

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2368 OF 2011

B.K. PAVITRA & ORS.

...APPELLANTS

VERSUS

UNION OF INDIA & ORS.

...RESPONDENTS

WITH

CIVIL APPEAL NOS.2369 OF 2011, 2370-2373 OF 2011, 2374-2377 OF 2011, 2378 OF 2011, 2379 OF 2011, 4320-4327 OF 2011 AND 5280-5286 OF 2011

J U D G M E N T

ADARSH KUMAR GOEL, J

1. These appeals involve the question of validity of the Karnataka Determination of Seniority of the Government Servants Promoted on the Basis of Reservation (To the Posts in the Civil Services of the State) Act, 2002 (the impugned Act). The Act *inter alia* provides for grant of consequential seniority to the Government servants belonging to Scheduled Castes and the Scheduled Tribes promoted under reservation policy. It also protects consequential seniority already accorded from 27th April, 1978 onwards.

2. The validity of the Act was challenged before this Court by way of Writ Petition (Civil) No.61 of 2002 titled **M. Nagaraj and others v. Union of India and others**. The issue referred to larger Bench in the writ petition along with connected matters was decided by this Court on 19th October, 2006¹. While upholding 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, individual matters were remitted to the appropriate Bench². Thereafter, the matter was remitted back to the High Court for deciding the question of validity of the said enactment³.

3. The petition was re-numbered by the High Court as Writ Petition (Civil) No.14672 of 2010. The High Court by the impugned judgment has held the Act to be valid. The question framed for determination by the High Court is as follows :

1

(2006) 8 SCC 212

2

Para 124 of '**M. Nagaraj**' (supra)

3

Vide order of this Court dated 18th March, 2010

“Whether the State Government has shown the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation for Scheduled Castes and Scheduled Tribes in matters of promotion and as to whether the extent of reservation provided for promotion in favour of the persons belonging to Scheduled Castes and Scheduled Tribes at 15% and 3% respectively, in Karnataka is justified?”

4. It will be appropriate to notice the factual matrix relevant to determine the controversy. Policy of reservation in promotion was introduced in the State of Karnataka vide Government Order dated 27th April, 1978. The reservation in promotion was provided to the SCs and STs to the extent of 15% and 3% respectively but upto and inclusive of the lowest Group-A posts in the cadres where there is no element of direct recruitment and where the direct recruitment does not exceed 66^{2/3}%. A roster of 33 points was issued applicable to each cadre of posts under each appointing authority. Prior to 1st April, 1992, there was no carry forward system of the vacancies. It was introduced on 1st April, 1992. In the stream of graduate Engineers, the reservation in promotion was available upto and inclusive of third level, i.e., Executive Engineers upto 1999 and on the date of filing of the petition (in 2002), it was available upto second level, i.e. Assistant Executive Engineer. In Diploma Engineers, it was available upto third level, i.e. Assistant

Executive Engineer - Division II. According to the appellants, Assistant Engineers of SC/ST category recruited in the year 1987 were promoted to the cadre of Assistant Executive Engineers while in general merit, Assistant Engineers recruited in 1976 were considered for promotion to the said cadre. The representation of the SC/ST group was as follows:

EE Cadre	19.9%
SE Cadre	23.95%
CE Cadre	4.3% (being a selection post)
Engineer-in-chief	44.44%

5. Thus, according to the appellants, SC/ST candidates got promotion early and on account of consequential seniority, percentage of SC/ST candidates was much higher than the permitted percentage and all top positions were likely to be filled up by SC/ST candidates without general merit candidates getting to higher positions. This aspect was considered in the judgment of this Court dated 1st December, 2000 in **M.G. Badappanavar v. State of Karnataka**⁴. This Court applying the principles laid down in **Ajit Singh Januja v. State of Punjab (Ajit Singh I)**⁵; **Ajit Singh (II) v. State of Punjab**⁶ and **R.K. Sabharwal v.**

4

(2001) 2 SCC 666

5

(1996) 2 SCC 715

6

(1999) 7 SCC 209

State of Punjab⁷ issued a direction to the State of Karnataka to redo the seniority and take further action in the light of the said judgments. Pointing out the consequence of accelerated seniority to the roster point promotee, it has been averred in the writ petition that the roster point promotee would reach the third level by the age of 45 and fourth, fifth and sixth level in next three, two and two years. The general merit promotee would reach the third level only at the age of 56 and retire before reaching the fourth level. This would result in reverse discrimination and representation of reserved category would range between 36% to 100%.

6. Stand of the State and the contesting respondents who have been given promotion under the reservation, is that inter se seniority amongst persons promoted on any occasion is determined as per Karnataka Government Servants (Seniority) Rules, 1957 (1957 Rules). By amendment dated 1st April, 1992 provision was made to fill-up backlog vacancies which was upheld by this Court in **Bhakta Ramegowda v. State of Karnataka**⁸. On that basis, Government order dated 24th June, 1997 was issued for fixation of seniority of SC/ST candidates promoted

7

(1995) 2 SCC 745

8

(1997) 2 SCC 661

under reservation. Thus, all candidates promoted 'on the same occasion' retained their seniority in the lower cadre. This aspect was not considered in **Badappanavar** (supra). Extent of reservation for SC and ST was 15% and 3% respectively on the basis of census figures of 1951, though the population of SCs and STs has substantially increased. As per census figures of 1991 population of SC and ST was 16.38% and 4.26% respectively. The stand of the appellants that the SC/ST candidates reach level four at 45 years or become Chief Engineers by 49 years or there is reverse discrimination has been denied.

7. In the light of the above pleadings and judgment of this Court in **M. Nagaraj** (supra), the matter was put in issue before the High Court. The contention raised on behalf of the appellants was that grant of consequential seniority to candidates promoted by way of reservation affected efficiency of administration and was violative of Articles 14 and 16. In spite of 85th Amendment having been upheld, law laid down in **Badappanavar** (supra), **Ajit Singh II** (supra) and **Union of India v. Virpal Chauhan**⁹ remained relevant in absence of 'backwardness', 'inadequacy of representation' and 'overall administrative efficiency' being independently determined. The State Government had not provided any material or data to show inadequacy of reservation to the

members of SC/ST nor the State has given any thought to the issue of overall administrative efficiency.

8. On the other hand, the submission on behalf of the State was that reservation to SCs and STs to the extent of 15% and 3% respectively could never be said to be excessive in view of progressive increase in population of SCs and STs.

9. The High Court referring to this Court's judgment in **M. Nagaraj** (supra) observed that concept of "catch up" rule and "consequential seniority" are judicially evolved concepts to control the effect of reservations. Deleting the said rule cannot by itself be in conflict with "equality code" under the Constitution. The 85th Amendment gave freedom to the State to provide for reservation in promotion with consequential seniority under Article 16(4-A) if 'backwardness', 'inadequacy of representation' and 'overall efficiency' so warranted. There is no fixed yardstick to identify and measure the above three factors. If the State fails to identify and measure the above three factors, the reservation can be invalid. Examining whether the State had in fact measured the above factors, the High Court observed that Order dated 27th April, 1978 was issued by the State of Karnataka after considering the statistics available about the representation of SCs and STs in promotional vacancies. On 3rd February, 1999, the policy was modified to

limit reservation in promotion in cadre upto and inclusive of the lowest category of Group-A posts in which there is no element of recruitment beyond 66^{2/3} %. The said order was further amended on 13th April, 1999 to the effect that reservation in the promotion for SCs and STs will continue to operate till their representation reached 15% or 3% respectively and promotion of SCs and STs and against backlog was to continue as per order dated 24th June, 1997 till the said percentage was so reached in the total working strength. As per the Karnataka Scheduled Castes, Scheduled Tribes and other Backward Classes (Reservation of seats in Educational Institutions and of appointments or posts in the services under the State) Act, 1994 (the Karnataka Act 43 of 1994), seniority in the lower cadre is maintained in promotional posts for the persons promoted "on one occasion". Since reservation had not exceeded 15% and 3% for SCs and STs while population of the said categories had increased, there was adequate consideration of the above three factors of "backwardness", inadequacy of representation" and "overall efficiency". Section 3 of the Act provided for an inbuilt mechanism for providing reservation in promotion to the extent of 15% and 3% respectively for the SCs and STs. The State Government collects statistics every year. The High Court held that contention that if all the posts in higher echelons may be filled by SCs and STs, the promotional

prospects of general merit candidates will get choked or blocked could not be accepted as reservation in promotion was provided only upto the cadre of Assistant Executive Engineers. It was further observed that there was no pleading that overall efficiency of service would be hampered by promoting persons belonging to SCs and STs.

10. The impugned judgment has been challenged on behalf of the appellants mainly relying upon judgment of this Court in **Uttar Pradesh Power Corporation Limited v. Rajesh Kumar**¹⁰. It was submitted that the High Court erroneously held that there was an inbuilt mechanism under Section 3 of the impugned Act or that the seniority rule maintaining lower cadre seniority in respect of persons promoted on a particular occasion was a safeguard against excessive reservation. Similarly, the finding that reservation was only upto a particular level and not beyond or that accelerated promotion upto that level did not affect further promotions was erroneous. It was also submitted that there was no provision for excluding the creamy layer which also rendered the Act invalid. It was submitted that no exercise whatsoever in terms of **M. Nagaraj** case has been undertaken by the State.

10

(2012) 7 SCC 1

11. Shri Basava Prabhu S. Patil, learned senior counsel appearing on behalf of the State submitted that the Act did not deal with the reservation. It only dealt with seniority. Seniority was not a fundamental right but a civil right as held in ***Bimlesh Tanwar vs. State of Haryana***¹¹. ***M. Nagaraj*** judgment of this Court had dealt with reservation and not with consequential seniority. Once reservation is within the prescribed limit, there was no bar to consequential seniority being granted. It was further submitted that even if seniority is to be struck down, the clock cannot be entirely reversed so as to affect seniority of persons who had retired or who are about to retire or who had reached higher positions.

12. Shri S.N. Bhat, learned counsel for the private respondents supported the impugned judgment and submitted that the Government was not required to carry out the exercise of finding out 'backwardness', 'inadequacy of representation' and 'overall administrative efficiency' for providing consequential seniority to officers on the basis of reservation. The said exercise was required to be carried out only for providing reservation in promotion. Reservation in promotion was permissible only upto Class I posts in Karnataka. Moreover, inter se seniority of reserved category and general category candidates promoted together was not

11

(2003) 5 SCC 604

disturbed. The roster points ensured that there was no excessive representation in different cadres of service. In view of Government Order dated 3rd February, 1999 there was enough data available to justify continuance of provision for consequential seniority under the impugned Act. Data collected by the Department of Statistics with regard to overall representation of SCs and STs as on 31st March, 2002 showed that the representation of SCs and STs was not above 15% and 3% respectively. Section 4 of the Act only protected consequential seniority which was already given. Promotions already effected cannot be disturbed.

13. Reference may now be made to the impugned Act. The preamble of the Act refers to policy of reservation in promotion in favour of Government servants belonging to SCs and STs in terms of order dated 27th April, 1978. Para 7 of the said order stipulates that inter se seniority amongst persons promoted in accordance with the said order has to be determined in the manner provided under Rule 4 or Rule 4A of the 1957 Rules. There is further reference to the judgment of this Court in **Badappanavar** (supra) to the effect that there was no specific rule permitting seniority to be counted for persons promoted against a reserved roster point. It further refers to the Constitution (85th Amendment) Act, 2001 permitting consequential seniority in the case of promotion on the basis of reservation. It states that to remove any

ambiguity and to clarify that government servants belonging to SCs and STs promoted in accordance with the reservation in promotion shall be entitled to seniority as it is available to government servants belonging to other categories. Section 3 of the impugned Act provides that government servants belonging to SCs and STs promoted in accordance with the policy reservation in promotion shall be entitled to consequential seniority on the basis of length of service in a cadre. Proviso to the said section to the effect that inter se seniority of government servants belonging to SCs/STs and those belonging to unreserved category promoted at the same time by a common order shall be on the basis of inter se seniority in the lower cadre. Section 4 provides for protection of consequential seniority already accorded from 27th April, 1978. Since Sections 3 and 4 are the key sections, the same are reproduced below :

“3. Determination of Seniority of the Government Servants Promoted on the basis of Reservation.- Notwithstanding anything contained in any other law for the time being in force, the Government Servants belonging to the Scheduled Castes and the Scheduled Tribes promoted in accordance with the policy of reservation in promotion provided for in the Reservation Order shall be entitled to consequential seniority. Seniority shall be determined on the basis of the length of service in a cadre.

Provided that the seniority inter-se of the Government Servants belonging to the Scheduled Castes and the Scheduled Tribes as well as those belonging to the unreserved category, promoted to a

cadre, at the same time by a common 5 order, shall be determined on the basis of their seniority inter-se, in the lower cadre.

Provided further that where the posts in a cadre, according to the rules of recruitment applicable to them are required to be filled by promotion from two or more lower cadres,-

(i) The number of vacancies available in the promotional (higher) cadre for each of the lower cadres according to the rules of recruitment applicable to it shall be calculated; and

(ii) The roster shall be applied separately to the number of vacancies so calculated in respect of each of those lower cadres;

Provided also that the serial numbers of the roster points specified in the Reservation Order are intended only to facilitate calculation of the number of vacancies reserved for promotion at a time and such roster points are not intended to determine inter-se seniority of the Government Servants belonging to the Scheduled Castes and the Scheduled Tribes vis-a-vis the Government Servants belonging to the unreserved category promoted at the same time and such inter-se seniority shall be determined by their seniority inter-se in the cadre from which they are promoted, as illustrated in the Schedule appended to this Act.

4. Protection of consequential seniority already accorded from 27th April, 1978, onwards.-

Notwithstanding anything contained in this Act or any other law for the time being in force, the consequential seniority already accorded to the Government servants belonging to the Scheduled Castes and the Scheduled Tribes who were promoted in accordance with the policy of reservation in promotion provided for in the Reservation Order with effect from the Twenty Seventh Day of April, Nineteen Hundred and Seventy Eight shall be valid and shall be protected and shall not be disturbed. “

14. Question for consideration is whether the impugned Act is consistent with Articles 14 and 16 of the Constitution. The said question has been gone into by this Court *inter alia* in identical circumstances in **Suraj Bhan Meena v. State of Rajasthan**¹² and **Uttar Pradesh Power Corporation Limited** (supra) to which we will make a reference at appropriate place.

15. We proceed to deal with the contention that High Court judgment proceeds on incorrect understanding of the law laid down in **M. Nagaraj** (supra). While no doubt in **M. Nagaraj** (supra), 85th Amendment was upheld with the observation that enabling the State to do away with the 'catch up' rule, a judicially evolved concept to control the effect of reservations, was valid but the exercise of power to do away with the said rule and providing consequential seniority in favour of roster point promotees of reserved category was subject to the limitation of determining the three factors of 'backwardness', 'inadequacy of representation' and 'overall efficiency'. The High Court brushed aside the said mandatory requirement by simply observing that Section 3 provided for an inbuilt mechanism as the extent of mechanism was

12

(2011) 1 SCC 467

limited to 15% and 3% respectively for the SCs and STs which dispensed with any requirement of determining inadequacy of representation or backwardness. High Court further dispensed with the requirement of determining overall efficiency by observing that there was no pleading that overall efficiency would be hampered by promoting persons belonging to SCs and STs. This reasoning in the judgment of the High Court, it is submitted, is contrary to the mandate of law as recognized in **M. Nagaraj** (supra) and the view similar to the impugned judgment has been repeatedly disapproved in decisions of this Court.

16. We find considerable force in the submission. The issue is no longer *res integra* and it will suffice to refer to the law clearly laid down by this Court in this regard.

17. In **M. Nagaraj** (supra), this Court considered constitutional validity of 77th, 81st, 82nd and 85th Amendments. In doing so, the Court was concerned with the question whether the amendment infringed the basic structure of the Constitution. It was held that equality is part of the basic structure but in the present context, right to equality is not violated by an enabling provision if exercise of power so justifies. In this regard, following observations are worthwhile to note :

31. At the outset, it may be noted that equality, rule of law, judicial review and separation of powers are distinct concepts. They have to be treated separately, though they are intimately connected. There can be no rule of law if there is no equality before the law; and rule of law and equality before the law would be empty words if their violation was not a matter of judicial scrutiny or judicial review and judicial relief and all these features would lose their significance if judicial, executive and legislative functions were united in only one authority, whose dictates had the force of law. The rule of law and equality before the law are designed to secure among other things, justice both social and economic

.....
32. In *Minerva Mills* [(1980) 3 SCC 625] Chandrachud, C.J., speaking for the majority, observed that Articles 14 and 19 do not confer any fanciful rights. They confer rights which are elementary for the proper and effective functioning of democracy. They are universally regarded by the Universal Declaration of Human Rights. If Articles 14 and 19 are put out of operation, Article 32 will be rendered nugatory.....

33. From these observations, which are binding on us, the principle which emerges is that “equality” is the essence of democracy and, accordingly a basic feature of the Constitution.

34. However, there is a difference between formal equality and egalitarian equality which will be discussed later on.

XXXX

42. There can be no justice without equality. Article 14 guarantees the fundamental

right to equality before the law on all persons. Great social injustice resulted from treating sections of the Hindu community as “untouchable” and, therefore, Article 17 abolished untouchability and Article 25 permitted the State to make any law providing for throwing open all public Hindu religious temples to untouchables. Therefore, provisions of Part III also provide for political and social justice.

18. Considering the right of equality in the context of reservation/affirmative action it was observed :

“43. Therefore, the concept of “equality of opportunity” in public employment concerns an individual, whether that individual belongs to the general category or Backward Class. The conflicting claim of individual right under Article 16(1) and the preferential treatment given to a Backward Class has to be balanced. Both the claims have a particular object to be achieved. The question is of optimisation of these conflicting interests and claims.”

19. Thereafter, concepts of ‘equity’, ‘justice’ and ‘merit’ in public employment were referred to and it was held that application of these concepts in public employment depends upon quantifiable data in each case. It was observed:

“44. Backward Classes seek justice. General class in public employment seeks equity. The difficulty comes in when the third variable comes in, namely, efficiency in service. In the issue of reservation, we are being asked to find a stable equilibrium between justice to the backwards, equity for the forwards and efficiency for the entire system. Equity and justice in the above context are

hard concepts. However, if you add efficiency to equity and justice, the problem arises in the context of the reservation. This problem has to be examined, therefore, on the facts of each case. Therefore, Article 16(4) has to be construed in the light of Article 335 of the Constitution. Inadequacy in representation and backwardness of the Scheduled Castes and Scheduled Tribes are circumstances which enable the State Government to act under Article 16(4) of the Constitution. However, as held by this Court the limitations on the discretion of the Government in the matter of reservation under Article 16(4) as well as Article 16(4-A) come in the form of Article 335 of the Constitution.

45.The basic presumption, however, remains that it is the State who is in the best position to define and measure merit in whatever ways it consider it to be relevant to public employment because ultimately it has to bear the costs arising from errors in defining and measuring merit. Similarly, the concept of “extent of reservation” is not an absolute concept and like merit it is context-specific.

46.Therefore, “vesting of the power” by an enabling provision may be constitutionally valid and yet “exercise of the power” by the State in a given case may be arbitrary, particularly, if the State fails to identify and measure backwardness and inadequacy keeping in mind the efficiency of service as required under Article 335.”

20. The above discussion led this Court to hold that conferment of enabling power on State under Article 16(4A) did not by itself violate the basic feature of equality. If the affirmative action stipulated under Article 16(4A) could be balanced with the need for adequate

representation for justice to the backwards while upholding equity for the forwards and efficiency for the entire system with the further observation that the content of a right is defined by the Courts and even while the amendment as such could be upheld, validity of an individual enactment was required to be gone into. If the State wished to exercise its discretion under Article 16(4A), it was 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. It was 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.

21. It may also be worthwhile to note further observations of this Court in the said judgment :

“49. Reservation is necessary for transcending caste and not for perpetuating it. Reservation has to be used in a limited sense otherwise it will perpetuate casteism in the country. Reservation is underwritten by a special justification.

XXXX

59. Giving the judgment of the Court in *Indra Sawhney [(1992) Supp. (3) SCC 217]* Jeevan Reddy, J. stated that Article 16(4) speaks of adequate representation not proportionate representation

although proportion of population of Backward Classes to the total population would certainly be relevant

.....
XXXX

102. Therefore, in every case where the State decides to provide for reservation there must exist two circumstances, namely, “backwardness” and “inadequacy of representation”. As stated above, equity, justice and efficiency are variable factors. These factors are context-specific. There is no fixed yardstick to identify and measure these three factors, it will depend on the facts and circumstances of each case. These are the limitations on the mode of the exercise of power by the State. None of these limitations have been removed by the impugned amendments. If the State concerned fails to identify and measure backwardness, inadequacy and overall administrative efficiency then in that event the provision for reservation would be invalid

.....

XXXXX

104. As stated above, be it reservation or evaluation, excessiveness in either would result in violation of the constitutional mandate. This exercise, however, will depend on the facts of each case. In our view, the field of exercise of the amending power is retained by the impugned amendments, as the impugned amendments have introduced merely enabling provisions because, as stated above, merit, efficiency, backwardness and inadequacy cannot be identified and measured in vacuum. Moreover, Article 16(4-A) and Article 16(4-B) fall in the pattern of Article 16(4) and as long as the parameters mentioned in those articles are complied with by the States, the provision of reservation cannot be faulted. Articles 16(4-A) and 16(4-B) are classifications within the principle of equality under Article 16(4).

XXXXX

106. According to the *Constitutional Law of India*, by H.M. Seervai, 4th Edn., p. 546, equality is not violated by mere conferment of discretionary power. It is violated by arbitrary exercise by those on whom it is conferred. This is the theory of “guided power”. This theory is based on the assumption that in the event of arbitrary exercise by those on whom the power is conferred, would be corrected by the courts

107. 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. As stated above, the concepts of efficiency, backwardness, inadequacy of representation are required to be identified and measured

108. Moreover, Article 335 is to be read with Article 46 which provides that the State shall promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Castes and Scheduled Tribes, and shall protect them from social injustice. Therefore, where the State finds compelling interests of backwardness and inadequacy, it may relax the qualifying marks for SCs/STs. These compelling interests however have to be identified by weighty and comparable data.

XXXXX

117. 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 State concerned 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 classes of posts without affecting general efficiency of service as mandated under Article 335 of the Constitution.

118. The constitutional principle of equality is inherent in the rule of law. However, its reach is limited because its primary concern is not with the content of the law but with its enforcement and application. The rule of law is satisfied when laws are applied or enforced equally, that is, even-handedly, free of bias and without irrational distinction. The concept of equality allows differential treatment but it prevents distinctions that are not properly justified. Justification needs each case to be decided on case-to-case basis.

XXXX

120. At this stage, one aspect needs to be mentioned. Social justice is concerned with the distribution of benefits and burdens. The basis of distribution is the area of conflict between rights, needs and means. These three criteria can be put under two concepts of equality, namely, “formal equality” and “proportional equality”. Formal equality means that law treats everyone equal. Concept of egalitarian equality is the concept of proportional equality and it expects the States to take affirmative action in favour of disadvantaged sections of society within the framework of democratic polity. In *Indra Sawhney* all the Judges except Pandian, J. held that the “means test” should be adopted to exclude the creamy layer from the protected group earmarked for reservation. 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. Views have often been expressed in this Court that caste should not be the determinant of backwardness and that the economic criteria alone should be the determinant of backwardness. As stated above, we are bound by the decision in *Indra Sawhney*. The question as to the “determinant” of backwardness cannot be gone into by us in view of the binding decision. In addition to the above requirements this Court in *Indra Sawhney* has evolved numerical benchmarks like ceiling limit of 50% based on post-specific roster coupled with the concept of replacement to provide immunity against the charge of discrimination.

xxxx

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.”

22. Question of application of principles laid down in ***M. Nagaraj*** (supra) for judging the exercise of enabling power of granting consequential seniority and promotion was raised in ***Suraj Bhan Meena*** (supra). Therein challenge was to the validity of notification dated 25th August, 2008 issued by the State Government of Rajasthan under proviso to Article 309 of the Constitution, amending the service rules in the State of Rajasthan w.e.f. 28th December, 2002. The notification purported to give consequential seniority to candidates belonging to SCs and STs who got roster point promotions. The

challenge to the notification was that without quantifying figures of SCs and STs or showing compelling reasons such as 'backwardness', 'inadequacy of representation' and 'overall administrative efficiency' as laid down in **M. Nagaraj** (supra) the grant of consequential seniority was not permissible. The High Court quashed the notification providing for consequential seniority on the ground that no exercise had been undertaken in terms of Article 16(4A) to acquire quantifiable data regarding inadequacy of representation to SCs and STs in public service and to assess whether such reservation was necessary. This was upheld by this Court as under :

“66. The position after the decision in *M. Nagaraj* case 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.

67. The view of the High Court is based on the decision in *M. Nagaraj* case as no exercise was undertaken in terms of Article 16(4-A) to acquire quantifiable data regarding the inadequacy of representation of the Scheduled Caste and Scheduled Tribe 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 Caste and Scheduled Tribe communities and the same does not call for any interference.”

23. Again in **Uttar Pradesh Power Corporation Limited** (supra), validity of Rule 8A of the U.P. Government Servants Seniority Rules, 1991, inserted by way of an amendment in 2007, was put in issue. While a Division Bench of Lucknow Bench in **Prem Kumar Singh v. State of U.P.**¹³ struck down the said rule, another Division Bench at Allahabad in **Mukund Kumar Srivastava v. State of U.P.**¹⁴ took a contrary view. This Court dismissed the appeal filed by the U.P. Power Corporation Limited and upheld the view of the Lucknow Bench. Reference was made to observations in para 819 in **Indra Sawhney v. UOI**¹⁵ to the effect that reservation under Article 16(4) of the Constitution could only be at the stage of entry into the State service and not in promotion. Reservation in promotion is bound to generate acute heartburning and lead to inefficiency in administration. The members of open category would think that whatever be their record or performance, members of reserved category will steal a march over them irrespective of their performance and competence. Once persons coming from different sources join a category or class, they must be treated alike for promotion and no distinction was permissible on the

13

(2011) 3 All LJ 343

14

(2011) 1 All LJ 428

15

(1992) Supp. (3) SCC 217

basis of 'birth-mark'. Reservation in promotion will be contrary to the mandate of Article 335, viz., maintenance of efficiency in administration and put premium on efficiency. Members of reserved category will not work hard since they do not have to compete with their colleagues and because of assured promotion, which will be against the goal of excellence under Article 51-A (j). Reference was also made to para 831 in the said judgment to the effect that extending concessions and relaxations in the matter of promotion to members of reserved category could affect efficiency of administration. Reference was then made to the decisions of this Court holding that roster only ensured percentage of reservation in promotion but could not affect seniority.¹⁶

24. Reference was then made to the Constitution amendment enabling reservation in promotions and consequential seniority which was upheld in **M. Nagaraj** (supra). The said judgment was summarized as follows:

“ **81.** From the aforesaid decision in *M. Nagaraj case* and the paragraphs we have quoted hereinabove, the following principles can be carved out:

16

R.K. Sabharwal versus State of Punjab; Ajit Singh Januja versus State of Punjab (Ajit Singh I); Ajit Singh (II) versus State of Punjab and Union of India versus Virpal Chauhan (supra)

- (i) Vesting of the power by an enabling provision may be constitutionally valid and yet “exercise of power” by the State in a given case may be arbitrary, particularly, if the State fails to identify and measure the backwardness and inadequacy keeping in mind the efficiency of service as required under Article 335.
- (ii) Article 16(4) which protects the interests of certain sections of the society has to be balanced against Article 16(1) which protects the interests of every citizen of the entire society. They should be harmonised because they are restatements of the principle of equality under Article 14.
- (iii) Each post gets marked for the particular category of candidates to be appointed against it and any subsequent vacancy has to be filled by that category candidate.
- (iv) The appropriate Government has to apply the cadre strength as a unit in the operation of the roster in order to ascertain whether a given class/group is adequately represented in the service. The cadre strength as a unit also ensures that the upper ceiling limit of 50% is not violated. Further, roster has to be post-specific and not vacancy based.
- (v) The State has to form its opinion on the quantifiable data regarding adequacy of representation. Clause (4-A) of Article 16 is an enabling provision. It gives freedom to the State to provide for reservation in matters of promotion. Clause (4-A) of Article 16 applies only to SCs and STs. The said clause is carved out of Article 16(4-A). Therefore, clause (4-A) will be governed by the two compelling reasons —“backwardness” and “inadequacy of representation”, as mentioned in Article 16(4). If the said two reasons do not exist, then the enabling provision cannot be enforced.
- (vi) If the ceiling limit on the carry over of unfilled vacancies is removed, the other alternative time factor comes in and in that event, the

timescale has to be imposed in the interest of efficiency in administration as mandated by Article 335. If the timescale is not kept, then posts will continue to remain vacant for years which would be detrimental to the administration. Therefore, in each case, the appropriate Government will now have to introduce the duration depending upon the fact situation.

(vii) If the appropriate Government enacts a law providing for reservation without keeping in mind the parameters in Article 16(4) and Article 335, then this Court will certainly set aside and strike down such legislation.

(viii) The constitutional limitation under Article 335 is relaxed and not obliterated. As stated above, be it reservation or evaluation, excessiveness in either would result in violation of the constitutional mandate. This exercise, however, will depend on the facts of each case.

(ix) The concepts of efficiency, backwardness and inadequacy of representation are required to be identified and measured. That exercise depends on the availability of data. That exercise depends on numerous factors. It is for this reason that the 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.

(x) Article 16(4), therefore, creates a field which enables a State to provide for reservation provided there exists backwardness of a class and inadequacy of representation in employment. These are compelling reasons. They do not exist in Article 16(1). It is only when these reasons are satisfied that a State gets the power to provide for reservation in the matter of employment."

25. Referring to the “Social Justice Committee Report” relied upon by the U.P. Power Corporation, it was observed that the said report was in respect of population and vacancies and not in respect of the concepts evolved in ***M. Nagaraj*** (supra). Therefore, exercise in the light of judgment in ***M. Nagaraj*** was a categorical imperative. The contention that no such exercise was necessary could not be accepted. Accordingly, this Court upheld the view that grant of consequential seniority in promotion to the persons belonging to SCs and STs who were granted promotion against roster points could not be sustained. Reference may be made to the following observations :

“85. As has been indicated hereinbefore, it has been vehemently argued by the learned Senior Counsel for the State and the learned Senior Counsel for the Corporation that once the principle of reservation was made applicable to the spectrum of promotion, no fresh exercise is necessary. It is also urged that the efficiency in service is not jeopardised. Reference has been made to the Social Justice Committee Report and the chart. We need not produce the same as the said exercise was done regard being had to the population and vacancies and not to the concepts that have been evolved in *M. Nagaraj*. It is one thing to think that there are statutory rules or executive instructions to grant promotion but it cannot be forgotten that they were all subject to the pronouncement by this Court in *Virpal Singh Chauhan* and *Ajit Singh*.

86. We are of the firm view that a fresh exercise in the light of the judgment of the Constitution Bench in

M. Nagaraj is a categorical imperative. The stand that the constitutional amendments have facilitated the reservation in promotion with consequential seniority and have given the stamp of approval to the Act and the Rules cannot withstand close scrutiny inasmuch as the Constitution Bench has clearly opined that Articles 16(4-A) and 16(4-B) are enabling provisions and the State can make provisions for the same on certain basis or foundation. The conditions precedent have not been satisfied. No exercise has been undertaken. What has been argued with vehemence is that it is not necessary as the concept of reservation in promotion was already in vogue. We are unable to accept the said submission, for when the provisions of the Constitution are treated valid with certain conditions or riders, it becomes incumbent on the part of the State to appreciate and apply the test so that its amendments can be tested and withstand the scrutiny on parameters laid down therein.

87. In the ultimate analysis, we conclude and hold that Section 3(7) of the 1994 Act and Rule 8-A of the 2007 Rules are ultra vires as they run counter to the dictum in *M. Nagaraj*. Any promotion that has been given on the dictum of *Indra Sawhney* and without the aid or assistance of Section 3(7) and Rule 8-A shall remain undisturbed.”

26. In ***Central Bank of India v. SC/ST Employees Welfare Association***¹⁷, question was whether in absence of a rule of reservation for promotion such reservation was permissible merely because the banks were following reservation policy of the Government of India. The Madras High Court after considering the

17

statistics found that there was no adequate representation of SCs and STs in higher scales. It directed that such representation be granted. Plea of the Bank that such reservation will affect efficiency in the administration was rejected. This Court held that in absence of any specific provision for reservation in promotion, the Court could not issue a direction for reservation. It was observed :

“32. We have already noticed above that in matters of promotion within Group A posts, which carry an ultimate salary of Rs 5700 per month, there was no provision for any reservation. On a conjoint reading of these two Office Memorandums dated 1-11-1990 and 13-8-1997, in the absence of any other provision or rule evidencing such a reservation in the matter of promotions, it cannot be said that there was reservation in promotion within Group A posts up to the ultimate salary of Rs 5700 per month. The High Court in the impugned judgment has gone by the lofty ideals enshrined in Articles 15 and 16 of the Constitution as well as the fact that in these Banks there is no adequate representation of SC/ST category of officers in Group IV and above. That may be so. It can only provide justification for making a provision of this nature. However, in the absence of such a provision, same cannot be read by overstretching the language of the Office Memorandum dated 13-8-1997. It is for the State to take stock of the ground realities and take a decision as to whether it is necessary to make provision for reservation in promotions to the aforesaid post as well.”

27. In ***S. Panneer Selvam v. State of Tamil Nadu***¹⁸, question before the Court was whether in absence of any policy decision by the State for giving consequential seniority to candidates promoted on the basis of reservation prior to a senior general category candidate, claim for consequential seniority could be accepted. Answering the question in the negative, it was held that in absence of provision for consequential seniority, 'catch up' rule will be applicable and the roster point promotees cannot claim such consequential seniority. The senior general candidates will regain their seniority on being promoted. Observations relevant in this regard are as follows :

“34. If we look at the above comparative table of the service particulars of the appellants and the respondents, it is seen that the contesting respondents U. Palaniappan joined the service almost seven years after the appellants, his seniority is automatically accelerated at an unprecedented rate and as on 1-4-2004 his seniority rank as ADE is 150 and seniority of V. Appadurai is 120. The appellants who are qualified and senior than the contesting respondents are placed much below in rank in comparison to the person belonging to the reserved class promotees who were promoted following the rule of reservation. It is to be noted that the private respondents in the present case have been promoted temporarily under Rule 39(a) and Rule 10(a)(i) of the General Rules with the condition that their inclusion in the promotional order shall not

18

(2015) 1 SCC 292

confer on them any right whatsoever in the service. Determination of seniority is a vital aspect in the service career of an employee and his future promotion is dependent on this. Therefore, determination of seniority must be based on some principles which are just and fair. In the absence of any policy decision taken or rules framed by the State of Tamil Nadu regarding Tamil Nadu Highways Engineering Service, accelerated promotion given to the respondents following rule of reservation in terms of Rule 12 will not give them consequential accelerated seniority.

XXXX

36. In the absence of any provision for consequential seniority in the rules, the “*catch-up rule*” will be applicable and the roster-point reserved category promotees cannot count their seniority in the promoted category from the date of their promotion and the senior general candidates if later reach the promotional level, general candidates will regain their seniority. The Division Bench appears to have proceeded on an erroneous footing that Article 16(4-A) of the Constitution of India automatically gives the consequential seniority in addition to accelerated promotion to the roster-point promotees and the judgment of the Division Bench cannot be sustained.”

26. It is clear from the above discussion that exercise for determining ‘inadequacy of representation’, ‘backwardness’ and ‘overall efficiency’, is a must for exercise of power under Article 16(4A). Mere fact that there is no proportionate representation in promotional posts for the population of SCs and STs is not by itself enough to grant consequential

seniority to promotees who are otherwise junior and thereby denying seniority to those who are given promotion later on account of reservation policy. It is for the State to place material on record that there was compelling necessity for exercise of such power and decision of the State was based on material including the study that overall efficiency is not compromised. In the present case, no such exercise has been undertaken. The High Court erroneously observed that it was for the petitioners to plead and prove that the overall efficiency was adversely affected by giving consequential seniority to junior persons who got promotion on account of reservation. Plea that persons promoted at the same time were allowed to retain their seniority in the lower cadre is untenable and ignores the fact that a senior person may be promoted later and not at same time on account of roster point reservation. Depriving him of his seniority affects his further chances of promotion. Further plea that seniority was not a fundamental right is equally without any merit in the present context. In absence of exercise under Article 16(4A), it is the 'catch up' rule which is fully applies. It is not necessary to go into the question whether the concerned Corporation had adopted the rule of consequential seniority.

27. In view of the above, we allow these appeals, set aside the impugned judgment and declare the provisions of the impugned Act to

the extent of doing away with the 'catch up' rule and providing for consequential seniority under Sections 3 and 4 to persons belonging to SCs and STs on promotion against roster points to be *ultra vires* Articles 14 and 16 of the Constitution. The judgment will not affect those who have already retired and will not affect financial benefits already taken. Consequential promotions granted to serving employees, based on consequential seniority benefit, will be treated as *ad hoc* and liable to be reviewed. Seniority list may be now revised in the light of this judgment within three months from today. Further consequential action may be taken accordingly within next three months.

.....J.
[ADARSH KUMAR GOEL]

.....J.
[UDAY UMESH LALIT]

NEW DELHI
FEBRUARY 09, 2017