

Prem Kumar Singh and Others Vs. State of U.P. and Others

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Court : Allahabad

Decided On : Jan-04-2011

Judge : Pradeep Kant; Ritu Raj Awasthi, JJ.

Appellant : Prem Kumar Singh and Others

Respondent : State of U.P. and Others

Advocate for Def. : Sri R.N.Trivedi; Senior Advocate; P.N. Gupta; C.S.C; Mahesh Chandra; K.S.Pawar; Manish Kumar; Brijesh Kumar Jatav; S.C.Yadav; Sanchit S.Asthana; Anand Swaroop Rai; I.P.Singh; P.N.Gupta. Advs

Judgement :

1. This bunch consists of writ petitions relating to the Government servants of Group A, Group B and Group C services in various Government departments of the State, like Vidhan Sabha, Civil Secretariat, Irrigation, Rural Engineering, Agriculture, Statistics, Drugs Control, Consolidation, Education, Medical and Health, Veterinary, Soil Conservation, Fire Service and Public Works Department, etc. and writ petitions relating to corporations, like U.P. Jal Nigam and U.P. Power Corporation Limited, etc.

2. All the writ petitions raise common challenge to the Uttar Pradesh Government Servants Seniority (Third Amendment) Rules, 2007 and in particular Rule 8-A and similar provisions in the service rules of the Corporations and other departments.

3. The writ petitions have made a challenge to the aforesaid Rule and also to Section 3(7) of the Uttar Pradesh Public Service (Reservation for Scheduled Castes, Scheduled Tribes and other Backward Classes) Act, 1994 as ultra vires Articles 14, 16(4-A) and 335 of the Constitution of India, with a further prayer that the respondents be directed not to provide reservation in the matter of promotion in concerned departments of the Government of U.P. and not to give effect to Rule 8-A aforesaid.

4. The petitioners also challenge the Government Order dated 17.10.2007, issued for implementing the provisions of Rule 8-A while determining the seniority of the members of service.

5. Rules 4 and 5, with their proviso of the U.P. Promotion by Selection (on Posts outside the Purview of the Public Service Commission) Eligibility List Rules, 1986, as amended in 1995 and 2001, hereinafter referred to as the Eligibility List Rules, 1986, are also under challenge.

6. The petitioners are also aggrieved by the Rules of preparation of separate eligibility list for scheduled castes and scheduled tribes for promotion to the posts, for which the criterion of promotion is 'merit', under the Eligibility List Rules, 1986, as amended from time to time and the inclusion of scheduled castes and scheduled tribes officers, in the Eligibility List for promotion to the higher post, in the absence of any vacancy in the reserved quota, against the general vacancy, by giving them accelerated seniority.

7. The writ petitions relating to corporations also raise the same challenge but with an additional ground that merely on issuance of the Government Order, the corporations have amended their Rules without application of mind and without even making an attempt or effort to find out the necessity of framing such a rule.

8. The main thrust of the challenge in all the writ petitions is that the State Government, grossly in violation of the constitutional provisions, the limitations provided therein and mandate of the Supreme Court in the case of 'M. Nagraj and others versus Union of India and others', reported in (2006) 8 SCC 212, has framed rules (Rule 8-A) providing consequential seniority with accelerated

promotion. The corporations have likewise adopted the same by amending their rules. On the same plea, they also challenge the very rule of reservation in promotion i.e. Section 3(7) of the Act, 1994 urging that neither at the time of enacting the said provision, nor at any point of time thereafter, any exercise has been done by the State Government as per the constitutional requirement prescribed in Article 16(4-A).

9. The sheet-anchor argument of the petitioners is that the case of M.Nagraj (supra) upholds the constitutional validity of Articles 16(4-A) and 16(4-B), declaring it to be an enabling provision for reservation in promotion with accelerated seniority. But this does not mean that the State Government was allowed to frame rules of reservation in promotion with or without consequential seniority with respect to scheduled castes and scheduled tribes persons without undertaking the exercise, as detailed in and provided in the said judgment.

10. Corollary to the aforesaid argument is that the State Government though is empowered to make rules, but neither it is obligatory on it to make such a rule nor such a rule can be framed unless the conditions as enumerated in the judgment of M.Nagraj are found to exist, as the constitutional provisions neither confer any vested right upon the scheduled castes and scheduled tribes persons to seek reservation in promotion, nor to have accelerated seniority; nor at the same time, the State Government can extend them the aforesaid benefit in service without forming an opinion after collecting quantifiable data so as to establish the backwardness of the class and that there is inadequate representation of members of scheduled castes and scheduled tribes in any class or classes of posts in the services under the State. While making such a rule, the command of Article 335 of the Constitution can also not be ignored.

11. The argument, therefore, is that the State Government, under misconception, or so to say, on misreading of the judgment of the Apex Court in the case of M.Nagraj and without understanding the ratio decidendi of the judgment and the principles laid therein, which pronounces the constitutional limitations prescribed in Article 16(4-A), has framed the rules, ignoring the directives of the Supreme Court, on mere assumption that the aforesaid enabling provisions of the Constitution

confer power upon them to make a rule for reservation of SCs/STs in promotion and accelerated seniority without any further exercise.

12. The State Government, in response, has broadly submitted that there was no need to undertake any exercise for finding the quantifiable data to provide reservation in promotion to the members belonging to scheduled castes and scheduled tribes, as the fact that scheduled castes and scheduled tribes indisputably belong to backward classes of citizens and their backwardness not only stands established, but is also clear on the face of it, which does not require any further determination. The creamy layer concept which has been rejected by the Supreme Court in the case of Ashok Thakur versus State of Punjab, (2008) 6 SCC 1, cannot be made applicable to the scheduled castes and scheduled tribes for the purposes of reservation in promotion or for accelerated seniority and that the statements of objects and reasons of the Constitution 77th and 85th Amendments themselves speak that the aforesaid classes has not yet reached the desired equal level to that of the general category persons and, therefore, in the opinion of the State Government, such reserved category requires reservation in promotion and also accelerated seniority, which is nothing but an affirmative action.

13. Further submission of the respondents is that 21% reservation has been provided to scheduled castes and 2% for scheduled tribes in services and that in view of the chart given by the State Government in the counter affidavit, it is clear that the said target could not be achieved as yet.

14. In answer to the petitioners' plea that such reservation in promotion and accelerated seniority will undoubtedly prejudice the accrued right of seniority of general category candidates for consideration of their promotion and would also affect efficiency in administration, of which Article 335 takes care and that it will cause reverse discrimination, it has been submitted by the respondents that the quantifiable data was not required to be collected for the reason aforesaid and if the quota of reserved category remains short, then there cannot be a plea of reverse discrimination, nor giving reservation in promotion in such a situation with accelerated seniority can be said to be in any manner arbitrary, discriminatory or

violative of Articles 14 and 16 of the Constitution. Clarifying the aforesaid argument, it has been submitted that granting reservation in promotion with accelerated seniority without compromising with the efficiency in administration is positive and affirmative action for bringing up the members of scheduled castes and scheduled tribes to the equal level to that of general category and while doing so, if some advantage is given to the members of scheduled castes and scheduled tribes category, that in no way takes away any vested right of the general category.

15. In addition to the aforesaid pleas, several other pleas have also been raised from both the sides, which we would refer to, at appropriate places of this judgment, but before we proceed to decide the validity of the challenge made and the defence put, we find it expedient to respond to the foremost plea of the respondents that the aforesaid Rule 8-A of the U.P. Government Servants Seniority Rules, 1991, hereinafter referred to as the Rules, 1991, was challenged before a Division Bench (Hon'ble Sheo Kumar Singh and Hon'ble Sabhajeet Yadav, JJ) at Allahabad in Writ Petition No. 63127 of 2010 in re: Mukund Kumar Srivastava versus State of U.P. and another, which writ petition has been dismissed upholding the validity of the aforesaid Rule 8-A, therefore, this Court is bound by the said judgment passed by a Bench of equal strength and hence all these petitions need be dismissed only on this ground.

16. Learned counsel for the petitioners, refuting the aforesaid plea, urged that the said judgment of this Court at Allahabad is per incuriam and further, for the following reasons, it cannot be taken as a binding precedent.

(i) The said writ petition by Mukund Kumar Srivastava was filed on 21.10.2010 and was summarily dismissed on that very date. Summary dismissal of the writ petition cannot create a valid binding precedent.

The Division Bench did not find it necessary to ask the State Government whether they have complied with the directives issued in the case of M. Nagraj, for which neither time was granted to seek instructions to the learned Chief Standing Counsel nor to file a counter affidavit.

The learned Bench upheld the validity of Rule 8-A only on being satisfied that the validity of the constitutional provisions of Article 16(4-A) has been upheld by the Supreme Court and, therefore, any rule framed thereunder has the legal sanctity of the aforesaid constitutional provisions.

(ii)The writ petition challenging the vires of the rules ought not to have been dismissed summarily, particularly when it was brought to the notice of the Court that similar issue is being heard finally at Lucknow Bench, wherein an interim order of stay confirmed by the Apex Court by a reasoned order is in vogue.

(iii)In the body of the writ petition (pleadings), no foundation was laid for challenging the rule (Rule 8-A), wherein the final seniority list dated 8.9.2010 appearing in the Rural Engineering Service Department for Executive Engineers was challenged and a prayer was also made for declaring Rule 8-A as ultra vires and unconstitutional.

The writ petition nowhere made any challenge to the aforesaid rule but for the aforesaid challenge of the seniority list.

(iv)The aforesaid rule has also been held to be valid without addressing on the issue of quantifiable data, regarding backwardness of the class, its inadequate representation in any class or classes of posts in the services under the State and the effect on efficiency in administration, in the absence of which no rule could have been framed and could be sustained in law, for which a positive mandate/directive was issued by the Supreme Court in the case of M. Nagraj which in no uncertain terms restricted the power of the State Government to make any such rule without undertaking the required exercise.

(v)There was neither any challenge to the rule of reservation, namely, Section 3(7) of the Act, 1994 nor to the Eligibility List Rules, 1986 as amended in 1995 and 2001.

Sequel to the aforesaid argument is that the aforesaid judgment of this Court at Allahabad has been rendered in the teeth of the judgment of the Apex Court in M.Nagraj case without testing the rule on parameters laid down by the Supreme

Court and without adjudicating upon the issue as to whether the exercise laid down therein was undertaken by the State Government before making the Rule and the conditions engrossed in the constitutional provisions of Article 16(4-A) did exist.

17. We have gone through the contents of the writ petition filed by Sri Mukund Kumar Srivastava and also the judgment rendered by the Division Bench at Allahabad. The petitioner therein challenged the seniority list of Executive Engineers in Rural Engineering Service Department of Government of U.P. published on 8.9.2010. This seniority list appeared to have been made by applying Rule 8-A. It, therefore, cannot be disputed that the petitioner though may have been aggrieved by the seniority list for many more reasons, but one of the reasons was the application of Rule 8-A while preparing the seniority list. Accepting the plea of the State, for the argument sake, that when the petitioner had challenged the seniority list, which was prepared by applying Rule 8-A, it cannot be said that there was no challenge to Rule 8-A, still it can very well be seen as to whether any challenge was made to Rule 8-A in the said writ petition.

18. A person might be aggrieved because of the applicability of Rule 8-A as it has lowered down his position in the seniority, but if he does not challenge the said rule and does not lay any foundation for such a challenge, it cannot be said that the said challenge was directly in issue between the parties in the said writ petition. At the most, since there was a prayer made for declaring the said rule ultra vires and unconstitutional, it can be said that the Court could have looked into the aforesaid prayer, but in the absence of any challenge or grounds of challenge, it cannot be said that there was any challenge to the aforesaid rule though the petitioner might have wished that the said rule be declared as ultra vires and unconstitutional because it had affected him adversely.

19. A prayer for declaring the Rule invalid, without making any challenge to the Rule, obviously would have resulted into the dismissal of the writ petition, as the Court was not required to adjudicate upon the validity of the Rule in view of the pleadings in the writ petitions.

20. Be that as it may, once the Court addressed itself on the issue of the validity of the aforesaid rule, the same was to be considered in the light of the judgment of the Apex Court in the case of M.Nagraj (supra). For adjudicating upon such an issue, the State Government either should have filed a counter affidavit or have placed all the relevant material before the Court, to show that the Rule impugned was framed on the conditions being present for which due exercise was done. But this was not done.

21. The Division Bench did proceed with the matter apparently in the light of the judgment aforesaid, but did not address itself on the directives issued by the Supreme Court nor did consider the fulfillment of the constitutional mandate and limitations prescribed thereunder. Merely because the constitutional validity of Article 16 (4-A) was upheld by the Apex Court, it would not automatically give power to the State Government to make the rule without taking recourse to the exercise which was imperatively necessary for the purpose in terms of the mandate of the judgment in M. Nagraj (supra).

22. Learned Judges after reproducing various paragraphs of the case of M. Nagraj (supra) and feeling themselves to be bound by the judgment of the Apex Court in the said case held as under:

"26. We are of the considered opinion that Rule 8A of 1991 Rules has merely effectuated the provisions contained under Article 16 (4A) of the Constitution of India whereby benefit of consequential seniority has been given to the members of scheduled castes and scheduled tribes due to reservation/roaster in promotion by obliterating the concept of catch-up Rule of seniority. Rule 8A of 1991 Rules specifically stipulates that if any member of scheduled castes or scheduled tribes is promoted on any post or grade in service earlier to other categories of persons, the members of SC/ST shall be treated to be senior to such other categories of persons who are promoted subsequently after promotion of members of SC/ST, despite any thing contained in Rules 6, 7 and 8 of 1991 Rules. In our view, Rule 8A of 1991 Rules has constitutional sanctity of Article 16 (4A) of the Constitution and cannot be found faulty merely on account of violation of judicially evolved concept of catch-up rule of seniority which has been specifically obliterated by

Article 16 (4A) of the Constitution. Likewise the said rule can also not be held to be unconstitutional or invalid on account of obliteration of any other judicially evolved principle of seniority or any other contrary rules of seniority existing under Rules 6, 7 and 8 of 1991 Rules, as Rule 8A of 1991 Rules opens with non-obstante clause with overriding effect upon Rules 6, 7 and 8 of 1991 Rules, therefore, we do not find any justification to strike down the provisions contained under Rule 8-A of 1991 Rules on the said ground and on any of the grounds mentioned in the writ petition."

23. In para 27 of the judgment, the Division Bench further observed as under:

"In this connection, we make it clear that deletion of said concept of catch-up Rule of seniority and addition of consequential seniority due to reservation in promotion on any post or grade in service are applicable to the member of scheduled castes and scheduled tribes only, whereas inter-se seniority of other categories employees shall continue to be determined according to their existing seniority rules as contemplated by the provisions of Rules 6, 7 and 8 of 1991 Rules, subject to aforesaid limitations. Thus the concept of catch-up Rule of Seniority stands obliterated only to the extent of giving benefit of consequential seniority to the members of scheduled castes and schedule tribes on account of their promotion on any post or grade in service due to reservation, therefore, the scope of obliteration of concept of catch-up rule is limited to that extent. In this view of the matter the petitioner is not entitled to get the relief sought for in the writ petition questioning the validity of said Rule 8A of 1991 Rules. Thus we uphold the validity of said Rules and the question formulated by us is answered accordingly."

24. The aforesaid reasoning given by the Division Bench at Allahabad nowhere shows that the Court did at all apply its mind to the requirements propounded by the Apex Court in M.Nagraj case (supra) while framing a rule for reservation in promotion with accelerated seniority. The Court never adverted on the question as to whether the State Government had collected any quantifiable data, nor addressed itself to the backwardness of the class, adequate representation, efficiency of administration (Article 335) and reverse discrimination. The Court also did not consider, that reservation in promotion with consequential seniority was

only to control the extent of reservation.

25. The Apex Court while upholding constitutional validity of Rule 16 (4-A) observed that such amendment does not in any way affect the basic structure of the Constitution and it was within the competence of the Parliament to make a provision of the like nature which only enables the State Government to make a rule if there any need actually be. Without answering to the mandate of the judgment of the Apex Court, which is the law of the land and is binding upon all courts under Article 141 of the Constitution of India, the Division Bench gave the final verdict upholding the validity of the rule 8-A, but the judgment does not refer to the existence of pre-conditions regarding which the State was required to undertake an exercise, and solely on the ground that Rule 8-A has been enacted to effectuate the constitutional validity of the provisions of Article 16(4-A), upheld the validity of the Rule.

26. It is the settled legal position that, the enabling provision though gives power to make law/rule but the rule cannot be framed unless requisite exercise is done and the conditions for making such a rule are found to exist in the opinion of the State Government. This issue, which was the core question for determining the validity of the rule in question was never considered, nor answered by the Division Bench at Allahabad.

27. On a reading of the judgment of M. Nagraj also, it stands established that the Apex Court has explained the meaning, purport and effect of the Constitutional 77th and 85th Amendments, saying that the aforesaid provisions are enabling provisions, recourse to which can only be made if on collecting the quantifiable data with respect to the backwardness of the class, its inadequate representation on any class or classes of posts in the services under the State, the State forms an opinion for making such a rule. And while making such a rule, restrictions of Article 335 of the Constitution were also to be borne in mind. The Division Bench at Allahabad did not address itself on any such issue.

28. We also take notice of the fact that, in the writ petition at Allahabad, there was no challenge to the reservation provided in promotion, by the Reservation Act, 1994 or even otherwise, nor any challenge to the Eligibility List Rules, 1986, as

amended in 1995 and 2001, which permitted the consideration of promotion of scheduled caste candidates, even against general vacancy, in the absence of any vacancy under the reserved quota, by giving them accelerated seniority, whereas in the present petitions, there is specific challenge in regard to the aforesaid matters.

29. The Division Bench also did not consider the effect of Rule 8-A alongwith Rules 4 and 5 read with proviso of Eligibility List Rules, 1986, as amended in 1995 and 2001.

30. A judgment can be said to have been rendered per incuriam when it is passed in ignorance of the relevant provisions of the Act or the Rules, if it suffers from any apparent mistake, it is against any statutory provision of law which provision has not been considered nor discussed or when it is not in consonance with the judgment of Apex Court or so to say, it is against the law laid down by the Apex Court, which is binding on all the Courts, under Article 141 of the Constitution. Reference can be made to following cases.

1. (1988) 2 SCC 602, A.R.Antulay versus R.S.Nayak (para 42).
2. (1990) 3 SCC 682, Punjab Land Development and Reclamation Corporation Ltd. versus Presiding Officer, Labour Court, (para 42.)
3. (2001) 6 SCC 356, Fuerst Day Lawson Ltd. versus Jindal Exports Limited (paras 19, 20 and 21.)
4. (2003) 5 SCC 448, State of Bihar versus Kalika Kuer @ Kalika Singh and others (paras 5,6,8 & 9.)
5. (2004) 7 SCC 558, Nirmal Jeet Kaur versus State of M.P., (para 22.)
6. (2006) 6 SCC 395, K.H.Siraj versus High Court of Kerala,
7. (2006) 9 SCC 643, Union of India versus Manik Lal Banerjee, (paras 11 and 12.)

8. (2010) 5 SCC 513, V. Kishan Rao versus Nikhil Super Specialty Hospital and another (paras 51 and 52).

31. We also take notice of the fact that Mukund Kumar Srivastava essentially was claiming his promotion on the post of Executive Engineer with effect from 8.7.1986 when persons junior to him were promoted. He made a representation and then filed the writ petition, a mention of which has been made in the judgment itself, as he was given promotion as late as on 20.5.2005. It was in the background of this relief that the writ petition was to be considered, though in the meantime final seniority list came into existence on 8.9.2010 and, therefore, the said list was also challenged.

32. As already discussed above, there was no pleading at all in the writ petition regarding challenge to Rule 8-A and, therefore, the validity of Rule 8-A was directly not in issue before the Court. There was also no challenge to the rule of reservation in promotion, nor that of the Eligibility List Rules, 1986.

33. In M.Nagraj's case, the Supreme Court made it clear that "The point which we are emphasising is that ultimately the present controversy is regarding 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 be constitutionally valid and yet "exercise of the power" by the State in a given case may be arbitrary, particularly, if the State fails to identify and measure backwardness and inadequacy keeping in mind the efficiency of service as required under Article 335". Their Lordship of the Division Bench did not address themselves to the aforesaid mandate of the Constitution Bench judgment in M. Nagraj (supra).

34. The Division Bench at Allahabad, did not enter into the question of exercise of power by the State Government under the enabling provisions of the Constitution and upheld the validity of Rule 8-A only for the reason, that there did exist such a power to enact the Rule, whereas the Apex Court, very clearly has pronounced, that if the given exercise has not been undertaken by the State Government while making a rule for reservation with or without accelerated seniority, such a rule may not stand the test of judicial review.

35. In fact, M. Nagraj obliges the High Court that when a challenge is made to the reservation in promotion, it shall scrutinize the same on the given parameters and it also casts a corresponding duty upon the State Government to satisfy the Court about the exercise undertaken in making such a provision for reservation. The Division Bench did not advert upon this issue, nor the State Government fulfilled its duty as enumerated in M. Nagraj.

36. The effect of the judgment delivered at Allahabad is also to be seen in the light of the fact that though the Division Bench at Allahabad did not adjudicate on the dispute with regard to the seniority for which the petitioner Mukund Kumar Srivastava has been relegated to the remedy of State Public Services Tribunal, but upheld the validity of Rule 8-A, which could not be said to be the main relief, claimed by the petitioner.

37. For the aforesaid reasons and also for the reason, that the present writ petitions do challenge the very rule of reservation in promotion, which challenge we have upheld for the reasons hereinafter stated, because of which the rule of accelerated seniority itself falls to the ground, we, with deep respect, are unable to subscribe to the view taken by the Division Bench at Allahabad and hold that the said judgment cannot be considered as binding precedent having been rendered *per incuriam*.

38. While adverting to the merits of the claims raised by the petitioners as well as by the respondents in defence of the rule, we need not reproduce the facts of each and every writ petition, as in substance, where seniority has already been made by applying Rule 8-A or where it was sought to be made, by applying the said rule, both the actions are under challenge.

39. Writ Petition No. 1389 (S/B) of 2007 filed by Prem Kumar Singh and others is the leading writ petition, on which arguments have been advanced at great length. This writ petition relates to the Irrigation Department of the Government of Uttar Pradesh. The petitioners are members of the U.P. Service of Engineer (Irrigation Department), Groups A and B service and are holding the posts of Chief Engineer Level II, Superintending Engineer, Executive Engineer and Assistant Engineer.

40. Giving the past position in regard to reservation in promotion, the Government Orders dated 8.3.1973 and 20.3.1974 have been brought on record. The Government order dated 8.3.1973 for the first time provided reservation in promotion to the extent of 18% and 2% respectively for Government servants belonging to scheduled castes and scheduled tribes, where promotion was to be made on the criterion of 'merit'. Prior to the issuance of the aforesaid Government Order, the reservation was applicable only in the matter of direct recruitment of the Government servants. However, no reservation in promotion was provided in respect of the promotional posts, which were to be filled in on the criterion of 'seniority subject to rejection of unfit'. Later on, by Government Order dated 20.3.1974, reservation in promotion was also provided on promotional posts which were to be filled in on the criterion of 'seniority subject to rejection of unfit' with a rider that this reservation would be available only in such service/posts where the direct recruitments were not to be made beyond 50%.

41. A perusal of the two Government Orders aforesaid would reveal that the G.O. dated 8.3.1973 clearly considered and stipulated (para 2 of the G.O.) that reservation in promotion on posts which are to be filled up by direct recruitment cannot be provided, as a senior person, if not found unfit in his performance and conduct, was necessarily to be promoted, but very conveniently by the subsequent G.O. dated 20.3.1974, without taking into account the aforesaid declaration made in the previous G.O., the reservation in promotion was applied in the matter of promotion where criterion for promotion was 'seniority subject to rejection of unfit'. While making this provision of promotion on the posts of promotion where criterion was 'merit' or where it was 'seniority subject to rejection of unfit', no reason was given as to why such reservation was being made. There was no mention in either of the two G.Os that the Government has undertaken any survey or has collected any data for finding out that in which service and on what post or classes of posts, there was inadequate representation of the scheduled castes and scheduled tribe Government servants.

42. The matter of reservation with respect to Other Backward Classes became subject-matter of consideration in the case of Indra Sawhney versus Union of India, reported in 1992 Supp. (3) SCC 217 by the Apex Court. The Supreme Court

declared on 16.11.1992 that reservation in the matter of promotion was not permissible. However, it was provided that wherever reservations are already provided in the matter of promotion, such reservation shall continue in operation for a period of five years from the date of judgment i.e. 16.11.1992 and within this period, it would be open for the appropriate authorities to revise, modify or reissue the relevant rules to ensure the achievements of the objects of Article 16(4).

43. The reservation in promotion already made was also protected. The State Government promulgated an Act, known as the U.P. Public Servants (Reservation for Scheduled Castes and Scheduled Tribes) Act, 1993, hereinafter referred to as the Act, 1993, which inter alia provided that on the date of commencement of the said Act, the reservation available to such reserved category shall continue to be applicable for a period of five years from 16.11.1992, but before the expiry of the aforesaid period, the U.P. Public Servants (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994, hereinafter referred to as the Act, 1994, was promulgated and the Act, 1993 was repealed.

44. Section 3(7) of the said Act of 1994 provided that if on the date of commencement of the 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.

45. This provision of the Act, 1994 in fact provided reservation, if not for all times to come in perpetuity, but atleast till the State Government so wished and desired to continue with the reservation in promotion. The Act, 1994 did not prescribe any maximum period during which reservation in promotion could be applied for, but left it entirely to the sweet will of the State Government to continue with the reservation in promotion for any number of years and for any period of time.

46. The aforesaid enactment was promulgated without determination of quantifiable data, viz. backwardness of the class, inadequacy of representation and without addressing to the provisions of Article 335 of the Constitution, obviously for the reason that 77th and 85th Amendments of the Constitution, each were made after the aforesaid legislation, providing reservation indefinitely by Act of 1994, which was also not in consonance with the dictum of the Apex Court in

the case of Indra Sawhney, though the 1993 Act, which provided reservation for a period of five years with effect from 16.11.1992 only, was in keeping with the aforesaid judgment.

47. Indra Sawhney was a case where matter regarding reservation in promotion was specifically dealt with and the Supreme Court in no ambiguous terms pronounced that reservation in promotion is not permissible, but protected the promotions already made with a leverage that promotion can be made for a further period of five years from the date of judgment in the manner they were being made earlier, subject to revision, modification or re-issuance of any rule, ensuring achievement of the object of Article 16(4) of the Constitution.

48. Intention of the aforesaid declaration regarding reservation in promotion and protection given therein was with a view to continue with the reservation in promotion for a given period of time and not in perpetuity.

49. In M.Nagraj, it has been observed that reservation is necessary for transcending caste and not for perpetuating it. Reservation has to be used in a limited sense otherwise it will perpetuate casteism in the country. But what the State Government did, is, that prior to the issuance of the G.O. dated 8.3.1973, reservation was being provided only in the matter of direct recruitment to a certain extent, but on issuance of the aforesaid G.O., the reservation was provided in promotion, but only against those posts where promotion was made on the criterion of 'merit' and specifically denying such reservation on the posts where criterion for promotion was 'seniority subject to rejection of unfit', saying that under the said criterion, a senior person, whose work and conduct is not questionable, has a right to be promoted first, but giving a go-bye to the aforesaid declaration made by itself, the State Government issued the next G.O. on 20.3.1974 introducing reservation in promotion even against the posts which were to be filled up by following the criterion of 'seniority subject to rejection of unfit' with only a rider that such reservation would not be applicable if the posts of direct recruitment are more than 50%.

50. In view of the law declared in Indra Sawhney, such reservation in promotion could have continued only for a period of five years commencing from 16.11.1992

and, therefore, they were to come to an end in November, 1997 subject to revision, modification or re-issuance of any rule, as directed therein.

51. The State Government, in the year 1993, enacted the Act, 1993, in which it was specifically provided that reservation in promotion should continue for a period of five years with effect from 16.11.1992, but soon thereafter, before the expiry of the aforesaid period, the Act, 1994 was promulgated, wherein Scheduled castes quota of reservation was enhanced from 18% to 21%. In this Act, the time-limit of five years, which was provided under the 1993 Act was done away with, by providing that reservation in promotion shall continue till the Government Orders are modified or revoked. It apparently means that the reservation in promotion has been extended indefinitely and in any case, till the State Government so desires, the reservation would continue.

52. If reservation is necessary for transcending caste and not for perpetuating it, it requires consideration whether reservation in promotion could be provided for such an indefinite period and whether the reservation so provided could continue in the wake of the judgment of the Apex Court in M. Nagraj without the State Government having undertaken any exercise to find out whether reservation in promotion in any service under the State, against any post or class posts is actually required in terms of the directives issued in the aforesaid judgment and whether accelerated/consequential seniority need be given to such promotees under the enabling provision of the Constitution viz. Article 16(4-A).

53. By the Constitution (77th Amendment) Act, 1995, Article 16 (4-A) was incorporated in the Constitution of India, introducing an enabling provision for providing reservation in promotion to scheduled castes and scheduled tribes. This came into force on June 17, 1995. By the Constitution (85th Amendment) Act, 2001, the words "in matters of promotion, with consequential seniority, to any class" were added in Article 16(4-A) with retrospective effect i.e. June 16, 1995. On the strength of aforesaid enabling provision in Article 16(4-A), the State Government issued the U.P. Government Servants Seniority (First Amendment) Rules, 2002, hereinafter referred to as the Rules, 2002, in October, 2002, by which Rule 8-A was inserted in the Rules, 1991, providing consequential seniority also to

scheduled castes and scheduled tribes on their promotion by virtue of rule of reservation/roaster. By means of U.P. Government Servants Seniority (Second Amendment) Rules, 2005, hereinafter referred to as the Rules, 2005, the aforesaid provision was omitted and, therefore, it remained no more in force till it has again been introduced by the Uttar Pradesh Government Servants Seniority (Third Amendment) Rules, 2007, hereinafter referred to as the Rules, 2007, which is under challenge.

54. The validity of said rule granting consequential seniority to the scheduled castes and scheduled tribes in the matter of promotion was assailed in a bunch of petitions before the Apex Court under Article 32 of the Constitution of India and the said matter was referred to the Constitution Bench. Interim orders were also passed in respect to these writ petitions. Some writ petitions were filed before this Court also assailing the validity of Article 16(4-A) and the Rules, 2002, in which common interim orders were passed.

55. The petitioners in Writ Petition No. 1389 (S/B) of 2007 felt aggrieved as their names for promotion to the posts of Engineer-in-Chief, Chief Engineer, Superintending Engineer and Executive Engineer, as the case may be, did find mention in the eligibility list prepared on August 15, 2007, but in the meantime, since Rule 8-A was introduced in the Rules, 1991 with retrospective effect, the seniority of these engineers in the Irrigation Department was required to be re-determined and on preparation of fresh eligibility list for promotion they believed that their names would go down much below, if Rule 8-A aforesaid is applied.

56. The petitioners were earlier promoted on the basis of existing seniority and though their names figure in the said eligibility list, but on re-determination of seniority, giving accelerated seniority to the Government servants belonging to scheduled castes and scheduled tribes on the promotional posts, their right would be greatly prejudiced and they will fall outside the eligibility list.

57. So far as the constitutional validity of Rule 8-A is concerned, the same cannot be challenged on the ground that the State Government has no power to make such a rule, the constitutional validity of Article 16(4-A), the enabling provision having been upheld by the Apex Court, but the manner and the reasons for which

such a rule can be enacted, are open to judicial scrutiny. In case the Court comes to the conclusion that the reasons have not come forward and the manner which was required to be adopted in view of the judgment of the Apex Court in M.Nagraj's case has not been followed, the rules may be rendered ultra vires and unconstitutional.

58. While considering the validity of Rule 8-A, necessarily the Court has also to consider, whether reservation in promotion provided by the earlier Government Orders and subsequently by the Act of 1994, can be held to be valid, keeping in mind the plea of the petitioners that at the time when the Government Orders were issued, and when the Act of 1994 was promulgated, there was no legal and constitutional protection for providing such reservation in promotion, which provision was introduced only by the 77th Constitutional Amendment.

59. The State Government has the power to make the rules in terms of Article 16(4-A) only, when the constitutional limitations and the circumstances, viz. the factors enumerated in the judgment of M. Nagraj and the conditions stipulated therein do exist. The State Government cannot frame a rule either of reservation in promotion or for giving accelerated seniority merely because the constitutional validity of enabling provision of the Constitution has been upheld by the Apex Court.

60. For judging the validity of the aforesaid rule, we have to see what has been held and observed in the case of M. Nagraj. The broad issues that arose for determination in the aforesaid case related to the validity, interpretation, and implementation of the 77th, 81st, 82nd and 85th Constitution Amendment Acts and action taken in pursuance thereof which sought to reverse decisions of the Supreme Court in matters relating to promotion in public employment and their application with retrospective effect.

61. The Supreme Court in para 43 of the said case observed, that in that case, they were are concerned with the right of an individual to equal opportunity on one hand and preferential treatment to an individual belonging to a Backward Class in order to bring about an equal level-playing field in the matter of public employment. The Apex Court in that case was concerned with conflicting claims

within the concept of justice, social, economic and political. It observed as under:

"The conflicting claim of individual right under Article 16(1) and the preferential treatment given to a backward class has to be balanced. both the claims have a particular object to be achieved. the question is of optimisation of these conflicting interest and claims."

In para 44, the Supreme Court went on to say, "The above three concepts are independent variable concepts. The application of these concepts in public employment depends upon quantifiable data in each case. Backward Classes seek justice. General class in public employment seeks equity. The difficulty comes in when the third variable comes in, namely, efficiency in service. In the issue of reservation, we are being asked to find a stable equilibrium between justice to the backwards, equity for the forwards and efficiency for the entire system.This problem has to be examined, therefore, on the facts of each case. Therefore, Article 16(4) has to be construed in the light of Article 335 of the Constitution. Inadequacy in representation and backwardness of the Scheduled Castes and Scheduled Tribes are circumstances which enable the State Government to act under Article 16(4) of the Constitution. However, as held by this Court the limitations on the discretion of the Government in the matter of reservation under Article 16(4) as well as Article 16(4-A) come in the form of Article 335 of the Constitution."

62. Their Lordships, thus, while considering the concept of justice, social, economic and political, in public employment observed that they depend upon quantifiable data in each case and that inadequate representation and backwardness of scheduled castes and scheduled tribes, is the circumstance which enables the State to act under Article 16(4-A) of the Constitution, but limitation on the discretion of the State Government in the matter of reservation under Article 16(4) as well as Article 16(4-A) come in the form of Article 335 of the Constitution.

63. The point which their Lordships was emphasising, has been very vividly stated as follows: "the point which we are emphasising is that ultimately the present controversy is regarding 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 be constitutionally valid and yet "exercise of the power" by the State in a given case may be arbitrary, particularly, if the State fails to identify and measure backwardness and inadequacy keeping in mind the efficiency of service as required under Article 335."

67. The Court further observed, "Reservation is necessary for transcending caste and not for perpetuating it. Reservation has to be used in a limited sense otherwise it will perpetuate casteism in the country. Reservation is undertaken by a special justification. Equality in Article 16(1) is individual-specific whereas reservation in Article 16(4) and Article 16(4-A) is enabling. The discretion of the State is, however, subject to the existence of 'backwardness' and "inadequacy of representation" in public employment. Backwardness has to be based on objective factors whereas inadequacy has to factually exist. This is where judicial review comes in. However, whether reservation in a given case is desirable or not, as a policy, is not for us to decide as long as the parameters mentioned in Articles 16(4) and 16(4-A) are maintained. As stated above, equity, justice and merit (Article 335)/efficiency are variables which can only be identified and measured by the State. Therefore, in each case, a contextual case has to be made out depending upon different circumstances which may exist Statewise."

68. The aforesaid observations in M.Nagraj case limits the discretion of the State in applying reservation in promotion and/or giving consequential seniority. In no uncertain terms, the Supreme Court says that the discretion of the State is subject to the existence of 'backwardness' and 'inadequacy of representation' in public employment, and that backwardness has to be based on objective factors whereas inadequacy has to factually exist. Judicial review intervenes at this stage. The question as to whether reservation in a given case is desirable or not, as a policy, is not for the Courts to decide as long the parameters mentioned in Articles 16(4) and 16(4-A) are maintained. However, in each case, a contextual case has to be made out depending upon different circumstances which may exist Statewise. Reservation under Article 16(4) is intended merely to give adequate representation to backward communities. It cannot be used for creating monopolies or for unduly or illegitimately disturbing the legitimate interests of other

employees. A reasonable balance must be struck between the claims of Backward Classes and claims of other employees as well as the requirement of efficiency of administration.

69. The Supreme Court further observed, "Giving the judgment of the Court in Indra Sawhney, Jeevan Reddy, J stated that Article 16(4) speaks of adequate representation not proportionate representation although proportion of population of Backward Classes to the total population would certainly be relevant. He further pointed out that Article 16(4) which protects interests of certain sections of 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."

70. Dealing with catch-up rule, in para 79, the Supreme Court observed:

"79. Reading the above judgments, we are of the view that the concept of "catch-up" rule and "consequential seniority" are judicially evolved concepts to control the extent of reservation..... Therefore, in our view, neither the "catch-up" rule nor the concept of "consequential seniority" is implicit in clauses (1) and (4) of Article 16 as correctly held in Virpal Singh Chauhan (1995) 6 SCC 684).

The Court also observed, "In our view, 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."

71. The Court also held that-

"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 the 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)* 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 reservation in promotion for SCs and STs.

72. While considering the question whether the impugned Constitutional Amendments violate the principle of basic structure, their Lordships observed, "...Clause (4) of Article 16, however, states that the appropriate Government is free to provide for reservation in cases where it is satisfied on the basis of quantifiable data that Backward Class is inadequately represented in the services. Therefore, in every case where the State decides to provide for reservation, there must exist two circumstances, namely, "backwardness" and "inadequacy of representation". As stated above, equity, justice and efficiency are variable factors. These factors are context-specific. There is no fixed yardstick to identify and measure these three factors, it will depend on the facts and circumstances of each case. These are the limitations on the mode of the exercise of power by the State.....If the State concerned fails to identify and measure backwardness, inadequacy and overall administrative efficiency then in that event the provision for reservation would be invalid.....The impugned constitutional amendments are enabling in nature. They leave it to the States to provide for reservation. It is well settled that Parliament while enacting a law does not provide content to the "right". The content is provided by the judgments of the Supreme Court. 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....."

In para 104, the Supreme Court further observed, ".....As stated above, be it reservation or evaluation, excessiveness in either would result in violation of the

constitutional mandate. This exercise, however, will depend on the facts of each case. In our view, the field of exercise of the amending power is retained by the impugned amendments, as the impugned amendments have introduced merely enabling provisions because, as stated above, merit, efficiency, backwardness and inadequacy cannot be identified and measured in vacuum....."

73. Discussing the role of enabling provisions in the context of Article 14, the Supreme Court observed as under:

"106. The gravamen of Article 14 is equality of treatment.According to the Constitutional Law of India, by H.M.Seervai, 4th Edn., p.546, equality is not violated by mere conferment of discretionary power. It is violated by Arbitrary exercise by those on whom it is conferred. This is the theory of "guided power". This theory is based on the assumption that in the event of arbitrary exercise by those on whom the power is conferred, would be corrected by the courts. This is the basic principle behind the enabling provisions which are incorporated in Articles 16(4-A) and 16(4-B). Enabling provisions are permissive in nature. They are enacted to balance equality with positive discrimination..... The enabling provisions deal with the concept, which has to be identified and valued as in the case of access vis-a-vis efficiency which depends on the fact situation only and not abstract principle of equality in Article 14 as spelt out in detail in Articles 15 and 16."

107.The object in enacting the enabling provisions like Articles 16(4), 16(4-A) and 16(4-B) is that the State is empowered to identify and recognise the compelling interests. If the State has quantifiable data to show backwardness and inadequacy then the State can make reservations in promotions keeping in mind maintenance of efficiency which is held to be a constitutional limitation on the discretion of the in making reservation as indicated by Article 335. As stated above, the concepts of efficiency, backwardness, inadequacy of representations are required to be identified and measured. That exercise depends on availability of data. That exercise depends on numerous factors. It is for this reason that enabling provisions are required to be made because each competing claim seeks to achieve certain goals. How best one should optimise these conflicting claims

can only be done by the administration in the context of local prevailing conditions in public employment. This is amply demonstrated by the various decisions of this Court discussed hereinabove.....However, when the State fails to identify and implement the controlling factors then excessiveness comes in, which is to be decided on the facts of each case. In a given case, where excessiveness results in reverse discrimination, this Court has to examine individual cases and decide the matter in accordance with law. This is the theory of "guided power". We may once again repeat that equality is not violated by mere conferment of power but it is breached by arbitrary exercise of the power conferred."

74. Their Lordships concluded that the object behind the impugned Constitutional Amendments is to confer discretion on the State to make reservation for SCs/STs in promotions subject to the circumstances and the Constitutional limitations indicated therein.

75. After upholding the validity of enabling provisions aforesaid and observing that under what circumstances and in what manner, reservation in promotion and accelerated seniority can be given to scheduled castes and scheduled tribes Government servants, their Lordships also laid down the test to judge the validity of the impugned State Acts.

78. Reiterating the boundaries of the width of the power, their Lordships observed, "As stated above, the boundaries of the width of the power, namely, the ceiling limit of 50% (the numerical benchmark), the principle of creamy layer, the compelling reasons, namely, backwardness, inadequacy of representation and the overall administrative efficiency are not obliterated by the impugned amendments. At the appropriate time, we have to consider the law as enacted by various States providing for reservation if challenged. At that time we have to see whether limitations on the exercise of power are violated. The State is free to exercise its discretion of providing for reservation subject to limitation, namely, that there must exist compelling reasons of backwardness, inadequacy of representation in a class of post (s) keeping in mind the overall administrative efficiency. It is made clear that even if the State has reasons to make reservation, as stated above, if the impugned law violates any of the above substantive limits on the width of the

power the same would be liable to be set aside."

79. The Court further observed, "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.....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.....The extent of reservation has to be decided on the facts of each case.....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."

80. In para 119, the Apex Court further observed that, "If the extent of reservation is excessive, then it makes an inroad into the principle of equality under Article 16(1). Extent of reservation, as stated above, will depend on the facts of each case. Backwardness and inadequacy of representation are compelling reasons for the State Government 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."

81. 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, the concept of post-based roster with inbuilt concept of replacement as held in R.K.Sabharwal. (i.e. R.K.Sabharwal versus State of Punjab, (1995) 2 SCC 745).

122. We reiterate 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."

82. In the light of the constitutional limits and the circumstances enunciated in the case of M. Nagraj, we have to test the validity of the rule 8-A, Section 3(7) of the Act of 1994 and the Eligibility List Rules, 1986 as amended from time to time under challenge.

83. Relying upon the judgment of Apex Court in M. Nagraj's case, arguments of the petitioners can be summarized as under:

(i)By upholding the constitutional validity of Article 16(4-A) as an enabling provision, the State does not get a free hand to frame a rule for reservation in promotion and/or with consequential accelerated seniority.

(ii)For making such a rule for reservation, there must exist compelling reasons of backwardness, inadequacy of representation in a class or classes of posts under the services of the State, keeping in mind the overall administrative efficiency.

(iii)For giving reservation in promotions to Government servants belonging to SCs/STs, there has to be quantifiable data to determine the backwardness of the class, and inadequacy in representation in any class or classes of posts in the services under the State and it should exclude the creamy layer.

(iv) The State has not undertaken any exercise for finding the quantifiable data to measure backwardness and inadequacy of their representation on any class or classes of posts in the services under the State to justify reservation as required.

By preparing separate eligibility lists for promotion of members belonging to scheduled castes, scheduled tribes and general category, as per the provisions of the Eligibility List Rules, 1986, merit is compromised and thus the same is not in conformity with the provisions of Article 335.

(v)Only because of accelerated seniority, promotion of scheduled castes and scheduled tribes cannot be made on the posts where vacancy is of general nature and if so done, it would result in reverse discrimination.

There cannot be any general rule of reservation in promotion with consequential seniority under Article 16(4-A), which needs determination of quantifiable data, to establish backwardness of the class and then inadequate representation on any class or classes of posts in the services under the State.

(vi)The Eligibility List Rules, 1986 stood amended in the years 1995 and 2001, by which a proviso has been added to Rules 4 and 5, which runs absolutely contrary to the constitutional provisions and gives undue advantage of accelerated seniority to scheduled castes and scheduled tribe candidates for being considered on the promotional posts alongwith general category persons against an unreserved

vacancy and thus defeat the fundamental right of senior general category persons for consideration of their promotion.

84. In regard to the plea that the State has not undertaken any exercise for yielding quantifiable data so as to determine nature and extent of backwardness of SC/ST and inadequacy of their representation in any class or classes of posts, to justify reservation, there is not much dispute on the fact situation as no such exercise appears to have been done before providing for reservation in promotion under the Act of 1994, nor before framing the aforesaid rule 8-A.

85. No such exercise has been undertaken even after the 77th and 85th Constitution Amendments but the reservation in promotion is continuing under the provisions of Section 3(7) of the Act, 1994, even when more than eighteen years have passed when the judgment in Indra Sawhney was delivered.

86. This also stands fortified by the fact that from the record produced before us, no such attempt appears to have been made nor finds mention therein and rather, the reason for framing Rule 8-A, is that in view of the constitutional validity being upheld of Article 16(4-A) by the Apex Court, the scheduled castes and scheduled tribes Government servants are entitled for reservation in promotion with consequential/accelerated seniority and, therefore, to effectuate and implement the aforesaid provision, the rule has been framed.

87. The record further shows that in fact after the judgment in M. Nagraj, the only notings and correspondence, which find place therein, including the cabinet decision, reveal that after the judgment in M. Nagraj, the Rules of 2002 which were omitted by Rule, 2005, were being revived in the shape of Rule, 2007. No effort was made before the framing of the Rule for collecting quantifiable data regarding backwardness of the class and their inadequate representation in any class or classes of posts in the services under the State. Thus the only exercise made was to revive the Rules, 2002, which were no more in force.

88. Needless to reiterate that the State Government was not having any power or authority to frame a rule simply because constitutional validity of an enabling provision of the Constitution has been upheld by the Apex Court, more so when

the case of M. Nagraj specifically and categorically prescribes the constitutional limitations in making such a rule.

89. In regard to the provisions of Reservation in the Act, 1994 and in particular Section 3(7), there was nothing on record, nor has been placed before us to show that any exercise as required under Article 16(4-A) (inserted by the Constitution 77th Amendment Act) was ever done while providing reservation to scheduled castes/scheduled tribes. In other words, when the aforesaid enactment was made, since the Constitution (77th Amendment) Act was not in existence, therefore, there was no occasion nor the State ever thought to undertake any exercise of collecting quantifiable data in respect of backwardness of the class, its inadequate representation on any class or classes of posts in the services under the State. Once the provision of reservation is found not to be backed by the constitutional requirements, such reservation cannot be saved.

90. In response to the aforesaid argument, it has, however, been contended by the respondent State that Article 16(4-A) permits reservation in promotion with consequential seniority in favour of scheduled castes and scheduled tribes if in the opinion of the State, they are not adequately represented in the services under the State. Emphasis has been laid upon the phrase "in the opinion of the State" urging that the phrase aforesaid does not mean that there has to be an objective satisfaction of the State in matters of this nature. All that is required is an honest conviction based on some material, which was already on record i.e. the Committee's report of 2001 (the report of Social Justice Committee dated 28.6.2001) and the data of recruitment and promotion of SC/ST in the State. According to the respondents, the opinion can be either subjective or objective. 'Subjective' means based on an individual's perceptions, feelings or intentions, as opposed to externally verifiable phenomena. Personal; individual (Black's Law Dictionary, 9th Edn. Page 1561).

91. In support of the aforesaid argument, it has been urged that the Constitution in various provisions uses different phrases for the purpose of determining the nature of the discretion vested in the Government. For instance, in some of the Articles, it is provided that the Government may take a decision "if it is satisfied" about the

existence of circumstances requiring a particular decision to be taken. Reference may be made to Article 311 (2)(b), 352, 356 and 360. Similarly, the other phrase used in the Constitution is that the Government "may determine". Reference may be made to Articles 33 and 38(2). In some other provisions of the Constitution, it is provided that the State shall "endeavour to secure" (Articles 43, 43-A, 44, 45, 48 and 49-A). Again when an obligation was to be cast on the Government, it is so provided (Article 49). In many of the statutes, the appropriate authority has to exercise its discretion in the following circumstances:

(i) "if satisfied"

(ii) "Reason to believe"-means coming to a decision on the basis of information. It is objective in nature (AIR 1972 AP 318, K. Munivelu versus The Government of India and others, at page 321). Reference may also be made to Cr.P.C Sections 93 (I), 328 (I), 438; FERA Sections 37, 38; NDPS Act Section 37; Income Tax Act, 1922 Section 34-A and AIR 1971 SC 2451, Sheo Nath Singh versus The Appellate Assistant Commissioner of Income Tax (Central), Calcutta and others.

(iii) "Of the opinion"- are based on speculative matter; on reflection or experience.

(iv) "In its discretion"

(v) "Having regard to" and "conclusive evidence".

92. The argument is that though, there may be some over-lapping in the meaning to be given to the aforesaid phrases, it cannot be doubted that if the Constitution or statutory provisions use different words and phrases, it has normally to be interpreted differently. The judgments in the cases of Kanhaiyalal Vishin Das Gidwani versus Arun Dattatray Mehta, (2001) 1 SCC 78, B.R.Enterprises versus State of U.P, (1999) 9 SCC 700, Board of Revenue versus Arthur Paul Benthall, 1955 (2) SCR 842, Oriental Insurance Co. Ltd versus Hansrajbhai V Kodala (2001) 5 SCC 175 have been cited in support of the aforesaid submission that whenever the Constitution or a statute uses different words or phrases, it conveys a different meaning.

93. Consequently, the respondents plead that the phrase "in the opinion of" in Articles 16(4) and 16(4-A) carries a different meaning than "upon being satisfied", whereas 'opinion is subjective, satisfaction may be objective'.

94. Referring to the "Words and Phrases", Permanent Edn. 29A, page 493, it is being contended that an opinion is a belief less strong than positive knowledge and the forming of an opinion, therefore, ordinarily involves exercise of discretion in determining the weight to be given to various conflicting considerations, and that an opinion is only that it creates no fact. It is what someone thinks about something, and the thought may be precisely accurate or totally inaccurate, and yet represent the absolute honest conviction of the person who expresses it. It is a notion or conviction founded on probable evidence.

95. Further, the phrase "in the opinion" does not mean that there has to be an objective satisfaction of the State in matters of this nature. All that is required is an honest conviction based on some material, which was already on record. (Report of Social Justice Committee 2001).

96. In *Indra Sawhney*, their Lordships of the Supreme Court had occasion to consider the phrase "in the opinion of the State". The Court observed that the expression "in the opinion of the State" would mean the formation of opinion by the State which is purely a subjective process. It cannot be challenged in a Court on the grounds of propriety, reasonableness and sufficiency though such an opinion is required to be formed on the subjective satisfaction of the Government whether the identified 'backward class of citizens' are adequately represented or not in the services under the State. But for drawing such requisite satisfaction, the existence of circumstances relevant to the formation of opinion is a *sine quo non*. If the opinion suffers from the vice of non-application of mind or formulation of collateral grounds or beyond the scope of Statute, or irrelevant and extraneous material, then that opinion is challengeable.

97. The State has been empowered to invade the constitutional guarantee of "all" citizens under Article 16(1) in favour of 'any' backward class of citizens only if in the opinion of the government it is inadequately represented. Objective being to remove disparity and enable the unfortunate ones in the society to share the

services to secure equality in, 'opportunity and status' and any State action must be founded on firm evidence of clear and legitimate identification of such backward class and their inadequate representation. Absence of either renders the action suspect. Both must exist in fact to enable State to assume jurisdiction to enable it to take remedial measures. "Power to make reservations as contemplated by Article 16(4) can be exercised only to make the inadequate representations in the services adequate." Use of the expression, "in the opinion of State" may result in greater latitude to State in determination of either backwardness or inadequacy of representation and sufficiency of material or mere error may not vitiate as State may be left in such field to experiment and learn by trial and error with little interference from the court, but if the principle of identification itself is invalid or it is in violation of constitutionally permissible limits or if instead of carefully identifying the characteristics which could clothe the State with remedial action it engages in analysis which is illegal and invalid and is adopted not for remedial purposes but due to extraneous considerations then the court would be shirking in their constitutional obligation if they fail to apply the corrective. States' latitude is further narrowed when on existence of the two primary, basic or jurisdictional facts it proceeds to make reservation as the wisdom and legality of it has to be weighed in the balance of quality pledged and guaranteed to every citizen and tested on the anvil of reasonableness to smother any illegitimate use and restrict the State from crossing the clear constitutional limits.

98. The Apex Court further observed, "Judicial Review has come to be one of the ways of obliging government to control itself. A reservation for a class which is not backward would be liable to be struck down. Similarly if the class is found to be backward but it is adequately represented, the power cannot be exercised.. Therefore, the exercise of power must precede the determination of these aspects each of which is mandatory. Since the exercise of power depends on existence of the two, its determination too must satisfy the basic requirement of being in accordance with the Constitution, its belief and thought. Any determination of backward class in historical perspective maybe legally valid and constitutionally permissible. But if in determination or identification of the backward class any constitutional provision is violated or it is contrary to basic feature of Constitution, then the action is rendered vulnerable."

99. The Court further observed that the language of clause (4) makes it clear that the question whether a backward class of citizens is not adequately represented in the services under the State is a matter within the subjective satisfaction of the State. This is evident from the fact that the said requirement is preceded by the words "in the opinion of the State". This opinion can be formed by the State on its own, i.e., on the basis of the material it has in its possession already or it may gather such material through a Commission/Committee, person or authority. All that is required is, there must be some material upon which the opinion is formed. Indeed, in this matter, the court should show due deference to the opinion of the State, which in the present context means the executive. The executive is supposed to know the existing conditions in the society, drawn as it is from among the representatives of the people in Parliament/Legislature. It does not, however, mean that the opinion formed is beyond judicial scrutiny altogether. The scope and reach of judicial scrutiny in matters within subjective satisfaction of the executive are well and extensively stated in Barium Chemicals v. Company Law Board which need not be repeated here. Suffice it to mention that the said principles apply equally in the case of a constitutional provision like Article 16(4) which expressly places the particular fact (inadequate representation) within the subjective judgment of the State/executive.

100. Thus the opinion of the State may be subjective, but there has to be some material on the basis of which opinion is to be formed. In the absence of any material, that too, when no exercise is done for collecting such material, the opinion of the State would not remain immune from judicial scrutiny, and any action taken on such an opinion, will be liable to be struck off and nullified.

101. The respondents have not brought on record showing any such exercise or material on the basis of which it could be presumed that there was some material before the State Government to form an opinion for providing reservation in promotion, that too indefinitely, against all posts in all cadres of the services under the State.

102. Reservation in promotion can only be saved if the State acts in accordance with the enabling provisions of Article 16(4-A). In the absence of any such material

being brought on record on exercise having been done, the reservation provided not in accordance with the 77th Amendment and 85th Amendment of the Constitution cannot be allowed to remain in force. In case such reservations are permitted to continue, that would be against the constitutional provisions and against the verdict given by the Apex Court in M. Nagraj and also that of Indra Sawhney.. This will also affect the efficiency in administration, as general category candidates would lose their right of consideration for promotion in the hands of scheduled castes and scheduled tribes candidates under an enactment, which does not have the support of the constitutional provisions, rather which provisions do not allow such legislation, or framing of Rule.

103. It has also been submitted by the respondents that the principles laid down by the Supreme Court in Indra Sawhney relating to "backward classes", do not apply in the case of SC/ST, in view of Articles 341 and 342 of the Constitution. Submission is that a caste notified as scheduled caste under Article 341 and scheduled tribe under Article 342 is an established backward class and suffers from backwardness and no exercise for the purpose is required to be done for finding quantifiable data to determine their backwardness and inadequacy in representation.

104. M.Nagraj considers the judgment of Indra Sawhney and observes that clause (4-A) follows the pattern specified in clauses (3) and (4) of Article 16. Clause (4-A) of Article 16 emphasises upon the opinion of the States in the matter of adequacy of representation. It gives freedom to the State in an appropriate case depending upon the 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.

105. In R.K.Sabharwal and others versus State of Punjab and others, (1995) 2 SCC 745, the Apex Court held that the entire cadre strength should be taken into account to determine the percentage of reservation. It was clarified that the judgment of Indira Sawhney was confined to the initial appointment and not to promotions. The operation of a roaster for filling the cadre strength by itself ensures that the reservation remains within the ceiling limit of 50%. This has been provided in the judgment of M. Nagraj also.

106. The argument, therefore, that the requirements under Article 16(4) were not to be considered while making rules for reservation with or without consequential seniority under Article 16(4-A) thus cannot be accepted in view of the law laid down by the Apex Court.

107. In M. Nagraj also, the Apex Court while considering clause (4) of Article 16 of the Constitution, which follows the same pattern, their Lordships observed that the appropriate Government was free to provide for reservation in cases where it was satisfied on the basis of quantifiable data that Backward Class has been inadequately represented in the services. When the State Government fails to identify the two controlling factors i.e. "backwardness" and "inadequacy of representation", then excessiveness comes in, which may be decided on the facts of each case. In a given case, it may result in reverse discrimination, which the Court has to examine on the basis of facts of individual case and decide the matter in accordance with law.

108. We, thus, conclude that no exercise as required under the constitutional provisions and as propounded in M. Nagraj was undertaken by the State Government while applying reservation in promotion, that too on all posts in all cadres, and class of posts in the services under the State, nor was there any material collected, to form the required opinion.

109. This requires us to consider the next plea of the respondent State that there was no requirement of collecting quantifiable data regarding inadequate representation of SCs and STs in the services under the State for framing the rule of reservation in promotion with accelerated seniority.

110. The argument is that reservation in promotion is continuing right from the year 1973 with the issuance of G.O. dated 8.3.1973 and thereafter by G.O. dated 20.3.1974, which provided reservation in promotion on the criterion of 'seniority subject to rejection of unit'. Thereafter 1993 Reservation Act and subsequently 1994 Reservation Act were promulgated. To show the inadequacy of representation of SCs and STs and that the representation of STs and SCs in services under the State has not reached the required level, the statement of objects and reasons of the Constitution (77th Amendment) Act, 1995 has been pressed into service. The aforesaid statement of objects and reasons shows that-

1.The members of SCs/ STs have been enjoying facility of reservation in promotion since 1955.

2.The Supreme Court by its judgment dated 16.11.1992 (in Indra Sawhney) has held that Article 16(4) is confined to initial appointment and cannot extend to reservation in the matter of promotion.

3.This ruling of the Supreme Court would adversely affect the interest of the SCs/STs.

4.Since the representation of the SCs/STs in services under the States has not reached the required level, it is necessary to continue the existing dispensation of providing reservation in promotion in the case of the SCs/STs., and

5.The Government had decided to continue with the existing policy of reservation in promotion for the SCs and STs.

111. The submission is that the effect of the Constitution 77th Amendment is that reservation provided for by the Government Orders dated 8.3.1973 and 20.3.1974 would continue without any further exercise in view of the constitutional provisions, and legislative recognition of the SCs/STs having not reached the required level, there was need to continue such reservation.

112. Further, the State of U.P. constituted the Social Justice Committee, whose terms of the reference were to ascertain the the relative position of SC/ST/OBC with regard to implementation of reservation in public services in Uttar Pradesh.

This Committee was required to examine the history of reservation in Uttar Pradesh and other States as also the report of the National Commission and other relevant documents. The argument is that the said reports were well within the knowledge of the State since before the rules were framed.

113. Again referring to the statement of objects and reasons to the Constitution (85th Amendment) Act, 2002 amending clause (4-A) to Article 16 and providing for consequential seniority, giving retrospective effect from 17.6.1995, it has been pointed out that the aforesaid objects and reasons provided as under:

1.The Government servants belonging to SC/ST category had been enjoying the benefit of consequential seniority on their promotion on the basis of rule of reservation.

2.The judgment of the Supreme Court in Union of India versus Veerpal Singh, (1995) 2 SCC 715, led to the issue of the OM dated 30.1.1997 by Government of India, which adversely affected SC/ST.

3.The Amendment was being made to negate the effect of OM dated 30.1.2002, in view of the Constitutional Amendment.

4.Mere withdrawal of the aforesaid OM would not meet the desired purpose to give consequential benefits and would require an amendment to Article 16(4-A).

5.Since reservation in matters of promotion was effective from 17.6.1995 (77th Amendment), the 85th Amendment was made retrospective from 17.6.1995. By the aforesaid amendment, it was specifically provided that with effect from 17.6.1995, consequential seniority would be given in matters of promotion.

114. Justifying the reservation in question and the consequential seniority, the statements of objects and reasons to the two Constitutional Amendments have been greatly relied upon, though with the passage of time, fact situation may change.

115. The theory that statement of objects and reasons could be referred to only for the limited purpose of ascertaining the conditions prevailing at the time which

necessitated the making of the law (Thangal Kanju Musaiar versus M. Venkatachalam Potti, (1955) 2 SCR 1196), has been enlarged in B.Banerjee versus Anita Pan, (1975) 1 SCC 166, wherein it has been held that, "The learned Judges rightly refer to the legislative proceedings, notorious common knowledge and other relevant factors properly brought to their ken. The 'sound-proof theory' of ignoring voices from Parliamentary Debates, once sacrificed by British tradition, has been replaced by the more legally realistic and socially responsible canon of listening to the legislative authors when their artifact is being interpreted. We agree with the High Court when it observed: "It is found from the speech of the Minister at the time of introducing the Bill in the Legislature, that the problems of tenants are many; there are landlords of different kinds".

116. Reference has also been made to the decision of the House of Lords in Pepper versus Hart, (1993) 1 All.E.R 42, where it has been held that proceedings in Parliament as referred to in Hansard can be utilised as an aid to construction. It has been observed that Parliamentary material as an aid to statutory construction should, subject to any question of Parliamentary privilege, be relaxed, especially, if it was necessary to understand such statement and their effect. It has been submitted that the said judgment made a departure from the hitherto limited approach regarding utilization of Statement of Objects and Reasons and proceedings in the House.

117. Reference has also been made to Parliamentary Debates while considering the Bill relating to giving consequential seniority which would indicate the position as was standing when the Bill was moved, and the views of the Members of the Lok Sabha.

118. In nutshell, the argument is that the Parliament gave legislative recognition of the SC/Sts having not reached the required level and, therefore, there was need to continue such reservations, which does not oblige the State Government to make any independent exercise.

119. In support of the aforesaid plea, it has also been urged that from times immemorial, there has been discrimination against scheduled castes and scheduled tribes in India. They led a sub-human existence. The Constitution itself

recognizes such a situation which would be evident from the provisions of Article 15(2)(a), which lays down that no citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to access to shops, public restaurant, hotels and places of public entertainment, or the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public. Article 17 prohibits untouchability and declares it to be an offence. Article 23 prohibits trafficking in human-beings and forced labour. Article 24 prohibits engagement of child labour. Article 39-A provides that the State shall secure a legal system which promotes justice on a basis of equal opportunity.

120. No doubt, the reservation to scheduled castes and scheduled tribes in the matter of promotion could have been considered in the background of historical facts but not without analysing and considering the present fact situation, by taking into account the material which was available with the State since before. The persistent atrocities upon the SCs/STs, which the history witnessed in the country if was the sole consideration for providing reservation in promotion with consequential seniority and the said view/principle would have been accepted by the Apex Court, the plea aforesaid could not have been rejected. But what we find is that in the case of M. Nagraj, the Supreme Court after taking into consideration the Statements of Objects and Reasons to the aforesaid two Constitutional Amendments and also the dictum of Indra Sawhney's case held that clause (4-A) is carved out of Article 16(4) and, therefore, clause (4-A) would be governed by two compelling reasons as mentioned in Article 16(4) and that the State Government was required to undertake such an exercise, in the absence of which the rules framed would be nullity and would stand vitiated, the plea aforesaid cannot be accepted. Once the Supreme Court after considering the import and effect of aforesaid constitutional provisions has declared the circumstances and the constitutional limitations in providing reservation in promotion with accelerated seniority, no argument can be accepted which is not in consonance with the dictum of the Apex Court.

121. Their Lordships of the Supreme Court were alive to the historical background, the atrocities which the scheduled castes and scheduled tribes suffered in the country, the statements of objects and reasons of the two Constitutional Amendments, the fact that by a legislative action, the obstacles which were being placed in implementing the rule of reservation in its full enormity, which did mention that the judgments in the cases of Ajit Singh Januja and Veerpal Singh are stumbling blocks in giving benefit of reservation in promotion to the scheduled castes and scheduled tribes, therefore, reservation be continued, still while interpreting the true meaning of Article 16 (4-A) and the intention of the legislation, alongwith the object which is sought to be achieved by said Constitutional Amendments, clearly held that it is only an enabling provision, which automatically does not allow reservation in promotion with or without accelerated seniority, and, therefore, the State is under constitutional obligation to identify the factors of backwardness and inadequate representation in a class or classes of posts in the services under the State, keeping in mind the provisions of Article 335.

122. The statement of object and reasons and the debates in Lok Sabha, which are being heavily relied upon by the respondents for justifying reservation in promotion, with accelerated seniority, cannot be construed as an exercise undertaken by the State Government for the purposes of enacting the rule, nor they can be made the basis for forming its opinion in terms of Article 16 (4-A).

123. The statement of objects and reasons alongwith debates in the Parliament, etc. all have led to the insertion of enabling provisions of Article 16(4-A) and 16(4-B) of the Constitution. The enabling provisions though confer power on the State to provide for reservation in promotion, in a class or classes of posts in the services under the State, but the exercise of that power has to be done in the manner prescribed only when the conditions precedent are found to be in existence.

124. The argument of the respondents that need to collect quantifiable data regarding backwardness of the class and their inadequate representation was not at all essential in the facts and circumstances of the case and their placing reliance upon the historical facts of atrocities inflicted upon the scheduled castes

and scheduled tribes and on the statements of Objects and Reasons of 77th and 85th Amendments of the Constitution and also on the pre-existing report of Social Justice Committee, leaves no room for any doubt that the State Government did not undertake any exercise, nor it made any such effort to collect the quantifiable data regarding backwardness of the class or their inadequate representation in any class or classes of posts in the services under the State and therefore, no consideration was made to the directives given in Article 335 of the Constitution also which puts limitations on such exercise while making rule for reservation in promotion with or without consequential seniority.

125. In this regard, it would be beneficial to quote the pleadings of the parties also. In para 85 of Writ Petition (No. 1389 (S/B) of 2007), the petitioners have stated that it was the constitutional obligation of the State, at the time of providing reservation in the matter of promotion to identify the class or classes of posts in the service for which reservation is required, however, neither any effort has been made to identify the class or classes of posts for which reservation is to be provided in promotion nor any exercise has been done to quantify the extent of reservation. In para 86, they have stated that neither prior nor after the amendments of the Constitution in the year 1995 and again in the year 2001, while inserting Article 16(4-A), the State Government has undertaken any exercise as required under Article 16(4-A) and Article 335 of the Constitution of India. As a matter of fact, if the State had to provide reservation in the matter of promotion, the pre-requisite of Article 16(4-A) ought to have been fulfilled by the State. In para 88, it has been stated that the aforesaid Government Orders as also Section 3(7) of the Act of 1994, referred to above, cannot be said to be in conformity with the constitutional requirements of Article 16(4-A).

126. In response to the aforesaid pleadings, it has been stated in para 56 of the counter affidavit of the State that the contents of paragraphs 85 and 86 of the writ petition are false and baseless, hence denied in view of the averments made in earlier paras. It is further submitted that after taking information in respect of adequacy of representation of the Scheduled Caste and Scheduled Tribes from the different departments, the decision to provide consequential seniority has been taken by the State by making amendment in the aforesaid Rules. In para 57 of the

counter affidavit, it has been stated that the contents of paragraphs 87 and 88 of the Writ Petition are not admitted, hence denied. In reply thereto, it is submitted that the reservation for scheduled Castes and Scheduled Tribes is in conformity with the spirit of Article 16(4-A) of the Constitution of India and is constitutional.

127. In para 28 of the counter affidavit, the State has made an effort to demonstrate inadequacy of representation in services on the basis of information collected from different departments on 1.1.1995 and 1.1.1996.

128. The data chart given therein does not conform to the constitutional requirement which necessitated the exercise by the Government with respect to backwardness of the class, their representation in class or classes of posts in the services under the State and efficiency of administration (Article 335). It is also not clear that since how long these posts were not filled and whether they could not be taken up for consideration as back-log vacancies. In sub-para 3 of para 28 of the counter affidavit, the position of present short-listed backlog posts has been mentioned as 26618 which includes direct recruitment posts and promotional posts of groups A, B,C and D category. On the basis of said data, reservation could not have been provided in the matter of promotion.

129. The data said to have been collected in 1995-1996, firstly did not respond to the constitutional requirements and secondly, they cannot be the basis for making a rule in the year 2007. The respondents' attempt to justify the insertion of Rule 8-A in the Rules, 1991, by filing a chart contained in Annexure CA-18 to the counter affidavit indicating the total short backlog posts which included Groups A, B, C and D posts i.e. of direct recruitment and promotion and number of posts filled, also does not help them in establishing that any exercise as required was done. The said data is absolutely irrelevant for the purposes of rule of consequential seniority; more so, the said chart is dated 31.12.2007, i.e. subsequent to the data of amendment of the rule, which is 14.9.2007.

130. The only document which has been shown by the respondents in their counter affidavit in support of their rules is contained in Annexure-18 to the counter affidavit, which does not indicate post/departmentwise representation of the scheduled castes and scheduled tribes category but the said data only indicates

the total number of representation of scheduled castes and scheduled tribes in Class A, B, C and D posts relating to backlog posts, earmarked and vacant posts including direct recruitment posts, which is not at all relevant for the purposes of rule of consequential seniority for controlling the extent of reservation.

131. The provision of consequential seniority has to be text specific and there cannot be an omnibus rule of consequential seniority for being applied to all the cadres of various services under the State including those cadres where the scheduled castes/scheduled tribes are already represented.

Curiously, in para 32 of the counter affidavit, the respondents have stated that rule 8-A has been inserted in 1991 Rules for fulfilling the requirement of Article 16 (4-A) of the Constitution and thereby they have averred that the said amendment is a proof of the fact that in State Government services, the representation of members of scheduled caste and scheduled tribe candidates is not complete. Para 32 of the counter affidavit is quoted below:

"32. That the contents of paragraph 47 of the writ petition are false and misconceived hence denied. By the Uttar Pradesh Government Servant Seniority (Third Amendment) Rules, 2007 after section 8 of Uttar Pradesh Government Servant Seniority Rules, 1991, the Section 8A is inserted to fulfill the requirement of Article 16 (4-A) of the Constitution of India. The aforesaid amendment is a proof of this fact that in State Government Services the representation of members of scheduled caste and scheduled tribe candidates is not complete."

132. Detailing the aforesaid facts, it has been stated by the petitioners (of Writ Petition No. 1389 (S/B) of 2007) in their rejoinder affidavit that scheduled castes and scheduled tribes quota on various posts in Group A service in the irrigation department is full and as such the SCs/STs are adequately represented in the service and there is no justification for providing consequential seniority from the date of roster point promotion. As on 30th June, 2007 (forenoon) the quota of scheduled castes and scheduled tribes in various promotional posts in Group A service of the Irrigation Department, with the exception of two reserved posts of Superintending Engineer, was complete. Even against the aforesaid two reserved vacancies, eligible scheduled caste candidates were available and have been

promoted subsequently in recruitment year 2007-08. Sri Jai Prakash and Sri V.K.Verma, Chief Engineer, Level-I were promoted as Engineer-in-Chief on 31.7.2007 and 30.11.2007 respectively. Sri Narendra Kumar, Sri Subhash Agarwal, Sri Hari Nandan Sharma, Sri Dharmpal Singh Chauhan, Sri Ashok Kumar Singh Pundir and Sri Jai Prakash Chief Engineer, Level-II were promoted on the post of Chief Engineer Level-I on 26.6.2007, Sri Atar Singh was promoted as Chief Engineer Level-I in the month of August, 2007, Sri Jai Prakash was subsequently promoted as Engineer-in-Chief on 1.8.2007 i.e. within one month of becoming Chief Engineer, Level I.

133. The vacancies, both unreserved as well as reserved, on the promotional posts i.e. Engineer-in-Chief, Chief Engineer-II, Superintending Engineer, Executive Engineer, for the recruitment year 2007-2008, starting on 1st July 2007 and upto January 2008, with the exception of 5 vacancies on the post of Chief Engineer-I, 3 vacancies on the post of Superintending Engineer and 12 vacancies on the post of Executive Engineer, have been filled by the respondents in the month of December 2007 and January, 2008. Even against the aforesaid vacancies, eligible persons have been considered by the D.P.C and recommendations for promotion have been made but promotion orders have not been issued. Against the sole reserved vacancy on the post of Chief Engineer Level-I, one Sri Ram Awadh has been considered for promotion in the D.P.C held on 22.2.2008, but promotion order has not yet been issued. Similarly even against one reserved vacancy on the post of Superintending Engineer and three reserved vacancies on the post of Executive Engineer, eligible reserved category candidates have been considered by the D.P.C and recommendations for promotion have been made but promotion orders have not yet been issued.

134. The petitioners No. 4, 5 and 6 of aforesaid writ petition have also been promoted to the post of Chief Engineer-II on 20.12.2007 and 31.12.2007 while petitioners No. 8, 9 and 10 have been promoted as Superintending Engineer on 15.1.2008 and petitioners no. 11 and 12 have been promoted as Executive Engineer on 31.1.2008.

135. The petitioners thus have shown that requisite number of reserved category officers are occupying/are available for occupying the reserved category posts and the reservation quota on various posts in Group A service in the Irrigation Department is complete.

136. In fact, the allegation is that as per details given in the chart Annexure RA-1 to the rejoinder affidavit, the number of officers belonging to the scheduled castes and scheduled tribes on the posts of Engineer-in-Chief and Chief Engineer I exceeded the reserved quota. At present also the number of SCs/STs working on the posts of Engineer-in-Chief and Chief Engineer-I exceeds the quota of reservation.

We do not intend to enter into the controversy regarding factual position about the various posts being occupied by the scheduled castes and scheduled tribes candidates in the services under the State in a class or classes of posts in a cadre of service, as it would be for the State to undertake this exercise, but from the pleadings on record, we are satisfied that the State has not considered the said aspect for finding out the quantifiable data to establish backwardness of the class or their inadequate representation in a class or classes of posts in the services under the State.

137. The reply given in the counter affidavit, thus, does not in any way show that the State has undertaken any exercise for collecting quantifiable data regarding backwardness of the class or that of inadequate representation in class of post or posts in the services under the State, neither at the time of enacting Section 3(7) of the Act, 1994, nor thereafter, nor at the time of framing Rule 8-A, and merely because the State thought that it is the mandate of Article 16(4-A) to provide reservation in promotion with accelerated seniority, the rule has been amended.

138. Backwardness of the class as well as their inadequate representation have not at all been considered against any class or classes of posts in the services under the State but a general rule for all posts in all services under the State has been framed, that too without any exercise. There are posts of different nature and categories making hierarchy of posts in various services of the State. The representation of the reserved category was to be seen against each class or

classes of posts, but nothing of the sort has been done. There is nothing on record to indicate that the requirement of efficiency in administration, as given in Article 335 of the Constitution, was ever taken into account. Merely by giving total number of posts in the services under the State under various categories of posts and showing that they were inadequately represented would not mean following of constitutional limitations and requirements prescribed therein.

139. While making such a provision under Section 3(7) of the Act of 1994, the State did not undertake any exercise for having quantifiable data with regard to backwardness of the class, inadequate representation and efficiency of administration. If any reservation was to be provided in promotion, the same could have been done only by undertaking the aforesaid exercise in view of the enabling provisions of the Constitution. No exercise was done as required. Therefore, merely because there did exist Government Orders providing reservation in promotion, they would not stand the test of judicial scrutiny in view of the constitutional limitations prescribed and the law declared by the Apex Court.

140. The object of providing reservation is to remove backwardness, and not to give any undue, or unreasonable advantage at the cost of fundamental right for being considered for promotion, of the senior persons, because they belonged to general category, and also the reservation cannot be provided in perpetuity or for an indefinite period. It has to be periodically assessed.

141. This is also evident from the fact that Articles 330 and 332 of the Constitution provide for reservation of seats in the House of People and Legislative Assemblies of States for scheduled castes and scheduled tribes respectively and since the Constitution mandated reservation, it also provided maximum time limit for such reservation in Article 334. This makes it clear that the spirit behind Article 334 obviously is that reservation cannot continue indefinitely. So far as reservation in services is concerned, Constitution-framers had taken cautious decision and did not mandate reservation in services and made it only enabling in the form of Articles 16(4) and 16(4-A). In such a situation, the State has to exercise its discretion very cautiously taking into consideration all the limitations as enumerated in the case of M. Nagraj, which, in para 123, says that provision of

reservation cannot be extended indefinitely.

142. In the year 1973, when provision for reservation was applied to merit promotions and in 1974, when it was extended to promotions based on criterion of seniority subject to rejection of unfit, there was no constitutional protection to such provisions. In the Act of 1994 also, when it was enacted, there was no such constitutional back-up, as, for the first time the enabling provision for making reservation in promotion was provided by 77th Amendment of the Constitution in 1995 and of accelerated seniority, by introducing 85th Constitutional Amendment. All Government Orders and enactments in regard to providing reservation in promotion, which do not stand the test of aforesaid constitutional provisions, cannot be allowed to be in force being constitutionally invalid.

143. M. Nagraj pointedly held that the State is not bound to make reservation for SCs/STs in matters of promotions. However, if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment, and that even if the State has compelling reasons as stated above, it 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. The object of reservation is to remove backwardness and not to create a disbalance in the services under the State on promotional posts amongst the reserved category and general category candidates.

144. The record produced by learned State counsel reveals that in fact after the judgment of the Apex Court in M. Nagraj, certain representations were made to the State Government for reviving the Rules of 2002 which were made for providing reservation in promotion with accelerated seniority and which were later on omitted in the year 2005, on which opinion of the Law Department of the State was asked for and the Law Department raised certain objections in reviving the said Rules, but later on, approval of the Chief Minister was sought, for revival of the Rules in view of the decision of the Apex Court in M. Nagraj. This note was put up on 27.6.2007 and thereafter the Law Department endorsed the aforesaid Rules

and the matter, after approval of the Chief Minister, was to be placed before the Cabinet. The Law Department gave its endorsement on 30.8.2007. The Rules of 2007 were thereafter promulgated with effect from 14.9.2007. On 17.10.2007, the Government Order was issued, in which action in pursuance of the amended Rules, 2007 was directed to be taken, which included the re-determination of seniority by applying the principle of Rule 8-A, thereby correcting the seniority list, which was prepared earlier under the catch-up rule which was made effective from 17.6.1995.

145. The record also reveals that after the judgment of the Apex Court in M. Nagraj, no exercise was at all done for identifying the class, its backwardness, adequate representation in a class or classes of posts in the services under the State, nor the contents of Article 335 of the Constitution were taken into account,, but merely on enabling provision of Article 16 (4-A) being declared as valid and constitutional, the Rules of 2002 have been revived by the Rules, 2007.

146. The petitioners have demonstrated in their rejoinder affidavit that promotions are being made on the basis of feeding cadre seniority in view of the interim orders of this Court and reserved category candidates, namely, scheduled castes and scheduled tribes are being promoted in their respective quotas and the quota of 21% is always complete and whenever there is any shortfall, that is not because of non-availability of the candidates belonging to scheduled castes and scheduled tribes but because of inaction on the part of the State in not making exercise of promotion of reserved category in their respective quotas and also that of general category candidates.

147. Further, representation of scheduled castes and scheduled tribes on a class or classes of posts, cannot be a constant factor, but it is variable and may change with the passage of time, an important factor which ought to have been considered before making a rule of reservation in promotion with consequential seniority.

148. The State Government has framed a general rule i.e. Rule 8-A making it applicable to all the services under the State and to all the post or class of posts in a sweeping manner, which also cannot be done under the constitutional provisions.

149. We next need examine the combined effect of the Eligibility List Rules, 1986 as amended in 1995 and 2001, and Rule 8-A. The Eligibility List Rules, 1986, as they stood originally, did not prescribe preparation of any eligibility list separately with respect to scheduled castes and scheduled tribes if the eligibility criteria of promotion was 'merit' though it provided for preparation of separate eligibility lists in respect of each year. The said rules were amended by the U.P. Promotion by Selection (on Posts outside the Purview of the Public Service Commission) Eligibility List (First Amendment) Rules, 1995, and rule 4 provided for preparation of three lists to be called as eligibility lists of the senior-most eligible candidates from each of the category, namely, general, scheduled castes and scheduled tribes, separately in the light of vacancies available for each of the said category containing names as far as possible, three times the number of vacancies subject to the minimum of eight.

150. The concepts of 'catch-up rule' and 'consequential seniority' are evolved in service jurisprudence and they are for controlling the extent of reservation. The State of U.P. has mechanically inserted Rule 8-A in the Seniority Rules, 1991 under a misconception as if it was the mandate of the Constitution as amended by 85th Amendment. This is further evident by the fact that the Government order dated 17.10.2007 expressly and elaborately mentions that in view of the 85th Amendment of the Constitution, the explanation to Rule 6 of the Rules, 1991 has become redundant and ineffective and as such the State Government has made the arrangement that irrespective of Rules 6, 7 and 8 of the said seniority Rules, the scheduled castes/scheduled tribes Government servants shall be entitled to consequential seniority on being promoted on the basis of reservation/roaster.

151. Rule 6 of the Rules, 1991 provides as under:

"6. Seniority where appointment by promotion only from a single feeding cadre.- Where according to the service rules, appointments are to be made only by promotion from a single feeding cadre, seniority inter se of persons so appointed shall be the same as it was in the feeding cadre.

Explanation.- A person senior in the feeding cadre shall, even though promoted after the promotion of a person junior to him in the feeding cadre shall, in the cadre

to which they are promoted, regain the seniority as it was in the feeding cadre.

152. By the U.P. Promotion by Selection (on Posts outside the Purview of the Public Service Commission) Eligibility List (Second Amendment) Rules, 2001, a further amendment was made by inserting a proviso to rule 4, which provided that if in a year of recruitment, no vacancy is available for scheduled castes or scheduled tribes but a person belonging to scheduled castes or scheduled tribes, as the case may be, is entitled to be included, by virtue of his seniority, in the eligibility list of the general category candidates, such person shall also be included in the eligibility list of general category candidates.

153. Rule 5 provided that where the criterion for promotion is seniority subject to the rejection of unfit, the appointing authority shall prepare three lists to be called the eligibility lists of the senior-most eligible candidates from each of the category, namely, general, scheduled castes and scheduled tribes, separately, in the light of vacancies available for each of the said category containing names, so far as may be, in the given proportion. The proviso to this rule says that if in a year of recruitment, no vacancy is available for recruitment, no vacancy is available for scheduled castes or scheduled tribes but a person belonging to scheduled castes or scheduled tribes, as the case may be, is entitled to be included, by virtue of his seniority, in the eligibility list of the general category candidates, such person shall also be included in the eligibility list of general category candidates. Sub-rule (2) of Rule 5 provides that the provisions containing in proviso to rule 4 shall *mutatis mutandis* apply if preparing an eligibility list under this rule.

154. The effect of the aforesaid provisions in the Eligibility List Rules is that in the matter of promotion where the criterion is either 'merit' or 'seniority subject to rejection of unfit', in both cases, if no vacancy is available for scheduled castes and scheduled tribes candidates, even then they are entitled to be included, by virtue of their seniority, in the eligibility list of general category candidates and are to be considered against a non-reserved vacancy on higher post. This means that if accelerated seniority is given to such scheduled castes and scheduled tribes candidates on the post on which they have got the accelerated promotion because

of the vacancy being reserved for them, they would steal march over the senior general category persons even in the matter of next promotion, they being entitled to accelerated seniority.

155. Prior to the aforesaid two amendments in the Eligibility List Rules in the years 1995 and 2001, there was no distinction regarding preparation of the eligibility list with respect to promotion where the criterion was 'merit'. In 1995 amendment, rule 4 only provided that if the criterion for promotion is 'merit', then three separate eligibility lists will be prepared of the senior-most eligible candidates from each of the category, namely, general, scheduled castes and scheduled tribes separately, in the light of vacancies available for each of the said categories. This meant that persons belonging to scheduled castes and scheduled tribes would get their due as per prescribed quota of reservation on any class of posts in the cadre of the service as those vacancies would be filled in only by reserved category candidates, but by virtue of subsequent amendment in 2001, the benefit of accelerated seniority was given to scheduled castes and scheduled tribes by introducing a further proviso to Rule 4. Here, it may be pertinent to mention that by prescribing quota of scheduled castes and scheduled tribes in the services under the State including on the promotional posts, the only requirement could be that the said quota is fulfilled subject to the availability of eligible scheduled castes and scheduled tribes persons.

156. Rule 5, with its proviso read with its sub-rule (2), had applied this principle of accelerated seniority even in promotions where the criterion is 'seniority subject to rejection of unfit' though prior to the said amendment, this was not the requirement.

157. The Eligibility List Rules, 1986 since make a specific provision for promotion of scheduled castes and scheduled tribes candidates to the next higher post in their cadre of service against the vacancies reserved under their quota, the question of their inadequate representation would hardly arise against any class or classes of posts, as the vacancies earmarked for being filled up by reserved category candidates would be filled up only by the persons belonging to such category and not by any third person. This reservation or earmarking of vacancies

on the posts in a particular cadre of service on the basis of their reservation quota, now 21% for scheduled castes and 2% for scheduled tribes, ensures the fulfillment of required quota of candidates belonging to reserved category and, therefore, the requirement of accelerated seniority to such promotees of scheduled castes and scheduled tribes does not appear to be necessary, as it in no way helps in achieving the quota of scheduled castes and scheduled tribes candidates, as the case may be, on a particular post or class of posts in the cadre of service. If the quota is already filled up, there would hardly be any occasion for giving additional benefit in the shape of accelerated seniority to the reserved category candidates for filling up the reserved promotional posts.

158. The Eligibility List Rules, 1986 thus take care of scheduled castes/scheduled tribes candidates on promoted post and permit their promotion against their identified posts prescribed under their quota. All such posts are to be offered to the scheduled castes and scheduled tribes as the case may be where the general category persons will have no right to be considered. Thus, the scheduled castes and scheduled tribes will be having their full quota in the services under the State against all posts earmarked for them where such quota is available and their right and interest would not be affected adversely if they are not given accelerated seniority. To the contrary, if accelerated seniority is given to the scheduled castes and scheduled tribes without considering the mandate of M. Nagraj case, it would result in reverse discrimination as the persons admittedly senior would become junior to their juniors and that though the quota of scheduled castes and scheduled tribes may be complete on a particular post or class of posts, but even then they will stand senior to the general category persons who earlier could not get a chance of consideration for promotion as the vacancy against which the scheduled castes and scheduled tribes persons were promoted, belong to that very class.

159. The combined effect of Eligibility List Rules and of consequential seniority to scheduled castes and scheduled tribes candidates will thus lead to reverse discrimination. Proviso appended to Rules 4 and 5 of the Eligibility List Rules in the year 2001 provides that if no vacancy in the quota of reserved candidate is available in a recruitment year and the reserved category candidate according to his seniority is entitled to be kept in eligibility list of general category, then he

would be placed in the eligibility list for the post meant for the general category candidates. The said proviso of Eligibility List Rules was inserted with effect from 25.9.2001 when 85th Amendment in the Constitution was not made, which was made on 4.1.2002, therefore, in the Eligibility List Rules, the word 'seniority' occurring at various places would mean feeding cadre seniority. The combined effect of Eligibility List Rules and consequential seniority rule, impugned in the present petitions, was not taken into consideration while framing the same.

160. The effect of such a rule would also be that even though on a particular post or class of posts in the cadre of service, either the quota is full or no reservation can be provided for want of quota, namely, the total cadre strength of the post is less than 5, to make even one post/vacancy available for scheduled caste, the reserved category by virtue of consequential seniority would have a prior right of occupying such a post, which otherwise is general vacancy and that too, by superseding his senior. This will mean not only providing reservation in excess of the quota which means reverse discrimination, but also supersession of a senior person without sanction of law. There may be a case of single post cadre, e.g. the Head of the department, and that post will also be available to persons belonging to scheduled castes and scheduled tribes by virtue of accelerated seniority, superseding the claim and infringing the fundamental right of consideration for promotion of a senior person of general category. This cannot be the intention of rules nor of constitutional provisions. Any promotion made of scheduled castes/scheduled tribe persons beyond the quota prescribed would necessarily result into reverse discrimination. No reservation can be provided by indirect method on a class or classes of posts where there is no quota available for scheduled castes/scheduled tribes. This will also exceed the limit of 50% reservation in service.

161. While considering the validity of 85th Amendment in the Constitution, regarding consequential seniority, the Apex Court held that "the concept of "catch-up" rule and "consequential seniority" are judicially evolved concepts to control the extent of reservation. The source of these concepts is in service jurisprudence. These concepts cannot be elevated to the status of an axiom like secularism, constitutional sovereignty, etc. It cannot be said that by insertion of the concept of

"consequential seniority" the structure of Article 16(1) stands destroyed or abrogated. It cannot be said that "equality code" under Articles 14, 15 and 16 is violated by deletion of the "catch-up" rule. These concepts are based on practices. However, such practices cannot be elevated to the status of a constitutional principle so as to be beyond the amending power of Parliament. Principles of service jurisprudence are different from constitutional limitations. Therefore, in our view neither the "catch-up" rule nor the concept of "consequential seniority" is implicit in clauses (1) and (4) of Article 16 as correctly held in Virpal Singh Chauhan."

162. The Supreme Court, therefore, approved the judgment of Union of India versus Virpal Singh Chauhan, (1995) 6 SCC 684 and further observed that the judgment in M.G.Badappanavar versus State of Karnataka, (2001) 2 SCC 666 was mainly based on the judgment in Ajit Singh (I) which had taken the view that the departmental circular which gave consequential seniority to the "roster-point promotee", violated Articles 14 and 16 of the Constitution. In none of the above cases, was the question of the validity of the constitutional amendments involved. Ajit Singh (I) (i.e. Ajit Singh Januja versus State of Punjab, (1996) 2 SCC 715), Ajit Singh (II) versus State of Punjab, (1999) 7 SCC 209 and M.G.Badappanavar (supra) were essentially concerned with the question of "weightage". Whether weightage of earlier accelerated promotion with consequential seniority should be given or not to be given are matters which would fall within the discretion of the appropriate Government, keeping in mind the backwardness, inadequacy and representation in public employment and overall efficiency of services. The above judgments, therefore, did not touch the questions which were involved in the case of M. Nagraj.

163. The 77th and 85th Constitutional Amendments were held to be curative by nature. Article 16(4) provides for reservation for backward classes in cases of inadequate representation in public employment. Article 16(4) was enacted as a remedy for the past historical discriminations against a social class. The object in enacting the enabling provisions like Articles 16(4), 16(4-A) and 16(4-B) is that the State is empowered to identify and recognize the compelling interests of the backward class.

164. Considering promotion for members of scheduled castes and scheduled tribes against the reserved vacancy, where the general category candidates have no right to be considered and thereafter giving them reservation in promotion with accelerated seniority will amount to supersession, as normally understood, unless the catch-up rule is done away with, the general category persons would regain seniority as and when his turn for promotion comes and he is promoted. But if accelerated seniority is provided to the reserved candidates, the senior person who belongs to general category would lose seniority. This may be permissible under a legal provision backed by constitutional mandate, but while providing such a reservation in promotion with accelerated seniority, the State Government has to consider the conditions/factors which are necessary and widely discussed by the Apex Court in M. Nagaraj's case. In the absence of any such exercise having been done, the rule of reservation and that of accelerated seniority may not pass the test of Articles 14 and 16 of the Constitution.

It is apparent that by operation of Eligibility List Rules, the State is ensuring filling up of all the posts earmarked for reserved category candidates in their quota. If Rule 8-A is also implemented in addition to Eligibility List Rules, 1986 viz. proviso inserted to Rules 4 and 5, the reserved category candidates would get consequential seniority after their promotion and would become eligible for promotion to next higher post over and above their seniors and would be considered for promotion for the posts meant for general category candidates. Such promotion of SCs/STs would exceed the quota of reservation and the same would amount to reverse discrimination which would be violative of Articles 14, 16(1) and 16(4-A) of the Constitution of India.

In case the quota of scheduled castes and scheduled tribes stands already filled up on a post or class of posts in the services under the State (as pleaded by the petitioners in Irrigation Department and other departments), there cannot be a case of inadequate representation of the said category of persons against such post or class of posts. There being no inadequate representation, the question of allowing accelerated seniority i.e. consequential seniority would not arise. If despite quota being full, consequential seniority is given to reserved category persons in promotion, that would intrude upon the fundamental rights of senior

persons belonging to general category from being considered for promotion to the next higher post and in their place, reserved category persons would be considered. Thus, the consequence would be that on the one hand, the quota of scheduled castes and scheduled tribes persons is full i.e. they are adequately represented and on the other hand, they will steal march over and above the senior general category persons and would occupy even those posts where the vacancies are not reserved for them. This is the effect of the Rules 4 and 5 read with its proviso of Eligibility List Rules, 1986 read with Rule 8-A alongwith explanation attached thereto.

This leads us to another very important point raised by the petitioners that in a short period of time, all the posts of Heads of the Departments would be occupied by reserved category candidates not because of their merit, but because of giving them reservation in promotion alongwith accelerated seniority. This would certainly cause discontentment and heart-burning amongst the senior members of the service belonging to general category, which would certainly lower down the efficiency in administration.

It is neither the mandate nor the will of the Parliament that irrespective of the adequate representation of the scheduled castes and scheduled tribes on all post or class of posts in the services under the State, promotion with or without accelerated seniority must be given to them. The assumption of the State that Rule 8-A has been inserted for giving effect to the constitutional amendment brought by inserting Article 16(4-A) from the back date is not sustainable. The State government having not undertaken any exercise as per the constitutional requirement and as per the directives of the Apex Court in M. Nagaraj case could not have inserted Rule 8-A nor could have amended the Seniority Rules, 1991 accordingly. Reservation in promotion on any class or classes of posts in the services under the State, can neither be provided as a matter of course, nor can it be claimed as a matter of right but can only be provided under compulsive circumstances in consonance with the constitutional provisions.

Here, we may make it clear, that since we have already held that the reservation in promotion presently provided cannot continue, therefore, the import and effect of

Eligibility List Rules, 1986 shall not be understood to mean that we have in any way approved the reservation. It is only to show the combined effect of Eligibility List Rules, 1986 and that of Rule 8-A, this discussion has been made.

Making a rule of reservation in promotion with accelerated seniority without advertent upon the backwardness of the class and inadequate representation on any post or class of posts in the services under the State without following the constitutional mandates and limitations provided therein, leaves no option for us but to hold that the State also remained totally oblivious with respect to the limitations prescribed under Article 335 of the Constitution.

The effect of such reservation in promotion with accelerated seniority was never considered by the State keeping in mind the efficiency of administration, which is bound to be compromised where reservation quota exceeds and results into reverse discrimination. There cannot be any grouse if reserved category persons get their promotion to the higher post in the channel of promotion and may be on the post of Head of the Department, by virtue of their merit after competing with the general category persons, who are senior to them, as was provided in the unamended Eligibility List Rules, 1986, but if such promotions are made ignoring the senior persons, who may be more meritorious, that will be defeating their fundamental right of consideration for promotion to the higher post, which is not permissible. Rule 8-A thus introduced by the Third Amendment Rules, 2007 is ultra vires and unconstitutional.

A similar question arose before the Supreme Court in Special Leave Petition (Civil) No. 6385 of 2010, Suraj Bhan Meena and another versus State of Rajasthan and others alongwith connected petitions, which were filed against the judgment of Rajasthan High Court quashing the notification 25.4.2008 issued by the State of Rajasthan, in exercise its powers conferred by the proviso to Article 309 of the Constitution of India amending the Rajasthan Various Service Rules with effect from 28.12.2002. The effect of the notification aforesaid amounted to giving consequential seniority to candidates belonging to scheduled castes and scheduled tribes.

Challenge was made mainly on the ground that such seniority could not have been given without quantifying the figures of scheduled castes and scheduled tribes candidates to enable a decision to be arrived at that reservation was required in promotion and also to show that the State had to pass such orders for compelling reasons, such as, backwardness and inadequacy of representation, as held by the Apex Court in the case of M. Nagraj.

The main plea was that since the State Government had not complied with the directions given by the Apex Court in M. Nagraj's case, the notification in question was liable to be quashed. It was further urged that in the case of Indra Sawhney, the Apex Court had held that Article 16(4) of the Constitution did not permit reservations in the matter of promotion. Thereafter, the Constitution (77th Amendment) Act, 1995 was enacted and came into force on 17.6.1995. The Apex Court in subsequent Special Leave Petitions filed by the Union of India and others against Virpal Singh Chauhan and others (1995)6 SCC 684, Ajit Singh Januja and others versus State of Punjab and others (1996) 2 SCC 715 and Ajit Singh II and others versus State of Punjab and others (1999) 7 SCC 209), introduced the 'catch-up" rule and held that if a senior general candidate was promoted after candidates from the Scheduled castes and scheduled tribes have been promoted to a particular cadre, the senior general candidate would regain his seniority on promotion in relation to the juniors who had been promoted against reserved vacancies. The Parliament on 4.1.2002 amended the Constitution by the Constitution (85th Amendment) Act, 2001 in order to give the benefit of consequential seniority to the reserved category candidates with effect from 17.6.1995. The Apex Court while upholding the constitutional validity of the Constitution (77th Amendment) Act, 1995 and the Constitution (85th Amendment) Act, 2001 clarified the position that it would not be necessary for the State Government to frame rules in respect of reservation in promotion with consequential seniority, but in case the State Government wanted to frame such rules in this regard, then it would have to satisfy itself by quantifiable data, that there was backwardness, inadequacy of representation in public employment and overall administrative inefficiency and unless such an exercise was undertaken by the State Government, the rule relating to reservation in promotion with consequential seniority could not be introduced. Relying upon the decision in the

case of M. Nagraj, the notification aforesaid was quashed.

It was the case of the petitioners in the aforesaid SLP that the impugned notification dated 25.4.2008 was liable to be declared ultra vires to the provisions of the Constitution being contrary to the decision of this Court in M. Nagraj's case.

It was further submitted that withdrawal of the notification dated 1.4.1997 by notification dated 28.12.2002 amounted to negating the judgment of the Apex Court in the case of Ram Prasad versus D.K.Vijay (1999) 7 SCC 251 and, accordingly, the notification dated 28.12.2002 was also liable to be quashed by the Court. In short, the question sought to be decided was whether the State Government was reintroducing a concept which had been replaced pursuant to the orders passed by this Court, which had been found to be ultra vires the provisions of the Constitution.

The Apex Court also took note of the argument that the respondents had not acquired any vested right since the Constitution Amendment Acts had been enacted by the Parliament only with the intention of nullifying the effects of the judgments in the cases of Virpal Singh Chauhan and Ajit Singh II. It was submitted that the Constitution (85th Amendment) Act, 2001 which was given effect to from 17.6.1995, had constitutionally nullified the principle of "regain of seniority" and the principle of "catch-up" which had been explained by the Apex Court in Virpal Singh Chauhan's case.

The defence put forward by the State of Rajasthan was that the relief praying for a declaration that the benefit of reservation in promotion with consequential seniority should not be given unless the three compelling conditions as indicated in M. Nagraj's case were fulfilled, was totally misconceived in the absence of any challenge to the order dated 10.2.1975 passed by the State of Rajasthan providing for reservations in favour of scheduled castes and scheduled tribes candidates in promotion. Furthermore, no such prayer had been granted by the High Court. The argument was that the relief prayed for was based on a complete misreading of the decision in M. Nagraj's case.

After noticing the various arguments raised on behalf of the parties, the Apex Court said that the primary question which their Lordships were called upon to answer was whether the amended provisions of Article 16(4-A) of the Constitution intended that those belonging to the scheduled castes and scheduled tribes communities, who had been promoted against reserved quota, would also be entitled to consequential seniority on account of such promotions, or would the "catch-up" rule prevail.

The Court noticed that the said question has been the subject-matter of different decisions of the Court, but the discordant note was considered and explained by the Constitution Bench in M. Nagraj's case. On account of reservation, those who were junior to their seniors, got the benefit of accelerated promotions without any other consideration, including performance. Those who were senior to the persons who were promoted from the reserved category were not overlooked in the matter of promotion on account of any inferiority in their work performance. It is only on account of fortuitous circumstances that juniors who belong to the reserve category were promoted from that category before their seniors could be accommodated.

In view of the arguments raised and the legal position as it existed in view of the judgment of the Constitution Bench judgment in the case of M. Nagraj in the light of the Constitution (77th Amendment) Act and the Constitution (85th Amendment) Act, the Supreme Court observed, "In effect, what has been decided in M. Nagraj's case (supra) is part recognition of the views expressed in Virpal Singh Chauhan's case (supra), but at the same time upholding the validity of the 77th, 81st, 82nd and 85th amendments on the ground that the concepts of "catch-up" rule and "consequential seniority" are judicially evolved concepts and could not be elevated to the status of a constitutional principle so as to place them beyond the amending power of the Parliament. Accordingly, while, while upholding the validity of the said amendments, the Constitution Bench added that, in any event, the requirement of Articles 16(4-A) and 16(4-B) would have to be maintained and that in order to provide for reservation, if at all, the tests indicated in Articles 16(4-A) and 16(4-B) would have to be satisfied, which could only be achieved after an inquiry as to identity."

The Court pronounced that the position after the decision in M. Nagraj's case is that reservation of posts in promotion is dependent on the inadequacy of representation of members of the scheduled castes and scheduled tribes and Backward Classes and subject to the condition of ascertaining as to whether such reservation was at all required. (Underlined by us.) The view of the High Court is based on the decision in M. Nagraj's case (supra) as no exercise was undertaken in terms of Article 16(4-A) to acquire quantifiable data regarding the inadequacy of representation of the scheduled castes and scheduled tribes communities in public services. With the aforesaid observation, the judgment passed by the Rajasthan High Court was affirmed.

Almost a similar controversy arose before the Himachal Pradesh High Court, where Himachal Pradesh Samanya Varg Karamchari Kalyan Mahasangh, in CWP-T No. 2628 of 2008, challenged the validity of the instructions dated 7th September, 2007 issued by the State of Himachal Pradesh, which made provision for reservations in the matter of promotions with consequential seniority in all classes of posts in the services under the State in favour of the scheduled castes and scheduled tribes. The State by these instructions had taken a decision to make reservation in promotion for the scheduled castes and scheduled tribes in terms of the provisions of Articles 16(4), 16(4-A) and 16(4-B) of the Constitution of India.

The Himachal Pradesh High Court, considering the various pronouncements of the Apex Court and the law laid down therein came to the conclusion that the Apex Court has upheld the constitutional amendments but has laid down that this does not obliterate the constitutional requirements of ceiling limit of 50%, the concept of creamy layer, the sub-classification between OBCs on the one hand and SCs and STs on the other hand, and the concept of post based roster with inbuilt concept of replacements. It has also been clearly said that the State is not bound to make reservations for scheduled castes and scheduled tribes. However, if it chooses to exercise the power vested in it to make such reservations, the State must collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment. In addition thereto Article 335 relating to efficiency must be also complied with. (Underlined by us.) It is subject to

these guidelines that the constitutional validity of the amendments was upheld.

Repelling the plea of the State that no such exercise for collecting any data was required in view of the fact that in the State of Himachal Pradesh, there was already a provision for reservation in promotion prior to the judgment in Indra Sawhney's case and thus collection of data as mandated in M. Nagraj's case is not required, the Division Bench of the Himachal Pradesh High Court held, "In Himachal Pradesh, reservation was provided in promotion prior to the judgment in Indra Sawhney's case. After Indra Sawhney's case, such reservation could not have been permitted beyond the period of five years.. To get over this judgment, the constitutional amendments were enacted. The Apex Court in no uncertain terms while upholding the constitutional amendments held that the collection of quantifiable data to establish backwardness and inadequacy of representation keeping in view the efficiency of administration of the State is necessary before making reservations. This requirement never existed prior to the judgment. According to the State, it had after due consideration decided to make provision for reservation in promotion much earlier. "Due consideration" is totally different from collecting quantifiable data. This exercise has to be conducted and no reservation in promotion can be made without conducting such an exercise. Therefore, the State cannot be permitted to make reservations till such exercise is carried out and clear-cut quantifiable data is collected on the lines indicated in M. Nagraj's case". (Underlined by us.)

The Court also took note of the fact that no clear-cut quantifiable data was placed so as to establish the need for reservation. Merely because the amended provision of the Constitution enables the State to make reservation is no ground not to collect data. Their Lordships further observed, "No doubt under the provisions of Article 16(4-A) the State is entitled to grant consequential seniority on promotion to the members belonging to the scheduled castes and scheduled tribes but there must be data available with the State Government to show that the scheduled castes and scheduled tribes are inadequately represented in the services or in the cadre to which promotions have to be made."

Rejecting the contention of the petitioners that the concept of creamy layer is applicable to to scheduled castes and scheduled tribes, the High Court of Himachal Pradesh allowed the writ petition, holding that until the State collects data and material establishing the need for reservation by collecting quantifiable data to show backwardness, inadequacy of representation and keeping in mind the overall efficiency of State administration, the State would not be entitled to make reservation in promotion for the scheduled castes and scheduled tribes. The impugned instructions were, therefore, quashed.

Against the said judgment, Special Leave Petition No. 30143/2009 was filed before the Hon'ble Supreme Court. The SLP alongwith Contempt Petition (C) No. 27/2010 was taken up for hearing on 26.4.2010, but the State of Himachal Pradesh made a prayer for withdrawal of the said SLP. The Apex Court passed the following order:

"The State of Himachal Pradesh has issued a Circular on 07.09.2007 as regards the promotion of SCs/STs in the State service. The said circular was challenged by the respondent no. 1 and the circular was quashed by the High Court by the impugned judgment. Learned counsel appearing for the State submits that the circular issued on 07.09.2007 has since been withdrawn as the State intends to collect more details with regard to representation of SCs/STs and to pass appropriate orders within reasonable time i.e. approximately within three months after collecting necessary details and datas. The petitioner would be at liberty to take appropriate steps, if any adverse order is passed. This Special Leave Petition and the Contempt Petition are thus disposed of finally."

We are, thus, of the opinion that merely because the reservation in promotion was provided prior to the case of Indra Sawhney by means of the Government Orders issued by the State Government which judgment did not permit any reservation in promotion though protected the promotions already made and also allowed reservation in promotion to be continued for a period of five years unless the rules were revised, modified or re-issued, and to overcome the said judgment the constitutional amendments were made, therefore, if the Government was to carry on with the reservation in promotion, it ought to have provided the same by

following the mandate of enabling provisions of the Constitution, but without doing so, reservation could not have been extended beyond the period of five years as directed by the Apex Court in the case of Indra Sawhney.

We also take notice of the fact that the State Government enacted the Act, 1994 making an almost permanent provision for reservation, or to say, for indefinite period, which is evident by the fact, that, though more than eighteen years have passed from the date when the judgment in Indra Sawhney's case was pronounced, the reservation is still continuing in promotion and that too without taking recourse to the constitutional requirements despite the fact that prior to the 77th and 85th Amendments of the Constitution, there was no constitutional provision for such reservation in promotion and after the aforesaid amendments in the Constitution, no exercise has been done by the State in this regard and the same very provisions of reservation are continuing. Obviously, the provision for reservation by Government Orders issued earlier in 1973 and 1974, 1994 Act was provided at a time when there was no constitutional protection to reservation in promotion, nor the Constitution did permit any such reservation, and thereafter without following the mandate of Articles 16(4), 16(4-A) and 16(4-B) of the Constitution, the same is continuing, therefore, such Government Orders and enactments, in particular Section 3(7) of 1994 Act, cannot be held to be valid nor can continue in operation any further unless the State Government undertakes the requisite mandatory exercise for collecting quantifiable data regarding the backwardness of the class, its inadequate representation in class or classes of posts in the services under the State, of course without compromising with the efficiency in administration, as per the dictates of the constitutional provisions of Article 335.

Further, providing reservation in promotion with accelerated seniority was a separate issue, which ought to have been considered in the light of the Eligibility List Rules, 1986. Even if on collecting the quantifiable data in respect of the backwardness of the class and its inadequate representation on the promotional posts in the services under the State, such a reservation be permissible, in the presence of the Eligibility List Rules, 1986, where three separate eligibility lists are to be prepared for considering promotion of general category and scheduled

caste/scheduled tribe category persons against their reserved vacancies, there would hardly be any reason or requirement under the Constitutional provisions to provide accelerated seniority to such promotees under reserved category. The reason being that on promotion so made of reserved category persons against the vacancies of reserved quotas, there would rarely be a case of inadequate representation even if backwardness of the class is established. It is only in a case where both the two factors, namely, backwardness of the class and inadequate representation on a class or classes of posts in the services under the State do exist that question of granting accelerated seniority may arise, but even in such a case, the State has to satisfy that no compromise is made with the efficiency in administration and such a rule does not violate the essence of Article 335 of the Constitution, nor it results into reverse discrimination.

In the absence of any exercise having been done as already discussed and referred to above, by first providing reservation under Section 3(7) of the Act of 1994 and thereafter with accelerated seniority to scheduled castes and scheduled tribe Government servants by inserting Rule 8-A in the Rules, 2007, the State has in fact violated the equality clause and has made the aforesaid statutory provision and rule without following the constitutional mandate and requirements thereof. Rule 8-A and Section 3(7) of the Act, 1994, therefore, cannot be protected and have to be declared ultra vires to the provisions of the Constitution.

We are, therefore, of the considered opinion that neither the Government Orders of 1973 and 1974 could be said to be validly issued, nor the enactment, namely Section 3(7) of the Act of 1994 can be protected, as the said provision was enacted when there was no constitutional protection to reservation in promotion and after the Constitutional 77th and 85th Amendments, no exercise as required under the constitutional provisions and elaborately explained in the case of M. Nagraj, has been done till date to find out whether reservation in promotion on any class or classes of posts is necessary or not. No such exercise has been done also when Rule 8-A has been enforced in 2007, by revising the Rules of 2002.

In case the State intends to provide reservation in promotion, it has to undertake an exercise for collecting quantifiable data with respect to backwardness of the

class, their inadequate representation in a class or classes of posts in the services under the State and of course in the light of Article 335 of the Constitution. The State is free to make such an exercise if it so desires.

In regard to the writ petitions connected with this bunch, which relate to various corporations, viz. UPPCL, Jal Nigam, U.P.Avas Evam Vikas Parishad, etc. suffice would be to mention that apart from other pleas as raised in Writ Petition No. 1389 (S/B) of 2007 Prem Kumar Singh and others versus State of U.P. and others, a further plea has been raised that these corporations have amended their Rules only on issuance of the Government Order even without undertaking any exercise to find out quantifiable data for giving promotion to SC/ST candidates. They have not applied their mind at all whether reservation with or without accelerated seniority is at all necessary in their department/corporation. In many of the writ petitions, there is specific plea that the quota of scheduled castes and scheduled tribes already stands filled up, but even then accelerated seniority is being sought to be given to reserved category candidates.

Likewise, all other writ petitions which relate to different departments of the State Government, also raise the same challenges, as has been raised in the case of Prem Kumar Singh.

Thus, all the writ petition in the bunch do not require any separate discussion and for the reasons aforesaid, they shall also be governed by the present judgment.

For the reasons given above and the discussions made, we declare the provisions of Section 3(7) of the Act, 1994 and that of Rule 8-A of the U.P. Government Servants Seniority (Third Amendment) Rules, 2007 as invalid, ultra vires and unconstitutional. Consequently, the Government Order dated 17.10.2007 is also hereby quashed.

In view of our finding that reservation in promotion as provided under Section 3(7) of the Act, 1994 is no more available, the Eligibility List Rules, 1986 as amended in 1995 and 2001, in so far as they provide for preparation of separate eligibility lists of general category and scheduled castes and scheduled tribes candidates with accelerated seniority, lose their significance and shall remain no more operative.

Consequent to the aforesaid declaration, we quash all the seniority lists, which have been prepared by applying Rule 8-A and are subject-matter of challenge in their respective writ petitions in the bunch. This direction will equally be applicable to all the departments of the State Government and the Corporations, etc.

We further clarify that in case the State Government decides to provide reservation in promotion to any class or classes of posts in the services under the State, it is free to do so after undertaking the exercise as required under the constitutional provisions, keeping in mind the law laid down by the Apex Court in the case of M. Nagraj. But till such an exercise is done and enactment/Rule is consequently made, no reservation in promotion on any post or classes of posts under the services of the State including the corporations, etc. shall be made henceforth. However, all promotions already made as per the provision/rule of reservation, where the benefit of Rule 8-A has not been given, while making the promotions, shall not be disturbed by the declaration aforesaid and shall stand protected.

All the writ petitions are, therefore, allowed. Costs easy.

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