REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) No. 690 of 2015

Suresh Chand Gautam …Petitioner(s)

Versus

State of Uttar Pradesh & Ors. …Respondent(s)

WITH

WRIT PETITION (CIVIL) NO. 715 OF 2015

WRIT PETITON (CIVIL) NO. 273 OF 2015

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J U D G M E N T

Dipak Misra, J.

In this batch of Writ Petitions preferred under Article 32 of the Constitution of India the prayer relates to issue of a direction in the nature of mandamus commanding the respondents to enforce appropriately the constitutional mandate as contained under the provisions of Articles 16(4-A), 16(4-B) and 335 of the Constitution of India or, in the alternative, directing the respondents to constitute a

Committee or appoint a Commission chaired either by a retired Judge of the High Court or Supreme Court in making survey and collecting necessary qualitative data of the Scheduled Castes and the Scheduled Tribes in the services of the State for granting reservation in promotion in the light of direction gives by this Court in ***M. Nagaraj & others v. Union of India & others***[1]. Let it be clarified in the beginning, apart from this prayer, other reliefs sought for in the petitions have not been argued and rightly so, as the said grievances have already been directed to be dealt with in interlocutory applications to be filed in the case of ***U.P. Power Corporation Limited v. Rajesh Kumar & others***[2].

2. At the commencement of the hearing, Dr. K.S. Chauhan, learned counsel appearing for the petitioner in Writ Petition (Civil) No. 715 of 2015, had submitted that the decision in ***M. Nagaraj*** (supra) by the Constitution Bench requires reconsideration. For the said purpose, he has made an effort to refer to certain passages from ***Indra Sawhney & others v. Union of India &***

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[1] (2006) 8 SCC 212
[2] (2012) 7 SCC 1

others[3] and ***R.K. Sabharwal v. State of Pubjab***[4]. We are not inclined to enter into the said issue as we are of the considered opinion that the pronouncement in ***M. Nagaraj*** (supra) is a binding precedent and has been followed in number of authorities and that apart, it has referred to, in detail, all other binding previous authorities of larger Benches and there does not appear any weighty argument to convince us, even for a moment, that the said decision requires any reconsideration. The submission on the said score is repelled.

3. The principal submission of Mr. Salman Khurshid, Mr. K.V. Vishwanathan, learned senior counsel and Dr. K.S. Chauhan learned counsel appearing for the respective petitioners is the alternative submission which can be put in three compartments:- (i) the decision rendered in ***M. Nagaraj*** (supra) has not been appositely applied (ii) the authority in ***Rajesh Kumar*** (supra) has to apply prospectively and cannot have retrospective effect, and (iii) even if it is assumed, as interpreted in ***M. Nagaraj*** (supra), Articles 16(4-A) and 16(4-B) are enabling constitutional

[3] (1992) Supp. 3 SCC 217
[4] 1995 (2) SCC 745

provisions, the concept of power coupled with duty requires the authorities to perform the duty and they are obliged to collect the quantifiable data to enable them to take a decision on reservation in promotion and hence, a mandamus should be issued to all authorities to carry out the constitutional command. We have permitted Dr. Rajiv Dhavan to argue the matter as he had appeared for some of the respondents in the case of ***Rajesh Kumar*** (supra).

4. Articles 16(4), 16(4-A) and 16(4-B) read as under:-

> "**Article 16. Equality of opportunity in matters of public employment.—**
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> (4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.
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> (4-A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.
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> (4-B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year

> in accordance with any provision for reservation made under clause (4) or clause (4-A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year".

5. In ***M. Nagaraj*** (supra), the Court has encompassed the facts in the following manner:-

> "The petitioners have invoked Article 32 of the Constitution for a writ in the nature of certiorari to quash the Constitution (Eighty-fifth Amendment) Act, 2001 inserting Article 16(4-A) of the Constitution retrospectively from 17-6-1995 providing reservation in promotion with consequential seniority as being unconstitutional and violative of the basic structure. According to the petitioners, the impugned amendment reverses the decisions of this Court in *Union of India* v. *Virpal Singh Chauhan*[5], *Ajit Singh Januja* v. *State of Punjab*[6] *(Ajit Singh-I), Ajit Singh (II)* v. *State of Punjab*[7], *Ajit Singh (III)* v. *State of Punjab*[8], *Indra Sawhney* v. *Union of India (supra)* and *M.G. Badappanavar* v. *State of Karnataka*[9]. The petitioners say that Parliament has appropriated the judicial power to itself and has acted as an Appellate Authority by reversing the judicial pronouncements of this Court by the use of power of amendment as done by the impugned amendment and is, therefore, violative of the basic structure of the Constitution. The said amendment is, therefore, constitutionally invalid and is liable to be set aside. The petitioners have

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[5] (1995) 6 SCC 684
[6] (1996) 2 SCC 715
[7] (1999) 7 SCC 209
[8] (2000) 1 SCC 430
[9] (2001) 2 SCC 666

> further pleaded that the amendment also seeks to alter the fundamental right of equality which is part of the basic structure of the Constitution. The petitioners say that the equality in the context of Article 16(1) connotes "accelerated promotion" so as not to include consequential seniority. The petitioners say that by attaching consequential seniority to the accelerated promotion, the impugned amendment violates equality in Article 14 read with Article 16(1). The petitioners further say that by providing reservation in the matter of promotion with consequential seniority, there is impairment of efficiency. The petitioners say that in *Indra Sawhney* (supra) decided on 16-11-1992, this Court has held that under Article 16(4), reservation to the Backward Classes is permissible only at the time of initial recruitment and not in promotion. The petitioners say that contrary to the said judgment delivered on 16-11-1992, Parliament enacted the Constitution (Seventy-seventh Amendment) Act, 1995. By the said amendment, Article 16(4-A) was inserted, which reintroduced reservation in promotion. The Constitution (Seventy-seventh Amendment) Act, 1995 is also challenged by some of the petitioners. The petitioners say that if accelerated seniority is given to the roster-point promotees, the consequences would be disastrous. …"

6. After referring to a series of authorities, the Court concluded as follows:-

> "121. The impugned constitutional amendments by which Articles 16(4-A) and 16(4-B) have been inserted flow from Article 16(4). They do not alter the structure of Article 16(4). They retain the controlling factors or the compelling reasons, namely, backwardness and inadequacy of representation which enables the States to provide for reservation keeping in mind the overall efficiency of the State administration under Article

335. These impugned amendments are confined only to SCs and STs. They do not obliterate any of the constitutional requirements, namely, ceiling limit of 50% (quantitative limitation), the concept of creamy layer (qualitative exclusion), the sub-classification between OBCs on one hand and SCs and STs on the other hand as held in *Indra Sawhney* (supra), the concept of post-based roster with inbuilt concept of replacement as held in *R.K. Sabharwal* (supra).

122. We reiterate that the ceiling limit of 50%, the concept of creamy layer and the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency are all constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse.

123. However, in this case, as stated above, the main issue concerns the "extent of reservation". In this regard the State concerned will have to show in each case the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation. As stated above, the impugned provision is an enabling provision. The State is not bound to make reservation for SCs/STs in matters of promotions. However, if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance with Article 335. It is made clear that even if the State has compelling reasons, as stated above, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling limit of 50% or obliterate the creamy layer or extend the reservation indefinitely.

> 124. Subject to the above, we uphold the constitutional validity of the Constitution (Seventy-seventh Amendment) Act, 1995; the Constitution (Eighty-first Amendment) Act, 2000; the Constitution (Eighty-second Amendment) Act, 2000 and the Constitution (Eighty-fifth Amendment) Act, 2001.
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> 125. We have not examined the validity of individual enactments of appropriate States and that question will be gone into in individual writ petition by the appropriate Bench in accordance with law laid down by us in the present case."

7. In ***Rajesh Kumar***'s case, a two-Judge Bench, apart from referring to the paragraphs we have reproduced hereinabove, also adverted to paragraphs 44, 48, 49, 86, 98, 99, 102, 107, 108, 110, 117, 123 and 124 and culled out certain principles. We think it absolutely appropriate to reproduce the said principles:-

> "(*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.
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> (*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."

8. ***Rajesh Kumar***'s case also referred to the authority in ***Suraj Bhan Meena & another v. State of Rajasthan & others***[10] wherein it has been ruled thus:-

[10] (2011) 1 SCC 467

> "*66*. The position after the decision in *M. Nagaraj case* (supra) is that reservation of posts in promotion is dependent on the inadequacy of representation of members of the Scheduled Castes and Scheduled Tribes and Backward Classes and subject to the condition of ascertaining as to whether such reservation was at all required.
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> *67*. The view of the High Court is based on the decision in *M. Nagaraj cases*(supra) 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."

9. After referring to the said decision, the Court in ***Rajesh Kumar***'s case took note of the Social Justice Committee Report and the chart and opined that the said exercise was done regard being had to the population and vacancies and not keeping in view the concepts that have been evolved in ***M. Nagaraj*** (supra). 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***

(supra) and ***Ajit Singh (2)*** (supra). Being of this view, the Court held that a fresh exercise in the light of the judgment of the Constitution Bench in ***M. Nagaraj*** (supra) 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. On the said score, the Court did not accept the submission as the provisions of the Constitution are treated valid with certain conditions and riders. Thereafter the Court concluded:-

> "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* (supra). Any promotion that has been given on the dictum of *Indra Sawhney* (supra) and without the aid or assistance of Section 3(7) and Rule 8-A shall remain undisturbed."

10. To have a complete picture, we may reproduce Section 3(7) of the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 (for short, "1994 Act") which reads as follows:-

> "**Section 3.** ***Reservation in favour of Scheduled Castes, Scheduled Tribes and Other Backward Classes***.—
> (1)-(6) * * *
>
> (7) If, on the date of commencement of this Act, reservation was in force under government orders for appointment to posts to be filled by promotion, such government orders shall continue to be applicable till they are modified or revoked."

11. Rule 8-A was inserted by the Uttar Pradesh Government Servants Seniority (First Amendment) Rules, 2002 (for short, '2002 Rules') in the U.P. Government Servants Seniority Rules, 1991, which is extracted below:-

> "**8-A.** ***Entitlement of consequential seniority to a person belonging to Scheduled Castes or Scheduled Tribes***.—Notwithstanding anything contained in Rules 6, 7 or 8 of these Rules, a person belonging to the Scheduled Castes or Scheduled Tribes shall, on his promotion by virtue of rule of reservation/roster, be entitled to consequential seniority also."

12. Rule 8-A was omitted on 13.05.2005 by the Uttar Pradesh Government Servants Seniority (Second

Amendment) Rules, 2005. However, it was provided in the said Rules that the promotions made in accordance with the revised seniority as determined under Rule 8-A prior to the commencement of the 2005 Rules could not be affected. Thereafter, on 14.9.2007, by the Uttar Pradesh Government Servants Seniority (Third Amendment) Rules, 2007, Rule 8-A was inserted with the same language. It has been mentioned in the said Rule that it shall be deemed to have come into force on 17.6.1995.

13. It is contended by Dr. Chauhan, that the decision in ***Rajesh Kumar*** (supra) has a prospective application. To buttress the said submission he has commended us to paragraphs 85 to 87.

14. Placing reliance on the said paragraphs, it is argued by Dr. Chauhan that the provisions of Section 3(7) of the 1994 Act remained in force upto 07.05.2012 as it was omitted by Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Amendment Ordinance, 2012. We do not intend to address to the said facets. Suffice it to say, the Court in ***Rajesh Kumar*** (supra) has clearly held that Section 3(7) of

the 1994 Act and Rule 8-A are *ultra vires.* What has been stated in the said judgment is that any promotion that has been given on the dictum of ***Indra Sawhney*** (supra) and without the aid or assistance of Section 3(7) and Rule 8-A was to remain undisturbed. Thus, the decision has made it distinctly clear what has been stated.

15. The stand that the provisions remained in force till the State omits it by an omission has no force. When the statutory provisions and the rules have been declared *ultra vires*, the two-Judge Bench was absolutely conscious what is to be stated and accordingly, has directed so. In this regard, reference may be made to the decision in ***Ganga Ram Moolchandani v. State of Rajasthan & others***[11], wherein a particular rule was declared *ultra vires*. A contention was advanced that the Court must hold that the decision would have prospective operation to avoid a lot of complications. The Court referred to the authorities in ***Ganga Ram Moolchandani*** (supra) and observed thus:-

> "To meet the then extraordinary situation that may be caused by the said decision, the Court felt that it must evolve some doctrine which had roots in reason and precedents so that the past

[11] (2001) 6 SCC 89

> may be preserved and the future protected. In that case it was laid down that the doctrine of prospective overruling can be invoked only in matters arising under the Constitution and the same can be applied only by this Court in its discretion to be moulded in accordance with the justice of the cause or matter before it."

After so stating, the Court proceeded to hold as follows:-

> "20. Accepting the lead given in the above decision, this Court has since extended the doctrine to the interpretation of ordinary statutes as well. In the cases of *Waman Rao* v. *Union of India*[12], *Atam Prakash* v. *State of Haryana*[13], *Orissa Cement Ltd.* v. *State of Orissa*[14], *Union of India* v. *Mohd. Ramzan Khan*[15] and *Managing Director, ECIL* v. *B. Karunakar*[16]the device of prospective overruling was resorted to even in the case of ordinary statutes. We find in the fitness of things, the law decided in this case be declared to be prospective in operation."

16. In the said case, eventually the Court, while declaring the rules *ultra vires*, opined that:-

> ".. It is made clear that this judgment will not affect any appointment made prior to this date under the Rules which have been found to be invalid hereinabove."

17. In ***M.A. Murthy v. State of Karnataka & Others***[17], it has been held that:-

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[12] (1980) 3 SCC587
[13] (1986) 2 SCC 249
[14] (1991) Supp 1 SCC 430
[15] (1991) 1 SCC 588
[16] (1993) 4 SCC 727
[17] (2003) 7 SCC 517

> ".. It is for this Court to indicate as to whether the decision in question will operate prospectively. In other words, there shall be no prospective overruling, unless it is so indicated in the particular decision. It is not open to be held that the decision in a particular case will be prospective in its application by application of the doctrine of prospective overruling. The doctrine of binding precedent helps in promoting certainty and consistency in judicial decisions and enables an organic development of the law besides providing assurance to the individual as to the consequences of transactions forming part of the daily affairs. That being the position, the High Court was in error by holding that the judgment which operated on the date of selection was operative and not the review judgment in *Ashok Kumar Sharma case No. II*[18]. All the more so when the subsequent judgment is by way of review of the first judgment in which case there are no judgments at all and the subsequent judgment rendered on review petitions is the one and only judgment rendered, effectively and for all purposes, the earlier decision having been erased by countenancing the review applications. The impugned judgments of the High Court are, therefore, set aside."

18. Tested on the aforesaid principles, it is luminescent that the pronouncement in ***Rajesh Kumar*** (supra) is by no means prospective. The declaration is clear and the directions are absolutely limpid. The Court has not stated that the entire past promotions should be saved. It allows limited sphere of saving. Thus viewed, the submission that prospectivity is inhered in the said judgment does not appeal

[18] (1997) 4 SCC 18

to us. If a promotee is saved as per the judgment of the said case, the same is saved; and for that reason, the Court has already directed in certain interlocutory applications that the promotees who have been reversed, their grievance shall be looked into by a committee and the decision of the committee can directly be challenged by way of interlocutory application before this Court in this case. We may ingeminate without any reservation that by no means prospectivity in entirety can be given to the said decision.

19. The centripodal stand of the petitioners is that assuming the principle stated in ***M. Nagaraj*** (supra) is correct and what has been stated in ***Rajesh Kumar***'s case following the dictum in ***M. Nagaraj*** (supra) holds sound; then also the enabling constitutional provisions cannot remain absolutely static. The constitutional amendments have been brought in, and once they have been held valid, it is the obligation of the State and the competent authority to give effect to the same as per the norms envisaged in the judgments of this Court. In case the said exercise is not carried out, it is the constitutional duty of this Court to see that the constitutional norm, philosophy and the purpose

are worked out, especially keeping in view Articles 16(4), 16(4-A), 16(4-B), 46 and 335 of the Constitution of India and also the principle of affirmative action which is meant for certain historically disadvantaged groups. It is further argued that in ***M. Nagaraj*** (supra) Articles 16(4-A) and 16(4-B) have been regarded as enabling provisions which confer powers on the State authorities to provide reservation in promotion with consequential seniority subject to the condition of availability of appropriate data to justify exercise of the enabling provision. The said authorities do not debar the State to carry out the said exercise and when it is not done, it is to be presumed that the State as a model employer has failed in its duty and hence, it is obligatory on the part of this Court to require it to carry out the procedure so that the constitutional vision is realized. It has been highlighted before us that the concept of "power coupled with duty" comes into play in the instant case and, therefore, the court should issue appropriate direction to the State to collect the necessary qualitative data. Reliance has been placed on eleven-Judge Bench decision in ***Madhav Rao Jivaji Rao Scindia v. Union of India***[19]. We have been

[19] (1971) 1 SCC 85

commended to paragraph 117 from the majority judgment by Justice J.C. Shah, which is to the following effect:-

> "117. There are many analogous provisions in the Constitution which confer upon the President a power coupled with a duty. We may refer to two such provisions. The President has under Articles 341 and 342 to specify Scheduled Castes and Scheduled Tribes and he has done so. Specification so made carries for the members of the Scheduled Castes and Scheduled Tribes certain special benefits e.g. reservation of seats in the House of the People, and in the State Legislative Assemblies by Articles 330 and 332, and of the numerous provisions made in Schedules V and VI. It may be noticed that Scheduled Castes and Scheduled Tribes are specially defined for the purposes of the Constitution by Articles 366(24) and 366(25). If power to declare certain classes of citizens as belonging to Scheduled Castes and Scheduled Tribes includes power to withdraw declaration without substituting a fresh declaration, the President will be destroying the constitutional scheme. The power to specify may carry with it the power to withdraw specification, but it is coupled with a duty to specify in a manner which makes the constitutional provisions operative."
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> [underlining is ours]

20. Learned counsel has also drawn our attention to the opinion of Hegde, J. which reads as follows:-

> "In my opinion Article 366(22) imposes a duty on the President and for that purpose has conferred on him certain powers. In other words the power conferred on the President under that provision is one coupled with duty. There are similar powers conferred on the President under the Constitution.

> Under Chapter XVI of the Constitution certain special provisions were made for the benefit of the Scheduled Castes and certain Scheduled Tribes. Seats were reserved for them both in the Parliament as well as in the State Assemblies. Certain other benefits were also secured to them in the matter of appointments to services and posts in connection with the affairs of the Union or of a State. But the Constitution did not specify which castes were Scheduled Castes and which Tribes were Scheduled Tribes. Under Articles 341(1) and 342(1) of the Constitution, the President was given power to specify the castes which he considered to be Scheduled Castes and the Tribes which he considered to be Scheduled Tribes. Though both the Articles say the President "may" specify the castes which he considers as Scheduled and Tribes which he considers Scheduled, it is clear that a constitutional duty was imposed on him to specify which castes were Scheduled Castes and which tribes were Scheduled Tribes for the purpose of the Constitution. The word "may" in those clauses must be read as "must" because if he had failed or declined to specify the castes and tribes, Articles 330, 332, 334, 335, 338 and 340 would have become inoperative and the constitutional guarantees given to the Scheduled Castes and Scheduled Tribes would have become meaningless."

21. Inspiration has also been drawn from ***Ambica Querry Works v. State of Gujarat***[20]**.** In the said case, the Court was engaged in interpretation of certain rules of Gujarat Minor Mineral Rules, 1966. On behalf of the appellant therein, reliance was placed on ***State of Rajasthan v.***

[20] (1987) 1 SCC 213

Harishanker Rajendrapal[21] to advance a contention that the word 'may' is to be read as 'shall' and thereby convey the meaning that it is mandatory. In that context, the Court observed:-

> "Often when a public authority is vested with power, the expression "may" has been construed as "shall" because power if the conditions for the exercise are fulfilled is coupled with duty. As observed in *Craies on Statute Law*, 7th Edn., p. 229, the expression "may" and "shall" have often been subject of constant and conflicting interpretation. "May" is a permissive or enabling expression but there are cases in which for various reasons as soon as the person who is within the statute is entrusted with the power, it becomes his duty to exercise it. As early as 1880 the Privy Council in *Julius* v. *Lord Bishop of Oxford*[22] explained the position. Earl Cairns, Lord Chancellor speaking for the judicial committee observed dealing with the expression "it shall be lawful" that these words confer a faculty or power and they do not of themselves do more than confer a faculty or power. But the Lord Chancellor explained there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so. Whether the power is one coupled with a duty must depend upon the facts and circumstances of each case and must be so decided by the courts in each case. Lord Blackburn observed in the said

[21] AIR 1966 SC 296
[22] (1880) 5 AC 214

> decision that enabling words were always compulsory where the words were to effectuate a legal right."

Be it noted, in the said decision, the Court has approved and applied the principle stated in ***Julius*** (supra).

22. We have also been referred to ***Brij Mohan Lal v. Union of India & others***[23]. In the said case, apart from other issues, the relief related to issue of direction to the respondents therein to stop the scheme and policy of appointment of retired District and Sessions Judges as *ad hoc* Judges of the Fast Track Courts (FTCs) in the State Judicial Services. We need not refer to the contentions raised and how the issue was eventually answered. In the said case, the two-Judge Bench deliberated on the question whether a writ of mandamus can at all be issued regard being had to the factual score of the case. The Court took note of the fact that origin of FTC Scheme was in a policy decision by the Central Government and the said decision was taken to implement the FTC Scheme, particularly, to deal with the arrears of criminal cases in the country and it had taken upon itself the burden of financing the entire

[23] (2012) 6 SCC 502

scheme. The Court referred to the concept of judicial review in policy matters and the scope of interference in that regard, adverted to the principles stated in ***S.P. Gupta***'s case and other decisions and opined thus:-

> "106. This Court has consistently held that the writ of mandamus can be issued, perhaps not as regards the manner of discharge of public duty but with respect to the due exercise of discretion in the course of such duty. In *S.P. Gupta* v. *Union of India* (supra) this Court issued directions to the Union of India to determine, within a reasonable time, the strength of permanent Judges required for disposal of cases instituted in the High Courts and to take tests to fill up the vacancies after making such determination.
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> 111. It is, thus, clear that it is the constitutional duty of this Court to ensure maintenance of the independence of judiciary as well as the effectiveness of the justice delivery system in the country. The data and statistics placed on record, of which this Court can even otherwise take judicial notice, show that certain and effective measures are required to be taken by the State Governments to bring down the pendency of cases in the lower courts. It necessarily implies that the Government should not frame any policies or do any acts which shall derogate from the very ethos of the stated basic principle of judicial independence. If the policy decision of the State is likely to prove counterproductive and increase the pendency of cases, thereby limiting the right to fair and expeditious trial to the litigants in this country, it will tantamount to infringement of their basic rights and constitutional protections.

> Thus, we have no hesitation in holding that in these cases, the Court could issue a mandamus. The extent of such power, we shall discuss shortly hereinafter."

The aforesaid decision, in our considered opinion, is quite distinguishable. The Court was referring to certain constitutional concepts, namely, constitutional duty, independence of judiciary, effectiveness of justice delivery system in the country, the infringement of specific rights and constitutional protection. We will in course of our deliberations advert to whether the said principles can be taken recourse to in the case at hand.

23. Reliance has also been placed by the learned counsel on the decision in ***Aneesh D. Lawande & others v. State of Goa & others***[24], where the Court has referred to the authority in ***Julius*** (supra) and observed every public authority who has a duty coupled with power before exercising the power is required to understand the object of such power and the conditions in which the same is to be exercised. Learned counsel for the petitioners emphasizing on the conception of "power coupled with duty" has referred to series of judgments. We have already referred to some

[24] (2014) 1 SCC 554

and we think it appropriate to refer to some. In ***Dhampur Sugar Mills Ltd. v.State of U.P. and others***[25], the attention of the two-Judge Bench was engaged in relation to constitution of the Advisory Committee under Uttar Pradesh Sheera Niyantran Adhiniyam, 1964. Before the High Court reliance was placed on ***Khoday distilleries Ltd. v. State of Karnataka***[26] for *inter alia* that Section 3 of 1964 Act could merely be an enabling provision and thus, directory in nature and hence, the writ petitioner could not compel the State to constitute an Advisory Committee. The High Court referred to the decision in ***Khoday distilleries Ltd.*** (supra) and opined that the provision was directory in nature. This Court referred to the relevant provisions of the Act, the Rules framed under the Act and the notification issued thereunder and came to hold that the submission of the writ petitioner that such a Committee ought to have been constituted by the State was well founded. It did not accept the view expressed by the High Court that the provision was directory. It observed that several statutes confer power on authorities and officers to be exercised by them at their

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[25] (2007) 8SCC 338
[26] (1995) 1 SCC 574

discretion and they are couched in permissive language, such as, "it may be lawful", "it may be permissible", "it may be open to do", etc. But in certain situations, such power is coupled with duty and must be exercised. The Court referred to ***Baker, Re Nichols v. Baker***[27], a passage from Judicial Review of Administrative Action[28], an instructive passage from Administrative Law[29], the authority in ***Padfield v. Minister of Agriculture, Fisheries and Food***[30]***, Commr. of Police v. Gordhandas Bhanji***[31] and ***Municipal Council, Ratlam v. Vardichan***[32] and on that basis, concurred with the view expressed in ***Julius*** (supra) and eventually, held that it was obligatory on the Government to constitute a Committee to carry out the purpose and objective of the Act. The import and effect of the aforesaid authorities we shall dwell upon when we will be addressing the issue whether a writ of mandamus can be issued in the present factual matrix regard being had to the nature of constitutional provisions.

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[27] (1890) 44 Ch D 262 (CA)
[28] De Smith, Judicial Review of Administrative Action, 1995, pp. 300-01
[29] Wade & Forsyth, Administrative Law, 9th Edn., p.233
[30] [1968] 1 All ER 694 (HL)
[31] AIR 1952 SC 16
[32] (1980) 4 SCC 162

24. We will be failing in our duty if we do not take note of another facet of the submissions advanced by the learned counsel for the petitioners. It is urged by them that it is the constitutional duty and obligation of the authorities to work out the constitutional provisions to effectuate the affirmative action meant for scheduled castes and the scheduled tribes persons and regard being had to the principles stated in ***M. Nagaraj*** (supra), the reservation in promotion with consequential seniority cannot be thought of without collection of the necessary quantitative data in regard to certain aspects. Mechanisms are to be provided for collection of such data. It is contended that failure to do so tantamounts to failure of performance of constitutional duty. Elaborating further, it is highlighted that when there is apathy in taking the steps to live up to the constitutional obligation, the Court is expected in law to issue a mandamus to command the authorities to carry out the constitutional duty, for non-performance of such duty would affect and eventually jeopardize the fundamental affirmative facets of the Constitution. It is also argued that this Court has in many an authority framed the guidelines, issued directions

for performance of duty and also filled the gaps wherever required and, therefore, in the present situation, the Court can direct for collection of the requisite data so that ultimate constitutional goal is achieved . In this regard, we have been commended to ***D.K. Basu v. State of West Bengal & others***[33], ***Ranveer Yadav v. State of Bihar***[34], ***Nagar Palika Nigam v. Krishi Upaj Mandi Samiti***[35], ***Ankush Shivaji Gaikwad v. State of Maharashtra***[36], ***Province of Bombay v. Khushaldas S. Advani***[37], ***Sub-Committee on Judicial Accountability v. Union of India & others***[38], ***Tara Prasad Singh & others v. Union of India & others***[39], ***Markand Dattatreya Sugavkar v. Municipal Corporation of Greater Mumbai & others***[40], ***S.P. Gupta v. Union of India***[41] and ***Supreme Court Advocates-on-Record Association & others v. Union of India***[42].

25. In ***S.P. Gupta*** (supra) the larger Bench has held thus:-

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[33] (2015) 8 SCC 744
[34] (2010) 11 SCC 493
[35] AIR 2009 SC 187
[36] (2013) 6 SCC 770
[37] AIR 1950 SC 222
[38] AIR 1992 SC 320
[39] AIR 1980 SC 1682
[40] (2013) 9 SCC 136
[41] 1981 Supp (1) SCC 87
[42] (1993) 4 SCC 441

> "It is true that the words in Article 216 of the Constitution are undoubtedly empowering but it has been so often decided as to have become an axiom that in public statutes words only directory, permissory or enabling may have a compulsory force where the thing to be done is for the public benefit or in advancement of public justice. Thus, the enabling power cannot be refused to be exercised by the repository of that power, as such refusal would be contrary to the constitutional principles and such action is not permissible under the scheme of the Constitution."

26. Relying on the said decision, learned counsel would submit the said principle has not been upset by the nine-Judge Bench in ***Supreme Court Advocates-on-Record*** (supra). We have been also apprised that the seven-Judge Bench has approved the principle stated in ***Julius*** (supra), wherein it has been held thus:-

> "there may be something in the nature of thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so."

27. Immense emphasis has been laid on ***D.K. Basu*** (supra) wherein the Court was dealing with Section 21 of the Protection of Human Rights Act, 1993 which deals with

setting up of State Human Rights Commission. Interpreting the said provision, the Court has observed:-

> "A plain reading of the above would show that Parliament has used the word "may" in sub-section (1) of Section 21 while providing for the setting up of a State Human Rights Commission. In contrast Parliament has used the word "shall" in Section 3(1) while providing for constitution of a National Commission. The argument on behalf of the defaulting States, therefore, was that the use of two different expressions which dealing with the subject of analogous nature is a clear indication that while a National Human Rights Commission is mandatory a State Commission is not. That argument is no doubt attractive, but does not stand close scrutiny. The use of the word "*may*" is not by itself determinative of the true nature of the power or the obligation conferred or created under a provision. The legal position on the subject is fairly well settled by a long line of decisions of this Court. The stated position is that the use of the word "*may*" does not always mean that the authority upon which the power is vested may or may not exercise that power. Whether or not the word "*may*" should be construed as mandatory and equivalent to the word "*shall*" would depend upon the object and the purpose of the enactment under which the said power is conferred as also related provisions made in the enactment. The word "*may*" has been often read as "*shall*" or "*must*" when there is something in the nature of the thing to be done which must compel such a reading. In other words, the conferment of the power upon the authority may having regard to the context in which such power has been conferred and the purpose of its conferment as also the circumstances in which it is meant to be exercised carry with such power an obligation which compels its exercise."

28. In the said case reference was made to ***Julius*** (supra) and the opinion of Justice Cairns, L.C. was quoted and thereafter, the opinion of Lord Blackburn which is to the following effect was reproduced:-

> "I do not think the words 'it shall be lawful' are in themselves ambiguous at all. They are apt words to express that a power is given; and as, prima facie, the donee of a power may either exercise it or leave it unused, it is not inaccurate to say that, prima facie, they are equivalent to saying that the donee may do it; but if the object for which the power is conferred is for the purpose of enforcing a right, there may be a duty cast on the donee of the power, to exercise it for the benefit of those who have that right, when required on their behalf."

29. As is evident, the Court has referred to number of judgments that the word "may" at times can assume the character of "shall". In the said case, stress was laid on access of justice and in that context, reliance was placed on ***Imtiyaz Ahmad v. State of U.P.*** **& others**[43]. After referring certain recommendations, the Court issued number of directions.

30. Learned counsel for the petitioner, as stated earlier, has founded his argument on the principles stated in many

[43] (2012) 2 SCC 688

authorities which pertain to interpretation of "power coupled with duty". Reference has been made to ***Breen v. Amalgamated Engineering Union***[44] which has been cited by the House of Lords in ***Padfield*** (supra) wherein their Lordships considering the discretion of statutory authority under the Agriculture Marketing Act, 1958 (UK) opined:-

> "The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant considerations and not by irrelevant. If its decision is influenced by extraneous considerations, which is ought not to have taken into account, then the decision cannot stand."

31. The said view has been accepted by the Court in ***S.P. Gupta*** (supra).

32. In ***T.N. Godavarman Thirumulpad v. Union of India and others***[45] the Court referred to the decision in ***Lafarge Umiam Mining (P) Ltd. v. Union of India & others***[46], reproduced a paragraph from it and observed:-

> "It will be clear from the italicised portions of the order of this Court in *Lafarge Umiam Mining (P) Ltd.* (supra) extracted above that this Court on an interpretation of Section 3(3) of the Environment (Protection) Act, 1986 has taken a view that it confers a power coupled with duty to appoint an

[44] (1971) 2 QB 175, 190
[45] (2014) 4 SCC 61
[46] (2011) 7 SCC 338

> appropriate authority in the form of a Regulator at the State and at the Central level for appraising projects, enforcing environmental conditions for approvals and to impose penalties on polluters and has, accordingly, directed the Central Government to appoint a National Regulator under the said provision of the Act. Mr Parasaran is, therefore, not right in arguing that in *Lafarge Umiam Mining (P) Ltd.* (supra), this Court has merely suggested that a National Regulator should be appointed and has not issued any mandamus to appoint a National Regulator."

33. The argument is, assuming the principles stated in ***M. Nagraj*** (supra) are correct, it is the duty of the State to give effect to the same and it cannot remain in apathy or lie in slumber. In such a situation, the Court has the power under the Constitution, when moved, to direct them to wake up and act.

34. The core issue is whether in the context of Articles 16(4-A) and 16(4-B), a writ or direction can be issued to the State Government or its functionaries or the instrumentalities of the State to collect and gather the necessary data for the purpose of taking a decision as regards the promotion and consequential fixation of seniority. In this regard, it is imperative to appreciate in proper perspective the concept of mandamus and the circumstances in which it can be issued.

35. In Halsbury's Laws of England, Fourth Edition, Volume 1, it has been stated:-

> **"89. Nature of mandamus.** The order of mandamus[47] is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation, or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right[48]; and it may issue in cases where, although there is an alternative legal remedy yet that mode of redress is less convenient beneficial and effectual[49]."

36. This Court in ***State of Kerala v. A. Lakshmikutt***[50], while dealing with the concept of mandamus, opined thus:-

> "... It is well settled that a writ of mandamus is not a writ of course or a writ of right, but is, as a rule, discretionary. <u>There must be a judicially enforceable right for the enforcement of which a mandamus will lie. The legal right to enforce the performance of a duty must be in the applicant himself. In general, therefore, the court will only enforce the performance of statutory duties by public bodies on application of a person who can show that he has himself a legal right</u> to insist on such performance. ..."
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> [Emphasis added]

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[47] Lee District Board v. LCC (1989) 82 LT 306; R v. Marshland Smeeth and Fen District Commr [1920] 1 KB 155, DC

[48] R. v. Archbishop of Canterbury and Bishop of London, (1812) 15 East 117, at 136

[49] R. v. Bank of England, (1819) 2 B & Ald 620, at 622; R v. Thomas (1892) 1 QB 426

[50] (1986) 4 SCC 632

37. In ***Dr. Umakant Saran v. State of Bihar and others***[51], the Court referred to its earlier decision in ***Dr. Rai Shivendra Bahadur v. The Governing Body of the Nalanda College***[52] and observed that in order that mandamus may issue to compel the authorities to do something, it must be shown that the statute imposes a legal duty and the aggrieved party has a legal right under the statute to enforce its performance.

38. In ***Sharif Ahmad and others v. Regional Transport Authority, Meerut and others***[53], the Court observed thus:-

> "Mr A.K. Sen, learned counsel for the appellants drew our attention to what S.A. de Smith has pointed out at p. 59 of the third Edn. of his well known treatise "*Judicial Review of Administrative Action*":
>
> > "It may describe any duty, the discharge of which involves no element of discretion or independent judgment. Since an order of mandamus will issue to compel the performance of a ministerial act, and since, moreover, wrongful refusal to carry out a ministerial duty may give rise to liability in tort, it is often of practical importance to determine whether discretion is present in the performance of a statutory function. The cases on mandamus show, however, that the presence of a minor discretionary element is

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[51] (1973) 1 SCC 485
[52] 1962 Supp. 2 SCR 144
[53] (1978) 1 SCC 1

> not enough to deter the Courts from characterising a function as ministerial."

> We think that the Regional Transport Authority, pursuant to the order of the Appellate Tribunal, had merely to perform a ministerial duty and the minor discretionary element given to it for finding out whether the terms of the Appellate Order had been complied with or not is not enough to deter the Courts from characterising the function as ministerial. On the facts and in the circumstances of this case by a writ of mandamus the said authority must be directed to perform its function."

39. Dr. Dhavan, who has been permitted to argue, has placed reliance on the said decision only to point out that the mandamus sought in the present case does not come in the nature of mandamus that the Court has dealt with, in the aforesaid case. It is his submission that the facts in which directions have been issued are quite different and that apart, the Court has issued a writ of mandamus in cases which involved minor discretionary element but not where a major policy decision is involved. It is his submission that when the authority has a discretion to exercise the discretion or not regard being had to many an administrative contingencies, the Court should refrain from issuing a mandamus. It is because at this stage there is

neither any semblance of right nor exercise of power coupled with duty.

40. In this regard reference to the decision in ***Director of Settlements, A.P. and others v. M.R. Apparao and another***[54] would be fruitful. In the said case, a three-Judge Bench of the Court, while dealing with the order of the High Court to issue mandamus, opined:-

> "... One of the conditions for exercising power under Article 226 for issuance of a mandamus is that the Court must come to the conclusion that the aggrieved person has a legal right, which entitles him to any of the rights and that such right has been infringed. In other words, existence of a legal right of a citizen and performance of any corresponding legal duty by the State or any public authority, could be enforced by issuance of a writ of mandamus. "Mandamus" means a command. It differs from the writs of prohibition or certiorari in its demand for some activity on the part of the body or person to whom it is addressed. Mandamus is a command issued to direct any person, corporation, inferior courts or Government, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. A mandamus is available against any public authority including administrative and local bodies, and it would lie to any person who is under a duty imposed by a statute or by the common law to do a particular act. In order to obtain a writ or order in the nature of mandamus, the applicant has to satisfy that he has a legal right to the performance of a legal duty by the party against whom the mandamus is

[54] (2002) 4 SCC 638

> sought and such right *must be subsisting on the date of the petition* (*Kalyan Singh* v. *State of U.P.*[55]). The duty that may be enjoined by mandamus may be one imposed by the Constitution, a statute, common law or by rules or orders having the force of law. …"

41. Having stated about general principles relating to mandamus, the question arises — whether a court should issue a direction to effectuate an enabling constitutional provision which has to be exercised by the State in its discretion on being satisfied of certain conditions precedent. There can be no doubt that certain constitutional duties are inferred from the various Articles of the Constitution and this Court has issued directions. Certain directions have been issued in ***S.P. Gupta*** (supra) and ***Supreme Court Advocates-on-Record Association*** (supra) (IInd Judges case) but they are based on principles of secure operation of legal system, access to justice and speedy disposal of cases. In ***All India Judges' Association & others v. Union of India & others***[56], the Court issued directions by stating that it is the constitutional obligation to ensure that the backlog of cases is decreased and efforts are made to increase the disposal of cases. Keeping in view the concept of

[55] AIR 1962 SC 1183
[56] (2002) 4 SCC 247

constitutional silence or abeyance, guidelines were issued in ***Vishaka & others v. State of Rajasthan & others*** [57] and for the said purpose, reliance was placed on international Treaties, norms of gender equality and right to life and liberty of working women. Guidelines have been issued in ***D.K. Basu*** (supra) to lay down the procedure to be followed in case of arrest and detention based on fundamental rights of convicts, prisoners and under trials under Article 21 of the Constitution. Similarly, in ***Prakash Singh & others v. Union of India & others***[58], the Court has laid down specific guidelines for police reform so as to insulate the police machinery from political/executive interference and the same is founded on the backdrop of right to life and the enhancement of the criminal justice delivery system.

42. In the case at hand, we are concerned with the enabling power as engrafted under Articles 16, 16(4-A)and 16(4-B). The said Articles being enabling provisions, there is no power coupled with duty. In ***Ajit Singh (II)*** (supra), it has been held that no mandamus can be issued either to provide for reservation or for relaxation. Recently, in ***Chairman &***

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[57] (1997) 6 SCC 241
[58] (2006) 8 SCC 1

Managing Director, Central Bank of India & Ors. v. Central Bank of India SC/ST Employees Welfare Association & Ors.[59] it has been held thus:-

> "In the first instance, we make it clear that there is no dispute about the constitutional position envisaged in Articles 15 and 16, insofar as these provisions empower the State to take affirmative action in favour of SC/ST category persons by making reservations for them in the employment in the Union or the State (or for that matter, public sector/authorities which are treated as State under Article 12 of the Constitution). The laudable objective underlying these provisions is also to be kept in mind while undertaking any exercise pertaining to the issues touching upon the reservation of such SC/ST employees. Further, such a reservation can not only be made at the entry level but is permissible in the matters of promotions as wells. At the same time, it is also to be borne in mind that Clauses 4 and 4A of Article 16 of the Constitution are only the enabling provisions which permit the State to make provision for reservation of these category of persons. Insofar as making of provisions for reservation in matters of promotion to any class or classes of post is concerned, such a provision can be made in favour of SC/ST Civil Appeal No. of 2015 & Ors. (arising out of SLP (C) No. 4385 of 2010 & Ors.) category employees if, in the opinion of the State, they are not adequately represented in services under the State. Thus, no doubt, power lies with the State to make a provision, but, at the same time, courts cannot issue any mandamus to the State to necessarily make such a provision. It is for the State to act, in a given situation, and to take such an affirmative action. Of course, whenever there exists such a provision for reservation in the matters of

[59] 2015 (1) SCALE 169

> recruitment or the promotion, it would bestow an enforceable right in favour of persons belonging to SC/ST category and on failure on the part of any authority to reserve the posts, while making selections/promotions, the beneficiaries of these provisions can approach the Court to get their rights enforced. What is to be highlighted is that existence of provision for reservation in the matter of selection or promotion, as the case may be, is the sine qua non for seeking mandamus as it is only when such a provision is made by the State, a right shall accrue in favour of SC/ST candidates and not otherwise."

The aforesaid passage makes its luminescent that existence of a provision for reservation in the matter of selection or promotion is the *sine qua non* for seeking mandamus. The right accrues in favour of the Scheduled Castes and the Scheduled Tribes candidates when there is a provision. We are absolute in conscious that the controversy before us is quite different. The relief is not sought on the basis of existence of a provision. The grievance pertains to steps being not taken to collect the quantifiable data as has been envisaged in ***M. Nagaraj*** (supra). To appreciate the relief in its quintessence, it is imperative to clearly understand the ratio laid down in ***M. Nagaraj*** (supra). The Constitution Bench while opining that Articles 16(4-A) and (4-B) are enabling provisions had observed thus:-

> "…Extent of reservation, as stated above, will depend on the facts of each case. Backwardness and inadequacy of representation are compelling reasons for the State Governments to provide representation in public employment. Therefore, if in a given case the court finds excessive reservation under the State enactment then such an enactment would be liable to be struck down since it would amount to derogation of the above constitutional requirements."

After so stating, the larger Bench has clearly held that Article 16(4-A) and 16 (4-B) do not alter the structure of Article 16(4). The said Articles are confined to the Scheduled Castes and the Scheduled Tribes and do not obliterate any of the constitutional requirements, namely, ceiling limit of 50% (quantitative limitation), the concept of creamy layer (qualitative exclusion), the sub-classification between OBCs on one hand and SCs and STs on the other hand as held in ***Indra Sawhney*** (supra), the concept of post-based roster with inbuilt concept of replacement as held in ***R.K. Sabharwal*** (supra). After so stating, the Court has adverted to the concept of "extent of reservation". In that regard, it has been opined that the State concerned is required to show in each case the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for

reservation. It has been clearly laid down that the State is not bound to make reservation for SCs/STs in matters of promotion. However, if the State wishes to exercise the discretion and make such provision, it has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance with Article 335. The expression of the opinion clearly demonstrates that the regard being had to the enabling provisions of Articles 16(4-A) and (4-B), the State is not bound to make reservation. It has a discretion to do so and the State's discretion can only be exercised on certain conditions being satisfied. In ***Rajesh Kumar***'s case, after culling out the principles stated in ***M. Nagaraj*** (supra) the Court has graphically stated that a fresh exercise in accord with the law laid down in ***M. Nagaraj*** (supra) is a categorical imperative. It has been held that the State can make provisions for reservation in promotion with consequential seniority on certain basis or foundation and conditions precedents have to be satisfied. The Court has declared Section 3(9) of the 1994 Act and Rule 8-A of the 2002 Rules as unconstitutional

as no fresh exercise had been undertaken. The submission of the learned counsel for the petitioners is that a command should be issued to the State of Uttar Pradesh to collect the data as enshrined in the Constitution Bench decision in ***M. Nagaraj*** (supra) so that benefit of reservation in promotion can be given. The relief sought may appear innocuous or simple but when the Court thinks of issue of a writ of mandamus, it has to apprise itself of an existing right or a power to be exercised regard being had to the conception of duty. The concept of power coupled with duty is always based on facts. If we keenly scrutinize the relief sought, the prayer is to issue a mandamus to the State and its functionaries to carry out an exercise for the purpose of exercising a discretion. To elucidate, the discretion is to take a decision to have the reservation, and to have reservation there is a necessity for collection of data in accordance with the principles stated in ***M. Nagaraj*** (supra) as the same is the condition precedent. A writ of mandamus is sought to collect material or data which is in the realm of condition precedent for exercising a discretion which flows from the enabling constitutional provision. Direction of this

nature, in our considered opinion, would not come within the principle of exercise of power coupled with duty. A direction for exercise of a duty which has inherent and insegretable nexus with the constitutional provision like Article 21 of the Constitution or a statutory duty which is essential for prayer as laid down in ***Julius*** (supra) where a power is deposited with a public officer but the purpose of being used for the benefit of persons who are specifically pointed out with regard to whom a discretion is applied by the Legislature on the conditions upon which they are entitled. We are inclined to think so as the language employed in **M.Nagaraj** (supra) clearly states that the State is not bound to make reservation in promotion. Thus, there is no constitutional obligation. The decisions wherein this Court has placed reliance on **Julius** (supra) and the other judgments of this Court and issued directions, the language employed in the statute is different and subserves immense public interest in the said authorities, the purpose and purport are quite different.

43. Be it clearly stated, the Courts do not formulate any policy, remains away from making anything that would

amount to legislation, rules and regulation or policy relating to reservation. The Courts can test the validity of the same when they are challenged. The court cannot direct for making legislation or for that matter any kind of sub-ordinate legislation. We may hasten to add that in certain decisions directions have been issued for framing of guidelines or the court has itself framed guidelines for sustaining certain rights of women, children or prisoners or under-trial prisoners. The said category of cases falls in a different compartment. They are in different sphere than what is envisaged in Article 16 (4-A) and 16 (4-B) whose constitutional validity have been upheld by the Constitution Bench with certain qualifiers. They have been regarded as enabling constitutional provisions. Additionally it has been postulated that the State is not bound to make reservation for Scheduled Castes and Scheduled Tribes in matter of promotions. Therefore, there is no duty. In such a situation, to issue a mandamus to collect the data would tantamount to asking the authorities whether there is ample data to frame a rule or regulation. This will be in a way, entering into the domain of legislation, for it is a step towards

commanding to frame a legislation or a delegated legislation for reservation.

44. Recently in ***Census Commissioner & others v. R. Krishnamurthy***[60] a three-Judge Bench while dealing with the correctness of the judgment of the high court wherein the High court had directed that the Census Department of Government of India shall take such measures towards conducting the caste-wise census in the country at the earliest and in a time-bound manner, so as to achieve the goal of social justice in its true sense, which is the need of the hour, the court analyzing the context opined thus :-

> "Interference with the policy decision and issue of a mandamus to frame a policy in a particular manner are absolutely different. The Act has conferred power on the Central Government to issue notification regarding the manner in which the census has to be carried out and the Central Government has issued notifications, and the competent authority has issued directions. It is not within the domain of the court to legislate. The courts do interpret the law and in such interpretation certain creative process is involved. The courts have the jurisdiction to declare the law as unconstitutional. That too, where it is called for. The court may also fill up the gaps in certain spheres applying the doctrine of constitutional silence or abeyance. But, the

[60] (2015) 2 SCC 796

> courts are not to plunge into policy-making by adding something to the policy by ways of issuing a writ of mandamus."

We have referred to the said authority as the court has clearly held that it neither legislates nor does it issue a mandamus to legislate. The relief in the present case, when appositely appreciated, tantamounts to a prayer for issue of a mandamus to take a step towards framing of a rule or a regulation for the purpose of reservation for Scheduled Castes and Scheduled Tribes in matter of promotions. In our considered opinion a writ of mandamus of such a nature cannot be issued.

45. Consequently, the Writ Petitions, being devoid of merit, stand dismissed. There shall be no order as to costs.

.....J.
[Dipak Misra]

.....J.
[Prafulla C. Pant]

New Delhi;
March 11, 2016