IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JAIPUR BENCH, JAIPUR

O R D E R

(1) D.B. CIVIL CONTEMPT PETITION NO. 359/2011
IN
D.B. CIVIL WRIT PETITION NO. 8104/2008

BAJRANG LAL SHARMA & 6 OTHERS
....PETITIONERS.
VS.
(1) SHRI SALAUDDIN AHMED
(2) SHRI KHEMRAJ
....RESPONDENTS/CONTEMNORS.

WITH

(2) D.B. CIVIL CONTEMPT PETITION NO. 941/2010
IN
D.B. CIVIL WRIT PETITION NO. 8104/2008

SAMTA ANDOLAN, JAIPUR
....PETITIONER.
VS.
(1) SHRI SALAUDDIN AHMED
(2) SHRI KHEMRAJ CHAUDHARI
....RESPONDENTS/CONTEMNORS.

REPORTABLE

DATE OF ORDER : 23.02.2012

HON'BLE MR. JUSTICE NARENDRA KUMAR JAIN-I
HON'BLE MR. JUSTICE RAGHUVENDRA S. RATHORE

Mr. Sanjeev Prakash Sharma Senior Advocate assisted by Mr. Shobhit Tiwari]
Mr. S.S. Shekhawat]
Mr. Gaurav Sharma], and
Mr. Ankit Sethi] for the petitioners.

Mr. C.S. Vaidhyanathan, Senior Advocate assisted by Dr. Manish Singhvi, Additional Advocate General, Ms. Raj Sharma, Additional Government Counsel, and Mr. Veyankatesh Garg for Mr. G.S. Bapna(Advocate General),
for the respondents.

BY THE COURT : (Per Hon'ble N.K. Jain-I, J.)

Since both the contempt petitions had been preferred for committing contempt of judgment dated 05.02.2010 passed by this Court in D.B. Civil Writ Petition No. 8104/2008, therefore, they were heard together and are being disposed off by a common order.

2. D.B. Civil Contempt Petition No. 941/2010, Samta Andolan Vs. Shri Salauddin Ahmed & Another was preferred on 26.10.2010, contending therein that this Court vide judgment dated 05.02.2010 quashed Notifications dated 28.12.2002 and 25.04.2008 and declared the same ultra vires to the provisions of Articles 14 and 16 of the Constitution of India. Further, this Court has also quashed and set aside all the consequential orders or actions taken by the respondents, including seniority list of Super Time Scale as well as Selection Scale of the Rajasthan Administrative Service Officers, issued on the basis of above notifications. The State of Rajasthan had then preferred a Special Leave Petition (Civil) No. 7716/2010 before the Hon'ble Apex Court, wherein no interim order had been passed in favour of State and despite all

these, the respondents are sitting tight over the matter and proceeding with promotions in different departments. The hearing before the Hon'ble Supreme Court has been concluded and order is reserved, but despite all these, the respondents are not restraining themselves from convening the Departmental Promotion Committee for various posts in different departments. The petitioner had given representation to the respondents for complying with the judgment passed by this Court, but instead of complying with the same, the respondents are continuously making promotions in different services and issuing seniority lists in various departments; for illustraton, promotions made in Co-operative Department, PWD Department, Finance Department, etc. in violation of the judgment passed by this Court. The copies of representations, seniority lists, promotion orders have been annexed with the contempt petition. It is further averred in the contempt petition that the petitioner has also served upon respondents a legal notice for contempt of Court on 12.10.2010. But despite all these efforts of the petitioner, the respondents are continuously defying and violating the judgment passed by this Court.

3. It was also contended that recently Principal Secretary, Department of Personnel issued a Circular dated 11.10.2010 to the Principal Secretaries of all the departments for convening the DPC, despite quashing of Notifications dated 28.12.2002 and 25.04.2008. Copy of Circular dated 11.10.2010 is also annexed with the contempt petition. The petitioner further stated that respondents/contemnors have shown scant regard for the judgment of this Court and inaction on their part amounts to contempt of order of this Court. It was further stated that an authority of any high position should not be permitted to flout the orders issued by this Court. The respondents, therefore, are guilty of committing contempt of judgment passed by this Court, as such, they are required to be punished severely under the provisions of Contempt of Courts Act.

4. D.B. Civil Contempt Petition No. 359/2011 was filed on 08.03.2011, contending therein that this Court vide its judgment dated 05.02.2010 quashed Notifications dated 28.12.2002 and 25.04.2008, issued by State of Rajasthan. It was also contended that despite dismissal of SLP filed by State before the Hon'ble Supreme Court, the

respondents are not making compliance of judgment dated 05.02.2010 passed by this Court. The petitioners are suffering on account of inaction of the respondents, as rights of the petitioners are being curtailed for being considered for promotion into IAS, because the maximum age for consideration for appointment on the post of IAS is 54 years and the petitioners are approaching the maximum age. The respondents are, now, duty bound to restore the seniority of the petitioners, who have a right of seniority, which has accrued/vested in them by virtue of seniority list dated 26.06.2000. The respondents are deferring the compliance of the judgment on the ground of collection of quantifiable data required for enabling the State of Rajasthan to exercise power under Article 16(4A) of the constitution of India. It is also contended that in pursuance of judgment dated 05.02.2010, the State is not required to collect quantifiable data for making compliance of the judgment, because enabling power, under Article 16(4A) of the Constitution of India, is the discretionary power of the respective State Government. The State Government is neither under any obligation to give reservation in promotion

along with consequential seniority, nor the reserved category employees have any vested constitutional right for the same. The State has issued a letter dated 14.02.2011 in so-called compliance of judgment dated 07.12.2010 passed by the Hon'ble Supreme Court in SLP No. 6385/2010 and asked all the the departments to give information with regard to SC/ST employees from 01.04.1997 onwards, on year wise basis. The State has also directed all the concerned departments to give information in the proforma strictly, which was enclosed with the letter, on consolidated basis of the whole service and not separately with regard to different posts coming under that service. The letter dated 14.02.2011 is contemptuous because:

(A) The State cannot collect data with retrospective date in pursuance of M. Nagaraj case and judgment dated 07.12.2010.

(B) State has to collect data in each case i.e. each ladder of promotion in a service; otherwise the exercise would be a camouflage which will not show the conglomeration of SC/ST employees at higher echelons of the services.

5. Article 16(4A) of the Constitution of India is an enabling provision, which is based on Government's opinion with regard to backwardness and inadequate representation of SC/ST employees. This opinion cannot be

given retrospective effect in any possibility, rather such opinion will have prospective application. This aspect of the matter has further been discussed by the Hon'ble Supreme Court in the case of **Shiv Nath Prasad Vs. Saran Pal Jeet Singh Tulsi and Others, (2008) 3 SCC 80** and the Hon'ble Apex Court directed the Government of M.P. To conduct any exercise, if they so wish, with prospective effect and from that very date of exercise, the powers, which are vested in Articles 16(4A) and 16(4B) of the Constitution of India, can be exercised. This approach of the State is impermissible and contemptuous to the judgment dated 05.02.2010 passed by this Court. It is, therefore, prayed that the respondents/contemnors are guilty of committing the contempt of judgment dated 05.02.2010 passed by this Court and as such, they are required to be punished severely.

6. The petitioners filed an application on 11.05.2011 in D.B. Civil Contempt Petition No. 359/2011 for further initiating contempt proceedings contending therein that the State has constituted a High Level Committee on 31.03.2011 headed by Shri K.K. Bhatnagar (Retd. IAS) as Chairman and two Members

namely Shri Ashok Sampatram, Principal Secretary, School and Sanskrit Education and Shri Govind Sharma, Principal Secretary, Mines and Petroleum Department for making compliance of and in accordance with judgment dated 07.12.2010 passed by the Hon'ble Supreme Court in SLP (Civil) No. 6385/2010. It was also stated that this is a further endeavour by the State of Rajasthan for deferring the compliance of judgments dated 05.02.2010 and 07.12.2010. It was further stated that neither this Hon'ble Court, nor the Hon'ble Supreme Court has directed the State to constitute a committee for making compliance of the judgments. It was also stated that it seems that this Committee is superior to the orders of the Court and the State Government has strangely stated that the compliance of Court judgments would be made only on the recommendations of the Committee. The constitution of the Committee is clearly an attempt to over-reach the process of the Court and to reduce the esteem of the judiciary, which is highly deplorable and contemptuous. The members of Committee are also liable to be punished for committing contempt of Court by participating in such an action. It is further mentioned in the

application that the Committee has started functioning, which clearly brings them under the jurisdiction of contempt of Court. It is also stated that the Law Department of State of Rajasthan, in compliance of judgment dated 05.02.2010, has passed necessary orders for making reversions and issuing the amended seniority lists after giving the benefit of regaining of seniority to general category employees. It was prayed in the application that Chairman and Members of the Committee be impleaded as party in the array of respondents/contemnors and contempt proceedings may also be initiated against them.

7. This Court, in D.B. Civil Contempt Petition No. 941/2010, issued notice to respondents on 01.11.2010. The State of Rajasthan filed I.A. No. 5/2010 before Hon'ble Supreme Court contending that arguments in SLP preferred by the State were concluded on 04.08.2010 and a notice has been issued in contempt petition pending in the High Court. The Hon'ble Apex Court stayed the contempt proceedings pending before this Court on 16.11.2010/25.11.2010. The Special Leave Petition filed by the State was dismissed by the Hon'ble Apex Court on

07.12.2010. Later on I.A. No. 5/2010 came up for hearing and the Hon'ble Apex Court observed that since Special Leave Petitions have been dismissed, even I.A. does not survive and the same was dismissed vide order dated 20.07.2011.

8. In D.B. Civil Contempt Petition No. 359/2011, notices were issued to respondents on 06.04.2011, but no proceedings took place in view of stay order passed by the Hon'ble Supreme Court in I.A. No. 5/2010. However, in view of dismissal of Special Leave Petition filed by the State before the Hon'ble Supreme Court, I.A. No. 5/2010 was also dismissed on 20.07.2011.

9. The contempt petition was listed on 28.07.2011 and on the request of learned Advocate General, the matter was adjourned for three weeks to report the compliance of judgment passed by this Court and affirmed by the Apex Court.

10. The respondents filed an application on 20.08.2011 seeking three weeks time for taking appropriate decision in the light of judgments passed by the Hon'ble Apex Court in the cases of **M. Nagaraj and Others Vs. Union of India and Others, (2006) 8 SCC 212** and

Suraj Bhan Meena and Another Vs. State of Rajasthan and Others, (2011) 1 SCC 467 and judgment passed by this Court dated 05.02.2010.

11. Again on 29.08.2011, further time was sought by the State, which was granted, to make compliance of judgment passed by this Court.

12. The matter was listed on 13.09.2011, the respondents filed their reply to Contempt Petition No. 359/2011, (Which is not on oath, as the same is not duly attested by Oath Commissioner), wherein it was contended that State Government took steps to comply with the orders passed by the High Court and the Supreme Court and constituted a Committee headed by Shri K.K. Bhatnagar vide order dated 21.03.2011. The Committee submitted its report on 29.08.2011. In para 5 of the reply, it was further mentioned that in compliance of the judgment passed by this Court, the State Government has passed following orders:-

(i) The notification dated 11.09.2011 withdrawing the notification dated 28.12.2002 and 25.04.2008;

(ii) The seniority list relating to selection scale and supertime scale issued on 15.6.2009 for the period from 1.4.1998 to 1.4.2008 has been withdrawn and it has been further ordered that those officers who were promoted in pursuance to these seniority lists would

continue on ad-hoc basis till further orders.

13. Copies of both the orders dated 11.09.2011 were placed on record as Annexure R/1 and R/2 and it was contended that judgment passed by this Court has been complied with. It was further submitted that after taking into consideration the report of Bhatnagar Committee, the State Government took a decision to amend the Rajasthan Administrative Service Rules, 1954(for short 'the Rules of 1954') and the amendment has been sent for publication in the Gazettee. Copy of amendment dated 11.09.2011 was also annexed as Annexure R/3. It was also stated that in the light of the aforesaid amendment, which has been brought into force from 01.04.1997, the seniority and the promotion will be revised. It was also stated that the delay in compliance of judgments dated 05.02.2010 and 07.12.2010 occurred on account of administrative reasons, constitution of Committee and its report, which was received on 19.08.2011 only. The respondents tendered unconditional apology for the delay in compliance of the judgment.

14. The petitioners filed rejoinder to the reply on 16.09.2011, wherein it was contended that State of Rajasthan did not

undertake the required exercise for enabling the power vested with the State of Rajasthan under Article 16(4A) of the Constitution of India. The exercise under Article 16(4A) of the Constitution of India cannot be given retrospective effect, as this would be physical exercise with regard to existence of the compelling reasons for enabling the power vested with the Government under Article 16 (4A). The Hon'ble Supreme Court and this Hon'ble Court never directed the State to constitute any committee for making compliance of the judgments, rather compliance to the judgment dated 05.02.2010 does not require formation of any committee. The Hon'ble Apex Court in its order dated 20.07.2011 specifically observed that Bhatnagar Committee has no connection with the compliance of the judgment dated 05.02.2010. This Court had recognised the accrued and vested right of the general category employees to regain their seniority over erstwhile junior SC/ST employees. Notification dated 01.04.1997 has been repealed with effect from 01.04.1997. This action itself is a blatant illustration of contempt of this Court's judgment dated 05.02.2010. This Court and the Hon'ble

Supreme Court both recognised the revival of notification dated 01.04.1997 after quashing of the notifications dated 28.12.2002 and 25.04.2008. So, the general category employees were held entitled to regain their seniority and promotion over erstwhile junior SC/ST employees. The contempt petition has been filed for compliance of notification dated 01.04.1997 and the State, under the garb of compliance, has withdrawn the same notification. The Notification dated 11.09.2011 has withdrawn the earlier Notifications dated 28.12.2002 and 25.04.2008, whereas they had already been quashed vide judgment dated 05.02.2010 passed by this Court. The withdrawal of the notifications is simply over-reaching the judgment passed by this Court. The State although has withdrawn the notifications, but recasted the Notification dated 28.12.2002 in different language, having same purport, intent and impact.

15. It was also contended in the rejoinder that the Notification dated 11.09.2011 says that, “If on the application of these provisions Scheduled Castes/Tribes employees who had been promoted earlier and are found in excess of adequacy level, shall

not be reverted and shall continue on ad-hoc basis, and also any employee who had been promoted in pursuance of Notification NO. F7 (1)DOP/A-II/96 dated 1-4-1997 shall not be reverted." It is contemptuous because this Hon'ble Court has held that reservation in promotion and consequential seniority to SC/ST employees in pursuance of notifications dated 28.12.2002 and 25.04.2008 is illegal. Despite of this, the respondents have taken a decision to continue with SC/ST employees on ad-hoc basis, which is clear, deliberate and willful disobedience and disregard to the orders of this Court. It shows that the contemnors have no respect for the judgment passed by this Court. The 'Explanation' appended in the Notification dated 11.09.2011 is contemptuous because this Hon'ble Court had endorsed the correct compliance of the judgment of Hon'ble Supreme court in the case of M. Nagaraj. The Hon'ble Supreme Court in M. Nagaraj had categorically observed that adequate representation is not proportionate representation, but the State of Rajasthan has defined the adequate representation in proportionate manner, which is contemptuous. It was also contended that Respondent No. 1, Chief Secretary has not bothered to file

reply and the Principal Secretary, for the ulterior motives and considerations, is misrepresenting before this Court by issuing Notification dated 11.09.2011 that compliance to the judgment dated 05.02.2010 has been made. The petitioners have further stated that the order dated 11.09.2011 passed by State, whereby seniority lists have been withdrawn and the persons, who were illegally given promotions, are allowed to continue on ad-hoc basis, is contemptuous for the following reasons:

(A) The Seniority list(s), which were already quashed by this Court Vide judgment dated 05.02.2010, are being withdrawn, which is none the less an endeavour to subrogate the judgment of this Hon'ble Court and show the supremacy of the Executive over the judgment of this Court, which needs to be taken sternly. There seems no administrative purpose and impact to withdraw seniority list (s), which were already quashed.

(B) The persons, whose promotions and seniority was held illegal by this Court, are now being protected by the State of Rajasthan vide order dated 11.09.2011, which is contemptuous.

16. It is further contended that the report of Bhatnagar Committee has no nexus with the compliance of judgment of this Court. This Court gave the general category candidates their vested and accrued rights to regain seniority and promotion over junior SC/ST employees, which do not require any report of Committee. Notification dated

11.09.2011 shows that SC/ST employees are represented more than required and the State of Rajasthan is with-holding this information from this Court. In the additional plea, the petitioners have stated that the Government had given illegal promotions and consequential seniority to junior SC/ST employees, which now should be reverted and they be placed below the general category employees. Any sort of protection or benefit afforded by the State to reserved category employees, would be contemptuous. The general and OBC category employees should be allowed to regain their seniority. Notification dated 11.09.2011 is nothing than the reiteration of the earlier quashed Notification dated 28.12.2002.

17. The petitioners also filed an application on 16.09.2011 to implead Nalini Kathotia, Deputy Secretary to Government, Department of Personnel, who signed the Notification dated 11.09.2011, as party and for initiating contempt proceedings against her also.

18. The matters were listed on 18.10.2011 and on the request of learned Advocate General, time was granted to State Government to examine the propriety of retrospective amendment, which has been made.

The matters were again listed on 03.11.2011 and again time was given to respondents to undertake the exercise, which was pointed out on 18.10.2011 by learned Advocate General. It was also undertaken by the respondents that the rule, which has been amended, will not be given effect to in the matter with respect to Rajasthan Administrative Services. However, this Court ordered with respect to subject matter in question that till next date, unless and until the exercise is undertaken and this Court is appraised, no order be issued.

19. The matters were listed on 16.12.2011. The petitioner filed Additional Affidavit stating therein that State of Rajasthan had enacted an Act on 30.07.2009 i.e. “The Rajasthan Schedule Castes, Schedule Tribes, Backward Classes, Special Backward Classes and Economically Backward Classes (Reservation of Seats in Educational Institutions in the State and of Appointments and posts in Services under the State) Act, 2008(Act No. 12 of 2009)”, (for short 'the Act of 2008), which provides reservation of seats in educational institutions in the State and of appointments and posts in the services under the State in favour of

Scheduled Castes, Schedules Tribes, Backward Classes, Special Backward Classes and Economically Backward Classes and for matters connected therewith or incidental there to. The Act was enacted resorting to proviso to Article 309 of the Constitution of India and Section 4 of the Act of 2008 deals with reservation of appointment and posts in the services under the State.

20. It was further stated that constitutional validity of the Act of 2008 was questioned in D.B. Civil Writ Petition No. 13491/2009, which was disposed off on 22.12.2010. This Court vide judgment dated 22.12.2010 stayed the operation of Sections 3 and 4 of the Act of 2008 and notification with respect to enhancing financial limit of creamy layer from 2.5 lacs to 4.5 lacs and with the consent of parties, the matter was referred to Rajasthan State Backward Classes Commission for examining the extent and requirement of reservation in promotion and initial recruitment. It was further stated that Article 309 of the Constitution of India empowers the legislature to pass enactment, which may regulate the recruitment and conditions of services of persons appointed in public services. The State of Rajasthan,

in pursuance of powers, enacted the Act of 2008. It was further stated that in view of Article 309 of the Constitution of India and proviso thereof, the State Government is only empowered to frame rules under Proviso to Article 309, until an enactment is made by the legislature under Article 309. However, after the enactment made by the legislature, the Executive is divested of the power to frame any rules under Proviso to Article 309 of the Constitution of India, as all rules, which are framed, shall have effect subject to provisions of such Act. Since Act of 2008 had already been enacted, therefore, Executive had no power under the Constitution of India to enact a rule. The Notification dated 11.09.2011 issued and annexed by the respondents with reply to contempt petition is de-hors the provisions of Constitution of India and amounts to over-reaching the process of Court and is contemptuous conduct of the respondents. This Court after hearing arguments of the parties, directed the State Government to consider the implication of the interim stay granted in CWP No. 13491/2009 decided along with other writ applications on 22.12.2010 and to take a considered decision and also to file counter affidavit to the

additional affidavit filed by the petitioners. Order dated 16.12.2011 passed by this Court is reproduced as under:

> "Arguments further heard.
>
> It was submitted by Shri Sanjeev Prakash Sharma, Senior Counsel appearing with Mr. Shobit Tiwari that provisions for reservation were made by State Legislature by enacting the Rajasthan Schedule Castes, Schedule Tribes, Backward Classes, Special Backward Classes and Economically Backward Classes (Reservation of Seats in Educational Institutions in the State and of Appointments and Posts in Services under the State) Act, 2008(for short 'the Act of 2008'). Section 4(3) of the said Act provides for reservation in promotion also, however, the said provision was enacted without undertaking exercise emphasized in the decision laid down by Hon'ble Apex Court in **M. Nagraj & ors. V/s. Union of india and ors. (2006) 8 SCC 212**.
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> Section 4 of the provision of the said Act of 2008 is quoted below:-
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> "4. Reservation of appointments and posts in the services under the State – (1) the reservation of appointments and posts in the services under the State for the Scheduled Castes, Scheduled Tribes, Backward Classes, Special Backward Classes and Economically Backward Classes shall be sixty-eight per cent.
> (2) The reservation referred to in sub-section (1) shall, in respect of the persons belonging to the Scheduled Castes, Scheduled Tribes, Backward Classes, Special Backward Classes and Economically Backward Classes, be as follows:-

(i) Scheduled Castes ..... sixteen per cent;
(ii)Scheduled Tribes.....twelve per cent;
(iii)Backward Classes.....twenty one per cent;
(iv) Special Backward Classes..... five per cent;
(v) Economically Backward Classes.....fourteen per cent;

Explanation – The above classification shall be mutually exclusive.

(3) Notwithstanding anything contained in sub-section (1) and sub-section (2), reservation in matters of promotion shall be only for the Scheduled Castes and Scheduled Tribes to the extent specified in Clauses (i) and (ii), respectively, of sub-section (2).

(4) Notwithstanding anything contained in sub-section (1) and sub-section (2), persons belonging to creamy layer shall not be eligible for consideration against the reserved quota in the appointments and posts under the State. However, for the removal of doubts, it is clarified that the provision of creamy layer shall not apply to the reservation for the Scheduled Castes and Scheduled Tribes."

It was submitted by Mr. Sanjeev Prakash Sharma that this Court has stayed the operation of the provisions of Sections 3 and 4 of the Act of 2008 in D.B. Civil Writ Petition No. 13491/2009, while deciding the same finally on 22nd December, 2010. In that petition, following order was passed by this Court:-

"We direct the State not to give effect to the Sections 3 and 4 of the Act of 2008 and the

Notification with respect to enhancing financial limit of creamy layer from 2.5 lacs to 4.5 lacs. Let the State reconsider provision for creating Special Backward Class, provision of 14% reservation to EBC also.
As agreed, let the matter be referred to the Rajasthan State Backward Classes Commission and the State Government shall place before the Commission the quantifiable data of numerous factors which is necessary in light of the Apex Court decisions in the case of M.Nagaraj(supra) and Ashoka Kumar Thakur(supra). As collection of quantifiable data is going to consume sufficient time, let this exercise be completed within a period of one year. The petitioners shall also be given opportunity amongst others in accordance with law to present their case before the Commission. It is reiterated that stay shall continue till the matter is decided afresh and even if the State decides to enhance reservation beyond the percentage which was existing prior to coming into force the Act of 2008, the State shall not give effect to the said enhanced percentage of reservation for a period of two months thereafter. As agreed, we leave all the questions raised in the petitions to be examined by the State at first instance in the light of amended provisions of Articles 15 and 16 of the Constitution and decisions of Apex Court in Indra Sawhney(supra), M.Nagaraj(supra), Ashoka Kumar Thakur(supra), Suraj Bhan Meena(supra) and S.V. Joshi (supra).”

In view of the aforesaid discussions by this Court, it is clear that operation of Section 4 of the Act of 2008 has been stayed and State Government has also enacted the provisions with respect to reservation in

promotion.

Article 309 of the Constitution of India provides rule making power available to the State Government until an enactment is made by the Legislature under Article 309 of the Constitution of India. Thus, it is submitted that in view of the enactment of the provisions of Section 4 by the State Legislature, it was not open to the State Government to exercise the power under Article 309 of the Constitution of India by enacting the rules vide notification dated 11th September, 2011. It was also submitted that in view of the fact that operation of Section 4(3), which provides for reservation in promotion, has been stayed and the said order has not been vacated so far, it was not open to the State Government to enact the rule under the proviso to Article 309 of the Constitution of India by issuing the notification dated 11th September, 2011. In view of interim order, it was not open for the State Government to enact a rule under proviso to Article 309 pursuant to the direction issued by this Hon'ble Court. An affidavit has also filed in this regard by the petitioner.

Mr. G.S. Bapna, Advocate General appearing on behalf of the State has rightly submitted that implication of the interim stay granted in CWP No. 13490/2009 decided along with other writ applications on 22nd December, 2010 has to be considered by the State Government. It was also to be considered whether after enacting the provisions contained in Section 4(3) with respect to reservation in promotion, it was not open to the State Government to undertake that exercise by way of making rule under Article 309

> of the Constitution of India and particularly whether it was open for the State Government to enact the Rules as provision of Section 4 has been stayed by this Court, till the exercise is undertaken by the Commission as mentioned in the aforesaid order.
>
> We direct the State Government to consider the aforesaid aspect and take a considered decision and also to file counter to additional affidavit, which has been filed today by the petitioner, within a period of fifteen days from today.
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> List on 12th January, 2012, as prayed." (Emphasis supplied)

21. The respondents filed their counter affidavit on 11.01.2012 to the additional affidavit filed by the petitioners and submitted that at this late, no leave could be granted by the Court for filing of Additional Affidavit. The Act of 2008 was neither an issue before this Court, nor before the Hon'ble Supreme Court as well as in the present contempt petitions. The judgment of this Court dated 05.02.2010 does not even remotely touch or decide on the issue of Act of 2008. It was also stated that the petitioner is misconstruing the judgment passed by this Court. In the present case, there is no challenge to the validity of amended rule dated 11.09.2011. It was also stated that it is incorrect to

say that rule has been framed de-hors the provisions of the Constitution of India and amounts to over-reaching the process of the Court and is contemptuous conduct. In fact, the rule has been framed by the State Government in exercise of its rule making legislature power under Proviso appended to Article 309 of the Constitution of India and legislative in character.

22. The petitioners filed reply to counter affidavit on 12.01.2012 stating therein that Section 4(3) of the Act of 2008 provides reservation in promotion. The Act, as per the preamble, provides for reservation and promotion by exercising the enabling power as conferred to the State under Article 16(4A) of the Constitution of India. It was further stated that rules, regulating the recruitment and the conditions of services of persons appointed by the Government, can be framed, until provision in that behalf is made under the Act of the appropriate legislature. The Notification dated 11.09.2011 was not issued under the provisions of the Act of 2008. It was also stated that Respondent/contemnor, Mr. Khemraj, who is Principal Secretary to Department of Personnel, was also party to judgment passed in Captain Gurvinder's case

and was having full knowledge of earlier judgment passed in Suraj Bhan Meena's case. Inspite of having knowledge of the directions issued in Captain Gurvinder's case on 22.12.2010 and also that State Government has enacted Act of 2008, with ulterior motives and ill intentions, to flout the order of this Court and to low down the esteem of this Court, proceeded to issue the Notification dated 11.09.2011, which was beyond his powers, therefore, he has abused the powers to show dishonour and contempt to this Court. It has further been stated that State of Rajasthan has issued contemptuous Notification dated 11.09.2011, which virtually set aside the judgment dated 05.02.2010 passed by this Court, therefore, Respondents be held guilty for committing contempt of judgment passed by this Court and they be punished suitably.

23. Mr. S.P. Sharma, learned Senior Advocate, appearing with Mr. Shobhit Tiwari, Advocate, submitted that judgment passed by this Court has not been complied with; Common judgment was passed way back on 05.02.2010; judgment passed by this Court was upheld and Special Leave Petition filed by the State was dismissed on 07.12.2010; the

regaining seniority rule was added to Rule 33 of Rules of 1954 vide Notification dated 01.04.1997; seniority list was prepared on that basis, however, said proviso introduced vide Notification dated 01.04.1997 was illegally deleted vide Notification dated 28.12.2002 and new proviso was added. Thereafter, new proviso, added vide Notification dated 28.12.2002, was also deleted vide notification dated 25.04.2008. Both the Notifications dated 28.12.2002 and 25.04.2008 were quashed vide judgment dated 05.02.2010 passed by this Court, the regaining seniority rule was restored and earlier seniority list prepared and issued on that basis should have been restored and all promotions should have been reviewed, but the respondents deliberately violated the judgment dated 05.02.2010 passed by this Court, earlier in the name of filing of SLP before the Hon'ble Supreme Court, despite the fact that no interim order was passed by Hon'ble Apex Court; after dismissal of the SLP filed by the State; in the name of appointment of K.K. Bhatnagar Committee and ultimately instead of complying with the judgment of this Court, introduced a new rule dated 11.09.2011, which itself amounts to

contempt of order of this Court. The Proviso added vide Notification dated 01.04.1997 was upheld by Division Bench of this Court in **B.K. Sharma & 7 Anr. Vs. State of Rajasthan & Others, 1998(2)WLC(Raj.)583** and by the Hon'ble Supreme Court in **Ram Prasad and Others Vs. D.K. Vijay and Others, (1999) 7 SCC 251** and effect of judgment of the Hon'ble Supreme Court was given and number of officers were reverted and number of officers were promoted on that basis, but vide Notification dated 28.12.2002, the Proviso added vide Notification dated 01.04.1997 was withdrawn, therefore, on the basis of vested and accrued rights, the Notification dated 28.12.2002 was quashed by this Court. The same is the position in the present case also. The vested and accrued rights under Notification dated 01.04.1997 have again been taken back vide Notification dated 11.09.2011. The persons, who were illegally promoted after new Proviso was added vide Notification dated 28.12.2002, which was quashed by this Court, have not been reverted and the general and OBC candidates, who should have been promoted, in their place, have not been promoted. Rather, those persons, who were illegally promoted, have

been saved and it has been provided in the Notification dated 11.09.2011 that those persons will be treated as Ad-hoc, but they will not be reverted, meaning thereby, the general and OBC candidates, who should have been promoted in their place, have not been and could not be promoted, therefore, this is a clear cut case of deliberate contempt of order of this Court. The rule introduced vide Notification dated 11.09.2011, in the facts and circumstances of the case, could not have been made effective with effect from 01.04.1997. At the most, it could have been made effective with immediate effect or prospective effect, that too after complying with all the three conditions, as per the judgment of Hon'ble Supreme Court in M. Nagaraj's case. The appointment of K.K. Bhatnagar Committee itself is a contempt of order of this Court. There was no direction by this Court or by the Hon'ble Supreme Court to appoint any committee for execution of judgment passed by this Court. The Hon'ble Apex Court, while dismissing I.A. No. 5/2010 filed by the State on 20.07.2011, observed that there is no connection between the formation of the said Committee and these proceedings, which have already come to an

end; even as per report of Bhatnagar Committee, there was sufficient representation of reserved category candidates in number of departments of the State, but still the rules of those departments have also been amended. The amendment could not have been brought by way of Notification dated 11.09.2011 to nullify the judgment passed by this Court. The lacunae, pointed out, have not been cured, they still exist; the framing of rule vide Notification dated 11.09.2011 is nothing, except over-reaching the Court's order, which is not permissible. He also referred memo of Special Leave Petition filed by the State before the Hon'ble Supreme Court, particularly Page 21 and submitted that even it was a case of the State before the Hon'ble Apex Court that after quashing of Notifications dated 28.12.2002 and 25.04.2008, the Notification dated 01.04.1997 revives and becomes effective. The respondents took time from this Court to comply with the judgment, but, instead of complying with the judgment, they have only delayed the contempt proceedings and now, they have placed on record a new Notification dated 11.09.2011 in the name of compliance of

judgment passed by this Court, which, in fact, itself is contemptuous, as it is de-hors the judgment passed by this Court. The conduct and arrogance of the respondents are proved from the fact that vide another Notification dated 11.09.2011, they have withdrawn both the Notifications dated 28.12.2002 and 25.04.2008 saying, “Existing Notifications”, whereas both the Notifications had already been quashed by this Court on 05.02.2010 and the same became non-effective and non-est with immediate effect, after passing of judgment by this Court on 05.02.2010, therefore, in no circumstances, it could have been said that the “existing notifications” are withdrawn; they ceased to exist on the day of passing of judgment by this Court and could not have been treated as existing notifications after the judgment of this Court. The seniority list should have been issued on the basis of rule, which was in existence prior to issuance of Notification dated 28.12.2002, but the same was not issued, nor promotions were made on that basis. Notification dated 01.04.1997 was upheld by Division Bench of this Court earlier in **B.K. Sharma's case (Supra),** then by the Hon'ble Supreme Court in

Ram Prasad's case(supra) and again by this Court vide judgment dated 05.02.2010, but the same has again been withdrawn vide Notification dated 11.09.2011 with effect from 01.04.1997. He further submitted that so far as Respondent No. 1, Mr. Salauddin Ahmed is concerned, he has not even filed reply to any contempt petition, nor he has filed any affidavit in support of reply in the name of respondents and the same is only supported by affidavit of Respondent No. 2, Mr. Khemraj Chaudhari, therefore, so far as Respondent No. 1 is concerned, he has not even cared to defend himself by saying that order has been complied with, or he is interested in compliance of the judgment or as to why he has not complied with the judgment passed by this Court. He further submitted that while exercising powers under Article 309 of the Constitution of India, the respondent-State had already enacted Act of 2008; the effect of Sections 3 and 4 of the Act of 2008 was stayed on the basis of agreement of both the parties vide order dated 22.12.2010 passed by this Court in D.B. Civil Writ Petition No. 13491/2009, therefore, the present Notification dated 11.09.2011 could not have been issued, while

exercising powers under Proviso to Article 309 of the Constitution of India, as the State had already enacted an Act. The powers under Proviso to Article 309 of the Constitution of India could only be exercised till an enactment of the Act, whereas in the present case, the Act of 2008 had already been enacted. The rule could have been made only under the provisions relating to rule making power provided in Act of 2008, therefore, Notification dated 11.09.2011 is invalid rule and the same cannot be said to be a compliance of judgment passed by this Court. The judgment has not been complied with even for the last two years, therefore, it is a clear cut case of deliberate contempt of judgment passed by this Court and the respondents be punished suitably.

24. Mr. C.S. Vaidhyanathan, Senior Advocate, appearing with Dr. Manish Singhvi, Additional Advocate General, Ms. Raj Sharma, Additional Government Counsel, and Mr. Veyankatesh Garg, on behalf of the respondents submitted that the order passed by this Court was challenged by the State before the Hon'ble Supreme Court and the Hon'ble Apex Court passed a very detailed and reasoned judgment, therefore, order of this

Court merged in the judgment passed by the Hon'ble Supreme Court and since the order of this Court has merged, therefore, the same does not exist. In these circumstances, the contempt petitions before this Court are not maintainable. The contempt petition, in the present matter, can be preferred only before the Hon'ble Supreme Court and in no circumstances, the present contempt petitions can be said to be maintainable before this Court. In support of his submissions, he referred **Gangadhara Palo Vs. Revenue Divisional Officer And Another, (2011) 4 SCC 602**.

25. He also submitted that Notification dated 11.09.2011 is sufficient compliance of order of this Court. The validity of this Notification cannot be judged in these contempt proceedings. This notification gives a separate cause of action and if the petitioners feel aggrieved by it, then they may challenge the same by way of fresh writ petition, but after framing of rule vide Notification dated 11.09.2011, the present contempt petitions have become infructuous.

26. He further submitted that after quashing of Notifications dated 28.12.2002 and 25.04.2008, the earlier Notification

dated 01.04.1997 does not revive automatically. He has submitted that there is no specific direction of this Court to comply with the Notification dated 01.04.1997 and since it does not revive automatically, therefore, no contempt is made out against the respondents in the present case. In support of his submissions, he referred **B.N. Tewari V. Union of India and Others, AIR 1965 SC 1430** and **Firm A.T.B. Mehtab Majid and Co. Vs. State of Madras and Another, [1963] Supp 2 SCR 435**.

27. He also submitted that merits of the case cannot be gone into in these contempt proceedings. The catch up rule of 1997 has been superseded by new Notification dated 11.09.2011. The State has power to make rules prospectively and retrospectively both under Article 309 of the Constitution of India. The State has also power to make any rule to cure the mistake pointed by the Court. The State, while exercising its powers, has framed the rule notified vide Notification dated 11.09.2011. He further submitted that there is no constitutional sanctity to catch up rule i.e. regaining seniority rule. So far as submission with regard to Act of 2008 is concerned, he

submitted that it is not the subject matter of present contempt petitions. The additional affidavit filed by the petitioners in this regard was at a very late stage, which has wrongly been taken on record. The order dated 22.12.2010 passed in Captain Gurvinder's Case is not at all relevant in the present case. The State has powers under Proviso to Article 309 of the Constitution of India to frame the rules.

28. He also submitted that Bhatnagar Committee's report is not a subject matter of this case, therefore, the same cannot be examined on merits in these contempt proceedings. He, therefore, submitted that this Court has no jurisdiction to entertain, hear and decide the contempt petitions, as the order of this Court merged in the order of the Hon'ble Supreme Court; the Notification dated 11.09.2011 is complete compliance of judgment passed by this Court and present contempt petitions have become infructuous. In these circumstances, there is no merit in any of the submissions of learned counsel for the petitioners and the contempt petitions may be dismissed.

29. We have considered the submissions of learned counsel for the parties; perused

the judgment passed by this Court as well as so-called compliance report filed by the respondents by way of reply to contempt petition and other documents available on record.

30. Before considering the submissions of parties, it will be useful to mention some facts of the original writ petition, in very brief, to know the background and intention of order of this Court on 05.02.2010, which is said to have not been complied with. The petitioners, who are members of Rajasthan Administrative Services, preferred writ petition before this Court challenging Notifications dated 25.04.2008 and 28.12.2002. The petitioners also prayed that an appropriate writ be issued directing the respondents to strictly adhere to the “catch up” rule and revise the seniority of all the petitioners in comparison to the candidates belonging to Scheduled Castes and Scheduled Tribes, after giving the benefit of regaining of the seniority to the general/OBC category candidates, as envisaged by the Notification dated 01.04.1997 and provisional seniority list dated 26.06.2000 of selection scale of the RAS and to restrain the respondents from providing the consequential seniority to the

candidates belonging to the Scheduled Castes and Scheduled Tribes, as the Rules of 1954 were not framed in pursuance of Article 16 (4A) of the Constitution of India. The position of Petitioner No. 1, Bajrang Lal Sharma and Respondent No. 3, Suraj Bhan Meena and Respondent No. 4 Sriram Choradia in the seniority list was also referred and it was averred in the writ petition that as per seniority list dated 26.06.2000, as on 01.04.1997, the Petitioner No. 1, Bajrang Lal Sharma was placed at Serial No. 129 and the Respondent Nos. 3 and 4 namely Suraj Bhan Meena(ST) and Sriram Choradia(SC) were placed at Serial No. 142 and 147 respectively, whereas after deletion of proviso added to Rule 33 vide Notification dated 01.04.1997, the Petitioner No. 1 Bajrang Lal Sharma was placed at Serial No. 170, Respondent No. 3 Suraj Bhan Meena(ST) at Serial No. 72 and Respondent No. 4, Sriram Choradia(SC) at Serial No. 101, as per Seniority List dated 24.06.2008, as on 01.04.1997, i.e. both Respondent Nos. 3 and 4 were placed above the Petitioner No. 1. In Seniority List dated 02.07.2008 as on 01.04.2008, the name of Petitioner No. 1, Bajrang Lal Sharma was shown at Serial No. 107, whereas the names of

Respondent No. 3, Suraj Bhan Meena(ST) and Respondent No. 4, Sriram Choradia(SC) were placed at Serial No. 34 and 53 respectively. From the above, it is clear that the Petitioner No. 1, Bajrang Lal Sharma, who, as per Notification dated 01.04.1997, was above Respondent No. 3, Suraj Bhan Meena and Respondent No. 4, Sriram Choradia, members of Scheduled Castes and Schedules Tribes, was placed below the Respondent Nos. 3 and 4, after the deletion of rule of 01.04.1997.

31. The deletion of proviso added on 01.04.1997 and insertion of new proviso in rules, vide Notification dated 28.12.2002 and deletion of new proviso added in rules on 28.12.2002, which was deleted vide Notification dated 25.04.2008, were examined and the same were found contrary to the judgment of the Hon'ble Supreme Court in M. Nagaraj's case and also contrary to the vested and accrued rights of the petitioners, therefore, both the Notifications dated 28.12.2002 and 25.04.2008 were quashed and set aside. This Court formulated two questions, which are reproduced as under:

> “1. Whether Notification dated 25.04.2008 which came into force with effect from 28.12.2002, is violative of Articles 14 and 16 of the Constitution, as it takes away the vested and accrued

rights retrospectively?

2. Whether Notification dated 28.12.2002 is violative of Articles 14 and 16 of the Constitution?"

32. Question No. 1 was dealt with in Para Nos. 71 to 95. The conclusion of question No. 1 is in Para No. 95 of the Judgment dated 05.02.2010, which reads as under:

"95. The above discussion makes it clear that retrospective effect of Notification dated 25.4.2008 has taken away the accrued and vested rights of the petitioners, therefore, it is arbitrary, discriminatory and violative of the rights guaranteed under Articles 14 and 16 of the Constitution. Therefore, we declare the Notification dated 25.4.2008 as ultra vires to the Constitution and the same is hereby quashed."

33. Question No. 2 was considered in Para Nos. 96 to 115. Relevant Para Nos. 113 to 115 are reproduced as under:

"113. The learned Advocate General, in this regard, conceded while arguing the application under Article 226(3) of the Constitution in SBCWP No.8104/2008, before the learned Single Judge. The said admission of the learned Advocate General finds place in the impugned order dated 9.7.2009 passed by the learned Single Judge. The learned Advocate General fairly and frankly admitted that the required exercise as per M.Nagaraj's case (supra) was not done by the State before issuing Notifications dated 25.4.2008 or

28.12.2002. The State Government could not have amended the Various Service Rules on 28.12.2002 only on the basis of the Constitution (Eighty-Fifth Amendment) Act on 4.1.2002, as the same was only an enabling provision, and in case the State Government wanted to give effect to the Constitution (Eighty-Fifth Amendment) Act, then the three exercises, as mentioned in M.Nagaraj's case (supra), was necessary, which were admittedly not carried out before issuing the impugned notification. Therefore, the impugned Notification dated 28.12.2002 is violative of Articles 14, 16 and 16(4A) of the Constitution, and the same is liable to be declared ultra vires to the Constitution.

114. Apart from the above, it is also to be noted that the amendment in the Various Service Rules vide Notification dated 1.4.1997 was upheld by the Division Bench of this Court in B.K. Sharma's case (supra) and also by the Hon'ble Apex Court in the case of Ram Prasad Vs. D.K. Vijay (supra). Vide the aforesaid two judgments, the right of seniority and promotion had vested in the persons belonging to general/OBC categories. Therefore, to nullify the judgment of B.K. Sharma's case and the Hon'ble Apex Court in the case of Ram Prasad Vs. D.K. Vijay (supra), and to deprive the petitioners from their accrued and vested right under statute and above judgments, the Various Service Rules including the RAS Rules, could not have been amended vide Notification dated 28.12.2002 with effect from 1.4.1997, as held by the Hon'ble Supreme Court in Union of India & Ors. Vs. Tushar Ranjan Mohan, (1994) 5 SCC 450 and Chairman, Railway Board Vs.

> C.R. Rangadhamaiah, (1997) 6 SCC 623.
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> 115. In view of above discussion, the notification dated 28.12.2002 is liable to be quashed, and the same is hereby quashed and set aside."

34. Consequently, both the notifications were quashed and all consequential orders or actions taken by the respondents including seniority list of super time scale as well as selection scale based on the old notifications were quashed. Para No. 116 of the judgment dated 05.02.2010 is reproduced as under:

> "116. In view of our findings on both the questions, the writ petitions No.8104/2008, 6241/2008 and 7775/2009 are allowed and Notifications dated 28.12.2002 and 25.4.2008 are declared ultra vires to the provisions of Articles 14 and 16 of the Constitution, and the same are hereby quashed and set aside. All consequential orders or actions taken by respondent-State including seniority list of Super Time Scale as well as Selection Scale of the Rajasthan Administrative Service officers, on the basis of above notifications are also quashed and set aside."

35. The above facts show that the State Government added Proviso to Rule 33 of RAS Rules and also in other various service rules to give benefit of regaining seniority to general and OBC candidates w.e.f. 01.04.1997

and thereafter, a seniority list was issued and all the petitioners, belonging to general and OBC category, were placed above the respondents, belonging to Scheduled Castes and Scheduled Tribes category. The Notification dated 01.04.1997 was upheld by Division Bench of this Court in B.K. Sharma's case and by the Hon'ble Supreme Court in Ram Prasad's case. The Parliament passed the Constitution(Eighty-Fifth Amendment) Act on 04.01.2002 w.e.f 17.06.1995, which was only an enabling provision and the State Government, without exercising three exercises, as mentioned in M. Nagaraj's case, amended RAS and various service rules vide Notification dated 28.12.2002, whereby earlier Notification dated 01.04.1997 was deleted and new Proviso was added, safeguarding the interest of those employees, who were promoted as per Notification dated 01.04.1997. However, the new Proviso, which was added vide Notification dated 28.12.2002, was also withdrawn vide Notification dated 25.04.2008. Again the seniority list was issued and all the petitioners, belonging to general and OBC category, were placed below the respondents, belonging to Scheduled Castes and Scheduled Tribes category.

Admittedly, the three exercises were not done, as per M. Nagaraj's case by the State Government before issuing Notifications dated 25.04.2008 or 28.12.2002 and vested/accrued rights had been taken away by these Notifications, therefore both the Notifications dated 28.12.2002 and 25.04.2008 were quashed and it was directed that all consequential orders or actions taken by the respondent-State Government including seniority list of Super Time Scale as well as Selection Scale of Rajasthan Administrative Service Officers shall also be quashed and set aside. When new seniority lists were issued on the basis of Notifications dated 28.12.2002 and 25.04.2008 and respondents, belonging to Scheduled Castes and Schedules Tribes category, were placed above the petitioners, belonging to general and OBC category, after quashing of Notifications by this Court, the situation as it existed before coming into force of impugned notification continues and it was the prime duty of the respondents to restore the seniority of the petitioners of a day prior to the Notification dated 28.12.2002, but the same was not done. However, what is the effect of it and whether it constitutes a

contempt of order passed by this Court or not, will be considered in later part of this order, after considering other facts and circumstances of the case, so-called compliance of order passed by this Court, as mentioned in reply to contempt petition and other objections raised on behalf of the respondents.

36. First of all, we would deal with the preliminary objection raised by learned counsel appearing on behalf of the respondents about maintainability of contempt petitions based on the Doctrine of merger.

37. Mr. C.S. Vaidhyanathan, learned Senior Advocate submitted that the order of this Court stood merged in the order of the Hon'ble Supreme Court, as Special Leave Petition was dismissed with reasoned order. Since order of this Court has been merged, therefore, it does not exist. If any contempt is made out, then the same is of the order passed by the Hon'ble Supreme Court and this Court has no jurisdiction to entertain, hear and decide contempt petitions in respect of order passed by the Hon'ble Supreme Court. In support of Doctrine of merger, he relied upon **Gangadhara Palo's case(supra)**, wherein a Division Bench of the Hon'ble Supreme Court

in Para Nos. 6 and 7 observed that when Special Leave Petition is dismissed by giving some reasons, however meagre, there will be a merger of the judgment of the High Court into the order of the Supreme Court dismissing the special leave petition.

Mr. Sanjeev Prakash Sharma Senior Advocate, on the other hand, referred and relied upon judgment delivered by a Larger Bench of the Hon'ble Supreme Court in **Kunhayammed and Others Vs. State of Kerala and Another, (2000) 6 SCC 359**, wherein the Hon'ble Apex Court considered the Doctrine of merger, in detail, with reference to jurisdiction of Hon'ble Supreme Court under Article 136 of the Constitution as well as the effect of Article 141 of the Constitution and observed that if the order refusing leave to appeal is a speaking order, i.e. gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court, which would bind the parties

thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting the special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties. Mr. Sanjeev Prakash Sharma, learned Senior Counsel submitted that against order of this Court, Special Leave was not granted and it was dismissed by a speaking order, but it does not mean that order of this Court merged in the order passed by the Hon'ble Supreme Court, therefore, the contempt petitions before this Court are maintainable.

38. The Division Bench of Hon'ble Supreme Court in **Gangadhara Palo's case (supra)** was dealing with a matter against the order of High Court dismissing a review petition. The order of High Court sought to be reviewed was challenged before the Hon'ble Apex Court by way of special leave petition, which was dismissed. Therefore, an objection

was raised that review petition itself was not maintainable, as special leave petition preferred against the order of High Court had been dismissed. Since special leave petition was dismissed simply by saying, “The special leave petition is dismissed.”, therefore, the Hon'ble Apex Court set aside the order of the High Court and remanded the matter to the High Court to decide the review petition on merits in accordance with law. The Hon'ble Apex Court had not considered a case, where special leave petition was dismissed by a detailed and speaking order. The Hon'ble Apex Court also observed that by a judicial order, power of review of High Court cannot be taken away, as that has been conferred by the statute or the Constitution. The Apex Court by judicial orders cannot amend the statute or the Constitution. Para Nos. 3 to 12 of the judgment are reproduced as under:

> “3. As regards the maintainability of the review petition, Mr. Sanjay Kapur, learned counsel for the respondent submitted that it was not maintainable because against the main judgment of the High Court dated 19-6-2001 dismissing the writ petition of the appellant herein, the appellant herein filed a special leave petition in this Court which was dismissed on 17-9-2001.
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> 4. The aforesaid order of this

Court dismissing the special leave petition simply states "The special leave petition is dismissed". Thus, this order gives no reasons. In support of his submission, the learned counsel for the respondent has relied upon a decision of this Court in K. Rajamouli V. A.V.K.N. Swamy, (2001) 5 SCC 37 and has submitted that there is a distinction between a case where the review petition was filed in the High Court before the dismissal of the special leave petition by this Court, and a case where the review petition was filed after the dismissal of the special leave petition by this Court.

5. We regret, we cannot agree. In our opinion, it will make no difference whether the review petition was filed in the High Court before the dismissal of the special leave petition or after the dismissal of the special leave petition. The important question really is whether the judgment of the High Court has merged into the judgment of this Court by the doctrine of merger or not.

6. When this Court dismisses a special leave petition by giving some reasons, however, meagre(it can be even of just one sentence), there will be a merger of the judgment of the High Court into the order of the Supreme Court dismissing the special leave petition. According to the doctrine of merger, the judgment of the lower court merges into the judgment of the higher court. Hence, if some reasons, however, meagre, are given by this Court while dismissing the special leave petition, then by the doctrine of merger, the judgment of the High Court merges into the judgment of this Court and after merger

there is no judgment of the High Court. Hence, obviously, there can be no review of a judgment which does not even exist.

7. The situation is totally different where a special leave petition is dismissed without giving any reasons whatsoever. It is well settled that special leave under Article 136 of the Constitution of India is a discretionary remedy, and hence a special leave petition can be dismissed for a variety of reasons and not necessarily on merits. We cannot say what was in the mind of the Court while dismissing the special leave petition without giving any reasons. Hence, when a special leave petition is dismissed without giving any reasons, there is no merger of the judgment of the High Court with the order of this Court. Hence, the judgment of the High Court can be reviewed since it continues to exist, though the scope of the review petition is limited to errors apparent on the face of the record. If, on the other hand, a special leave petition is dismissed with reasons, however meagre(it can be even of just one sentence), there is a merger of the judgment of the High Court in the order of the Supreme Court. (See the decisions of this Court in Kunhayammed V. State of Kearla, (2000) 6 SCC 359, S. Shanmugavel Nadar V. State of T.N., (2002) 8 SCC 361, State of Manipur V. Thingujam Brojen Meetei, (1996) 9 SCC 29 and U.P. SRTC V. Omaditya Verma, (2005) 4 SCC 424.)

8. A judgment which continues to exist can obviously be reviewed, though of course the scope of the review is limited to errors apparent on the face of the record but it cannot be

said that the review petition is not maintainable at all.

9. The learned counsel for the respondent Mr Sanjay Kapur has, however, invited our attention to para 4 of the judgment of this court in K. Rajamouli, wherein it was observed:(SCC p. 41, para 4)

“4. Following the decision in Kunhayammed we are of the view that the dismissal of the special leave petition against the main judgment of the High Court would not constitute res judicata when a special leave petition is filed against the order passed in the review petition provided the review petition was filed prior to filing of special leave petition against the main judgment of the High Court. The position would be different where after dismissal of the special leave petition against the main judgment a party files a review petition after a long delay on the ground that the party was prosecuting remedy by way of special leave petition. In such a situation the filing of review would be an abuse of the process of the law. We are in agreement with the view taken in Abbai Maligai Partnership Firm V. K. Santhakumaran, (1998) 7 SCC 386 that if the High Court allows the review petition filed after the special leave petition was dismissed after condoning the delay, it would be treated as an affront to the order of the Supreme Court. But this is not the case here. In the present case, the review petition was filed well within time and since the review petition was not being decided by the High Court, the appellant filed the special leave petition against the main judgment of the High Court. We, therefore, overrule

the preliminary objection of the counsel for the respondent and hold that this appeal arising out of special leave petition is maintainable." (emphasis supplied)

10. We have carefully perused SCC Para 4 of the aforesaid judgment. What has been observed therein is that if the review petition is filed in the High Court after the dismissal of the special leave petition, "it would be treated as an affront to the order of the Supreme Court". In our opinion, the above observation cannot be treated as a precedent at all. We are not afraid of affronts. What has to be seen is whether a legal principle is laid down or not. It is totally irrelevant whether we have been affronted or not.

11. A precedent is a decision which lays down some principle of law. In our view, the observations made in SCC Para 4 of the aforesaid judgment, quoted above, that "[if a review petition is filed after the dismissal of the special leave petition] it would be treated as an affront to the order of the Supreme Court" is not a precedent at all. A mere stray observation of this Court, in our opinion, would not amount to a precedent. The above observation of this Court is, in our opinion, a mere stray observation and hence not a precedent.

12. By a judicial order, the power of review cannot be taken away as that has been conferred by the statute or the Constitution. This Court by judicial orders cannot amend the statute or the Constitution."

39. The Larger Bench of the Hon'ble Supreme Court in **Kunhayammed and Others case (supra)**, while considering Doctrine of merger and review, dismissal of SLP by non-speaking order or speaking order and effect thereto, observed that a petition for leave to appeal to this Court may be dismissed by a non-speaking order or by a speaking order. Whatever be the phraseology employed in the order of dismissal, if it is a non-speaking order, i.e., it does not assign reasons for dismissing the special leave petition, it would neither attract the doctrine of merger, so as to stand substituted in place of the order put in issue before it, nor would it be a declaration of law by the Supreme Court under Article 141 of the Constitution for there is no law which has been declared. If the order of dismissal be supported by reasons, then also the doctrine of merger would not be attracted because the jurisdiction exercised was not an appellate jurisdiction, but merely a discretionary jurisdiction refusing to grant leave to appeal. Hon'ble Apex Court also observed that the declaration of law by Apex Court will be governed by Article 141 of the Constitution, but still the case not being

one where leave was granted, the doctrine of merger does not apply. Even if the merits have been gone into, they are the merits of special leave petition only. The Hon'ble Apex Court in its concluding para, specifically held that if the order rejecting leave to appeal is speaking order, then it does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting the special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties. Para Nos. 27, 40 and 44 of the judgment are reproduced as under:

> “27. A petition for leave to appeal to this Court may be dismissed by a non-speaking order or by a speaking order. Whatever be the phraseology employed in the order of dismissal, if it is non-speaking order, i.e., it does not assign reasons for dismissing the special leave petition, it would neither attract the doctrine of merger so as to stand substituted in place of the order put in issue before it nor would it be a declaration of law by the Supreme Court under Article 141 of the Constitution for there is no law which has been declared. If the order of dismissal be supported by reasons then also the doctrine of merger would not be attracted because the

jurisdiction exercised was not an appellate jurisdiction but merely a discretionary jurisdiction refusing to grant leave to appeal. We have already dealt with this aspect earlier. Still the reasons stated by the Court would attract applicability of Article 141 of the Constitution if there is a law declared by the Supreme Court which obviously would be binding on all the courts and tribunals in India and certainly the parties thereto. The statement contained in the order other than on points of law would be binding on the parties and the court or tribunal, whose order was under challenge on the principle of judicial discipline, this Court being the Apex Court of the country. No court or tribunal or parties would have the liberty of taking or canvassing any view contrary to the one expressed by this Court. The order of Supreme Court would mean that it has declared the law and in that light the case was considered not fit for grant of leave. The declaration of law will be governed by Article 141 but still, the case not being one where leave was granted, the doctrine of merger does not apply. The Court sometimes leaves the question of law open. Or it sometimes briefly lays down the principle, may be, contrary to the one laid down by the High Court and yet would dismiss the special leave petition. The reasons given are intended for purposes of Article 141. This is so done because in the event of merely dismissing the special leave petition, it is likely that an argument could be advanced in the High Court that the Supreme Court has to be understood as not to have differed in law with the High Court.

40. A petition seeking grant of special leave to appeal may be rejected for several reasons. For example, it may be rejected (i) as barred by time, or (ii) being a defective presentation, (iii) the petitioner having no locus standi to file the petition, (iv) the conduct of the petitioner disentitling him to any indulgence by the court, (iv) the question raised by the petitioner for consideration by this Court being not fit for consideration or deserving being dealt with by the Apex Court of the country and so on. The expression often employed by this Court while disposing of such petitions are- “heard and dismissed”, “dismissed”, “dismissed as barred by time” and so on. May be that at the admission stage itself the opposite party appears on caveat or on notice and offers contest to the maintainability of the petition. The Court may apply its mind to the meritworthiness of the petitioner's prayer seeking leave to file an appeal and having formed an opinion may say “dismissed on merits”. Such an order may be passed even ex parte, that is, in the absence of the opposite party. In any case, the dismissal would remain a dismissal by a non-speaking order where no reasons have been assigned and no law has been declared by the Supreme Court. The dismissal is not of the appeal but of the special leave petition. Even if the merits have been gone into, they are the merits of the special leave petition only. In our opinion neither doctrine of merger nor Article 141 of the Constitution is attracted to such an order. Grounds entitling exercise of review jurisdiction conferred by Order 47 Rule 1 CPC or any

other statutory provision or allowing review of an order passed in exercise of writ or supervisory jurisdiction of the High Court(where also the principles underlying or emerging from Order 47 Rule 1 CPC act as guidelines) are not necessarily the same on which this Court exercises discretion to grant or not to grant special leave to appeal while disposing of a petition for the purpose. Mere rejection of a special leave petition does not take away the jurisdiction of the court, tribunal or forum whose order forms the subject-matter of petition for special leave to review its own order if grounds for exercise of review jurisdiction are shown to exist. Where the order rejecting an SLP is a speaking order, that is, where reasons have been assigned by this Court for rejecting the petition for special leave and are stated in the order still the order remains the one rejecting prayer for the grant of leave to appeal. The petitioner has been turned away at the threshold without having been allowed to enter in the appellate jurisdiction of this court. Here also the doctrine of merger would not apply. But the law stated or declared by this Court in its order shall attract applicability of Article 141 of the Constitution. The reasons assigned by this Court in its order expressing its adjudication(expressly or by necessary implication) on point of fact or law shall take away the jurisdiction of any other court, tribunal or authority to express any opinion in conflict with or in departure from the view taken by this Court because permitting to do so would be subversive of judicial discipline and an

affront to the order of this Court. However this would be so not by reference to the doctrine of merger.

44. To sum up, our conclusions are:

(i) Where an appeal or revision is provided against an order passed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.

(ii) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. The first stage is upto the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and the special leave petition is converted into an appeal.

(iii) The doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not

while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.

(iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case, it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(v) If the order refusing leave to appeal is a speaking order, i.e. gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting the special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

> (vi) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.
>
> (vii) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before the Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Rule 1 of Order 47 CPC." (Emphasis supplied)

40. Mr. Sanjeev Prakash Sharma, Senior Advocate also submitted and placed reliance upon judgment delivered by Constitution Bench of the Hon'ble Supreme Court in **Central Board of Dawoodi Bohra Community and Another Vs. State of Maharashtra and Another, (2005) 2 SCC 673**, wherein Constitution Bench of the Hon'ble Apex Court held that law laid down by Supreme Court is binding on any subsequent Bench of lesser strength. A smaller Bench cannot disagree or dissent from the view of law taken by a larger Bench. He has submitted that Judgment in **Gangadhara Palo's case(supra)** was delivered by Two Judges Bench, whereas the judgment in **Kunhayammed and Others case(supra)** was delivered by three Judges Bench of the Supreme Court, therefore,

as per Constitution Bench Judgement in **Central Board of Dawoodi Bohra Community and Another's case(supra)**, the judgment of three Judges Bench in Kunhayammed and Others case (supra) was binding on two Judges Bench, which delivered the judgment in Gangadhara Palo's case(supra).

41. The Constitution Bench of Hon'ble Supreme Court in **Central Board of Dawoodi Bohra Community and Another's case(supra)** examined the law laid down by the Constitution Benches and laid down as to what course is permissible in case a smaller Bench is doubting the view taken by larger Bench and held that law laid down by the Supreme Court is binding on any subsequent Bench of lesser strength. Para No. 12 of the judgment reads as under:

> "12. Having carefully considered the submissions made by the learned Senior Counsel for the parties and having examined the law laid down by the Constitution Benches in the abovesaid decisions, we would like to sum up the legal position in the following terms:
>
> (1) The law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or coequal strength.
>
> (2) A Bench of lesser quorum cannot disagree or dissent from

the view of the law taken by a Bench of larger quorum. In case of doubt all that the Bench of lesser quorum can do is to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger quorum than the Bench whose decision has come up for consideration. It will be open only for a Bench of coequal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of coequal strength, whereupon the matter may be placed for hearing before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law the correctness of which is doubted.

(3) The above rules are subject to two exceptions:(i) the abovesaid rules do not bind the discretion of the Chief Justice in whom vests the power of framing the roster and who can direct any particular matter to be placed for hearing before any particular Bench of any strength; and (ii) in spite of the rules laid down hereinabove, if the matter has already come up for hearing before a Bench of larger quorum and that Bench itself feels that the view of the law taken by a Bench of lesser quorum, which view is in doubt, needs correction or reconsideration then by way of exception(and not as a rule) and for reasons given by it, it may proceed to hear the case and examine the correctness of the previous decision in question dispensing with the need of a specific reference or the order of the Chief Justice constituting the Bench and such listing. Such was the situation in *Raghubir Singh* and *Hansoli Devi*."

42. The Hon'ble Apex Court in **Kunhayammed and Others case(supra)** specifically held that if the order refusing the leave to appeal is a speaking order, then it does not amount to saying that order of the court, tribunal or authority below has stood merged in the order of the Supreme Court, rejecting special leave petition. Although, the judgment delivered in Kunhayammed and Others case(supra) was referred in Gangadhara Palo's case(supra), delivered by two Judges Bench of Hon'ble Apex Court, but the same was not discussed in detail, for the reason that in Gangadhara Palo's case(supra), special leave petition was dismissed by the Hon'ble Supreme Court without any reason and review petition before the High Court was held to be maintainable and the case was remitted to the High Court to decide the review petition on merits in accordance with law.

43. There is no doubt that leave in present Special Leave Petition No. 7716/2010 preferred against order of this Court was not granted and it was dismissed by reasoned order. Therefore, in view of law laid down by three Judges Bench of the Hon'ble Apex Court in **Kunhayammed and Others case**

(supra), the order of this Court did not merge in the order of Hon'ble Supreme Court, but whatever has been laid down by the Hon'ble Apex Court, even while dismissing the special leave petition, is binding on the parties. In **Gangadhara Palo's case(supra)**, relied upon by counsel for the respondents, the Hon'ble Apex Court held that by a judicial order, the power of review can not be taken away or Judicial Court, can not amend the Staute or the Constitution. This Court has statutory as well as constitutional power of contempt under the provisions of Contempt of Courts Act and also under Constitution of India. In these circumstances, the contempt petitions before this Court are maintainable.

44. Apart from above, it is also relevant to mention that Contempt Petition No. 941/2010 was filed before this Court on 26.10.2010 and notice of contempt petition was issued to respondents on 01.11.2010. Since final arguments had already been heard and judgment was reserved in special leave petitions filed by the State and others against order of this Court by the Hon'ble Apex Court on 04.08.2010, therefore, State of Rajasthan filed I.A. No. 5/2010 before the

Hon'ble Apex Court, wherein contempt proceedings before this Court were stayed on 16.11.2010 and 25.11.2010. Thereafter, special leave petitions were dismissed by Hon'ble Apex Court on 07.12.2010. I.A. No. 5/2010 was heard on 20.07.2011. The Hon'ble Supreme Court, while dismissing IA No. 5/2010 vide order dated 20.07.2011, observed that since special leave petitions have been dismissed, even I.A. No. 5/2010 does not survive. Consequently, dismissed I.A. No. 5/2010 with observation that parties will be free to make their submissions with regard to action taken by the Government in the matter pending before the High Court. Order dated 20.07.2011 passed by the Hon'ble Apex Court makes it clear that Hon'ble Apex Court directed the parties to make their submissions with regard to contempt and action taken by the State Government in the contempt matter pending before the High Court.

45. It is also relevant to mention that reply to contempt petition was filed, wherein no such objection has been taken by the respondents. But, since it was a legal question, therefore, we allowed the learned counsel for the respondents to raise the same

and we have discussed and decided this issue in the preceding paras. Since leave was not granted in the matter by the Hon'ble Supreme Court, therefore, appellate jurisdiction was not exercised by it and only a discretionary jurisdiction was exercised and special leave petitions were dismissed. Even if, special leave petitions were dismissed by reasoned order, order passed by this Court has not merged in the order passed by the Hon'ble Supreme Court, as held by three Judges Bench of the Hon'ble Supreme Court in Kunhayammed and Others case(supra) and further that this Court has statutory as well as constitutional powers of contempt, therefore, we are of the considered view that present contempt petitions are maintainable before this Court.

46. Mr. Sanjeev Prakash Sharma, learned Senior Advocate appearing on behalf of the petitioners submitted that after quashing of Notifications dated 28.12.2002 and 25.04.2008, Notification dated 01.04.1997 came into existence, as Notification dated 01.04.1997 was deleted vide Notification dated 28.12.2002. Since, the Notification dated 28.12.2002 itself has been quashed, therefore, Notification dated 01.04.1997 automatically came into force. Vide

Notification dated 01.04.1997, a Proviso was added to Rule 33, giving benefit of regaining seniority to general and OBC candidates, therefore, seniority lists should have been prepared as per Notification dated 01.04.1997. Mr. Sharma, learned Senior Counsel also referred a copy of Special Leave Petition filed by the State before the Hon'ble Supreme Court against order of this Court, wherein the State accepted that in case the order passed by the High Court, quashing Notifications dated 28.12.2002 and 25.04.2008, is not set aside, then earlier Notification dated 01.04.1997 will revive. He also submitted that if Notification dated 01.04.1997 does not revive, then where was the occasion for the respondents to delete the same notification vide Notification dated 11.09.2011. He also submitted that Notification dated 01.04.1997 has already been upheld by Division Bench of this Court in B.K. Sharma's case and by Hon'ble Supreme Court in Ram Prasad's case and effect was also given to the judgment passed by the Hon'ble Apex Court in Ram Prasad's case, as number of persons were promoted and number of persons were reverted following the regaining seniority principle introduced vide

Notification dated 01.04.1997. But the State Government, while introducing new Notification dated 11.09.2011, has saved the promotions of those persons promoted as per Notification dated 01.04.1997, but has not reverted the candidates belonging to reserved category, who were promoted illegally after deletion of Notification dated 01.04.1997 vide Notification dated 28.12.2002 and further deletion of Notification dated 28.12.2002 vide Notification dated 25.04.2008 and they all have been saved by treating them on ad-hoc basis. If they would have been reverted, then candidates belonging to general and OBC category would have been promoted in view of the judgment passed by this Court. Notification dated 25.04.2008 was declared ultra vires for the reason that it had taken away the accrued and vested rights of the petitioners. Now, again by protecting the illegal promotions of reserved category candidates, by treating them as ad-hoc, the respondents have committed the same wrong.

47. On the other hand, Mr. C.S. Vaidhyanathan, learned Senior Advocate appearing on behalf of the respondents submitted that after declaring both the

Notifications dated 28.12.2002 and 25.04.2008 as ultra vires, no specific direction was issued about revival of Notification dated 01.04.1997 and in absence of any specific Mandamus in this regard, the Notification dated 01.04.1997 does not revive automatically. In support of his submission, he has referred judgments of the Hon'ble Supreme Court in **B.N. Tewari V. Union of India and Others(supra)** and **Firm A.T.B. Mehtab Majid and Co. Vs. State of Madras and Another(supra)**.

48. We have considered the submissions of Mr. C.S. Vaidhyanathan, learned Senior Advocate in this regard. In **B.N. Tewari's case(supra)**, according to the resolution of Ministry of Home Affairs dated September 13, 1950, reservation for Scheduled Castes and Scheduled Tribes was fixed at 12.5% and 5% respectively without anything like the “carry forward” rule. In 1952, however, by way of supplementary executive instructions, a carry forward rule was introduced that if a sufficient number of candidates of reserved category are not available, the vacancies, that remains unfilled, will be treated as unreserved and filled by the best available candidates, but a corresponding number of

vacancies will be reserved for the following year for the reserved category candidates. If suitably qualified candidates of the reserved category are again not available to fill up the vacancies carry forwarded from the previous year, the vacancies not filled by them will be treated as unreserved and the reservation made in those vacancies will lapse. Thus, according to 1952 instructions, the carry forward rule was only for two years and thereafter, there was no carry forward. In 1955, however, Government made further change in the carry forward rule and it was provided that if a sufficient number of candidates from reserved category are not available, unfilled vacancies should be treated as unreserved and will be filled by the best available candidates. The number of reserved vacancies thus, treated as unreserved will be added as an additional quota to the number that would be reserved in the following year in the normal course and to the extent to which approved candidates are not available in that year against this additional quota, a corresponding addition should be made to the number of reserved vacancies in the second following year. Thus, the number of reserved vacancies of

1954, which were treated as unreserved for want of suitable candidates in that year, will be added to the normal number of reserved vacancies in 1955. Any recruitment against these vacancies in the year 1955 will first be counted against the additional quota carried forward from 1954. If, however, suitable candidates are not available in 1955 also and a certain number of vacancies are treated accordingly as 'unreserved' in that year, the total number of vacancies to be reserved in 1956 will be un-utilised balance of the quota carried forward from 1954 and 1955 plus the normal percentage of vacancies to be reserved in 1956. The Hon'ble Apex Court had struck down 1955 carry forward rule in **T.Devadasan V. Union of India & Anr., AIR 1964 SC 179**, therefore, it was contended that since there is no carry forward rule in existence as 1955 carry forward rule was struck down and 1952 rule had ceased to exist by the substitution made by the Government in 1955. The Hon'ble Apex Court considered the question whether after striking down the rule of 1955, the carry forward rule of 1952 still exits or not. The Hon'ble Apex Court after declaring the 1955 rule invalid observed that it does not mean that this Court had held

that 1952 rule must be deemed to exist. It was further observed that carry forward rule of 1952 was substituted by carry forward rule of 1955. On this substitution, the carry forward rule of 1952 clearly ceased to exist because its place was taken by the carry forward rule of 1955. Para No. 6 of the judgment is as under:

> "(6). We shall first consider the question whether the carry forward rule of 1952 still exists. It is true that in Devadasan's case, AIR 1964 SC 179, the final order of this Court was in these terms:-
>
> "In the result the petition succeeds partially and the carry forward rule as modified in 1955 is declared invalid."
>
> That, however, does not mean that this Court held that the 1952-rule must be deemed to exist because this Court said that the carry forward rule as modified in 1955 was declared invalid. The carry forward rule of 1952 was substituted by the carry forward rule of 1955. On this substitution the carry forward rule of 1952 clearly ceased to exist because its place was taken by the carry forward rule of 1955. Thus by promulgating the new carry forward rule in 1955, the Government of India itself cancelled the carry forward rule of 1952. When therefore this Court struck down the carry forward rule as modified in 1955 that did not mean that the carry forward rule of 1952 which had already ceased to exist, because the Government of India itself cancelled it and had substituted a modified

rule in 1955 in its place, could revive. We are therefore of opinion that after the judgment of this Court in Devadasan's case AIR 1964 SC 179 there is no carry forward rule at all, for the carry forward rule of 1955 was struck down by this Court while the carry forward rule of 1952 had ceased to exist when the Government of India substituted the carry forward rule of 1955 in its place. But it must be made clear that the judgment of this Court in Devadasan's case, AIR 1964 SC 179, is only concerned with that part of the instructions of the Government of India which deal with the carry forward rule; it does not in any way touch the reservation for scheduled castes and scheduled tribes at 12½% and 5% respectively; nor does it touch the filling up of scheduled tribes vacancies by scheduled caste candidates where sufficient number of scheduled tribes are not available in a particular year or vice versa. The effect of the judgment in Devadasan's case, AIR 1964 SC 179, therefore is only to strike down the carry forward rule and it does not affect the year to year reservation for scheduled castes and scheduled tribes or filling up of scheduled tribe vacancies by a member of scheduled castes in a particular year if a sufficient number of scheduled tribe candidates are not available in that year or vice versa. This adjustment in the reservation between scheduled castes and tribes has nothing to do with the carry forward rule from year to year either of 1952 which had ceased to exist or of 1955 which was struck down by this Court. In this view of the matter it is unnecessary to consider whether the carry

> forward rule of 1952 would be unconstitutional, for that rule no longer exists."

49. In **Firm A.T.B. Mehtab Majid and Co.'s case(supra)**, the Hon'ble Apex Court considered the validity of Rule 16 of Madras General Sales Tax(Turnover & Assessment) Rules, 1939. The impugned rule was published on September 7, 1955 and was substituted in the place of old Rule 16. The new rule was to be effective from April 1, 1955. The Hon'ble Apex Court held that Rule 16(2) discriminates against the imported hides or skins, which had been purchased or tanned outside the State and therefore, it contravenes the provisions of Article 304(a) of the Constitution of India. It was further urged that if the impugned rule is held to be invalid, old Rule 16 gets revived and the tax assessed on the petitioner will be good. Hon'ble Supreme Court observed, that 'we do not agree'. Once the old rule has been substituted by a new rule, it ceases to exist and it does not get revived when the new rule is held invalid. Relevant paras of the judgment are reproduced as under:

> "We are therefore of opinion that the provisions of r. 16(2) discriminates against the imported hides or skins which had been purchased or tanned outside the State and

> that therefore they contravene the provisions of Art. 304(a) of the Constitution.
>
> It has been urged for the respondent that if the impugned rule be held to be invalid, old r. 16 gets revived and that the tax assessed on the petitioner will be good. We do not agree. Once the old rule has been substituted by the new rule, it ceases to exist and it does not automatically get revived when the new rule is held to be invalid.
>
> Lastly, we may refer to the Preliminary objection raised on behalf of the respondent to the maintainability of this petition, in view of the decision of this Court in Ujjam Bai V. State of Uttar Pradesh, [1963] 1. S.C.R. 778. This petition does not come within that decision. This is not a case in which the tax has been levied by the Deputy Commercial Tax Officer by mis-construing certain provisions of a valid Act, but is a case where the taxing officer had no jurisdiction to assess the tax on account of the invalidity of the rule under which the tax was assessed.
>
> We therefore allow this petition with costs holding the impugned rule 16(2) invalid and order the issue of a writ of mandamus to the State of Madras and the Sales Tax Authorities under the Act to refrain from enforcing any of the provisions of r. 16(2) and direct them to refund the tax illegally collected from the petitioner."

50. The above-referred two judgments in **B.N. Tewari's case(supra)** and **Firm A.T.B. Mehtab Majid and Co.'s case(supra)** were

passed on the basis of facts of those cases. In B.N. Tewari's case(supra), it was held that executive instructions of 1952 do not revive automatically, when executive instructions of 1955 are held to be invalid. Similarly in Firm A.T.B. Mehtab Majid and Co.'s case(supra), which was relating to Madras General Sales Tax(Turnover & Assessment) Rules, 1939, it was held that Rule 16(2) of the Rules of 1939 is discriminatory and the old rule does not get revived. However, both the above-referred judgments were further considered by the Hon'ble Apex Court subsequently in the cases of **Mohd. Shaukat Hussain Khan V. State of Andhra Pradesh, AIR 1974 SC 1480**, and **State of Maharashtra V. The Central Provinces Manganese Ore Co. Ltd., AIR 1977 SC 879** and on the basis of facts and circumstances of those cases, it was held that on declaring new rule as invalid, the earlier rule exists. The same point was again considered by the Hon'ble Supreme Court in the case of **D.K. Trivedi and Sons and Others, etc. V. State of Gujarat and Others, etc., AIR 1986 SC 1323.**

51. In **Mohd. Shaukat Hussain Khan V. State of Andhra Pradesh, AIR 1974 SC 1480**,

the Hon'ble Apex Court was considering the Andhra Pradesh(Telangana Area) Abolition of Inams Act(9 of 1967), which had repealed the earlier Abolition Act 8 of 1955(as amended in 1956), and the said Act was struck down by the High Court. It was held that as the inams lands had already vested in the Government on 20.07.1955, there was no need to abolish inams, which already stood abolished long before the date when the Act 9 of 1967 was enacted. What the Court held by declaring the Act 9 of 1967 void was that it was non-est. The Hon'ble Apex Court held that provisions of Act 8 of 1955, as amended by Act 10 of 1956, could not be said to have been repealed at all and, therefore, they were in existence. The repeal of an enactment, which had already been given effect, was a devise for depriving the inamdars, whose rights had been abolished, of their right of compensation, and was accordingly struck down as still-born, null and void, as such unconstitutional from its inception and could not have the effect, as if it had repealed the previous Acts. Hon'ble Supreme Court considered its earlier judgment in B.N. Tewari's case(supra) and distinguished the same on facts and held that

provisions of Act 8 of 1955 are in existence.

Para No. 11 of the judgment reads as under:

> “11. The decision cited by the learned Advocate for the appellant in B.N. Tiwari V. Union of India, (1965) 2 SCR 421 = (AIR 1965 SC 1430)-is inapplicable. In that case the Ministry of Home Affairs by a resolution in 1950 had declared reservation in favour of scheduled castes and tribes and had made a rule in 1952 for carry-forward, whereby the unfilled reserved vacancies of a particular year would be carried forward for one year only. In 1955 the above rule was substituted by another rule providing that the unfilled reserved vacancies of a particular year would be carried forward for two years. The court held that when the 1952 carry forward rule was substituted by another rule in 1955, the former rule ceased to exist when 1955 rule was declared unconstitutional in T. Devadasan V. Union of India, AIR 1964 SC 179 as such there was no carry forward rule in existence in 1960. In these circumstances the question that was considered was whether the carry forward rule of 1952 could still be said to exist. This Court took the view that the carry forward rule of 1952 having been substituted by the carry forward rule of 1955, the former rule clearly ceased to exist because its place was taken by the carry forward rule of 1955. Thus by promulgating the new carry forward rule of 1955, the Government of India itself cancelled the carry forward rule of 1952. Therefore, when this Court struck down the carry forward rule as modified in 1955 that did not mean that the carry forward rule of 1952 which had

> already ceased to exist, because the Government of India itself cancelled it and had substituted a modified rule in 1955 in its place, could revive. In the case before us it has attempted to do something which the Legislature could not do namely to abolish inams which did not exist and which had already vested in the Government and which the Legislature could not abolish again. In these circumstances, the repeal of an enactment, which had already been given effect was a device for depriving the inamdars whose rights had been abolished, of their right of compensation, and was accordingly struck down as still-born, null and void, as such unconstitutional from its inception and cannot have the effect as if it had repealed the previous Acts. On this analysis the provisions of Act 8 of 1955 as amended by Act 10 of 1956 could not be held to have been repealed at all, and therefore they are in existence."

52. In **State of Maharashtra V. The Central Provinces Manganese Ore Co. Ltd., AIR 1977 SC 879**, the Hon'ble Apex Court considered the facts of B.N. Tewari's case (supra) as well as Firm A.T.B. Mehtab Majid and Co.'s case(supra) and held that ordinarily, unless the substituted provision is there to take its place, in law and in effect, the pre-existing provision continues. There is no question of a revival. Para No. 17 to 21 of the judgment are reproduced as under:

"17. We do not think that the word substitution necessarily or always connotes two severable steps, that is to say, one of repeal and another of a fresh enactment even if it implies two steps. Indeed, the natural meaning of the word "substitution" is to indicate that the process cannot be split up into two pieces like this. If the process described as substitution fails, it is totally ineffective so as to leave intact what was sought to be displaced. That seems to us to be the ordinary and natural meaning of the words "shall be substituted." This part could not become effective without the assent of the Governor-General. The State Governor's assent was insufficient. It could not be inferred that, what was intended was that, in case the substitution failed or proved ineffective, some repeal, not mentioned at all, was brought about and remained effective so as to create what may be described as a vacuum in the statutory law on the subject-matter. Primarily, the question is one of gathering the intent from the use of words in the enacting provisions seen in the light of the procedure gone through. Here, no intention to repeal, without a substitution is deducible. In other words, there could be no repeal if substitution failed. The two were a part and parcel of a single indivisible process and not bits of a disjointed operation.

18. Looking at the actual procedure which was gone through, we find that, even if the Governor had assented to the substitution, yet, the amendment would have been effective, as a piece of valid legislation, only when the

assent of the Governor-General had also been accorded to it. It could not be said that what the Legislature intended or what the Governor had assented to consisted of a separate repeal and a fresh enactment. The two results were to follow from one and the same effective legislative process. The process had, therefore, to be so viewed and interpreted.

19. Some help was sought to be derived by the citation of B.N. Tewari V. Union of India, (1965) 2 SCR 421 = (AIR 1965 SC 1430) and the case of Firm Mehtab Majid & Co. V. State of Madras, (AIR 1963 SC 928) (supra). Tewari's case(supra) related to the substitution of what was described as the “carry forward” rule contained in the departmental instruction which was sought to be substituted by a modified instruction declared invalid by the Court. It was held that when the rule contained in the modified instruction of 1955 was struck down the rule contained in a displaced instruction did not survive. Indeed one of the arguments there was that the original “carry forward” rule of 1952 was itself void for the very reason for which the “carry forward” rule, contained in the modified instructions of 1955, had been struck down. Even the analogy of a merger of an order into another which was meant to be its substitute could apply only where there is a valid substitution. Such a doctrine applies in a case where a judgment of a Subordinate Court merges in the judgment of the Appellate Court or an order reviewed merges in the order by which the review is granted. Its application to a legislative process may be possible only in cases of valid

substitution. The legislative intent and its effect is gathered, inter alia, from the nature of the action of the authority which functions. It is easier to impute an intention to an executive rule making authority to repeal altogether in any event what is sought to be displaced by another rule. The cases cited were of executive instructions. We do not think that they could serve as useful guides in interpreting a legislative provision sought to be amended by a fresh enactment. The procedure for enactment is far more elaborate and formal. A repeal and a displacement of a legislative provision by a fresh enactment can only take place after that elaborate procedure has been followed in toto. In the case of any rule contained in an executive instruction, on the other hand, the repeal as well as displacement are capable of being achieved and inferred from a bare issue of fresh instructions on the same subject.

20. In Mehtab Majid & Co.'s case(AIR 1963 SC 928) (supra) a statutory rule was held not to have revived after it was sought to be substituted by another held to be invalid. Tis was also a case in which no elaborate legislative procedure was prescribed for a repeal as it is in the case of statutory enactment of statutes by legislatures. In every case, it is a question of intention to be gathered from the language as well as the acts of the rule making or legislating authority in the context in which these occur.

21. A principle of construction contained now in a statutory provision made in England since

1850 has been:

> "Where an Act passed after 1850 repeals wholly or partially any former enactment and substitutes provisions for the enactment repealed, the repealed enactment remains in force until the substituted provisions come into operation."
> (See: Halsbury's Laws of England, Third Edn. Vol. 36, p. 474; Craies on "Statute Law", 6th Edn. p. 386)
>
> Although, there is no corresponding provision in our General Clauses Acts, yet, it shows that the mere use of words denoting a substitution does not ipso facto or automatically repeal a provision until the provision which is to take its place becomes legally effective. We have, as explained above, reached the same conclusion by considering the ordinary and natural meaning of the term "substitution" when it occurs without anything else in the language used or in the context of it or in the surrounding facts and circumstances to lead to another inference. It means, ordinarily, that unless the substituted provision is there to take its place, in law and in effect, the pre-existing provision continues. There is no question of a "revival.""

53. In the present case also, the Notifications dated 28.12.2002 and 25.04.2008 were declared ultra vires and net effect of it was that earlier Notification dated 01.04.1997 continued. There is no question of revival. In **D.K. Trivedi and Sons and Others, etc. V. State of Gujarat and Others,**

etc., AIR 1986 SC 1323, the Notification of 1976 was declared invalid and the Hon'ble Apex Court held that net result is that Notification of 1974 continued to be operative. Para 72 of the judgment reads as under:

> “72. The position before us is the same. It was not the intention of the Government of Gujarat that even if the new schedule of royalty substituted by the 1975 Notification was void and inoperative, Schedule I as substituted by the 1974 Notification would none the less stand repealed. It was equally not the intention of the Government of Gujarat that even if the rates of dead rent substituted in Schedule II by the 1976 Notification were void and inoperative, the rates of dead rent as substituted by the 1974 Notification would none the less stand repealed. If the contention in this behalf were correct, it would lead to the startling result that on and from th date of coming into force of the 1975 Notification no dead rent was payable in respect of minor minerals and that on and from the date of the coming into force of the 1976 Notification no dead rent was payable in respect of any leased area. The rates in Schedule I and Schedule II were intended to be substituted by new rates. The intention was not to repeal them in any event. If the substitutions effected by the 1975 and 1976 Notifications were invalid, such substitutions were equally invalid to repeal the 1974 Notification. The result is that the 1974 Notification continued to be operative both as regards the rates of royalty

> and the rates of dead rent until they were validly substituted with effect from April 1, 1979, by the 1979, Notification."

54. In the present case, three Notifications dated 01.04.1997, 28.12.2002 and 25.04.2008 are relevant. These notifications are reproduced as under:

"GOVERNMENT OF RAJASTHAN
DEPARTMENT OF PERSONNEL
(A-Gr.II)

No. F.7(1)DOP/A-II/96 Jaipur dated 1.4.97

NOTIFICATION

In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India, the Governor of Rajasthan hereby makes the following amendment in the Various Service Rules as specified in the Schedule appended hereto from the date of issue namely:-

AMENDMENT

After the existing last proviso of rule as mentioned in Column no. 3 against each the Service Rules as mentioned in Column No. 2 of the Schedule appended hereto following new proviso at the next Serial Number shall be added, namely:-

"That if a candidate belonging to the Schedule Caste/Schedule Tribe is promoted to an immediate higher post/grade against a reserved vacancy earlier then his senior general/O.B.C. candidate who is promoted later to the said immediate higher post/grade, the general/O.B.C. candidate will regain his seniority over such earlier promoted candidates of the Scheduled Caste/Scheduled Tribes in the immediate higher post/grade."

"GOVERNMENT OF RAJASTHAN
DEPARTMENT OF PERSONNEL(A-2)

No. F.7(1)DOP/A-II/2002 Jaipur, dated 28.12.2002

NOTIFICATION

In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India, the Governor of Rajasthan hereby makes the following amendment in the Various Service Rules as specified in the Schedule appended hereto, namely:-

AMENDMENT

The existing proviso to rule as mentioned in column number 3 against each of the Service Rules as mentioned in column number 2 shall be deemed to have been deleted w.e.f. 1-4-1997 and the following new proviso shall be deemed to have been inserted as the last proviso to the respective rule as mentioned in Column No. 3 w.e.f. the date of issue of this notification."

"Provided that a candidate who has got the benefit of proviso inserted vide Notification No. F.7(1)DOP/A-II/96 dated 01.04.1997 on promotion to an immediate higher post shall not be reverted and his seniority shall remain unaffected. This proviso is subject to final decision of the Hon'ble Supreme Court of India in Writ Petition(Civil) No. 234/2002 All India Equality Forum V/s Union of India and Others."

SCHEDULE

S.No.	Name of Service Rules	Number of existing rule
1	2	3
S.No. 1 to 109	Xxxxxxxx	xxxxxxxx
	xxxxxxxx	xxxxxxxx
	xxxxxxxx	xxxxxxxx

By order and in the name of the Governor,

Sd/-
(S.K. Verma)
Deputy Secretary to the Government"

"GOVERNMENT OF RAJASTHAN
DEPARTMENT OF PERSONNEL
(A-II)

No. F.7(3)DOP/A-II/2008 Jaipur, dated 25.04.2008

NOTIFICATION

In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India, the Governor of Rajasthan hereby makes the following rules further to amend the Various Service Rules as mentioned in the Schedule appended hereto, namely:-

1. **Short title and commencement**:-(1) these rules may be called the Rajasthan Various Service(Amendment) Rules, 2008.

(2) They shall be deemed to have come into force with effect from 28.12.2002.

2. **Amendment**:-The following existing proviso to rule as mentioned in Column NO. 3 against each of the Service Rules, listed in Column No. 2 of the Schedule given below is hereby deleted, namely:-

"Provided that a candidate who has got the benefit of proviso inserted vide Notification No. F.7(1)DOP/A-II/96 dated 01.04-1997 on promotion to an immediate higher post shall not be reverted and his seniority shall remain unaffected. This proviso is subject to final decision of the Hon'ble Supreme Court of India in Writ Petition(Civil) No. 234/2002 All India Equality Forum V/s Union of India and Others."

SCHEDULE

S.No.	Name of Service Rules	Rule
1	2	3
S.No. 1 to 110	Xxxxxxxx	xxxxxxxx
	xxxxxxxx	xxxxxxxx
	xxxxxxxx	xxxxxxxx

By order and in the name of the
Governor,

Sd/-
(Dr. Loknath Soni)
Deputy Secretary to the Government"

55. This Court has considered all the three notifications. Notification dated 01.04.1997, relating to regaining seniority by general and OBC candidates over and above to their junior reserved candidates as and when they are promoted, was considered and upheld by Division Bench of this Court in B.K. Sharma's Case and by the Hon'ble Supreme Court in Ram Prasad's case and effect of judgment was also given in part. However, without complying with all the three requirements, as per judgment of M. Nagaraj's case and without waiting for decision of Hon'ble Apex Court in M. Nagaraj's case, the Notification dated 28.12.2002 was issued, deleting the Notification dated 01.04.1997. Since, no quantifiable data were collected before issuing Notification dated 28.12.2002, therefore, it was declared unconstitutional and violative of Article 14 and 16 of the Constitution of India. Similarly, the Notification dated 25.04.2008 was also quashed and declared ultra vires to the provisions of Constitution of India. The language of Notification dated 28.12.2002 will show that, “The existing proviso to rule as mentioned in column number 3 against each of the Service Rules as mentioned in column

number 2 shall be deemed to have been deleted w.e.f. 1-4-1997 and the following new proviso shall be deemed to have been inserted as the last proviso to the respective rule as mentioned in Column No. 3 w.e.f. the date of issue of this notification." By this Notification dated 28.12.2002, the existing proviso dated 01.04.1997 was deleted. This Court quashed and set aside the Notification dated 28.12.2002 itself, meaning thereby, the Notification dated 01.04.1997, which was deleted vide Notification dated 28.12.2002, which has been quashed and set aside, continued. It is relevant to mention that Notification dated 01.04.1997 was deemed to have been deleted vide invalid and unconstitutional Notification dated 28.12.2002, which has been quashed and set aside by this Court. Similarly, the proviso inserted vide Notification dated 28.12.2002, protecting the interest of candidates, was also withdrawn vide Notification dated 25.04.2008. As it had taken away the vested and accrued rights, therefore, Notification dated 25.04.2008 was also declared unconstitutional and violative of Articles 14 and 16 of the Constitution of India. The rule of regaining seniority introduced by way

of proviso vide Notification dated 01.04.1997 was based on three Constitutional Bench judgments of the Hon'ble Apex Court in **Union of India Vs. Virpal Singh Chauhan, (1995) 6 SCC 684; Ajit Singh and Others Vs. State of Punjab and Others, (1996) 2 SCC 715 and Ajit Singh and Others Vs. State of Punjab and Others, (1999) 7 SCC 209**. However, while upholding Constitution(Eighty Fifth Amendment) Act, Constitution Bench of the Hon'ble Supreme Court in M. Nagaraj case (supra) put a rider that before framing any rule in this regard, the State is required to collect quantifiable data showing, (i) backwardness of the Class; (ii) inadequacy of representation of that Class in public employment and (iii) Over all efficiency of the State Administration. Admittedly, all the three exercises were not carried out by the State Government and the Notifications dated 28.12.2002 and 25.04.2008 were quashed. Since Notifications dated 28.12.2002 and 25.04.2008 both were invalid and the amendment, which deleted the existing proviso dated 01.04.1997, itself was quashed and set aside, the proviso inserted vide Notification dated 01.04.1997 in Rule 33 came into existence. Even otherwise, as per three

judgments of the Hon'ble Supreme Court in Virpal Singh Chauhan's case(supra); Ajit Singh-I and Others' case(supra) and Ajit Singh-II and Others' case(supra), the catch up rule came into force, as all the three exercises as per judgment of M. Nagaraj's case had not been carried out by the State Government. Mr. C.S. Vaidhyanathan, Senior Advocate emphasized that Notification dated 01.04.1997 does not revive automatically, relying on the judgments of Hon'ble Supreme Court in B.N. Tewari's case(supra) and Firm A.T.B. Mehtab Majid and Co.'s case(supra), whereas both the judgments are not applicable in the facts and circumstances of the present case and these judgments were distinguished in subsequent judgments passed by the Hon'ble Supreme Court in Mohd. Shaukat Hussain Khan's case(supra), The Central Provinces Manganese Ore Co. Ltd.'s case(supra) and D.K. Trivedi's case(supra). Therefore, we do not find any merit in submission of learned Senior Advocate appearing for the respondents, in the facts and circumstances of the present case.

56. Now the question which remains for our consideration is whether the three orders/notifications dated 11.09.2011

(Annexure R/1 to R/3 appended with reply to contempt petition) can be said to be compliance of order dated 05.02.2010 passed by this Court. The brief facts of the original writ petition have already been mentioned in Para No. 30 hereinabove. In Para No. 35 above, we have already observed that it was the prime duty of the respondents to restore seniority of the petitioners of a day prior to the Notification dated 28.12.2002 which was in existence, as per existing rule at that time, but the same was not done. We have already considered in detail as to whether after quashing of Notifications dated 28.12.2002 and 25.04.2008, the earlier Notification dated 01.04.1997 exists or not and after considering the said question in detail, we have already negatived the submissions of learned counsel for the respondents to the effect that Notification dated 01.04.1997 does not revive automatically, meaning thereby, our finding is that Notification dated 01.04.1997 exists and continues and seniority list should have been prepared, ignoring the Notifications dated 28.12.2002 and 25.04.2008, but the same has not been prepared. Therefore, it constitutes contempt

of order passed by this Court by the respondents.

57. So far as three orders/Notifications dated 11.09.2011(Annexure R/1 to R/3) are concerned, they do not comply with the directions issued by this Court vide order dated 05.02.2010.

58. Vide Order dated 11.09.2011(Annexure R/1), order dated 15.06.2009, whereby seniority list of Super Time Scale and Selection Scale of Rajasthan Administrative Service Officers for the period from 01.04.1998 to 01.04.2008 was issued, has been withdrawn. It has further been directed that all officers affected by this Order, will continue to work as it is, on the present postings on Ad-hoc basis till further orders, whereas as per directions issued by this Court vide order dated 05.02.2010 all consequential orders and actions on the basis of Notifications dated 28.12.2002 and 25.04.2008 were quashed. Therefore, those persons of reserved category, who were illegally promoted on the basis of these Notifications should not have been allowed to continue on the present postings even on ad-hoc basis. Further, the seniority list of Super Time Scale as well as Selection Scale

of Rajasthan Administrative Service Officers should have been framed and published, ignoring both the Notifications dated 28.12.2002 and 25.04.2008 and on the basis of position, which was in existence a day prior to the Notification dated 28.12.2002, i.e. on the basis of earlier Notification dated 01.04.1997. Consequently, the DPC ought to have been convened to review the promotions of all the petitioners belonging to general and OBC category and they should have been considered for promotion accordingly. Therefore, order/Notification dated 11.09.2011(Annexure-R/1) is, in no way, a compliance of order dated 05.02.2010 passed by this Court.

59. The Notification dated 11.09.2011 (Annexure R/2), which is said to have been issued in compliance of order dated 05.02.2010 passed by this Court, also does does not comply with the said order passed by this Court; rather it shows the supremacy and misuse of the powers by the Executive and disregard to the order passed by this Court. For ready reference, Notification dated 11.09.2011(Annexure R/2) is reproduced as under:

Ann. R/2

"GOVERNMENT OF RAJASTHAN
DEPARTMENT OF PERSONNEL
(A-Group-II)

No. F.7(3)DOP/A-II/2008 Jaipur, dated 11.09.2011

NOTIFICATION

In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India, the Governor of Rajasthan hereby makes the following amendment, namely:-

Amendment

The existing Notifications No. F.7(1) DOP/A-II/2002 dated 28.12.2002 and F.7(3) DOP/A-II/2008 dated 25.4.2008 are hereby withdrawn from the date they were issued.

By order and in the name of the Governor,

Sd/-
(Nalini Kathotia)
Deputy Secretary to the Government"

60. The above Notification shows that "the existing Notifications No. F.7(1) DOP/A-II/2002 dated 28.12.2002 and F.7(3)DOP/A-II/2008 dated 25.4.2008" are hereby withdrawn from the date, they were issued. This Notification dated 11.09.2011(Annexure R/2) shows that both the Notifications dated 28.12.2002 and 25.04.2008 were in existence on the date of publication of Notification i.e. on 11.09.2011(Annexure R/2), whereas both the Notifications were quashed by this Court way back on 05.02.2010 and thereafter, in no circumstances, it could have been said

that they are in existence. Soon after quashing of both the Notifications, they ceased to exist, they were not in existence and they could not have been relied upon for any purpose whatsoever. The petitioners have alleged in D.B. Civil Contempt Petition No. 941/2010, in Para 5, that despite declaring both the Notifications as unconstitutional and after quashing the same, the respondents are not restraining themselves from convening the Departmental Promotion Committee for various posts in different departments. In Para No. 9 of said Contempt Petition, it has further been alleged that recently, Principal Secretary, Department of Personnel issued a Circular dated 11.10.2010 to all Principle Secretaries of all Departments for convening the DPC. From Annexure R/2, it is clear that the respondents were treating both the Notifications dated 28.12.2002 and 25.04.2008 as “in existence” even on the date of issuance of Circular i.e. 11.10.2010 (Annexure-7), which shows that DPCs were directed to be convened on the basis of invalid Notifications dated 28.12.2002 and 25.04.2008, in utter disregard of the order passed by this Court. The respondents have not cared to file even a reply to D.B. Civil

Contempt Petition No. 941/2010. The Circular dated 11.10.2010(Annexure-7), which itself is contemptuous, has not been withdrawn. In these circumstances, the Notification dated 11.09.2011(Annexure R/2) does not comply with the order of this Court, rather it further constitutes contempt of order of this Court.

61. Notification dated 11.09.2011 (Annexure R/3) also does not comply with the order passed by this Court. The Notification dated 11.09.2011(Annexure R/3) reads as under:

Annexure R/3

"GOVERNMENT OF RAJASTHAN
DEPARTMENT OF PERSONNEL
(A-Gr.II)

No. F.7(3)DOP/A-II/2008 Jaipur, dated 11.09.2011

NOTIFICATION

In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India, the Governor of Rajasthan hereby makes the following rules further to amend in the Rajasthan Administrative Service Rules, 1954, namely:-

1. **Short title and commencement.**-(1) these rules may be called the Rajasthan Administrative Service(Amendment) Rules, 2011.

(2) They shall be deemed to have come into force w.e.f. 1-4-1997.

2. **Amendment to rule 33.**-In sub-rule(1) of rule 33 of the Rajasthan Administrative Service Rules, 1954 after the existing last proviso, the following new proviso at the next serial number shall be added, namely:-

"that reservation for Scheduled Castes

and Scheduled Tribes employees, with consequential seniority, shall continue till the roster points are exhausted; and adequacy of promotion is achieved.

Once the roster points are complete the theory of replacement shall thereafter be exercised in promotion whenever vacancies earmarked for Scheduled Castes/Scheduled Tribes employees occur.

If on the application of these provisions Scheduled Castes/Scheduled Tribes employees who had been promoted earlier and are found in excess of adequacy level, shall not be reverted and shall continue on ad-hoc basis, and also any employee who had been promoted in pursuance of Notification No. F.7(1)DOP/A-II/96 dated 1-4-1997 shall not be reverted.

Notification No. F.7(1)DOP/A-II/96 dated 1-4-1997 shall be deemed to have been repealed w.e.f. 1-4-1997.

Explanation:-Adequate representation means 16% representation of the Scheduled Castes and 12% representation of the Scheduled Tribes in accordance with the roster point.

By order and in the name of the Governor,

Sd/-
(Nalini Kathotia)
Deputy Secretary to the Government,"

(i) The above Notification shows that it has not been issued in compliance of order dated 05.02.2010 passed by this Court in D.B. Civil Writ Petition No. 8104/2008, whereas compliance order is ordinarily issued by specifically mentioning that it is issued in compliance of order, sought to be complied with.

(ii) Vide this Notification, earlier Notification No. F.7(1)DOP/A-II/96 dated 1-4-

1997 has been repealed with effect from 01.04.1997, whereas it could not have been done, for the reason that the Notification dated 01.04.1997 was upheld by Division Bench of this Court in B.K. Sharma's case(supra) and by the Hon'ble Supreme Court in Ram Prasad's case(supra) and vested and accrued rights under this Notification were taken away vide Notification dated 25.04.2008, which could not have been so done and, therefore, the Notification dated 25.04.2008 was quashed by this Court vide judgment dated 05.02.2010, meaning thereby that the vested and accrued rights under Notification dated 01.04.1997 were further protected. Although, in this Notification, it has been provided that employees who had been promoted in pursuance of Notification dated 01.04.1997 shall not be reverted, but their further right of consideration of promotion for higher post has not been safeguarded. Therefore, repealing of Notification dated 01.04.1997 with effect from 01.04.1997 constitutes clear contempt of order passed by this Court.

(iii) The Notification dated 01.04.1997 was issued on the basis of Constitution Bench judgments of the Hon'ble Supreme Court in

Veerpal Singh Chouhan's case(supra) and Ajeet Singh-I's case(supra). Thereafter, the Parliament passed Constitution(Eighty-Fifth Amendment) Act, 2001 on 04.01.2002 with effect from 17.06.1995, but while upholding the constitutional validity of Constitution (Eighty-Fifth Amendment) Act, 2001, the Hon'ble Apex Court in M. Nagaraj's case, put a rider that before making such rule, the State will have to exercise and collect quantifiable data showing (i) backwardness of the Class; (ii) inadequacy of representation of that Class in public employment and (iii) Over all efficiency of the State Administration. Admittedly, these three exercises were not carried out by the State on the date of judgment passed by this Court. The appointment of K.K. Bhatnagar Committee and its report cannot be said to be sufficient compliance of all the three exercises, as per M. Nagaraj's case. K.K. Bhatnagar Committee has not and could not collect quantifiable data showing backwardness of the class, as these data could be collected by Census Department or by a Commission to be appointed for this purpose. The report of Bhatnagar Committee, if any, to show any class as backward class,

is not based on proper data and its conclusion in this regard is baseless. It appears that appointment of Bhatnagar Committee in this regard is nothing, except to over reach the order of this Court and to reframe the rule like Notification dated 28.12.2002, which has already been quashed by this Court. The respondents, were in knowledge of order of this Court dated 22.12.2010 passed in D.B. Civil Writ Petition No. 13491/2009, wherein the matter had already been referred to the Rajasthan State Backward Classes Commission, the report of which had not come in the hands of the respondents. Therefore, the Notification dated 11.09.2011(Annexure R/3), in fact, is in violation of order of this Court and cannot be said to comply the order of this Court.

(iv) The words, “if on the application of these provisions, the Scheduled Castes and Scheduled Tribes employees, who had been promoted earlier and are even in excess of adequacy level, shall not be reverted and shall continue on ad-hoc basis” are contrary to the order of this Court, as after quashing all consequential actions and seniority lists issued in pursuance of Notifications dated

25.04.2008 and 22.12.2002, the candidates, belonging to SC/ST category, who were illegally promoted, should have been reverted and general and OBC candidates, who were eligible and entitled, ought to have been placed above the candidates belonging to Scheduled Castes and Scheduled Tribes in seniority list and their cases should have been considered for promotion against those posts. But, neither seniority list was revised, nor their cases were considered for promotion and SC/ST candidates, who were promoted illegally on the basis of invalid Notifications dated 28.12.2002 and 25.04.2008, have been kept on ad-hoc basis. Since they have been kept on ad-hoc basis, therefore, posts have not been treated as vacant and on these posts, the general and OBC candidates have not been considered for promotion. Therefore, it can not be accepted that Notification dated 11.09.2011(Annexure R/3) has been issued in compliance of order of this Court.

(v) Although, the Legislature has powers to enact any law prospectively and retrospectively, but in the facts and circumstances of the present case, the present rule could not have been allowed to

come into force retrospectively, i.e. with effect from 01.04.1997, as it takes away the vested and accrued rights, which were made basis for quashing of the Notification dated 28.12.2002, after relying upon various judgments passed by the Hon'ble Supreme Court. Para 114 of the Judgment dated 05.02.2010 passed by this Court is relevant, therefore, the same is quoted for ready reference:

> “114. Apart from the above, it is also to be noted that the amendment in the Various Service Rules vide Notification dated 1.4.1997 was upheld by the Division Bench of this Court in B.K. Sharma's case (supra) and also by the Hon'ble Apex Court in the case of Ram Prasad Vs. D.K. Vijay (supra). Vide the aforesaid two judgments, the right of seniority and promotion had vested in the persons belonging to general/OBC categories. Therefore, to nullify the judgment of B.K. Sharma's case and the Hon'ble Apex Court in the case of Ram Prasad Vs. D.K. Vijay (supra), and to deprive the petitioners from their accrued and vested right under statute and above judgments, the Various Service Rules including the RAS Rules, could not have been amended vide Notification dated 28.12.2002 with effect from 1.4.1997, as held by the Hon'ble Supreme Court in Union of India & Ors. Vs. Tushar Ranjan Mohan, (1994) 5 SCC 450 and Chairman, Railway Board Vs. C.R. Rangadhamaiah, (1997) 6 SCC 623.”

(vi) The present Notification seems to be in the form of earlier Notification dated 28.12.2002, which has been quashed by this Court. Therefore, by way of an invalid and unconstitutional rule, it cannot be said that order passed by this Court has been complied with.

(vii) The 'Explanation' appended in the Notification dated 11.09.2011(Annexure R/3) is also contrary to the judgment passed by the Hon'ble Apex Court in M. Nagaraj's case, wherein it has been observed that adequate representation is not proportionate representation.

(viii) The Notification dated 11.09.2011 (Annexure R/3) shows that Scheduled Castes and Scheduled Tribes employees are in excess, therefore, their reversion has been protected, may be on ad-hoc basis. In any circumstances, Notification dated 11.09.2011 (Annexure R/3) cannot be said to be in compliance of order passed by this Court.

(ix) Notification dated 11.09.2011 (Annexure R/3) has been issued without any authority of law. The provisions of reservation were made by the State Legislature by enacting The Rajasthan Schedule Castes, Schedule Tribes, Backward

Classes, Special Backward Classes and Economically Backward Classes(Reservation of Seats in Educational Institutions in the State and of Appointments and posts in Services under the State) Act, 2008 and Section 4(3) of the said Act provides for reservation and promotion also. However, the said provision was enacted without undertaking the exercises emphasized in decision of the Hon'ble Supreme Court in M. Nagaraj's case. An additional affidavit in this regard was filed by the petitioner on 16.12.2011, wherein it was stated that the Act of 2008 was challenged in D.B. Civil Writ Petition No. 13491/2009, which was decided finally on 22.12.2010. It was agreed that State of Rajasthan will not give effect to Sections 3 and 4 of the Act of 2008 and the Notification with respect to enhancing of financial limit of creamy layer from 2.5 lacs to 4.5 lacs. As agreed by the parties, the matter was referred to Rajasthan State Backward Classes Commission and the State Government was directed to place before the Commission the quantifiable data of numerous factors, which are necessary in the light of the Apex Court decision in the cases of M. Nagaraj and Ashoka Kumar Thakur. The point

was argued on 16.12.2011 in this case and learned Advocate General sought time to see implication and further whether it was open for the State Government to enact the rules, as provisions of Section 4 have been stayed by this Court till the exercise is undertaken by the Commission, as mentioned in the aforesaid matter. The stay order dated 22.12.2010 passed in D.B. Civil Writ Petition No. 13491/2009 was quoted in the order dated 16.12.2011 passed in this case, which has been reproduced above. Since Legislature has already enacted an Act in this regard, therefore, proviso to Article 309 of the Constitution of India could not have been invoked by the respondents so as to exercise powers of subordinate legislation for issuing present Notification dated 11.09.2011 (Annexure R/3).

62. In fact, all the above referred orders/Notifications dated 11.09.2011, which are enclosed with the reply to contempt petition, have not been issued in compliance of the order passed by this Court. Rather, they have been intentionally issued by showing supremacy powers of the Executive and in utter disregard to the order of this Court. The respondents initially did not

comply with the order dated 05.02.2010 passed by this Court on the pretext that they have preferred special leave petition before the Hon'ble Supreme Court. Although no interim stay was ever passed in favour of the State Government. Even after dismissal of SLP filed by the State on 07.12.2010, the order passed by this Court was not complied with. Thereafter, time was sought by the respondents to comply with the order passed by this Court, on 11.05.2011 and again on 28.07.2011. The issuance of Notification dated 11.09.2011; instead of reversion of the illegally promoted SC/ST candidates, keeping them on ad-hoc basis, shows the adamacy on the part of the respondents to willfully flout the order passed by this Court. On 16.12.2011, time was granted to see the implication of stay order dated 22.12.2010 passed in D.B. Civil Writ Petition No. 13491/2009. Thereafter, on all the dates, it was argued that order has been complied with and contempt petitions are not maintainable before this Court. This Court or the Hon'ble Supreme Court never directed the respondents to constitute any committee, like K.K. Bhatnagar Committee. This Court in D.B. Civil Writ Petition No. 13491/2009, on

agreement of parties, referred the matter to Rajasthan State Backward Classes Commission and it was directed that State Government shall place before the Commission the quantifiable data of numerous factors, which are necessary in the light of the Hon'ble Apex Court decision in the cases of M. Nagaraj and Ashoka Kumar Thakur, but instead of carrying out the required exercise, the respondents constituted K.K. Bhatnagar Committee which in no way, can be said to be compliance of order passed by this Court. The Notification dated 11.09.2011 has been framed and placed on record to take a false plea that order has been complied with, it gives separate cause of action and this Court cannot examine its validity. When this Notification has been placed on record in contempt proceedings, purporting to be in compliance of order passed by this Court, definitely this Court has the jurisdiction to examine whether it is sufficient compliance of order passed by this Court or not. If it is not, then this Court is competent to comment on it and to hold that it is not a compliance of order passed by this Court. It may give separate cause of action to other persons, but so far as the petitioners are

concerned, they have every right to say and comment on it and this Court is also competent to examine it, particularly, when it has been placed along with reply to contempt petition as compliance of order passed by this Court.

63. So far as, Respondent No. 1, Mr. Salauddin Ahmed is concerned, he has not even filed a reply to contempt petitions, nor he has filed his affidavit in support of reply to contempt petition, which is supported by an affidavit of Respondent No. 2, Mr. Khemraj alone. Therefore, it appears that Respondent No. 1 is not willing to contest these contempt petitions, as he has not controverted any allegation, made against him in the contempt petitions. Therefore, he is held guilty of contempt for non-compliance of order passed by this Court and also for want of any explanation in respect of it.

64. For the aforesaid reasons, we are fully satisfied that all the three orders/Notifications dated 11.09.2011 (Annexure R/1 to Annexure R/3), filed with the reply to contempt petition, do not comply with the order passed by this Court and both the respondents are guilty of willfully committing contempt of order passed by this

Court. We, therefore, hold them guilty for willfully committing contempt of order passed by this Court on 05.02.2010.

65. As already discussed above, sufficient time was available with the respondents to comply with the order passed by this Court in Feburary, 2010. Almost two years have elapsed since passing of the order by this Court and more than 14 months have elapsed after dismissal of special leave petition filed by the State before the Hon'ble Supreme Court. During contempt proceedings, time was sought to report the compliance, which was granted on 11.05.2011. Three weeks further time was sought, which was granted to report the compliance on 28.07.2011. Learned Advocate General prayed for further time to examine the matter, which was also granted on 18.10.2011. Again an opportunity was granted on 03.11.2011. Further on 16.12.2011, the Advocate General sought time for compliance, which was also granted. In these circumstances, we are of the considered view that this is a fit case, wherein no further time be granted to the respondents in the matter.

However, in the interest of justice, we grant them last opportunity of three days

to purge themselves with the contempt and comply with the order passed by this Court in its letter and spirit, failing which they are directed to remain present in person before this Court on 27.02.2012 to make their submissions in respect of award of punishment to them for committing willful contempt of order dated 05.02.2010 passed by this Court.

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

Manoj

"All corrections made in the judgment/order have been incorporated in the judgment/order being emailed."

MANOJ NARWANI
JUNIOR PERSONAL ASSISTANT.