, it was held that the earlier law of catch-up rule would hold the field.

22. A Division Bench of the Rajasthan High Court in State of Rajasthan & others, etc. v Bajrang Lal Sharma & others [Civil Special appeal (Writ) No.3/2010 and connected matters] decided as recently as on 5.2.2010, in a detailed judgment dealt with the issue of seniority between SCs and STs on one hand and general category candidates on the other hand, in the context of judgment of the Supreme Court in M. Nagaraj (supra). A writ came to be filed by the members of Rajasthan Administrative Service challenging notification dated 25.4.2008, whereby the State Government, while exercising powers conferred by the proviso to Article 309 of the Constitution, amended various service rules with effect from 28.12.2002, whereby the following existing proviso to the rule, as mentioned in column 3, was deleted:

Provided that a candidate who has got the benefit of proviso inserted vide Notification No. F.7(1) DOP/A-II/96 dated 01.04.1997 on promotion to an immediate higher post shall not be reverted and his seniority shall remain unaffected. This proviso is subject to final decision of the Honble Supreme Court of India in Writ Petition (Civil) No.234/2002 All India Equality Forum V/s Union of India & Others.

The prayer of the petitioners was also to issue a writ directing the respondents to strictly adhere to the catch-up rule and revise their seniority in comparison to the candidates belonging to SCs and STs after giving the benefit of regaining of the seniority by the general/OBC category candidates, as also to restrain the respondents from providing the consequential seniority to the candidates belonging to the SCs and STs. Deletion of the proviso in various service rules vide notification dated 25.4.2008, it was urged, would amount to giving consequential seniority to the candidates belonging to SCs and STs, which could not have been given without collecting the required quantifiable data to reach to a conclusion that reservation is required in promotion and to show that the State was having any compelling reason, namely, backwardness, inadequacy of representation and that it would not cause any overall administrative efficiency before providing reservation in promotion with consequential seniority, as held by the Honble Supreme Court in M. Nagaraj (supra). Since the State Government had not complied with the directions of the Apex Court before issuing the impugned notification, it was urged, the said notification was liable to be quashed being violative of the directions contained in M. Nagarajs case. One of the pleas raised on behalf of the respondents in defending the challenge to the notification referred to above was that SC/ST is not a caste but it is a class, and since it is a class based reservation and creamy layer is applicable for OBC and not SC and ST, after upholding of the constitutional validity of 77th and 85th Constitutional Amendments by the Apex Court, nothing remained to be decided. Even though, the contention referred to above may not have been specifically rejected, but when the impugned notification was set aside on the basis of judicial precedents, inclusive of the judgment in M. Nagarajs case, from which the Division Bench extensively quoted, the contention as noted above raised on behalf of the respondents shall be deemed to have been rejected.

23. Before we may part with the aspect of the case that observations made by the Honble Supreme Court in M. Nagarajs case as regards applicability of creamy layer principle to SCs and STs as well are general in nature, as urged by the learned ASG, in all fairness, we may mention that it was urged during the course of arguments and through written note handed over to us after the arguments as well that in Ashok Kumar Thakur (supra), the observations contained in M. Nagarajs case about applicability of creamy layer as regards SCs and STs, have to be read in the context of Indra Sawhneys case, as observed by the then Honble Chief Justice, and once there is not specific dissent to the said observations, the concurring judgment of the Honble Chief Justice to the effect that creamy layer has no applicability to SCs and STs should be treated as the majority view. In that regard, reliance has been placed upon Guardians of Poor v Guardians of Poor [(1889) 24 QBD 117], and Court on its own motion v State & Others [Crl. M.11677/2007 in WP (Crl) No.796/2007, decided on 29.11.2007]. We would have gone into this aspect of the case if the applicability or otherwise of creamy layer to SCs and STs would have been a question framed, debated and adjudicated by the Honble Bench while deciding Ashok Kumar Thakurs case. We have already observed that this was not a question involved, and one of the Honble Judges, Justice Raveendran, has specifically said so. We are unable to agree with the contention raised by the learned ASG that Honble Justice Bhandari had left the question open. In the written note handed over to us, it has been clearly mentioned that the observations of Honble Justice Bhandari in paragraph 389 is that the discussion regarding creamy layer in M. Nagarajs case is far from obiter, and the same are contrary to the observations made by the Honble Chief Justice, and, therefore, it cannot be said that Ashok Kumar Thakur has laid down any decision on the question as to whether M. Nagaraj would apply the test of creamy layer to SC/ST. Despite so saying, it is still stated in the written note that Honble Justice Bhandari has left the question open as to whether creamy layer test will apply to SC/ST. It is also stated in the note that Honble Justice Pasayat speaking for self and Honble Justice Thakkar, has not expressed any view in this regard, and that Honble Justice Raveendran has not dealt with the aspect at all. What thus clearly emerges from the written note is that the views of the Honble Chief Justice and Honble Justice Bhandari are contrary, whereas Honble Justice Pasayat speaking for self and Honble Justice Thakkar, has expressed no opinion, and Honble Justice Raveendran has not dealt with the aspect at all. Once, the question was not in issue nor debated and adjudicated upon, and once there are two contradictory views one expressed by the Honble Chief Justice and the other by Honble Justice Bhandari, whereas three of the Honble Judges have not expressed any opinion or dealt with the issue, as per the written stand of the learned ASG himself, the plea raised by him that it being a concurring judgment, the view of the Honble Chief Justice would prevail, has to be repelled. That being so, there would be no need to refer to the facts of the two judicial precedents relied upon by the learned ASG, as noted above.

24. We may also mention that the learned ASG has relied upon the judgment of the Honble Supreme Coourt in Avinash Singh Bagri & others v Registrar, IIT Delhi & another [(2009) 8 SCC 220] to urge that the view of the Honble Chief Justice in Ashok Kumar Thakurs case has been validated (as put in the written note) by three Honble Judges in the said case. The facts of the case aforesaid reveal that Avinash Singh Bagri and five others had filed a writ petition in the Apex Court under Article 32 of the Constitution airing their grievance that most of the SC/ST students who had been given admission in IIT, Delhi, were being denied the right to pursue their studies by the respondent Institute on the ground of poor performance and such students were being expelled and their admissions were being cancelled after one year or two years. A separate writ petition was also filed by two others who were expelled by IIT, Delhi highlighting similar grievance before the Court. The petitioners belonged to reserved categories of SC/ST/OBC. They were students of IIT, Delhi pursuing their BTech course, and had got admission in IIT through all India joint entrance test. They were expelled from the BTech course as they could not make the required average credits in their second year. It was their case that despite providing reservation in higher education like medical and engineering streams, no coaching or any other facilities were provided to SC/ST/OBC candidates to enable them to compete with other general category students, as a result of which more than 90% of such students were dropped out from higher courses in first or second year, resulting in the reserved seats in higher courses lying vacant and unfilled. They gave some statistics as regards the unfilled reserved seats in IIT. After referring to the criteria provided by IIT of securing minimum marks by the general and reserved category candidates at the end of each semester failing which their continuation was to be terminated, mention is then of IITs at Kharagpur, Bombay, Chennai, Guwahati and Roorkee, where such criteria was not provided and no expulsions were being made. For the students of IIT at places aforesaid, if a student was to fail to achieve the required average credits in the first or second year, he/she was not expelled, and for such students, there was a programme known as slow track programme, and if the student cleared a subject, he was awarded with full credits assigned to the subject. In IIT, Delhi, it was mentioned, there was no slow track programme. The petitioners had highlighted their related grievances as well. The respondents defended the criteria so adopted. The facts of the case would unmistakably reveal that the Apex Court was dealing with difficulties being faced by reserved category candidates at IIT, Delhi, which may result into drop out of reserved category students resulting in reserved seats in higher courses having remained vacant and unfilled, and further that the criteria adopted by IIT, Delhi was not adopted by any other IIT in the country. There was no issue whatsoever as regards applicability of creamy layer to SCs and STs. In paragraph 43 of the judgment, it is mentioned that It is not in dispute that SCs and STs are a separate class by themselves and the creamy layer principle is not applicable to them. One sentence on which reliance has been placed by the learned ASG, in itself would show that the observations as above have come to be made by stating that there is no dispute. Surely, if there is no dispute, it would be a case of admission and admission on law would not be binding. In the very next sentence, the Honble Court has referred to Article 46 of the Constitution which enjoins upon the State to promote with special care the educational and economic interests of the weaker sections of the people and protect them from social injustice and all forms of exploitation. The need has been stressed in the judgment to take care of socially and educationally backward categories. A direction came to be issued to the respondent Institute to consider the case of petitioners afresh in the light of the various aspects mentioned in the judgment, and in view of the peculiar facts, reappraise their performance taking note of special features available/applicable to the reserved categories and take a decision one way or the other. The plea raised by the learned ASG during the course of arguments as also emanating from the written note that the view of the Honble Chief Justice in M. Nagarajs case has been validated by three Honble Judges in the case of Avinash Singh Bagri is not correct. There is not even a mention in Bagris case of the judgment in M. Nagaraj. We have already mentioned that the law laid down by the Honble Supreme Court, as per provisions contained in Article 141 of the Constitution, is binding upon all courts and tribunals in the country, but this is equally settled a proposition of law that it is the ratio deci dendi or the law laid down which is binding. In the present case, no such law has been laid down, and the observation that creamy layer principle would not be applicable to SCs and STs has been made there being no dispute as regards the same.

25. We may now deal with the plea raised by the learned ASG that creamy layer principle would not be applicable to SCs and STs in view of articles 341 and 342 of the Constitution. The provisions of the Constitution as mentioned above read as follows:

341. Scheduled Castes. - (1) The President may with respect to any State or Union territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State or Union territory, as the case may be.

(2) Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification issued under clause (1) any caste, race or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification

342. Scheduled Tribes. - (1) The President may with respect to any State or Union territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purposes of this Constitution be deemed to be Scheduled Tribes in relation to that State or Union territory, as the case may be

(2) Parliament may by law include in or exclude from the list of Scheduled Tribes specified in a notification issued under clause (1) any tribe or tribal community or part of or group within any tribe or tribal community, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

The provisions reproduced above would show that the President may by public notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of the Constitution be deemed to be Scheduled Castes in relation to a particular State or Union territory. The Parliament has power by law to include in or exclude from the list of Scheduled Castes specified in a notification issued under Art.341(1) any caste, race or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification. Provisions of Article 342 are similar, but are applicable to Scheduled Tribes. In our considered view, reliance placed on the two Articles of the Constitution, is wholly misplaced. The said Articles do not even remotely touch upon the issue as involved in the present case. The provisions of the Constitution as mentioned above only deal with the powers of the President after necessary consultations to specify castes, races or tribes or parts of or groups within castes, races or tribes, which shall, for the purposes of the Constitution, be deemed to be Scheduled Castes/Scheduled Tribes in relation to a particular State or Union territory. No doubt, special provisions as regards who should be SC or ST have been made in the Constitution, but the same are not at all relatable to exclusion of creamy layer.

26. In all fairness to the learned ASG, we may mention that reliance has been placed upon the judgment of the Honble Supreme Court in E. V. Chinnaiah v State of A.P. & others, etc. [(2005) 1 SCC 394], wherein it has been held that the power of the State to deal with the Scheduled Caste List is totally absent except to bear in mind the required maintenance of efficiency of administration in making or appointments which is found in Article 335, and, therefore, any executive action or legislative enactment which interferes, disturbs, rearranges, regroups or reclassifies the various castes found in the Presidential List will be violative of scheme of the Constitution and will be violative of Article 341 of the Constitution. The judgment relied upon by the learned ASG, in our view, has to be understood in the context of the challenge posed therein. The facts of the case aforesaid, in brevity, reveal that challenge was posed to validity of the Andhra Pradesh Scheduled Caste (Rationalisation of Reservations) Act, 2000 before the High Court. The writ was dismissed by the High Court by a majority of 4:1. The matter came up before the Supreme Court, the High Court having certified it to be fit case for appeal. The State Government had appointed a Commission headed by a retired Judge to identify the groups amongst the Scheduled Castes found in the list prepared under Article 341 by the President, who had failed to secure the benefit of the reservations provided for Scheduled Castes in the State in admissions to professional colleges and appointments to public services in the State. The report given by the Honble Judge was accepted by the State resulting into issuance of an ordinance dividing the 57 castes enumerated in the Presidential List into four groups based on inter se backwardness and fixing separate quotas in reservation for each of these groups. Thus, the castes in the Presidential List came to be grouped as A, B, C and D. The 15% reservation for backward classes in the State in educational institutions and in the services of the State under Articles 15(4) and 16(4) of the Constitution of India for SCs were apportioned amongst the four groups in the following manner:

1. Group A : 1%

2. Group B : 7%

3. Group C : 6%

4. Group D : 1%

The said ordinance came to be challenged before the High Court by way of various writ petitions as being violative of Articles 15(4), 16(4), 162, 246, 341(1), 228(7), 46, 335 and 213 of the Constitution, as also the Constitution (Scheduled Castes) Order, 1950 notified by the President, and the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act, 1976. The contention advanced on behalf of the appellants was that the State legislature would have no competence to make any law in regard to bifurcation of the Presidential List of Scheduled Castes prepared under Article 341(1) of the Constitution, and, therefore, the impugned legislation being one solely meant for subdividing or subgrouping the castes enumerated in the Presidential List, the same would suffer from lack of legislative competence. It was also urged that once, the castes are put in the Presidential List, the said castes would become one homogeneous class for all purposes under the Constitution, and, therefore, there could be no further division of the said castes in the Scheduled List by any Act of the State legislature. Some other pleas in support of the appeal were also made. The main controversy involved in the case was the power of the State legislature to divide and subdivide the SC/ST categories for conferring benefit upon those who advanced and may not be entitled for the benefit of reservations. In para 113 of the judgment it has been clearly mentioned that the power of the State Legislature to decide as regards grant of benefit of reservation in jobs or in educational institutions to the backward classes is not in dispute. It is furthermore not in dispute that if such a decision is made the State can also lay down a legislative policy as regards extent of reservation to be made for different members of the backward classes including Scheduled Castes. On the controversy as in issue, it was held that the State legislature cannot take away the benefit on the premise that one or the other group amongst the members of the Scheduled Castes has advanced and, thus, is not entitled to the entire benefit of reservation. We are in agreement with the contention raised by the learned counsel for the applicants that the case is not concerned with a comparison with the forward community to see whether the community as a whole or its members individually have become at par with their forward peers. All that was in issue and debated pertained to that once, the community is accepted to be backward, there cannot be bifurcation or subgrouping of SC/ST list to treat some communities as more backward than the others. We may refer to the observations made by the Honble Supreme Court in that regard contained in paras 31 and 39 of the judgment. The same read, thus:

31. Therefore, it is clear that the purpose or the true intendment of this Act is only to first divide the castes in the Presidential List of the Scheduled Castes into 4 groups and then divide 15% of reservation allotted to the Scheduled Castes as a class amongst these 4 groups. Thus it is clear that the Act does not for the first time provide for reservation to the Scheduled Castes but only intends to re-distribute the reservation already made by sub-classifying the Scheduled Castes which is otherwise held to be a class by itself. It is a well settled principle in law that reservation to a backward class is not a constitutional mandate. It is the prerogative of the State concerned if they so desire, with an object of providing opportunity of advancement in the society to certain backward classes which includes the Scheduled Castes to reserve certain seats in educational institutions under Article 15(4) and in public services of the State under Article 16(4). That part of its constitutional obligation, as stated above, has already been fulfilled by the State. Having done so, it is not open to the State to sub-classify a class already recognised by the Constitution and allot a portion of the already reserved quota amongst the State created sub-class within the List of Scheduled Castes.

39. Legal constitutional policy adumbrated in a statute must answer the test of Article 14 of the Constitution of India. 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 cannot be sub-divided so as to give more preference to a miniscule proportion of the Scheduled Castes in preference to other members of the same class.

From the statement of law as extracted above, we are once again in agreement with the contention raised by the learned counsel representing the applicant that what was held is that a class cannot be subdivided so as to give more preference to a miniscule proportion in preference to the other members of the same class, and as long as the members of the community are still considered backward, there cannot be a sub-categorisation to give more benefit to some than the others. The judgment relied upon by the learned counsel cannot be interpreted to mean that even if a person is no more backward and answers the creamy layer criteria as may be fixed by the Government, he would still continue to enjoy and reap the benefits of affirmative action.

27. Independent of the case law relied upon by the counsel representing the applicants, we are of the view that while applying the principle of creamy layer, there cannot be a distinction between SCs and STs on one hand and OBCs on the other. In view of the provisions contained in Article 14 of the Constitution, the State cannot deny to any person equality before the law or the equal protection of the laws. There is a prohibition of discrimination against any citizen on grounds only of religion, race, caste, sex and place of birth, as per provisions contained in Article 15(1). However, by virtue of provisions contained in Article 15(4) the State is not prevented from making any special provision for the advancement of any socially and educationally backward classes of citizens or for Scheduled Castes or Scheduled Tribes. In view of provisions contained in Article 15(5) the State is not prevented from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for Scheduled Castes and Scheduled Tribes, insofar as such special provisions relate to their admission to educational institutions. The power of the State as regards making special provisions for the advancement or for admissions to educational institutions is equally applicable to socially and educationally backward classes of citizens and the SCs and STs. In view of the provisions contained in Article 16, there has to be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State, and there cannot be any discrimination based upon grounds only of religion, race, caste, sex, descent, place of birth and residence or any of them. Further, by virtue of provisions contained in Article 16(4) the State is not prevented from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, may not be adequately represented in the services under it. By virtue of provisions contained in Article 16(4A) the State is not prevented from making any provision for reservation in matters of promotion, with consequential seniority to any class or classes of posts in the services under it. It does not appear that the Constitution makes any distinction between the SCs and STs as regards making special provisions for admission or services under the State, except for that insofar as the promotion with consequential seniority is concerned, the same appears to be only applicable to SCs and STs. If the creamy layer principle is applicable to OBC categories, which, we may mention, is admittedly so, why such principle could not be applicable to SCs and STs. The only distinction that comes to our notice is that whereas, SCs and STs are socially, educationally and economically backward from generations, by the very fact that they belong to SCs or STs, they are considered to be socially, educationally and economically backward, whereas other backward classes may have to be identified for making special laws for them. It may be recalled that the concept of OBCs has its roots in the Mandal Commissions report. The President pursuant to a resolution of the Parliament, appointed the second Backward Class Commission on January 1, 1979 under the chairmanship of Shri B. P. Mandal to investigate the conditions of Socially and Economically Backward Classes (SEBCs). The Commission submitted its report in 1980, identifying number of castes as SEBCs. It concluded that excluding SCs and STs, Other Backward Classes (OBCs) constitute nearly 52% of the Indian population. On the basis of the report of the Commission, two office memoranda came to be issued by the Government which have been adverted to hereinbefore. The benefit of the recommendations made by the Commission as per memorandum dated 13.8.1990 was to be extended to socially and educationally backward classes as opined by the Commission. As per the second memorandum dated 25.9.1991, the benefit was to be provided to economically backward sections of people not covered by any of the existing schemes of reservation. It appears to us that whereas SCs and STs are per se considered socially, educationally and economically backward, others in the same situation have been identified on an extensive exercise carried out in that regard. Be it, therefore, SCs, STs or OBCs, all are socially, educationally and economically backward, and if that be so, if the creamy layer test is to apply to OBCs, it has to apply to SCs and STs as well.

28. The justification for permitting reservation in favour of SCs and STs is that these communities are considered to be backward. The creamy layer principle is evolved for the simple reason that an erstwhile person belonging to backward class is no more backward. Once, he may rub shoulders with any general category candidate, and, in a given case, may be even better placed than him, he would no more be backward socially, economically or educationally. We may illustrate an SC category candidate, because of the percentage of seats reserved for his category, may be selected and appointed to the Indian Administrative Service (IAS) or the Indian Police Service (IPS). Once, he occupies the elite service in the country, he gets a status which may be far better than that of a general category employee occupying some other post far below to that of IAS or IPS, who, even though may have competed with the SC category candidate and obtained more marks than him, but could not make it to the elite service. Such an SC category candidate may have in due course four children and all of them may, because of reservation, also come to be selected and appointed to the same service. Can children of such reserved category person be said to be socially, economically and educationally backward! In our considered view, he will have perhaps far better means than his general category counterpart to get his children educated in the best of educational educations in the country. His social status is uplifted and he has, by virtue of the office held by him, a far higher social status than the general category employee may have. Of course, any pay in this country may not be enough, but once a person is in an all India service, he cannot be said to be economically backward. If despite all this, the principle of creamy layer is not to be applied to him, in our view, it would constitute discrimination against general category candidates, which would be constitutionally impermissible in terms of Article 16 of the Constitution. Once, the tag of backwardness goes, then the differentiation between the SC/ST and general categories only on the basis of caste would be impermissible and against all canons of principle of equality. There has to be exclusion of the creamy layer from the benefits of reservation/affirmative action of the State, as otherwise it would become discriminatory between equals, who cannot be treated unequal only on the basis of caste. The comparison in such a case is a comparison of the individual who is to be given the benefit with a similarly situated person of the forward group. Such person cannot be given the benefit of affirmative action of the State under Articles 15(4), 16(4) or 16(4A), as such person would not satisfy the test of backwardness. The principle of exclusion of the forwards amongst the backwards, i.e., creamy layer, it appears, has been culled out by the Honble Supreme Court for the reasons as we have already mentioned above. The basic premise and the theme behind affirmative action is to permit proportionate equality for the time being to achieve real equality or formal equality, proportionate equality being the means to achieve an end, i.e., formal equality. To permit benefits of affirmative action to those who may not need State protection would be defeating the goal of formal equality and would amount to reverse discrimination. The justification of an affirmative Station action is existence of backwardness, and if this test of backwardness is not satisfied, there would be no justification for affirmative action and the action would be hit by Article 14 of the Constitution. Thus, where identification is based on caste, exclusion of creamy layer necessarily comes in to justify a class to satisfy the characteristics of a same class. The Honble Supreme Court in R. S. Garg v State of Uttar Pradesh [(2006) 6 SCC 430] has held that affirmative action in essence and spirit involves classification of people as backward class of citizens and those are not backward class of citizens, and that a group of persons although are not as such backward or by passage of time ceased to be so, would come within the purview of the creamy layer doctrine evolved by the Honble Supreme Court. Pertinent observations which may need reproduction contained in para 37, read, thus:

37. Equality clauses contained in Articles 14, 15 and 16 of the Constitution of India may in certain situations have to be considered as the basic structure/features of the Constitution of India. We do not mean to say that all violations of Article 14 or 16 would be violative of the basic features of the Constitution of India as adumbrated in Kesvananda Bharati vs. State of Kerala [(1973) 4 SCC 225 : 1973 Supp. SCR 1]. But, it is trite that while a law is patently arbitrary, such infringement of the equality clause contained in Article 14 or Article 16 may be held to be violative of the basic structure of the Constitution. {See Waman Rao vs. Union of India [(1981) 2 SCC 362], Maharao Saheb Shri Bhim Singhji, etc. vs. Union of India & Ors. [AIR 1981 SC 234] and Minerva Mills Ltd. & Ors. vs. Union of India & Ors [(1980) 3 SCC 625]. A statute professing division amongst citizens, subject to Articles 15 and 16 of the Constitution of India must pass the test of strict scrutiny. Article 15(4) and Article 16(4) profess to bring the socially and educationally backward people to the forefront. Only for the purpose of invoking equality clause, the makers of the Constitution thought of protective discrimination and affirmative action. Such recourse to protective discrimination and affirmative action had been thought of to do away with social disparities. So long as social disparities among groups of people are patent and one class of citizens in spite of best efforts cannot effectively avail equality of opportunity due to social and economic handicaps, the policy of affirmative action must receive the approval of the constitutional courts. For the said purpose, however, the qualifications laid down in the Constitution for the aforementioned purpose must be held to be the sine qua non. Thus, affirmative action in essence and spirit involves classification of people as backward class of citizens and those who are not backward class of citizens. A group of persons although are not as such backward or by passage of time ceased to be so would come within the purview of the creamy layer doctrine evolved by this court. The court by evolving said doctrine intended to lay a law that in terms of our constitutional scheme no group of persons should be held to be more equal than the other group. In relation to the minorities, a 11-Judge Bench of this Court in T.M.A. Pai Foundation vs. State of Karnataka [(2002) 8 SCC 481] categorically held that protection is required to be given to the minority so as to apply the equality clauses to them vis-a-vis the majority. In Islamic Academy of Education vs. State of Karnataka [(2003) 6 SCC 697], it was opined that the minority have more rights than the majority. To the said extent Islamic Academy of Education (supra) was overruled by a 7-Judge Bench of this Court in P.A. Inamdar vs. State of Maharashtra [(2005) 6 SCC 537].

29. We have already referred to the judgment of the Honble Supreme Court in M. Nagaraj. We may still refer to the pertinent discussion on applicability of the principle of creamy layer to SCs and STs. In that regard we may reproduce part of para 120 and paras 122 and 123 of the judgment in M. Nagaraj, thus:

120. In Indra Sawhney this Court has, therefore, accepted caste as a determinant of backwardness and yet it has struck a balance with the principle of secularism which is the basic feature of the Constitution by bringing in the concept of creamy layer.

122. We reiterate that the ceiling-limit of 50%, the concept of creamy layer and the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency are all constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse.

123. However, in this case, as stated, the main issue concerns the "extent of reservation". In this regard the concerned State will have to show in each case the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation. As stated above, the impugned provision is an enabling provision. The State is not bound to make reservation for SC/ST in matter of promotions. However if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance of Article 335. It is made clear that even if the State has compelling reasons, as stated above, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling-limit of 50% or obliterate the creamy layer or extend the reservation indefinitely.

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30. Before we may part with this aspect of the case, we would like to mention that it is not understandable as to why the State is insisting upon that the creamy layer principle should not be applicable to SCs and STs. Is it not the wish of the Parliament expressed through the relevant provisions of the Constitution referred to above that the benefit of reservation should reach to all those who, because of their caste or tribe, are backward? In other words, is it the intention of the Legislature that the benefit of reservation should reach to only those who were erstwhile backwards? We may not have any exact or approximate data before us to state that in a percentage of 15% and 7.5% reservation with regard to SCs and STs respectively, what is the percentage of such categories who have already received the benefit of reservation, but it is the common view of all that for the reason that creamy layer principle has not been made applicable to SCs and STs, the advantage of reservation has remained confined to a handful of families. If the creamy layer principle is not made applicable to SCs and STs, it is bound to happen like that. Surely, those who have already obtained the benefit of reservation and have come to occupy higher positions, they have become socially, economically and educationally advanced. They have the facilities, resources and finances to take care of themselves and their children. Surely, children of such people with all the facilities, which the others who have not received the benefit of reservation, are far better and that being so, it is they who would normally come higher in merit than their counter parts of reserved category of SCs and STs. It is in that context that we are observing that the benefit of reservation would remain confined to only a handful of people of the reserved category, whereas others would be deprived of the same. The benefit of reservation to uplift the backward class of SCs and STs has to reach all. A time has to come when every one who deserves to be uplifted is given a chance for the same, failing which the object that all backward class categories have to be uplifted and brought into the main stream with unreserved category candidates would remain a dream. We may recall that the reservation at the advent of the Constitution was limited for some years, and is continuing unabated with manifold added dimensions, even though sixty years have gone by since the Constitution came into being, and there is no hope that reservations, which were, as mentioned above, to be for a limited time, would ever come to a end. In view of the State, adequate reservation for SCs and STs is 15% and 7.5% respectively. It was so to start with and continues to be the same till date. Surely and definitely, if the creamy layer principle may have been applied, the percentage of backwardness per se presumed to be with SCs and STs would have come down and there would have been some ray of hope that at one time, such percentage would come down and may even come to an end. Further, the insistence of the State not to apply creamy layer principle to SCs and STs may work injustice inter se SCs and STs. In fact and reality, those to whom the benefit of reservation has not reached, are made to compete with those who have received it and have become at par or even better than the unreserved category persons.

31. The last plea as regards non-applicability of the principle of creamy layer to SCs and STs of the learned ASG is based upon DOP&T circular/letter dated 29.3.2007 who contends that creamy layer concept would not be applicable to SCs and STs. In the letter aforesaid after making mention of the four Amendments brought about in the Constitution, i.e., 77th, 81st, 82nd and 85th Amendments, and after reproducing some portions of the judgment of the Supreme Court in M. Nagarajs case, it is mentioned that the law officers of the Government had advised that the observations made in M. Nagarajs case regarding creamy layer amongst SCs and STs would be obiter dicta. All that we may comment upon is that the advice tendered to DOP&T is against the dictum of the Honble Supreme Court in M. Nagaraj.

32. Insofar as, complying with the conditions precedent for reservation in promotions and accelerated seniority are concerned, it may be recalled that the case of the State is that according to the 2001 Census, there are 16.2% Scheduled Castes and 8.2% Scheduled Tribes and, therefore, reservation in the matter of public employment is proportionate to the population of such categories, and that since the said benchmark has not been achieved, reservation would be continued, and further that the numerical benchmark laid down by the Central Government for the purposes of reservation in favour of SCs and STs is 15% and 7.5% respectively, and it is impleaded post-based, which would mean that if representation of SCs in a grade becomes 15%, they are not given any reservation, and, therefore, the Government treats 15% reservation for SCs as adequate and whenever such adequacy is achieved, no reservation is provided to that class, and that the same is also true as regards STs, and further that there is an inbuilt system to ensure that reservation to SCs and STs is not given when their representation in a service becomes adequate. The data provided is as on 1.1.2006, and admittedly, no exercise has been undertaken after the judgment of the Honble Supreme Court in M. Nagaraj. The judgment in Nagarajs case was delivered on 19.10.2006. From the affidavit filed on behalf of the respondents, contents whereof have been referred to above, it is apparent that adequate representation of SCs and STs has been worked out on the basis of proportionate representation of their population. The provisions of Article 16(4) of the Constitution would not prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens, which, in the opinion of the State, is not adequately represented in the services under it. It is adequacy of the representation of backward classes of citizens which has to be assessed, and not proportionate representation as per their population. Once again, in the provisions contained in Article 16(4A), the State is not prevented from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under it in favour of SCs and STs, which, in the opinion of the State, are not adequately represented. It is once again, adequacy of representation which is to be worked out and not proportionate representation. In Indra Sawhneys case, Honble Justice Jeevan Reddy observed that clause (4) of Article 16 speaks of adequate representation and not proportionate representation, and that adequate representation cannot be read as proportionate representation. We may refer to para 807 of the judgment in Indra Sawhneys case, which reads as follows:

807. We must, however, point out that clause (4) speaks of adequate representation and not proportionate representation. Adequate representation cannot be read as proportionate representation. Principle of proportionate representation is accepted only in Articles 330 and 332 of the Constitution and that too for a limited period. These articles speak of reservation of seats in Lok Sabha and the State legislatures in favour of Scheduled Castes and Scheduled Tribes proportionate to their population, but they are only temporary and special provisions. It is therefore not possible to accept the theory of proportionate representation though the proportion of population of backward classes to the total population would certainly be relevant.

Honble Justice Sawant also observed that not only Article 16(4) but for that matter, Article 335 also does not speak of giving proportionate representation to the backward classes and SCs/STs. Para 505 of the judgment reads as follows:

505. It is necessary in this connection, to point out that not only Article 16(4) but for that matter, Article 335 also does not speak of giving proportional representation to the backward classes and SCs/STs respectively. Article 16(4), as repeatedly pointed out earlier, in terms, speaks of adequate representation to the backward classes, while Article 335 speaks of the claims of the members of the SCs/STs. However, it cannot be disputed that whether it is the appointments of SCsSTs or other backward classes, both are to be made consistently with the maintenance of the efficiency in administration.

In Anil Chandra (supra) as well, it has been observed that adequate representation does not mean proportional representation. In view of the scheme of the constitutional provisions, the theory propounded by the State with regard to proportionate representation is wholly unsustainable and has to be repelled. No exercise as ordained by the Honble Supreme Court in M. Nagarajs case as regards conditions precedent for applicability of reservation in promotions and accelerated seniority has been done. Reservation of seats for SCs and STs in the House of the People is governed by Article 330 of the Constitution. The total number of seats reserved in any State or Union territory for SCs and STs shall bear, as nearly as may be, the same proportion to the total number of seats allotted to that State of Union Territory in the House of the People as the population of SCs and STs in that State or Union territory or part thereof, as the case may be, in respect of which seats are so reserved, bears to the total population of the State or Union territory. In view of the provisions contained in Article 243D(1) seats shall be reserved for the SCs and STs 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 SCs and STs in that Panchayat area. As per provisions contained in Article 243T reservation of seats for SCs and STs in every municipality 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 municipality as the population of the SCs and STs in that municipal area bears to the total population of that area. What is true as regards adequacy of seats in the House of the People, i.e., the Lok Sabha, Panchayats and municipalities, is not true as regards the extent of reservation in appointments or promotion, as the case may be. The State appears to have laboured under a wrong impression in making the extent of reservation proportionate to the population of the SCs and STs.

33. The requirement of taking appropriate steps as regards pre-conditions spelled out in the judgment of the Apex Court in M. Nagarajs case, and the consequences of not doing so, have since already been commented upon in the judicial precedents already referred to above. We need not give the facts of such cases as the same have already been given in sufficient detail hereinbefore. We may only make a mention of observations made in that context in the said judgments. The Honble Supreme Court while dealing with the concept of creamy layer as spelled out in Nair Service Society (supra) held that it has categorically laid down that determination of creamy layer is part of the constitutional scheme. In Anil Chandra (supra) it has been held that it was the constitutional obligation of the State, at the time of providing reservation in the matter of promotions, to identify the class or classes of posts in the service for which reservation is required, however, neither any effort has been made to identify the class or classes of posts for which reservation is to be provided in promotion nor any exercise has been done to quantify the extent of reservation. The result of not doing so has already been adverted to above. A Division Bench of the High Court of Himachal Pradesh in H. P. Samanya Varg Karamchari Kalyan Mahasangh (supra) has held that from the law laid down by the Apex Court it is clear that the Court has upheld the constitutional amendments but has laid down that this would not obliterate the constitutional requirements of ceiling of 50%, the concept of creamy layer, the sub-classification between OBCs on the one hand and the SCs and STs on the other hand, and the concept of post-based roster with inbuilt concept of replacements. It has also been held that it has been clearly laid down that the State is not bound to make reservations for SCs and STs, however, if it chooses to exercise the powers vested in it to make such reservations, the State must collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment, and in addition thereto article 335 relating to efficiency must be also complied with. It was subject to these guidelines that the constitutional validity of the amendments was upheld. The Punjab & Haryana High Court in Prithpal Singh (supra) after reproducing paras 120, 121 and 122 of the judgment of the Honble Supreme Court in M. Nagarajs case, observed as follows:

From the above, it is crystal clear that the 85th Constitutional Amendment and Section 16(4A) per se do not provide the benefit of consequential seniority unless the concerned State on the basis of the relevant material/data makes a provision for consequential seniority. After the delivery of the aforesaid judgment or even the 85th Constitutional amendment the State of Punjab has not made any provision for consequential seniority in the State of Punjab. The Reservation Act of 2006 does not contain any such provision. In absence of there being any provision the principle of catch-up rule laid down by the Honble Apex Court in case of Ajit Singh Januja shall apply

For lack of taking steps which are pre requisite, it was held that inter se seniority between the general category and reserved category candidates would continue to be determined in view of Ajit Singh Janujas case. A Division Bench of the Rajasthan High Court in State of Rajasthan v Bajrang Lal Sharma (supra), after discussing the entire case law on the subject, in a lengthy judgment has concluded in para 112 as follows:

112. The above discussion makes it clear that clause (4A) of Article 16 was only an enabling provision and as held by the Honble Apex Court in M. Nagarajs case (supra), that the State is not bound to make reservation for the SCs and the STs in the matters of promotion. However, if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance with Article 335. Admittedly, the said exercise has not been done by the State Government either before amending the various Service Rules including the RAS Rules vide Notification dated 28.12.2002 or before issuing Notification dated 25.4.2008.

34. From the discussion made above, we hold that the creamy layer principle is applicable to Scheduled Castes and Scheduled Tribes as well. It is not confined only to OBC category. We also hold that provisions as regards reservation are enabling. Clause (4A) of Article 16 is also enabling provision. The State, it may be recalled, as per the language of the relevant provisions of the Constitution itself, is not bound to make reservation for SCs and STs in matters of promotion, but if it may do so, it has to collect quantifiable data showing the backwardness and inadequacy of representation of that class in public employment. It has also to comply with the provisions contained in Article 335 which in terms states that the claims of members of SCs and STs shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or a State. While thus making reservations in promotions, the requirement of efficiency of administration has also to be necessarily considered.

35. In all fairness to the learned ASG, we may mention that it was urged by him that this Court may not interfere at this stage as in the very nature of things, the exercise as ordained by the Honble Supreme Court in M. Nagarajs case has to take time, and that the State for the time being has worked out reservation in promotion proportionate to the population of the SCs and STs in services, and further that something has been done in the matter, whereas other things required can be done later. There is no merit in the contention raised by the learned ASG as noted above. The judgment in M. Nagarajs case in express terms lays down that the exercise has to be done before the enabling powers can be exercised. Pertinent observations in that behalf as contained in para 123 of the judgment in M. Nagaraj have already been reproduced hereinbefore.

36. While giving the facts of the case, we have adverted to the case set up by the applicants that for the period prior to 17.6.1995 there was no source of power providing for reservation in promotion, as it was held by the Honble Supreme Court in Indra Sawhney (supra) that reservation in promotion cannot be sourced to Article 16(4) of the Constitution. It is the case of the applicants that all promotions made prior to the Amendment ought to have been treated as ad hoc and as a consequence there can be no conferment of consequential seniority. The position in law apart, as mentioned above, it is further the case of the applicants that insofar as at least the Railways is concerned, the rules did not permit conferment of consequential seniority. In fact, it was specifically provided that the seniority of roster point promotees would be governed by their panel positions. The history of reservation and the manner of its working in the Indian Railways has been given in detail in the judgment of the Honble Supreme Court in Virpal Singh Chauhans case (supra). The mention in the judgment, to start with, is of Indian Railway Establishment Manual, Vol.I, containing instructions regulating inter alia seniority of non-gazetted railway servants, as contained in Chapter III. Para 306 provides that Candidates selected for appointment at an earlier selection shall be senior to those selected later irrespective of the dates of posting except in the case covered by paragraph 305. Para 309 reads as follows:

Seniority on Promotion. Paragraph 306 above applies equally to seniority in promotion vacancies in one and the same category due allowance being made for delay, if any, in joining the new posts in the exigencies of service.

Subject to paragraphs 302 to 306, when the dates of appointment to the grade are the same, the date of entry into the grade next below it, shall determine seniority, as per para 314. Para 319 deals with seniority on promotion to non-selection posts, as per which promotion to non-selection posts shall be on the basis of seniority-cum-suitability, suitability being judged by the authority competent to fill the post, by oral and/or written test of a departmental examination or a trade test of by scrutiny of record of service as considered necessary. It is also stated therein that the railway servant, once promoted in his turn after being found suitable against a vacancy, which is non-fortuitous, should be considered as senior in that grade to all others who are subsequently promoted after being found suitable. The letter of Railway Board dated 13.8.1959 is of a general nature, which says that as a general rule the seniormost candidate should be promoted to a higher non-selection post, subject to his suitability. Once promoted against a vacancy which is non-fortuitous, he should be considered as senior in the grade to all others who are subsequently promoted. Boards letter dated 31.8.1982 deals with the subject Reservation for Scheduled Castes and Scheduled Tribes in promotion in Group D and C (Class IV and III) on the basis of seniority-cum-suitability. Para 4 of the letter aforesaid reads as follows:

"Against the above background, the matter has been reviewed by the Board. It has been decided that positing of Scheduled Caste/Scheduled Tribe candidates on promotions in non-selection posts should also be done as per the reserved points on the roster subject, however, to the condition that seniority of the Scheduled Caste/Scheduled Tribe candidates in comparison to other candidates will continue to be governed by the panel position in the case of categories where training is not provided and in accordance with the merit position in the examination where training is provided."

Mention is also of Railway Board letter dated 19.1.1972 dealing with promotion to selection posts, which would show that even in cases of promotions made on the basis of merit, the same principle applies. Railway Board letter dated 20.10.1960 says that Seniority of SC/ST employees will be determined under the normal rules. The reservation roster is considered only a machinery to ensure the prescribed percentage of reservation for SC/ST employees and should not be related to the question of seniority and confirmation. If any of the SC/ST employee is confirmed in the post by virtue of roster, such confirmation will not give them any benefit in respect of seniority. Chapter XII dealing with confirmation and seniority refers to letter dated 11.2.1972, which reads as follows:

"Sub: Reservation for Scheduled Castes and Scheduled Tribes Application of roster both at the time of initial recruitment and confirmation.

Reference Board's letter No. E (SCT) 62 CM 15/7 Dated 20th April 1963 which provides that the reservation roster is to be applied only at the time of initial recruitment and that confirmation should be made in the order of seniority which in the case of non-trained categories is determined on the basis of the position in the panel supplied by the Railway Service Commission and in the case of trainee categories on the basis of the merit position in the examination.

2. The Board after careful consideration have decided that in the post filled by direct recruitment on or after the date of issue of this letter, reservation may be made for Scheduled Castes and Scheduled Tribes both at the time of initial appointment on temporary basis as well as at the time of confirmation. In posts filled by promotion, however, no reservation admissible at the stage of confirmation of promotees and the existing procedure of confirming employees in order of their panel position may continue.

3. The seniority of candidates belonging to Scheduled Castes and Scheduled Tribes vis-`-vis other will continue to be determined as at present. i. e., according to the panel position in the case of categories where training is not provided and in accordance with the merit position in the examination where training is provided.

Reference is then to letter dated 31.8.1982 relevant portion whereof has already been extracted hereinbefore. In view of the case law and the instructions, it was held that the reservation roster would only ensure the prescribed percentage of reservation but would not affect seniority, and that whereas reserved candidates would be entitled to accelerated promotions, they would not be entitled to consequential seniority, and further that the seniority between the general and reserved candidates in promoted category would continue to be the same as was at the time of the initial appointment provided both belong to the same grade. It is the plea of the applicants that there may be provision for reservation in promotion but there was no provision for conferment of consequential seniority. In Indra Sawhneys case, specifically it was held that Article 16(4) cannot be the source of making reservation in promotions. The judgment in Virpal Singh Chauhans case came to be delivered on 10.10.1995 and the same was made prospective from 10.2.1995, i.e., the date of judgment in R. K. Sabharwals case. The issue of prospectivity of Virpal Singh Chauhan and R. K. Sabharwal was considered by a Constitutional Bench in Ajit Singh Januja (supra) wherein it was held that promotions already made would be deemed to be ad hoc and there cannot be conferment of seniority till there was vacancy in regular course. The issue as raised by the applicants, it is the case of the applicants, that for the period prior to 10.2.1995 the issue raised by them would be covered by the judgment of the Honble Supreme Court in the case of Ajit Singh Januja (supra) and for the period between 10.2.1995 and 17.6.1995 the principle of regaining seniority has been accepted by the railways itself and, therefore, for the period prior to 17.6.1995 no seniority can be conferred. For the period after 10.2.1995, it is the case of the applicants, the railways has itself accepted vide circular dated 25.9.1997 that the seniority lists which are prepared as per circulars dated 19.1.1972 and 31.8.1982 would be valid for promotions after 10.2.1995. For the period 17.6.1995 till 8.3.2002, it is the case of the applicants that the post-77th Amendment as well as the 85th Amendment, the power subsisted for conferment of accelerated seniority but the said power has been exercised by the railways for the first time on 8.3.2002. The said circular is sought to be made retrospective from 17.6.1995, which would be unsustainable. In the Indian Railways, it is the case of the applicants, there was no provision for accelerated seniority and, therefore, the retrospective power would not be available to the Railways.

37. We have applied our mind to the pleadings and the contentions raised by the learned counsel representing the applicants on the issues as mentioned above, but are of the view that once, in brevity, it is the case of the applicants that when no compliance of pre-conditions as spelled out in M. Nagarajs case has been done, reservation in promotion with accelerated seniority shall have to be worked in the way and manner as per the law settled earlier on the issue. If that be so, we need not have to labour on the issues raised by the applicants, as surely, if the position is already settled, the only relevant discussion and adjudication in this case can be and should be confined to non-observance of the pre-conditions for making accelerated promotions as valid. We have already held above that the railways have not worked out or even applied their mind to the pre-conditions as mentioned above before giving effect to the provisions of Article 16(4A), and for that reason, circular dated 29.2.2008 vide which the seniority of SC/ST railway servants promoted by virtue of rule of reservation/roster has to be regulated in terms of instructions contained in Boards letter dated 8.3.2002 and 13.1.2005, has to be quashed. There is a specific prayer to quash instructions dated 8.3.2002 and 13.1.2005 as well, but there would be no need to do so as the same have been discussed in the case of railways itself in the matter of Virpal Singh Chauhan (supra), and commented upon. While setting aside instructions dated 29.2.2008, our directions would be to not to give accelerated seniority to Scheduled Caste and Scheduled Tribe category employees till such time pre-conditions on which alone Article 16(4A) of the Constitution is to operate, are complied with. No directions in this case can be given as regards seniority of the applicants vis-`-vis those who were appointed with them and have stolen a march over them because of reservation and have obtained accelerated seniority. No such specific prayer has been made either. However, it would be open for the parties to this lis or any one else to seek determination of their proper seniority for which legal proceedings shall have to be resorted to. It would be difficult to order across the board that all those who have obtained the benefit of reservation and have also been accorded accelerated seniority be put below general category candidates who may have been senior to the reserved category employees and became below in seniority on the promoted posts because of conferment of accelerated seniority to the reserved category employees. Surely, for seeking seniority over and above Scheduled Caste and Scheduled Tribe employees, number of things shall have to be gone into, as for instance, as to when was the promotion made and seniority fixed, and whether the cause of general category employees would be within limitation. There can be number of issues that may arise. We have mentioned only one by way of illustration.

38. Present Original Application is disposed of in the manner fully indicated above. In view of the nature of the controversy involved in the case, costs of the litigation are made easy.

( Meera Chhibber ) ( L. K. Joshi ) ( V. K. Bali )

Member (J) Vice-Chairman (A) Chairman

/as/