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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 3490/2010 & CM No. 6956/2010 (stay)

ALL INDIA EQUALITY FORUM & OTHERS..... Petitioners

Through: Ms.Kiran Suri, Sr.Adv. with Mr.Kumar Parimal, Adv.

versus

UNION OF INDIA THROUGH ITS SECRETARY AND OTHERS ..... Respondents

Through: Ms.Poonam Singh for Ms.Saroj Bidawat, Adv. for R-1.
Mr.R.V. Sinha and Mr.R.N. Singh, Advs. for R-2 to 4.
Mr.Rajat Malhotra and Mr.Sunil Malhotra, Advs. for R-5/GNCTD.

CORAM:
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT

% 23.08.2017

C. HARI SHANKAR, J.

1 The petitioner, which claims to be a non-Government Society registered under the Societies Registration Act, 1860, seeks, by means of the present writ petition, to challenge Office Memorandum (OM) No.36012/18/95-Estt./(RES) Pt.II dated 13th August, 1997, issued by the Department of Personnel & Training (DOPT). The said OM reads as under:-

> *"The undersigned is directed to invite attention to the Department's O.M.*

No.36012/36.93 Estt., (SCT) dated 19.08.1993 clarifying that the Supreme Court had, in the Indira Sawhney case, permitted the reservation for the scheduled Castes and Scheduled Tribes, in promotion to continue for a period of five years from 16.11.1992.

Consequent to the judgment in Indira Sawhney's case, the Constitution was amended by the Constitution (Seventy Seventh Amendment) Act, 1995 and Article 16(4A) was incorporated in the Constitution. The Article enables the State to provide for reservation, in matters of promotion, which 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.

In pursuance of Article 16(4A), it has been decided to continue the reservation in promotion as at present, for the Scheduled Castes and the Scheduled Tribes in the service posts under the Central Government beyond 15.11.1997 till such time as the representation of each of the above two categories in each reaches the prescribed percentage of reservation where after the reservation in promotion shall continue to maintain the representation to the extent of prescribed percentages for the respective categories.

All Ministers Departments are requested to urgently bring these instructions to the notice of all their attached subordinate offices as also the public Sector Undertaking and Statutory Bodies etc.

2 The present writ petition seeks

(a) quashing of the impugned OM dated 13th August 1997,

(b) quashing of all promotions made in pursuance to the said OM, and promotion of general category candidates retrospectively from the date reserved category candidates were promoted, allegedly illegally, on the basis of the said Notification (there is no reference to any specific general or reserved category candidate; neither is any such candidate impleaded), and

(c) issuance, of a direction, to the respondents, to restrain them from providing for any further reservation in promotion without first "*following the judgment of the Hon'ble Supreme Court in M. Nagaraj's case by collecting quantifiable data".* [The case of ***M. Nagaraj***, referred to, is the celebrated Constitution Bench decision of the Supreme Court in ***M. Nagaraj v U.O.I., (2006) 8 SCC 212***, authored by S.H.Kapadia, J. (as His Lordship then was).]

3 It might be stated, at the outset, that, with respect to prayer (b) in the writ petition, that, ordinarily, in the absence of any affected party being impleaded, such a prayer could not merit any consideration whatsoever, even in part. However, we were informed, across the bar, that, by an order dated 11th March, 2000, the Supreme Court had directed that all promotions effected by the respondent would be subject to the outcome of

the challenge by the petitioners. Though we have not been shown any copy of the said order, we have no reason to doubt the said statement, made as it is by learned Senior Counsel. In view thereof, no orders would be required to be passed, by us, *qua* prayer (b) in the writ petition. The discussion, in the present judgement, would, therefore, be restricted to prayers (a) and (c) in the writ petition. The issue that would, essentially and fundamentally, fall for consideration, would, undoubtedly, be the validity of the impugned Notification no.36012/18/95-Estt./(RES) Pt.II dated 13th August, 1997, issued by the DOPT.

4 The issues raised in the writ petition throw open an expansive jurisprudential vista, and could invite a comprehensive and detailed dissertation on the entire law relating to reservation for Scheduled Castes and Scheduled Tribes, in the context of Articles 16(1), 16(4) and 335 of the Constitution of India. This Court is, however, proscribed from doing so by virtue of an order of the Supreme Court, dated 11th March 2010, passed in a batch of writ petitions, including **WP (C) 413/1997**, which is stated to have been filed by the present petitioner. The operative portion of the said order reads thus:

> *"Therefore, we permit the petitioners in these writ petitions to withdraw these writ petitions with liberty to move the High Court and in the event of writ petitions are filed before the High Court the same may be considered in the light of the observations made by this Court in* ***M. Nagaraj and others vs. Union of India and another***

(supra). *The petitioners would be at liberty to seek appropriate interim relief in the High Court."*

5 The peripheries of the analysis, in the present case have, therefore, necessarily to be circumscribed by the contours of ***M. Nagaraj (supra)***. More particularly expressed, this Court would be required to examine whether the impugned O.M., dated 13th August 1997, could sustain, in the wake of ***M. Nagaraj (supra),*** and the exposition of law therein.

6 ***M. Nagaraj (supra) analysed***:

6.1 Before proceeding to examine the judgement in ***M. Nagaraj (supra)***, a brief recapitulation of the events that led to the said decision would be apposite.

6.2 The *terminus a quo*, for the purposes of the present case, may legitimately said to be the judgment of the 9-Judge Bench of the Supreme Court in ***Indira Sawhney v U.O.I., 1992 Supp (3) SCC 216.*** As is well-known, the said judgment dealt with a challenge, laid to the entire policy of reservation, of the Central and State Governments, for Scheduled Castes (SCs), Scheduled Tribes (STs) and other backward classes (OBC). While generally upholding the constitutionality of the said reservation policy of the Government, the Supreme Court recorded, in para

859 of the report, the answers to the various questions dealt with and answered framed by counsel in the matter. Answer No. (7), which is of relevance for the present case, merits reproduction *in extenso*:

> *"**(7)** Article 16 (4) does not permit provision for reservations in the matter of promotions. 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 in 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 that such reservation may continue in operation for a period of 5 years from this day". (Emphasis supplied)*

Indra Sawhney (supra) was decided on 16th November 1992. The period of 5 years stipulated in the above extracted passage from the judgement, therefore, expired on 15th November, 1996.

6.3 In view of the above direction of the Supreme Court in ***Indra Sawhney (supra)***, Office Memorandum No. 36012/37/93/Estt./(SCT), dated 19th August 1993, was issued by the DOPT, which reads thus:-

> *"The undersigned is directed to say that consequent on the judgment of the Supreme Court in Indira Sawhney and others Vs. Union of India and others, doubts have been expressed in some quarters whether the existing provisions of reservation for SC/ST in the matter of promotion are to be continued. In para 107 of their judgment in the above said case delivered on 16.11.1992, the Supreme Court has given the following direction:-*
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> > *'It is further directed that wherever reservation 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 shall continue in operation for a period of five years from this day'. (16.11.1992)*
>
> 2. *In view of this direction of the Supreme Court, the existing provisions of reservation for SC/ST in the matter of promotion are required to be continued.*
>
> 3. *The above said position is brought to the notice of all Ministers/Departments for information and for ensuring that the existing provisions of reservation for SC/ST in the matter of promotion are implemented, without fail".*

6.4 Apparently with a view to transgress the 5-year window provided, *vide* ***Indra Sawhney (supra)***, for reservations in promotion favouring SCs and STs, sub-article (4A) was inserted in Article 16 of the Constitution, *vide* the Constitution (77th Amendment) Act, 1995, which came into force on 17th June 1995. The said sub-Article, read as it was worded, provided a *carte blanche* to the State to make any provision, for reservation in promotion, in favour of SCs and STs, provided they were "not adequately represented in the services under the State", and read thus:

> "**(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 Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State".*

6.5 The above sub-Article 4(A) of Article 16 of the Constitution of India was, subsequently, amended by the Constitution (85th Amendment Act), 2001 - which was deemed to have come into force on 17th June 1995 - by replacing the words "*in matters of promotion to any class*", contained in the said sub-Article, with

the words "*in matters of promotion, with consequential seniority to any class*".

6.6 Consequent upon the 77th and 85th amendments to the Constitution aforementioned, various orders/notifications were issued, by the Central and State Governments, towards implementation thereof. The said orders/notifications, as also the 77th, 81st and 85th amendments to the Constitution, were challenged, before the Supreme Court, in a batch of writ petitions, including **WP (C) 413/1997**, which is stated to have been filed by the present petitioner i.e. the All India Equality Forum. The challenge, in **WP (C) 413/1997**, was to OM No.3602/18/dated 13th August, 1997, issued by the DOPT, which already stands reproduced hereinabove.

6.7 During the pendency of the said writ petitions, the issue of constitutional validity of sub-Articles (4) and (4A) of Article 16 came to be decided, by a Constitution Bench of the Supreme Court in ***M. Nagaraj (supra)***. The fundamental challenge, in ***Nagaraj (supra)***, was to the stipulation that reservation in promotion, granted to SCs and STs by the said sub-Articles, would also carry, with it, the benefit of consequential seniority. Grant of such consequential seniority, in the submissions of the petitioners therein to the Supreme Court, resulted in impairment of efficiency, as also in discriminating between equals, in

violation of Articles 14 and 16(1) of the Constitution. The Supreme Court analyzed, and determined, the controversy, thus:

(i) The controversy involved balancing of the right of an individual to equal opportunity, on the one hand, and preferential treatment to an individual belonging to the backward class on the other, in order to bring about an equal level playing field in the matter of public employment.

(ii) Equality in law was different from equality in fact. In understanding Article 16(4), equality in fact played a dominant role.

(iii) The discretion, conferred on the executive by Articles 16(4) and 16(4A), was limited by Article 335 of the Constitution.

(iv) The controversy essentially related to the *exercise of the power* by the State Government depending upon the fact situation in each case. Therefore, "vesting of the power" by an enabling provision may have been constitutionally valid; the "exercise" of the said "power" by the State in a given case may nevertheless 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."*

(v) The need for achieving a balance arose when the issue of extent of reservation was involved. Reservation, beyond a cut-off point, resulted in reverse discrimination.

(vi) A numerical benchmark was, therefore, "*the surest immunity against charges of discrimination*".

(vii) The discretion vested in the State, under Article 16(4) or 16(4A), was subject to the existence of "backwardness" and "inadequacy of representation". Backwardness had to be based on objective factors whereas inadequacy had to factually exist. This was where judicial review came in.

(viii) With respect to the maximum extent of reservation permissible, it was noticed that, while earlier decisions seemed to take contrary views, the judgement in ***Indra Sawhney (supra)*** held that reservation could not be in excess of 50% and that Article 16 (4) spoke of adequate representation, not proportionate representation.

(ix) On the issue of whether the 50% rule was applicable to each year, it was noticed that, while ***Indra Sawhney (supra)*** held that the said 50% was applicable to each year, the subsequent decision in ***R.K. Sabharwal v State of Punjab, (1995) 2 SCC 745*** held that, in the case of promotion, the entire cadre strength had to be taken into account to determine whether reservation, up to the required limit, had been reached, and that the pronouncement in ***Indra Sawhney (supra)*** dealt with initial appointments.

The further discussion, in ***Nagaraj (supra)***, dealing with the "catch-up" principle, is not of any particular relevance, insofar

as the controversy in issue is concerned; accordingly, this order eschews any discussion on the said concept.

6.8 Having, thus, distilled the various principles seminal to the controversies arising before it, ***Nagaraj (supra)*** proceeds (in para 86 of the report), to observe, thus, with respect to Article 16 (4A) of the Constitution:

> "***86.*** *Clause (4-A) follows the pattern specified in clauses (3) and (4) of Article 16. Clause (4-A) of Article 16 emphasises the opinion of the States in the matter of adequacy of representation. It gives freedom to the State in an appropriate case depending upon th e ground reality to provide for reservation in matters of promotion to any class or classes of posts in the services. 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). 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 come into force. The State can make provision for reservation only if the above two circumstances exist. Further, in* ***Ajit Singh (II) [(1999) 7 SCC 209 : 1999***

SCC (L&S) 1239] *this Court has held that apart from "backwardness" and "inadequacy of representation" the State shall also keep in mind "overall efficiency" (Article 335). Therefore, all the three factors have to be kept in mind by the appropriate Government in providing for reservation in promotion for SCs and STs." (Emphasis supplied)*

6.9 Further, para 117 of the report enters the following caveat:

"***116.*** *The test for judging the width of the power and the test for adjudicating the exercise of power by the State concerned 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 width test" we have to see whether the impugned amendments obliterate the constitutional limitations mentioned in Article 16(4), namely, backwardness and inadequacy of representations. As stated above, these limitations are not obliterated by the impugned amendments. However, the question still remains whether the State concerned has identified and valued the circumstances justifying it to make reservation. This question has to be decided casewise. 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 the facts of each case. The judgment in Indira 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 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".*

(*Emphasis supplied)*

7 As already stated hereinabove, consequent on the pronouncement in ***M. Nagaraj (supra)***, the batch of writ petitions, pending before the Supreme Court, challenging various orders/notifications issued under Article 16(4)(A) of the Constitution, were disposed of, by the Supreme Court vide order dated 11th March, 2010, in the following terms:-

"The Constitution of India was amended by the Seventy-Seventh Amendment Act, 1995,

Eighty-fifth Amendment Act, 2001 and Eighty-first Amendment Act, 2000. By these Acts Article 16(4), (4-A) and 16(4-B) were amended. Thus Seventy-Seventh Amendment Act, 1995 and Eighty-fifth Amendment Act, 2001 came into effect w.e.f. 16.06.1995 and Eighty-first Amendment Act, 2000 came into effect on 09.06.2000. Subsequent to these Amendments of the Constitution various State Government issued order/notifications to implement the provisions of the Constitution. These notifications/orders were challenged in various writ petitions and special leave petitions before this Court. In these proceedings the constitutional amendments were also challenged. By the decision of the Constitution Bench of this Court in ***M. Nagaraj and others vs. Union of India and others*** *reported in* ***(2006) 8 SCC 212****, the constitutional validity of Article 16(4), (4-A) and (4-B) was upheld. In the judgment it was directed that various individual writ petitions would be considered by appropriate Bench in accordance with the law laid down in this decision. As various state orders and notifications have been challenged in these writ petitions be considered by the respective High Courts. The validity of the same be decided in view of the final decision of the Constitution Bench of this Court in* ***M. Nagaraj and others vs. Union of India and others (supra)****.*

Therefore, we permit the petitioners in these writ petitions to withdraw these writ petitions with liberty to move the High Court and in the event of writ petitions are filed before the High Court the same may be considered by the High

> *Court in the light of the observations made by this Court in **M. Nagaraj and others vs. Union of India and other (supra)**. The petitioners would be at liberty to seek appropriate interim relief in the High Court.*
>
> *The writ petitions as well as contempt petitions are disposed of accordingly".*

8 It is pursuant to the liberty thus granted by the Supreme Court in the above extracted paras of its order dated 11th March, 2010, that the petitioner has moved this Court by means of the present writ petition.

9 Consequent to the pronouncement of law in ***M. Nagaraj (supra)*** there has been a slew of decisions by the Supreme Court as well as various other judicial fora, to the effect that the Government could not blindly provide for reservation in promotions, in favour of SCs and STs unless, prior thereto, the requisite exercise, to acquire quantifiable data regarding inadequacy of representation of SCs and STs in public services was undertaken and, thereafter, the said consideration was juxtaposed against the opposing considerations of backwardness and overall efficiency of administration. A few such decisions may be noticed:

9.1 ***U.O.I. v Pushpa Rani, (2008) 9 SCC 242*** was a decision in which the challenge, postulated on the anvil of ***Nagaraj (supra)***,

was repelled. Even so, the rationale, of the Supreme Court, from doing so, as contained in para 61 of the report, is instructive:

> *"**61.** The point which remains to be considered is whether the order of the Tribunal, which has been confirmed by the High Court, can be maintained by applying the ratio of **M. Nagaraj case [(2006) 8 SCC 212]** . Dr. Rajeev Dhavan, learned Senior Counsel appearing for some of the respondents, made strenuous efforts to convince us that the policy of reservation cannot be applied at the stage of making promotions because the Railway Administration did not produce any evidence to show that Scheduled Castes and Scheduled Tribes were not adequately represented in different cadres and that the efficiency of administration will not be jeopardised by reserving posts for Scheduled Castes and Scheduled Tribes, but we have not felt persuaded to accept this submission. In the applications filed by them, the respondents did not plead that the application of the policy of reservation would lead to excessive representation of the members of Scheduled Castes and Scheduled Tribes, or that the existing policy of reservation framed by the Government of India was not preceded by an exercise in relation to the issue of adequacy of their representation. Rather, the thrust of their claim was that restructuring of different cadres in Group C and D resulted in upgradation of posts and the policy of reservation*

> *cannot be applied qua upgraded posts. Therefore, the Union of India and the Railway Administration did not get opportunity to show that the employees belonging to Scheduled Castes and Scheduled Tribes did not have adequate representation in different cadres; that the outer limit of reservation i.e. 50% will not be violated by applying the policy of reservation and that the efficiency of administration will not be jeopardised by applying the policy of reservation. Therefore, it is neither possible nor desirable to entertain a totally new plea raised on behalf of the respondents, more so, because adjudication of such plea calls for a detailed investigation into the issues of facts.*" (Emphasis supplied)

It is apparent, from a reading of the above passage, that, while the Supreme Court acknowledged the legal position that any provision for reservation for SCs and STs, in the absence of the preliminary exercise of collating quantifiable data regarding inadequacy of representation, and the juxtaposing, against each other, the said consideration, with the considerations of backwardness and maintenance of overall efficiency of administration, having been conducted, would violate Article 16 (1) as well as Article 335 of the Constitution of India. However, as requested pleadings, to the said effect, were absent in that case, the Supreme Court demurred from entering into the controversy. In the present case, however, the following

averments appear, on the record of the pleadings of the petitioner in the writ petition:

> "***24.*** *Naturally when persons of lesser merits are inducted at the cost of persons of higher merit, the efficiency in administration is bound to suffer. After all Government servants are meant to serve the public at large. For this purpose the State, as a model employer has the right to appoint the cream of the society in public service. But to render social Justice to the backward classes some sacrifices merit and efficiency has to be done. At the same time there has to be a limit to the sacrifice otherwise the very foundation of efficiency would be shaken and the State would collapse. In this regard Article 335 of the Constitution comes into play as a cap on the discretionary power and the HSC repeatedly, time and again, stressed the importance of Article 335 of the Constitution. The proviso to Article 325 being of limited application, the importance Article 335 should always be kept in mind as stressed by this Hon'ble Court.*
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> ***26.*** ***…*** *This Hon'ble Court has been very particular in stressing the point that while exercising this discretionary power overall efficiency in administration should and must be ensured. The reference is to overall efficiency and not to efficiency in the cadre or class of posts in which reservation is provided for. Overall efficiency necessarily means the efficiency in the entire service. This Hon'ble Court has held that Articles 16 (4A) and 16 (4B) empowers the State will be enabling provision of providing for*

reservation in promotion but at the same time casts a responsibility of maintaining overall efficiency in administration, that is, in service. This overall efficiency in administration can be achieved only when merit and social Justice is balanced in the service at all levels on the basis of quantifiable data on backwardness, inadequacy of representation, extend the reservation and efficiency also at all levels, that is, a balance between Articles 14 and 16 (1) on the one hand and Articles 16 (4A) and 16 (4B) on the other.

27. *This Hon'ble Court has cast this responsibility of maintaining this balance on the State. It is, therefore, the duty of the State to evolve a mechanism by which the maintenance of balance essential and the Articles of Constitution referred above, that is Articles 14, 16 (1), 16 (4A), 16 (4B) and Article 335, are implemented in that letter and spirit. How to evolve and ensure this balance is a matter on which the State has to deliberate and take an appropriate decision."*

In the face of these averments, in the writ petition of the petitioner, ***Nagaraj (supra)*** cast a duty, on the State, to demonstrate, before this Court in response thereto, that the necessary exercise of collating quantifiable data regarding inadequacy of representation, backwardness and maintenance of overall efficiency of administration, was carried out before continuing the policy of reservation, for SCs and STs, beyond the 5-year period provided by ***Indra Sawhney (supra)***.

However, all that is to be found, in the counter-affidavit filed by Respondents 2 and 3, in response to the writ petition, in this regard, is the following:

> *"**(D)** That it is further submitted that decision to grant reservation in appointment/promotion is policy matters of the Govt and the impugned policy decisions dated 13.8.1997 has been taken by the Govt. in bona fide exercise of its power under the Constitution or otherwise and there is no justification/reason for quashing the same by this Double Court by exercise of its power of judicial review of the executives decision under Article 226 of the Constitution of India.*
>
> ***(F)** That the action of the replying respondent in giving the reservation to various categories of persons is in terms of the conscious decision of the Govt. taken in this regard and the same is just and in bona fide exercise of its power and not liable to be interfered with by this Hon'ble Court in its extra ordinary power of judicial review."*

9.2 ***Suraj Bhan Meena v State of Rajasthan, (2011) 1 SCC 467***, upheld the decision of the High Court of Rajasthan, impugned therein, in the following words:

> *"**66.** The view of the High Court is based on the decision in **M. Nagaraj case [(2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013]** 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." (Emphasis supplied)*

9.3 ***U.P. Power Corporation v Rajesh Kumar, (2012) 7 SCC 1,*** re-emphasised ***Nagaraj (supra)***, by carving, out of the said decision, the following clear principles (in the 81 of the report):

> *"(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. *" (Emphasis supplied)*

Having thus delineated the principles emerging from ***Nagaraj (supra)***, the Court went on to conclude (in para 86 of the report), thus:

> *"**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 concepts of reservation in promotion was already in vogue. We are unable to accept the said submissions, 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 and scrutiny on parameters laid down therein".*

9.4 The same principles stand reiterated in a recent judgment of the Supreme Court in ***B.K. Pavitra V. UOI (2017) 4 SCC 620***, in the following terms:-

> *"It is clear from the above discussion in S.Panneer Selvam case that exercise for determining "inadequacy of representation" , "backwardness" and "overall efficiency", is a must for exercise of power under Article 16(4-A). Mere fact that there is no proportionate representation in promotional post for the population of SCs and STs is not by itself enough to grant consequential seniority to promotes 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".*

10 On this legal position being brought to his notice, Shri R.V. Sinha, learned counsel appearing for the respondent, fairly admitted that the controversy, in the present case, stood covered by the judgments of the Supreme Court in ***M. Nagaraj (supra)*** and ***B.K. Pavitra (supra)***. At the same time, he contended, vociferously, that the writ petition itself was not maintainable, as the petitioner would be required, in the first instance to approach the Central Administrative Tribunal (hereinafter referred to as "the Tribunal") in view of the law laid down by

the Supreme Court ***L. Chandra Kumar v U.O.I., (1997) 3 SCC 261***.

11 Needless to say, the said objection of Mr.Sinha cannot merit any consideration in the present case, as the petitioner has moved this Court pursuant to the specific liberty, granted by the Supreme Court in this behalf, vide its order dated 11th March, 2010, already referred to hereinabove. In view of the said liberty, it is not open to this Court to travel behind the said judgment and enter into any discussion regarding maintainability of the petition. The brief of this Court this, neatly and squarely, to adjudicate on whether, or not, the impugned OM, dated 13th August 1997 could sustain, in the wake of the law as enunciated in ***M. Nagaraj (supra)***.

12 The objection of Mr Sinha is, therefore, overruled.

13 As has already been noticed hereinabove, the counter affidavit, filed in the present proceedings on behalf of Respondents 2 to 4, does not disclose that the requisite exercise, collecting quantifiable data and determining the aspects of backwardness, inadequacy of representation and overall efficiency of the administration, was ever undertaken before blindly extending, beyond 15th December, 1997, the provision for reservation, in promotion, favouring SCs and STs. The 77th Amendment to the Constitution, and sub-article (4A), which was inserted in Article

16 thereby, were obviously taken as providing a *carte blanche* to the Government to extend the provisions of reservation for SCs and STs beyond the period of 5 years stipulated in ***Indra Sawhney (supra)***. As ***Nagaraj (supra)***, and the decisions following thereupon show us, however, that is not the case. Any reservation (as also consequential seniority) extended to SCs and STs, without, in the first instance, conducting the requisite exercise of garnering quantifiable data, indicating inadequate representation, and juxtaposing, they're against, the considerations of backwardness and overall efficiency of administration, would necessarily infract Articles 16 (1) and 335 of the Constitution of India and, consequently, be liable to be quashed.

14 The impugned OM dated 13th August 1997, issued by the DOPT cannot, therefore, sustain in view of the law laid down in the decisions already cited hereinabove.

15 Resultantly, prayers (a) and (c), in the writ petition, succeed. The impugned Office Memorandum No 36012/18/95-Estt. (Res) Pt. II, dated 13th August, 1997, issued by the DOPT, is quashed and set aside. The respondents are restrained from granting any reservation, in promotion, to Scheduled Castes or Scheduled Tribes, in exercise of the power conferred by Article 16 (4A) of the Constitution of India, without, in the first instance, carrying out the necessary preliminary exercise of

acquiring quantifiable data indicating inadequacy of representation, of the said categories, in service, and evaluating the situation by taking into consideration the said data, along with the competing considerations of backwardness and overall efficiency in administration, and arriving at an empirical decision on the basis thereof.

16 Prayer (b) in the writ petition, to the extent it exhorts this court to quash all promotions made in pursuance of the impugned OM dated 13th August 1997, would stand satisified by the interim order, stated to have been passed by the Supreme Court, in, *inter alia,* WP (C) 413 of 1997 filed by the petitioner, to the effect that all promotions made would be subject to the outcome of the challenge laid by the petitioners in the instant case. No further orders would, therefore, require to be passed, by us, regarding prayer (b), which would, consequently, also stand allowed, to the extent that all promotions effected on the basis of the impugned OM, dated 13th August, 1997, would stand quashed.

17 The further prayer, forming the latter part of prayer (b) in the writ petition, that "*the employees of general category be given benefit of promotion retrospectively from the date reserved category employees were promoted illegally*" cannot, however, be granted, for the simple reason that promotion may be dependent on a variety of factors, including seniority, eligibility,

qualifying service, availability of vacancies, application of the quota-rota principle, and the like, and, in the absence of any specific prayer *qua* any specific post, an omnibus direction, to promote all "employees of general category", retrospectively, "from the date reserved category employees were promoted illegally", cannot possibly be issued. All that we can say, on this prayer of the petitioner, is that, if, consequent on this judgement, any general category employee becomes entitled to promotion against a post against which an SC or ST candidate was promoted on the basis of the impugned OM dated 13th August 1997, it shall be open to such general category candidate/candidates to represent to the concerned administrative authorities, or to independently seek her, or his, judicial remedies in that regard. Liberty, to the said extent is, therefore, granted.

18 The writ petition is disposed of, in the above terms.

19 No costs.

C.HARI SHANKAR, J.

ACTING CHIEF JUSTICE

AUGUST 23, 2017
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