IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No. 2608 OF 2011

U.P. Power Corporation Ltd. ... Appellant

Versus

Rajesh Kumar & Ors. … Respondents

WITH

CIVIL APPEAL NO. 4009 OF 2012
(arising out of SLP (C) No. 10217/2011)
WITH
CIVIL APPEAL NO. 4022 OF 2012
(arising out of SLP (C) No. 15114/2011)
WITH
CIVIL APPEAL NOS. 4027-4029 OF 2012
(arising out of SLP (C) Nos. 20577-20579/2011)
WITH
CIVIL APPEAL NOS. 2605 OF 2011, 2607/2011, 2609/2011, 2610/2011, 2614/2011, 2616/2011, 2629/2011, 2675/2011, 2676/2011, 2677/2011, 2678/2011, 2679/2011, 2729/2011, 2730/2011, 2737/2011
WITH
CIVIL APPEAL NO. 4023 OF 2012
(arising out of SLP(C) No. 14188 OF 2012 (CC 4420/2011)
WITH
CIVIL APPEAL NO. 4024 OF 2012
(arising out of SLP(C) No.14189/2012 (CC 4421/2011)
WITH
CIVIL APPEAL NO. 4025 OF 2012
(arising out of SLP(C) No.14190/2012 (CC 4431/2011)
WITH
CIVIL APPEAL NO. 4691 OF 2011
WITH
CIVIL APPEAL NO. 4697 OF 2011
WITH
CIVIL APPEAL NO. 4699 OF 2011
WITH
CIVIL APPEAL NO.4026 OF 2012
(arising out of SLP(C) No. 14191 OF 2012 (CC 5070/2011)
WITH
CIVIL APPEAL NO. 4016 OF 2012
(arising out of SLP(C) No.14179/2012 (CC 5580/2011)

WITH

CIVIL APPEAL NO.4021 OF 2012

(arising out of SLP(C) No.14184/2012 (CC 6362/2011)

WITH

CIVIL APPEAL NO. 4017 OF 2012

(arising out of SLP(C) No. 14181/2012 (CC 6482/2011)

WITH

CIVIL APPEAL NO. 4018 OF 2012

(arising out of SLP(C) No. 14182/2012 (CC 7037/2011)

WITH

CIVIL APPEAL NO.4019 OF 2012

(arising out of SLP(C) No. 14183/2012 (CC 7042/2011)

WITH

CIVIL APPEAL NO. 4020OF 2012

(arising out of SLP(C) No.14184/2012 (CC 7058/2011)

WITH

CIVIL APPEAL NO.4030 OF 2012

(arising out of SLP(C) No. 30325/2011)

WITH

CIVIL APPEAL NO. 4031 OF 2012

(arising out of SLP(C) No. 30326/2011)

WITH

CIVIL APPEAL NO.4032 OF 2012

(arising out of SLP(C) No. 30327/2011)

WITH

CIVIL APPEAL NO.4033 OF 2012

(arising out of SLP(C) No. 30692/2011

WITH

CIVIL APPEAL NO.4034 OF 2012

(arising out of SLP(C) No. 30696/2011)

AND

CIVIL APPEAL No. 2622 OF 2011

State of U.P. ... Appellant

Versus

Brij Bhushan Sharma & Anr. … Respondents

WITH

CIVIL APPEAL NO. 2611 OF 2011

WITH

CIVIL APPEAL NO. 2612/2011

WITH
CIVIL APPEAL NO. 2613 OF 2011
WITH
CIVIL APPEAL NO. 2623 OF 2011
WITH
CIVIL APPEAL NO. 2624 OF 2011
WITH
CIVIL APPEAL NO. 2682-2683 OF 2011
WITH
CIVIL APPEAL NO. 2684 OF 2011
WITH
CIVIL APPEAL NO. 2881 OF 2011
WITH
CIVIL APPEAL NO. 2884-2885 OF 2011
WITH
CIVIL APPEAL NO. 2886 OF 2011
WITH
CIVIL APPEAL NO. 2908 OF 2011
WITH
CIVIL APPEAL NO. 2909 OF 2011
WITH
CIVIL APPEAL NOS. 2944-2945 OF 2011
CIVIL APPEAL NO. 66 OF 2012

WITH

CIVIL APPEAL NO.4067/2012
(arising out of SLP(C) No.14207/2012 (CC 17243/2011)

J U D G M E N T

Dipak Misra, J.

Leave granted in Special Leave Petitions.

2. The controversy pertaining to reservation in promotion for the Scheduled Castes and Scheduled Tribes with consequential seniority as engrafted under Articles 16(4A) and 16(4B) and the

facet of relaxation grafted by way of a proviso to Article 335 of the Constitution of India being incorporated by the Constitution (Seventy-seventh Amendment) Act, 1995, the Constitution (Eight-first Amendment) Act, 2000, the Constitution (Eighty-second Amendment) Act, 2000 and the Constitution (Eighty-fifth Amendment) Act, 2001 at various stages having withstood judicial scrutiny by the dictum in ***M. Nagaraj* v. *Union of India***[1], the issue of implementation of the same through existing statutory enactment by the State Legislature and the subsequent rules framed by the authorities of the State or concerned corporation of the State of Uttar Pradesh, has, as the learned counsel appearing for both sides in their astute and penetrating manner have pyramided the concept in its essentiality, either appeared too simple that simplification may envy or so complex that it could manifest as the reservoir of imbalances or a sanctuary of uncertainties. Thus, the net result commands for an endeavour for a detailed survey of the past and casts an obligation to dwell upon the controversy within the requisite parameters that are absolutely essential for adjudication of the *lis* emanated *in praesenti.*

[1] (2006) 8 SCC 212 : AIR 2007 SC 71

THE FACTUAL EXPOSE'

3. Extraordinary and, in a way, perplexing though it may seem, yet as the factual scenario pronouncedly reveals, the assail in some of the appeals of this batch of appeals is to the judgment and order passed by the Division Bench of the High Court of Judicature at Allahabad in Writ Petition No. 63217 of 2010 (*Mukund Kumar Srivastava* vs. *State of U.P. and Another*) upholding the validity of the provisions contained in Rule 8-A of the U.P. Government Servants Seniority Rules, 1991 (for brevity 'the 1991 Rules') that were inserted by the U.P. Government Servants Seniority (3rd Amendment) Rules, 2007 by the employees-appellants and in some of the appeals, the challenge by the State Government and the U.P. Power Corporation Ltd. (for short 'the Corporation') is to the judgment and order passed by the Division Bench of the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow, in Writ Petition No. 1389 (S/B) of 2007 (*Prem Kumar Singh and others* v. *State of U.P. and others*) and other connected writ petitions holding, inter alia, that the decision rendered by the Division Bench in the case of *Mukund Kumar Srivastava* (supra) at Allahabad is *per incuriam* and not a binding precedent and further Section 3(7) of the Uttar Pradesh

Public Servants (Reservation for Scheduled Castes, Scheduled Tribes and other Backward Classes) Act, 1994 (for short 'the 1994 Act') and Rule 8A of the 1991 Rules, as brought into force in 2007, are invalid, ultra vires and unconstitutional and, as a necessary corollary, the consequential orders relating to seniority passed by the State Government deserved to be quashed and, accordingly, quashed the same and further clarified that in case the State Government decides to provide reservation in promotion to any class or classes of posts in the services under the State, it is free to do so after undertaking the exercise as required under the constitutional provisions keeping in mind the law laid down by this Court in ***M. Nagraj*** (supra). It has been directed that till it is done, no reservation in promotion on any post or classes of posts under the services of the State including the Corporation shall be made hence forth. However, the Division Bench observed that the promotions already made as per the provisions/Rules where the benefit of Rule 8A has not been given while making the promotion shall not be disturbed.

4. The cleavage has invited immense criticism by the learned senior counsel appearing for both sides on principles of judicial discipline, decorum, propriety and tradition. Initially the debate

centred around the concept of precedent and the duties of the Benches but gradually it was acceded to, absolutely totally being seemly, to decide the controversy on merits instead of a remit and, accordingly, the learned counsel for the parties addressed the Court at length. As advised, we shall dwell upon the merits of the controversy but we shall not abdicate our responsibility to delve into the first issue, i.e., judicial discipline as we are inclined to think that it is the duty, nay, obligation in the present case to do so because despite repeated concern shown by this Court, the malady subsists, making an abode of almost permanency. Ergo, we proceed to state the facts on the first issue and our opinion thereon and, thereafter, shall deal with the assail and attack on both the judgments on merits.

5. One Rajesh Kumar and two others, the private respondents in the appeal preferred by the Corporation, filed Writ Petition No. **146 (S/B) of 2009** at the Lucknow Bench of the High Court of Judicature at Allahabad seeking declaration to the effect that Rule 8A of the 1991 Rules and the resolution passed by the Corporation are ultra vires. That apart, the assail was to the constitutional validity of Section 3(7) of the 1994 Act on the foundation that the State Government in gross violation of the

constitutional provisions enshrined under Articles 16(4A) and 16(4B) and the interpretation placed thereon by the Constitution Bench in ***M. Nagraj*** (supra) has framed the Rules and the Corporation has adopted the same by amending its Rules and introduced the concept of reservation in promotion with accelerated seniority.

6. It was contended before the Lucknow Bench that neither the State Government nor the Corporation had carried out the exercise as per the decision in ***M. Nagraj*** (supra) and in the absence of the same, the provisions of the Act and the Rules caused discomfort to the constitutional provisions. The stand and stance put forth by the writ petitioners was combated by the Corporation contending, inter alia, that the Scheduled Castes and Scheduled Tribes were inadequately represented in the service and the chart wise percentage of representation to direct recruitment of reserved categories incumbents would clearly reflect the inadequacy. We are not referring to the pleadings in detail as that will be adverted to at a later stage. Suffice to say at present, in view of the assertions made by the parties and the records produced the Division Bench framed the question for determination whether Rule 8-A of the Rules is ultra vires and

unconstitutional. During the course of hearing of the writ petition, the Corporation brought to the notice of the Division Bench at Lucknow the judgment dated 21.10.2010 passed by the Division Bench at Allahabad in Writ Petition No. 63127 of 2010 (*Mukund Kumar Srivastava* v. *State of U.P. and another).* It was urged that the same was a binding precedent and, therefore, the Division Bench was bound to follow the same. But, the Bench hearing the writ petition declared the said decision as not binding and *per incuriam* as it had not correctly interpreted, appreciated and applied the ratio laid down in ***M. Nagraj*** (supra) and, on that base, declared Section 3(7) of the 1994 Act and Rule 8A of the 1991 Rules as unconstitutional and issued the directions as have been stated hereinbefore.

7. It is the admitted position at the Bar that certain writ petitions were filed at Lucknow Bench and they were being heard. They were filed on earlier point of time and were being dealt with on merits by the concerned Division Bench. At that juncture, the Division Bench at Allahabad entertained Writ Petition No. 63127 of 2010. The Bench was of the view that without calling for a counter affidavit from any of the respondents the writ petition could be decided. Be it noted, the

petitioner therein was an Executive Engineer in Rural Engineering Service at Sonebhadra Division and had challenged the seniority list of Executive Engineers of Rural Engineering Service published vide Office Memorandum No. 2950/62-3-2010-45-RES/2010 dated 8.9.2010 and further sought declaration of Rule 8A of the 2007 Rules as unconstitutional. A prayer for issue of a writ of mandamus was sought not to proceed with and promote any person on the next higher post on the basis of the impugned seniority list of Executive Engineers of Rural Engineering Service. The Bench, as is manifest from the order, adverted to the facts and then dwelled upon the validity of the Rules. It scanned Rules 6, 7, 8 and 8A and referred to the decision of this Court in ***Indra Sawhney etc.* v. *Union of India and others***[2], Section 3 of the 1994 Act, Article 335 of the Constitution and quoted in extenso from ***M. Nagraj*** (supra) and came to hold as follows: -

> "The Constitutional validity of Amending Act 77th Amendment Act 1995 and 85th Amendment Act 2001 whereby clause (4A) has been inserted after clause (4) under the Article 16 of the Constitution has already been upheld by the Constitution Bench of Hon'ble Apex Court in **M. Nagraj case (supra)** holding that neither the catch up rule nor the Constitutional seniority is implicit in Clause

[2] 1992 Supp. (3) SCC 217 : AIR 1993 SC 477

(1) and Clause (4) of Article 16 rather the concept of catch up rule and consequential seniority are judicially evolved concepts to control the extent of reservation. The source of these concepts is in service jurisprudence. These concepts cannot be elevated to the status of an axiom, like secularism, constitutional sovereignty, equality code etc. forming basic structure of the Constitution. It cannot be said that by insertion of concept of consequential seniority the structure of Article 16 stands destroyed or abrogated. It cannot be said that equality code contained under Articles 14, 15, 16 is violated by deletion of catch-up rule.

We are bound by the aforesaid decision of Hon'ble Apex Court in **M. Nagraj case (supra)**. Therefore, there can be no scope for doubt to hold that deletion of catch-up rule and conferring the benefits of consequential seniority upon the members of SC and ST on account of reservation in promotion in a particular service or grade or post has any way obliterated the equality code contained under Articles 14, 15 and 16 of the Constitution as concept of catch-up rule of seniority does not directly flow from Article 16(1) and (4) of the Constitution of India. We are of the considered opinion that Rule 8A of 1991 Rules has merely effectuated the provisions contained under Article 16(4A) of the Constitution of India whereby benefit of consequential seniority has been given to the members of scheduled castes and scheduled tribes due to reservation/roster in promotion by obliterating the concept of catch-up Rule of seniority. Rule 8A of 1991 Rules specifically stipulates that if any member of scheduled castes or scheduled tribes is promoted on any post or grade in service earlier to other categories of persons, the member of SC/ST shall be treated to be senior to such other categories of persons who are promoted subsequently after promotion of members of SC/ST, despite

> anything contained in Rules 6, 7 and 8 of 1991 Rules. In our view Rule 8A of 1991 Rules has constitutional sanctity of Article 16(4A) of the Constitution and cannot be found faulty merely on account of violation of judicially evolved concept of catch-up rule of seniority which has been specifically obliterated by Article 16(4A) of the Constitution. Likewise the said rule can also not be held to be unconstitutional or invalid on account of obliteration of any other judicially evolved principle of seniority or any other contrary rules of seniority existing under Rules 6, 7 and 8 of 1991 Rules, as Rule 8A of 1991 Rules opens with non-obstante clause with overriding effect upon Rules 6, 7 and 8 of 1991 Rules, therefore, we do not find any justification to strike down the provisions contained under Rule 8-A of 1991 Rules on the said ground and on any of the grounds mentioned in the writ petition."

After so stating, the Division Bench proceeded to observe as follows: -

> "27. In this connection, we make it clear that deletion of the said concept of catch-up Rule of seniority and addition of consequential seniority due to reservation in promotion on any post or grade in service are applicable to the member of scheduled castes and scheduled tribes only, whereas inter-se seniority of other categories employees shall continue to be determined according to their existing seniority rules as contemplated by the provisions of Rules 6, 7 and 8 of 1991 Rules, subject to aforesaid limitations. Thus the concept of catch-up Rule of Seniority stands obliterated only to the extent of giving benefit of consequential seniority to the members of scheduled castes and scheduled tribes on account of their promotion on any post or grade

> in service due to reservation, therefore, the scope of obliteration of concept of catch-up rule is limited to that extent. In this view of the matter the petitioner is not entitled to get the relief sought for in the writ petition questioning the validity of said Rule 8A of 1991 Rules. Thus we uphold the validity of said Rules and the question formulated by us is answered accordingly."

It is interesting to note that in paragraph 29 of the said judgment the Division Bench expressed thus: -

> "29. However, since the petitioner did not challenge the Constitutional Validity of Law regarding reservation in promotion in favour of scheduled castes and scheduled tribes existing in State of Uttar Pradesh which is applicable to the services and posts in connection of affairs of State of Uttar Pradesh inasmuch as other services and posts covered by said Reservation Act 1994, in our opinion, the petitioner shall not be permitted to raise this question by filing any other writ petition again. In given facts and circumstances of the case, we are not inclined to issue any mandamus, commanding the respondents, not to proceed with impugned seniority list for the purpose of promotion on the next higher post without expressing any opinion on the merit of said seniority list. We are also not inclined to issue any such restraint order, staying any promotion on the next higher post, if the respondents are intending to make such promotion on the basis of impugned seniority list."

8. We have been apprised at the Bar that it was brought to the notice of the Division Bench at Allahabad that certain writ

petitions, where there was comprehensive challenge, were part-heard and the hearing was in continuance at Lucknow Bench, but, as is vivid from the first paragraph of the said judgment, the Bench heard the learned counsel for the petitioner and the standing counsel for the State and caveator and proceeded to decide the matter without a counter affidavit.

9. Presently, we shall advert to how the Lucknow Bench dealt with this decision.

10. After stating the basic pleas, the Division Bench at Lucknow proceeded to state as follows:-

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

Before the said Bench, it was contended that the judgment rendered by the Division Bench at Allahabad is *per incuriam* and is not a binding precedent.

11. Various grounds were urged to substantiate the aforesaid stand. The Division Bench, after analysing the reasoning of the Allahabad Bench in great detail and after referring to certain decisions and the principles pertaining to binding precedent, opined as follows:-

> "The Division Bench at Allahabad, did not enter into the question of exercise of power by the State Government under the enabling provisions of the Constitution and upheld the validity of Rule 8-A only for the reason, that there did exist such a power to enact the Rule, whereas the Apex Court, very clearly has pronounced, that if the given exercise has not been undertaken by the State Government while making a rule for reservation with or without accelerated seniority, such a rule may not stand the test of judicial review.
>
> In fact, M. Nagraj obliges the High Court that when a challenge is made to the reservation in promotion, it shall scrutinize the same on the given parameters and it also casts a corresponding duty upon the State Government to satisfy the Court about the exercise undertaken in making such a provision for reservation. The Division Bench did not advert upon this issue, nor the State Government fulfilled its duty as enumerated in M. Nagraj.

> The effect of the judgment delivered at Allahabad is also to be seen in the light of the fact that though the Division Bench at Allahabad did not adjudicate on the dispute with regard to the seniority for which the petitioner Mukund Kumar Srivastava has been relegated to the remedy of State Public Services Tribunal, but upheld the validity of Rule 8-A, which could not be said to be the main relief, claimed by the petitioner.
>
> For the aforesaid reasons and also for the reason, that the present writ petitions do challenge the very rule of reservation in promotion, which challenge we have upheld for the reasons hereinafter stated, because of which the rule of accelerated seniority itself falls to the ground, we, with deep respect, are unable to subscribe to the view taken by the Division Bench at Allahabad and hold that the said judgment cannot be considered as binding precedent having been rendered per incuriam."

12. We have reproduced the paragraphs from both the decisions in extenso to highlight that the Allahabad Bench was apprised about the number of matters at Lucknow filed earlier in point of time which were being part heard and the hearing was in continuum. It would have been advisable to wait for the verdict at Lucknow Bench or to bring it to the notice of the learned Chief Justice about the similar matters being instituted at both the places. The judicial courtesy and decorum warranted such discipline which was expected from the learned Judges but for the unfathomable reasons, neither of the courses were taken

recourse to. Similarly, the Division Bench at Lucknow erroneously treated the verdict of Allahabad Bench not to be a binding precedent on the foundation that the principles laid down by the Constitution Bench in ***M. Nagraj*** (supra) are not being appositely appreciated and correctly applied by the Bench when there was reference to the said decision and number of passages were quoted and appreciated *albeit* incorrectly, the same could not have been a ground to treat the decision as *per incuriam* or not a binding precedent. Judicial discipline commands in such a situation when there is disagreement to refer the matter to a larger Bench. Instead of doing that, the Division Bench at Lucknow took the burden on themselves to decide the case.

13. In this context, we may profitably quote a passage from **Lala Shri Bhagwan and another v. Ram Chand and another**[3]**:-**

> "18. .. It is hardly necessary to emphasise that considerations of judicial propriety and decorum require that if a learned single Judge hearing a matter is inclined to take the view that the earlier decisions of the High Court, whether of a Division Bench or of a single Judge, need to be reconsidered, he should not embark upon that enquiry sitting as a single Judge, but should refer the matter to a

[3] AIR 1965 SC 1767

> Division Bench or, in a proper case, place the relevant papers before the Chief Justice to enable him to constitute a larger Bench to examine the question. That is the proper and traditional way to deal with such matters and it is founded on healthy principles of judicial decorum and propriety. It is to be regretted that the learned single Judge departed from this traditional way in the present case and chose to examine the question himself."

14. In **Sundarjas Kanyalal Bhathija and others v. The Collector, Thane, Maharashtra and others**[4] while dealing with judicial discipline, the two-Judge Bench has expressed thus:-

> "One must remember that pursuit of the law, however, glamorous it is, has its own limitation on the Bench. In a multi-Judge Court, the Judges are bound by precedents and procedure. They could use their discretion only when there is no declared principle to be found, no rule and no authority. The judicial decorum and legal propriety demand that where a learned single Judge or a Division Bench does not agree with the decision of a Bench of co-ordinate jurisdiction, the matter shall be referred to a larger Bench. It is a subversion of judicial process not to follow this procedure."

The aforesaid pronouncements clearly lay down what is expected from the Judges when they are confronted with the decision of a Co-ordinate Bench on the same issue. Any contrary attitude, however adventurous and glorious may be, would lead to uncertainty and inconsistency. It has precisely so happened

[4] AIR 1991 SC 1893

in the case at hand. There are two decisions by two Division Benches from the same High Court. We express our concern about the deviation from the judicial decorum and discipline by both the Benches and expect that in future, they shall be appositely guided by the conceptual eventuality of such discipline as laid down by this Court from time to time. We have said so with the fond hope that judicial enthusiasm should not obliterate the profound responsibility that is expected from the Judges.

15. Having dealt with the judicial dictum and the propriety part, we shall now proceed to deal with the case on merit as a common consensus was arrived at the Bar for the said purpose. The affected employees have filed certain civil appeals against the judgment of the Allahabad High Court and the employees who are affected by the verdict of the Lucknow Bench have also preferred appeals. That apart, the State of U.P. and the Corporation have also challenged the decision as the rules framed have been declared ultra vires. The main controversy relates to the validity of Section 3(7) of the 1994 Act and Rule 8A of the 1991 Rules. Thus, we really have to advert to the constitutional validity of the said provisions.

16. Prior to the advertence in aforesaid regard, it is necessary to have a certain survey pertaining to reservation in promotional matters. The question of reservation and the associated promotion with it has been a matter of debate in various decisions of this Court. After independence, there were various areas in respect of which decisions were pronounced. Eventually, in the case of ***Indra Sawhney and another* v. *Union of India and others*** (supra) the nine-Judge Bench, while dealing with the question whether clause (4) of Article 16 of the Constitution provides for reservation only in the matter of initial appointment, direct recruitment or does it contemplate and provide for reservations being made in the matter of promotion as well, recorded the submissions of the petitioners in paragraph 819 which reads as follows: -

> "The petitioners' submission is that the reservation of appointments or posts contemplated by clause (4) is only at the stage of entry into State service, i.e., direct recruitment. It is submitted that providing for reservation thereafter in the matter of promotion amounts to a double reservation and if such a provision is made at each successive stage of promotion it would be a case of reservation being provided that many times. It is also submitted that by providing reservation in the matter of promotion, the member of a reserved category is enabled to leap-frog over his compatriots, which is bound to

generate acute heartburning and may well lead to inefficiency in administration. The members of the open competition category would come to think that whatever be their record and performance, the members of reserved categories would steal a march over them, irrespective of their performance and competence. Examples are give how two persons (A) and (B), one belonging to O.C. category and the other belonging to reserved category, having been appointed at the same time, the member of the reserved category gets promoted earlier and how even in the promoted category he jumps over the members of the O.C. category already there and gains a further promotion and so on. This would generate, it is submitted, a feeling of disheartening which kills the spirit of competition and develops a sense of disinterestedness among the members of O.C. category. It is pointed out that once persons coming from different sources join a category or class, they must be treated alike thereafter in all matters including promotions and that no distinction is permissible on the basis of their "birth-mark". It is also pointed out that even the Constituent Assembly debates on draft Article 10(3) do not indicate in any manner that it was supported to extend to promotions as well. It is further submitted that if Article 16(4) is construed as warranting reservation even in the matter of promotion it would be contrary to the mandate of Article 335 viz., maintenance of efficiency in administration. It is submitted that such a provision would amount to putting a premium upon inefficiency. The members of the reserved category would not work hard since they do not have to compete with all their colleagues but only within the reserved category and further because they are assured of promotion whether they work hard and efficiently or not. Such a course would also militate against the goal of excellence referred to in clause (j) of Article 51-A (Fundamental Duties)."

Thereafter, the Bench referred to the decisions in ***General Manager, S. Rly.*** **v.** ***Rangachari***[5]***, State of Punjab*** **v.** ***Hira Lal***[6]***, Akhil Bharatiya Soshit Karamchari Sangh*** **v.** ***Union of India***[7] and ***Comptroller and Auditor General*** **v.** ***K.S. Jagannathan***[8] and did not agree with the view stated in ***Rangachari*** (supra), despite noting the fact that ***Rangachari*** has been a law for more than thirty years and that attempt to reopen the issue was repelled in ***Akhil Bharatiya Soshit Karamchari Sangh*** (supra). Thereafter, their Lordships addressed to the concept of promotion and, eventuall,y after adverting to certain legal principles, stated thus: -

> "**831.** We must also make it clear that it would not be impermissible for the State to extend concessions and relaxations to members of reserved categories in the matter of promotion *without* compromising the efficiency of the administration. The relaxation concerned in *State of Kerala* v. *N.M. Thomas* [(1976) 2 SCC 310] and the concessions namely carrying forward of vacancies and provisions for in-service coaching/training in *Karamchari Sangh* are instances of such concessions and relaxations. However, it would not be permissible to prescribe lower qualifying marks or a lesser level of evaluation for the members of reserved categories since that would compromise the efficiency of administration. We reiterate that while it may be

[5] AIR 1962 SC 36
[6] (1970) 3 SCC 567
[7] (1981) 1 SCC 246
[8] (1986) 2 SCC 679

permissible to prescribe a reasonably lesser qualifying marks or evaluation for the OBCs, SCs and STs – consistent with the efficiency of administration and the nature of duties attaching to the office concerned – in the matter of direct recruitment, such a course would not be permissible in the matter of promotions for the reasons recorded hereinabove."

In paragraph 859, while summarising the said aspect, it has been ruled thus: -

"**859.** We may summarise our answers to the various questions dealt with and answered hereinabove:

....

(7) Article 16(4) does not permit provision for reservations in the matter of promotion. This rule shall, however, have only prospective operation and shall not affect the promotions already made, whether made on regular basis or on any other basis. We direct that our decision on this question shall operate only prospectively and shall not affect promotions already made, whether on temporary, officiating or regular/permanent basis. It is further directed that wherever reservations are already provided in the matter of promotion – be it Central Services or State Services, or for that matter services under any Corporation, authority or body falling under the definition of 'State' in Article 12 – such reservations may continue in operation for a period of five years from this day. Within this period, it would be open to the appropriate authorities to revise, modify or re-issue the relevant rules to ensure the achievement of the objective of Article 16(4).

> If any authority thinks that for ensuring adequate representation of 'backward class of citizens' in any service, class or category, it is necessary to provide for direct recruitment therein, it shall be open to it to do so (Ahmadi, J expresses no opinion on this question upholding the preliminary objection of Union of India). It would not be impermissible for the State to extend concessions and relaxations to members of reserved categories in the matter of promotion *without* compromising the efficiency of the administration."

17. After the said decision, another decision, namely, ***Union of India and others* v. *Virpal Singh Chauhan and others***[9] came to the field. In the said case, the two-Judge Bench was concerned with the nature of rule and reservation in promotions obtaining in the railway service and the rule concerning the determination of seniority between general candidates and candidates belonging to reserved classes in the promotional category. The Bench referred to the decision in ***R.K. Sabharwal* v. *State of Punjab***[10], various paragraphs of the Indian Railways Establishment Manual and paragraphs 692 and 693 of the ***Indra Sawhney*** (supra) and opined that the roster would only ensure the prescribed percentage of reservation but would not affect the seniority. It has been stated that while the reserved

[9] (1995) 6 SCC 684
[10] (1995) 2 SCC 745

candidates are entitled to accelerated promotion, they would not be entitled to consequential seniority.

18. Thereafter, in ***Ajit Singh Januja and others* v. *State of Punjab and others***[11], the three-Judge Bench posed the question in the following terms: -

> "The controversy which has been raised in the present appeals is: whether, after the members of Scheduled Castes/Tribes or Backward Classes for whom specific percentage of posts have been reserved and roster has been provided having been promoted against those posts on the basis of "accelerated promotion" because of reservation of posts and applicability of the roster system, can claim promotion against general category posts in still higher grade on the basis of their seniority which itself is the result of accelerated promotion on the basis of reservation and roster?"

The Bench referred to the decisions in ***Virpal Singh Chauhan*** (supra), ***R.K. Sabharwal*** (supra) and ***Indra Sawhney*** (supra) and ultimately concurred with the view expressed in ***Virpal Singh Chauhan*** by stating as follows: -

> **"16.** We respectfully concur with the view in *Union of India* v. *Virpal Singh Chauhan*, that seniority between the reserved category candidates and general candidates in the promoted category shall continue to be governed by their panel position i.e. with reference to their inter se seniority in the lower grade. The rule of

[11] (1996) 2 SCC 715

reservation gives accelerated promotion, but it does not give the accelerated "consequential seniority". If a Scheduled Caste/Scheduled Tribe candidate is promoted earlier because of the rule of reservation/roster and his senior belonging to the general category is promoted later to that higher grade the general category candidate shall regain his seniority over such earlier promoted Scheduled Caste/Tribe candidate. As already pointed out above that when a Scheduled Caste/ Tribe candidate is promoted earlier by applying the rule of reservation/roster against a post reserved for such Scheduled Caste/Tribe candidate, in this process he does not supersede his seniors belonging to the general category. In this process there was no occasion to examine the merit of such Scheduled Caste/Tribe candidate vis-a-vis his seniors belonging to the general category. As such it will be only rational, just and proper to hold that when the general category candidate is promoted later from the lower grade to the higher grade, he will be considered senior to a candidate belonging to the Scheduled Caste/Tribe who had been given accelerated promotion against the post reserved for him. Whenever a question arises for filling up a post reserved for Scheduled Caste/Tribe candidate in a still higher grade then such candidate belonging to Scheduled Caste/Tribe shall be promoted first but when the consideration is in respect of promotion against the general category post in a still higher grade then the general category candidate who has been promoted later shall be considered senior and his case shall be considered first for promotion applying either principle of seniority-cum-merit or merit-cum-seniority. If this rule and procedure is not applied then result will be that majority of the posts in the higher grade shall be held at one stage by persons who have not only entered service on the basis of reservation and roster but have excluded the

> general category candidates from being promoted to the posts reserved for general category candidates merely on the ground of their initial accelerated promotions. This will not be consistent with the requirement or the spirit of Article 16(4) or Article 335 of the Constitution."

19. In ***Jagdish Lal and others* v. *State of Haryana and others***[12], a three-Judge Bench opined that seniority granted to the Scheduled Caste and Scheduled Tribe candidates over a general candidate due to his accelerated promotion does not in all events get wiped out on promotion of general candidate. The Bench explained the decisions in ***Vir Pal Singh Chauhan*** (supra) and ***Ajit Singh Januja*** (supra).

20. In ***Ajit Singh and others (II)* v. *State of Punjab and others***[13], the Constitution Bench was concerned with the issue whether the decisions in ***Vir Pal Singh Chauhan*** (supra) and ***Ajit Singh Januja*** (supra) which were earlier decided to the effect that the seniority of general candidates is to be confirmed or whether the later deviation made in ***Jagdish Lal*** (supra) against the general candidates is to be accepted. The Constitution Bench referred to Articles 16(1), 16(4) and 16(4A) of the Constitution and discussed at length the concept of promotion based on equal opportunity and seniority and treated

[12] AIR 1997 SC 2366
[13] (1999) 7 SCC 209

them to be facets of Fundamental Right under Article 16(1) of the Constitution. The Bench posed a question whether Articles 16(4) and 16(4A) guarantee any Fundamental Right to reservation. Regard being had to the nature of language employed in both the Articles, they were to be treated in the nature of enabling provisions. The Constitution Bench opined that Article 16(1) deals with the Fundamental Right and Articles 16(4) and 16(4A) are the enabling provisions. After so stating, they proceeded to analyse the ratio in ***Indra Sawhney*** (supra), ***Akhil Bharatiya Soshit Karamchari Sangh*** (supra) and certain other authorities in the field and, eventually, opined that it is axiomatic in service jurisprudence that any promotions made wrongly in excess of any quota are to be treated as ad hoc. This applies to reservation quota as much as it applies to direct recruits and promotee cases. If a court decides that in order only to remove hardship such roster-point promotees are not to face reversions, - then it would, in our opinion be, necessary to hold – consistent with our interpretation of Articles 14 and 16(1) – that such promotees cannot plead for grant of any additional benefit of seniority flowing from a wrong application of the roster. While courts can relieve immediate hardship arising out of a past illegality, courts

cannot grant additional benefits like seniority which have no element of immediate hardship. Ultimately while dealing with the promotions already given before 10.2.1995 the Bench directed as follows: -

> "Thus, while promotions in excess of roster made before 10-2-1995 are protected, such promotees cannot claim seniority. Seniority in the promotional cadre of such excess roster-point promotees shall have to be reviewed after 10-2-1995 and will count only from the date on which they would have otherwise got normal promotion in any future vacancy arising in a post previously occupied by a reserved candidate. That disposes of the "prospectivity" point in relation to *Sabharwal*."

21. At this juncture, it is condign to note that Article 16(4A) and Article 16 (4B) were inserted in the Constitution to confer promotion with consequential seniority and introduced the concept of carrying forward vacancies treating the vacancies meant for reserved category candidates as a separate class of vacancies. The said Articles as amended from time to time read as follows: -

> "16(4A) Nothing in this Article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not

> adequately represented in the services under the State.
>
> 16(4B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of that year."

22. The validity of the said Articles were challenged under Article 32 of the Constitution of India before this Court and the Constitution Bench in ***M. Nagraj*** (supra) upheld the validity of the said Articles with certain qualifiers/riders by taking recourse to the process of interpretation. As the controversy rests mainly on the said decision, we will advert to it in detail at a later stage.

23. Presently, we shall dwell upon the provisions that were under challenge before the High Court. The Legislative Assembly of Uttar Pradesh brought in a legislation, namely, the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and other Backward Classes) Act, 1994 (UP Act No. 4 of 1994) to provide for reservation in public services and posts in favour of the persons belonging to Scheduled Castes, Scheduled Tribes and other Backward Classes of citizens and for

matters connected therewith or incidental thereto. Section 3(7), which is relevant for our present purpose, reads as follows: -

> "**Reservation in favour of Scheduled Castes, Scheduled Tribes and other Backward Classes.** –
>
> ....
>
> (7) If, on the date of commencement of this Act, reservation was in force under Government Orders for appointment to posts to be filled by promotion, such Government Orders shall continue to be applicable till they are modified or revoked."

Sub-section (7) of Section 3 was the subject-matter of assail before the High Court.

24. As the factual matrix would reveal, the State of Uttar Pradesh brought into existence the Uttar Pradesh Government Servants Seniority (First Amendment) Rules, 2002 on the 18th of October, 2002 in exercise of the power conferred under Article 309 of the Constitution whereby after Rule 8, new Rule 8-A was inserted. The said Rule reads as follows: -

> "8-A. Notwithstanding anything contained in Rule s6,7 or 8 of these rules, a person belonging to the Scheduled Castes or Scheduled Tribes shall on

> his promotion by virtue of rule of reservation/ roster, be entitled to consequential seniority also."

25. It is worth noting that on May 13, 2005, by the Uttar Pradesh Government Servants Seniority (Second Amendment) Rules, 2005, Rule 8-A was omitted. However, it was provided in the said Rules that the promotions made in accordance with the revised seniority as determined under Rule 8-A prior to the commencement of the 2005 Rules could not be affected. Thereafter, on September 14, 2007, by the Uttar Pradesh Government Servants Seniority (Third Amendment) Rules, 2007, Rule 8-A was inserted in the same language which we have already reproduced hereinabove. It has been mentioned in the said Rule that it shall be deemed to have come into force on June 17, 1995. It is germane to note here that the U.P. Power Corporation Limited adopted the said Rules as there is no dispute about the fact that after the Rules came into existence and have been given effect to at some places and that is why the challenge to the constitutional validity of the Act and the Rules was made before the High Court. We have already indicated how both the Benches have dealt with the said situation.

26. At this stage, we may usefully state that though number of appeals have been preferred, yet some relate to the assail of the interim orders and some to the final orders. We may only state for the sake of clarity and convenience that if Section 3(7) and Rule 8-A as amended in 2007 are held to be constitutionally valid, all the appeals are bound to be dismissed and if they are held to be *ultra vires*, then the judgment passed by the Lucknow Bench shall stand affirmed subject to any clarification/modification in our order.

27. As has been noticed hereinbefore, the Allahabad Bench had understood the dictum in ***M. Nagaraj*** (supra) in a different manner and the Division Bench at Lucknow in a different manner. The learned counsel appearing for various parties have advanced their contentions in support of the provisions in the enactment and the Rules. We would like to condense their basic arguments and endeavour to pigeon-hole keeping in view the facts which are requisite to be referred to at the time of analysis of the said decision in the backdrop of the verdict in ***M. Nagaraj*** (supra).

28. Mr. Andhyarujina and Mr. Raju Ram Chandran, learned senior counsel criticising the decision passed by the Lucknow Bench, have submitted that the High Court has fallen into grave error by not scrutinising the materials produced before it, as a consequence of which a sanctuary of errors have crept into it. If the counter affidavit and other documents are studiedly scanned, it would be luminescent that opinion has been formed as regards inadequate representation in promotional posts and, therefore, it had become an imperative to provide for reservation. The opinion formed by the Government need not be with mathematical precision to broad spectrum and such exercise has already been done by the State of U.P., since reservation in promotional matters was already in vogue by virtue of administrative circulars and statutory provisions for few decades. It is urged that the concept of inadequate representation and backwardness have been accepted by the amending power of the Constitution and, therefore, the High Court has totally flawed by laying unwarranted emphasis on the said concepts. The High Court could not have sat in appeal on the rule of reservation solely on the factual bedrock. The chart brought on record would reflect department wise how the persons from backward

classes have not been extended the benefit of promotion and the same forms the foundation for making the enactment and framing the rule and hence, no fault could have been found with the same. Once an incumbent belongs to Scheduled Castes/ Scheduled Tribes category, it is conclusive that he suffers from backwardness and no further enquiry is necessary. It has been clearly held in the case of ***Indra Sawhney*** (supra) that the test or requirement of social and educational backwardness cannot be applied to Scheduled Castes/ Scheduled Tribes who indubitably fall within the expression 'Backward Classes of Citizen'. It is beyond any shadow of doubt that Scheduled Castes/ Scheduled Tribes are a separate class by themselves and the creamy layer principle is not applicable to them. It has been so held in ***Avinash Singh Bagri and Ors.*** v. ***Registrar IIT Delhi and Another***[14]. Article 16 (4A) uses the phrase 'in the opinion of' and the said word carries a different meaning to convey that it is subjective in nature rather than objective. The Report of the "Social Justice Committee" dated 28.06.2001 clearly ascertains the need for implementation of reservation in promotional matters in public service in U. P. and the said Report deserves acceptance. The State Government was

[14] (2009) 8 SCC 220

possessed of sufficient materials to implement the promotional provisions which are enabling in nature and the same is justified by the "Social Justice Committee Report" which has examined the current status of implementation of Scheduled Castes/ Scheduled Tribes and other backward classes in other public services with respect to their quota, their participation and progress in various services, the substantial backlog in promotional posts in category A, B and C posts and the inadequacy of representation in promotional posts and various departments and State owned corporations. The High Court has completely erred specially when there was sufficient data available with the State Government. Regard being had to the factum that the said promotions were being given for few decades, a fresh exercise regarding adequacy was not necessary. The concept of efficiency as stipulated under Article 335 of the Constitution is in no way affected if the reservation does not exceed 50%. The consequential seniority being vested by the Constitution, it follows as natural corollary and hence, no further exercise was required to be undertaken. The learned counsel for the State has drawn the attention of this Court with respect to the percentage of representation to justify that requisite data was

available and no further exercise was needed and, therefore, the decision of the High Court is fundamentally fallacious.

29. Mr. P. S Patwalia, learned senior counsel appearing in some appeals for the corporation, has submitted that the requirement of having quantifiable data is not a new concept propounded in the case of ***M. Nagraj*** (supra) but is a reiteration of the earlier view enunciated in ***Indra Sawhney case*** (supra) and, therefore, the provision could not have been declared as u*ltra vires*. The emphasis on backwardness is absolutely misconceived, for Scheduled Castes/ Scheduled Tribes are duly notified as such in the Presidential list by virtue of Articles 341 and 342 of the Constitution. Their exclusion from the list can alone be done by the amendment of the Presidential Order and hence, any kind of collection of data as regards the backwardness is an exercise in futility. The concept of creamy layer principle cannot be applied to Scheduled Castes/ Scheduled Tribes as has been held in the case of ***Ashok Kumar Thakur*** v. ***Union of India***[15]**.** Learned senior counsel has placed reliance on the decision in ***E. V. Chinniah*** v. ***State of Andhra Pradesh***[16] to highlight that there may be only one list of Scheduled Castes/Scheduled Tribes and

[15] (2008) 6 SCC 1
[16] (2005) 1 SCC 394

this list constitutes one group for the purpose of reservation and the same cannot be interfered with, disturbed, re-grouped or re-classified by the State. In essence, the submission is that there may not be exclusion by engrafting the principle of backwardness for the purpose of reservation in promotion. Commenting on the adequacy of representation, it is urged by Mr. Patwalia that the data was immediately collected after the 1994 Act and thereafter, no fresh data was necessary to be collected after the decision rendered by the Constitution Bench in ***M. Nagraj*** (supra). It is further submitted by the learned counsel that even if quantifiable data is not collected, the State can be asked to do so in view of the order passed by this Court in ***S. B Joshi*** v. ***State of Karnatka and Others*** in W.P. 259 of 1994 decided on 13.07.2010. The efficiency of service as encapsuled in Article 335 of the Constitution has been duly respected by providing a uniform minimum standard of the matters of promotion as far as the Corporation is concerned and, therefore, no fault can be found in that regard.

30. Mr. P. P. Rao, learned senior counsel appearing for some of the private respondents assailing the decision of the Lucknow Bench, has urged that when there was no challenge to the orders

issued prior the amendment for reservation in promotion, no quantifiable data is necessary. Section 3 (7) of the 1994 Act does not make any change except recognising the earlier orders which lay down that they shall continue to be applicable till it is modified or revoked and, therefore, it has only been conferred statutory recognition. The High Court has misunderstood the decision in ***M. Nagraj*** (supra) while stating that the collection of quantifiable data was not undertaken though the said decision clearly lays down that a collection of quantifiable data showing backwardness for the class would be required while demonstrating the same in Court to the extent of promotion when it is under challenge. In the case at hand, the issue is not the extent of reservation or excessive reservation but reservation in promotion. That apart, the principles laid down in ***M. Nagraj*** (supra) do not get attracted if reservation in promotion is sought to be made for the first time but not for continuing the reservation on the basis of assessment made by the Parliament in exercise of its constituent powers. The Constitutional Amendment removed the base of the decision in ***Indra Sawhney*** (supra) that reservation in promotion is not permissible and the Government in its wisdom has carried out the assessment earlier

and decided to continue the policy and, therefore, to lay down the principle that in view of the decision in ***M Nagraj*** (supra), a fresh exercise is necessary would tantamount to putting the concept in the realm of inherent fallacy. The decision in ***Suraj Bhan Meena and Another*** v. ***State of Rajasthan & Ors.***[17] is not a binding precedent inasmuch as it takes note of the contention (at paragraph 24 at page no. 474-475 of the Report) but does not deal with it. The 85th Amendment which provides for consequential seniority wipes out the 'catch up' rule 'from its inception and the general principle of seniority from the date of promotion operates without any break and for the same reason the said amendment had been given retrospective effect'. The intention of the Parliament at the time of exercise of its constitutional power clearly states that the representation of Scheduled Castes/ Scheduled Tribes in the services in the States had not reached the required level and it is necessary to continue the existing position of providing reservation in promotion in the case of Scheduled Castes/ Scheduled Tribes. The learned senior counsel has laid immense emphasis on the intention of the Parliament and the Legislature to continue the policy and, pyramiding the said submission, he has contended that no fresh

[17] (2011) 1 SCC 467

exercise is required. It is propounded by Mr. Rao that Article 16 basically relates to classes and not backward individuals and therefore, no stress should be given on the backwardness. Alternatively, the learned senior counsel has submitted that the matter should be referred to a larger Bench, regard being had to the important issue involved in the case.

31. Mr. Rakesh Dwivedi, learned senior counsel who represents some of the petitioners aggrieved by the Lucknow Bench decision, has urged that backwardness is presumed in view of the nine-Judge Bench decision in ***Indra Sawhney*** (supra) and the same has to be regarded beyond any cavil. The dictum in ***M. Nagraj*** (supra) cannot be understood to mandate collection of quantifiable data for judging the backwardness of the Scheduled Castes/ Scheduled Tribes while making reservation in promotion. But, unfortunately, the High Court has understood the Judgment in the aforesaid manner. There is no material produced on record to establish that Scheduled Castes/ Scheduled Tribes candidates having been conferred the benefit of promotion under reservation have ceased to be backward. Though the decision in ***Indra Sawhney*** (supra) held that the promotion in reservation is impermissible, yet it

continued the reservation in promotion for a period of five years and, therefore, the Constitution Amendment came into force in this backdrop Section 3 (7) of the 1994 Act could not have been treated to be invalid. But the stand that the refixation of seniority after coming into existence of Rule 8-A of the Rules or the rule by the corporation is basically fallacious, for persons who were promoted earlier to the higher post are entitled to seniority from the date of promotion. The learned senior counsel has contended that after coming into force of the amendment of the Constitution by inserting Article 16 (4A), the decisions in ***Rangachary*** (supra) and ***Akhil Bhartiya Karmachari Sangh*** (supra) have been restored and the concept of 'catch up' rule as propounded in ***Ajit Singh II*** (supra) has also been nullified. Article 16 (4A) only makes it explicit what is implicit under service jurisprudence in matters of promotion and the said benefit was always enjoyed by the Scheduled Castes/ Scheduled Tribes people and ***M. Nagraj*** (supra) does not intend to affect the said aspect. The learned counsel has referred to paragraph 798 of ***Indra Sawhney*** (supra) to highlight the scope of judicial scrutiny in matters which are within the subjective satisfaction of the executive and are to be tested as per the law laid down in

Barium Chemicals v. ***Company Law Board*** [18]. In essence, the submission is that in adequacy of representation is in the domain of subjective satisfaction of the State Government and is to be regarded as a policy decision of the State. The learned senior counsel has distinguished the principle enunciated in ***Suraj Bhan Meena*** (supra). In that case, the court was not dealing with an issue where the reservation had already been made and was in continuance. It is highlighted by Mr Dwivedi that in the present case the issue is not one where there is no material on record to justify the subjective satisfaction, but, on the contrary, there is adequate material to show that the State Government was justified in introducing the provision in the Act and the Rule. As regards the efficiency in administration has mandate under Article 335 of the Constitution, the submission of Mr. Dwivedi is that the constitutional amendment has been made keeping in mind the decision in ***Indra Sawhney*** (supra) and the amendment of Article 335 facilitates the reservations in promotion. The learned senior counsel would contend that maintenance of efficiency basically would convey laying a prescription by maintaining the minimum standard and in the case of the Corporation it has been so done. It has been

[18] (1970) 3 SCC 567

propounded by him that if backwardness becomes the criterion, it would bring out the internal conflict in the dictum of ***M. Nagraj*** (supra) and then in that case it has to be reconciled keeping in view the common thread of judgment or the matter should be referred to a larger Bench. In any case, ***M. Nagraj*** (supra) does not lay down that the quantifiable data of backwardness should be collected with respect to eligible Scheduled Castes/ Scheduled Tribes employees seeking promotion. Mr. Dwivedi has commended to the decision in ***Union of India*** v. ***Rakesh Kumar*** [19] to highlight that the proportion of population is the thumb rule as far as the Scheduled Castes/ Scheduled Tribes are concerned and that should be the laser beam to adjudge the concept of inadequacy of reservation. Reservation in promotion involves a balancing act between the national need to equalise by affirmative action and to do social justice on one hand and to ensure that equality of opportunity as envisaged under Article 14 is not unduly affected by the benefit of promotion which has been conferred by the Act and Rules on the Scheduled Castes/ Scheduled Tribes as a balancing act and same has always been upheld by this Court.

[19] 2010 4 SCC 50

32. Mr. Shanti Bhushan, learned senior counsel, has submitted that the Constitution Bench in ***M. Nagaraj*** (supra) has clearly laid down certain conditions, namely, that there must be compelling reasons for making reservation in promotion; that the State is not bound to make reservation for Scheduled Castes/ Scheduled Tribes in matters of promotion; that if the State thinks that there are compelling reasons to make such reservation in promotion, it is obligatory on the part of the State to collect quantifiable data showing the backwardness of the class and inadequacy of representation of that class in public employment and also by making such reservation in promotion, the efficiency in administration is not affected; that the exercise is required to be made before making any reservation for promotion; that the State has not applied its mind to the question as to what could be regarded as an adequate representation for Scheduled Castes/Scheduled Tribes in respect of promotion; that the provision for reservation in matters of promotion has to be considered in any class or classes of posts not adequately represented in the services under the State but unfortunately, the exercise in that regard has not at all been taken up but amendments have been incorporated; that the concept of

backwardness and inadequacy of representation as understood in the case of ***M. Nagaraj*** (supra) has been absolutely misunderstood and misconstrued by the State Government as a consequence of which the Rules of the present nature have come into existence; that the overall efficiency as enshrined under Article 335 of the Constitution has been given a total go-bye which makes Section 3(7) of the 1994 Act and Rule 8-A absolutely vulnerable and thereby invites the frown of the enabling provision and the dictum in ***M. Nagaraj*** (supra); that Rule 8-A which confers accelerated seniority would leave no room for the efficient general category officers which is not the intention of the framers of the Constitution and also as it is understood by various decisions of this Court.

33. Dr. Rajeev Dhavan, learned senior counsel, supporting the decision of the Division Bench which has declared the Rule as *ultra vires*, has submitted that if ***M. Nagaraj*** (supra) is properly read, it does clearly convey that social justice is an over reaching principle of the Constitution like secularism, democracy, reasonableness, social justice, etc. and it emphasises on the equality code and the parameters fixed by the Constitution Bench as the basic purpose is to bring in a state of balance but

the said balance is destroyed by Section 3(7) of the 1994 Act and Rule 8-A inasmuch as no exercise has been undertaken during the post ***M. Nagaraj*** (supra) period. In ***M. Nagraj*** (supra), there has been emphasis on interpretation and implementation, width and identity, essence of a right, the equality code and avoidance of reverse discrimination, the nuanced distinction between the adequacy and proportionality, backward class and backwardness, the concept of contest specificity as regards equal justice and efficiency, permissive nature of the provisions and conceptual essence of guided power, the implementation in concrete terms which would not cause violence to the constitutional mandate; and the effect of accelerated seniority and the conditions prevalent for satisfaction of the conditions precedent to invoke the settled principles. The learned senior counsel further submitted that ***M. Nagaraj*** (supra) deals with cadre and the posts but the State has applied it across the board without any kind of real quantifiable data after pronouncement of the ***M. Nagaraj*** (supra). It is his further submission that after Section 3(7) of the 1994 Act and Rule 8-A are allowed to stand, the balancing factor which has so far been sustained by this Court especially pertaining to reservation would stand crucified.

It is urged by him that the chart supplied by the State only refers to the number and, seniority of officers but it does not throw any light on the core issue and further, a mere submission of a chart would not meet the requisite criteria as specified in ***M. Nagaraj*** (supra).

34. Mr. Vinod Bobde, learned senior counsel, has submitted that if accelerated seniority is confirmed on the roster by the promotees, the consequences would be disastrous inasmuch as the said employee can reach the fourth level by the time he attains the age of 45 years and at the age of 49, he would reach the highest level and stay there for nine years whereas a general merit promotee would reach the third level out of the six levels at the age of 56 and by the time he gets eligibility to get into the fourth level, he would reach the age of superannuation. It is urged by him that if reservation in promotion is to be made, there has to be collection of quantifiable data, regard being had to the backwardness and inadequacy of representation in respect of the posts in a particular cadre and while doing so, the other condition as engrafted under Article 335 of the Constitution relating to the efficiency of administration has to be maintained. It is his further submission that in ***M. Nagaraj*** (supra), Articles

16(4A) and 16(4B) have been treated to be enabling provisions and an enabling provision does not create a fundamental right. If the State thinks to exercise the power, it has to exercise the power strictly in accordance with the conditions postulated in the case of ***M. Nagaraj*** (supra). The State of U.P. has totally misguided itself by harbouring the notion that merely because there has to be representation of Scheduled Castes and Scheduled Tribes in the services, the State is obliged to provide for reservation in promotion under Article 16(4A). The learned senior counsel would vehemently contend that nothing has been brought on record to show that after pronouncement of ***M. Nagaraj*** (supra), the State had carried out an exercise but has built a castle in Spain by stating that the provision being always there, the data was available. It is canvassed that the stand of the State runs counter to the principles laid down in ***M. Nagaraj*** (supra) which makes Section 3(7) and Rule 8-A sensitively susceptible. The consequential seniority was introduced on 18.10.2002 but was obliterated on 13.5.2005 and thereafter, it was revived on 14.9.2007 with retrospective effect and the reason is demonstrable from the order/circular dated 17.10.2007 which is based on total erroneous understanding and appreciation of

the law laid down by this Court. It is argued by him that the Act and the Rules were amended solely keeping in view the constitutional provision totally ignoring how the said Articles were interpreted by this Court. It is propounded by Mr. Bobde that the State has referred to certain data and the "Social Justice Committee Report" of 2001 but the same cannot save the edifice of the impugned statutory provision and the Rules as the State could not have anticipated what this Court was going to say while upholding the constitutional validity.

35. Mr. Ranjit Kumar, learned senior counsel, has laid immense emphasis on paragraphs 121 to 123 of M***. Nagaraj*** (supra) to buttress the stand that reservation in promotional matters is subject to the conditions enumerated in the said paragraphs. The learned senior counsel has drawn inspiration from an order dated 11.3.2010 passed by a two-Judge Bench in Writ Petition (civil) 81 of 2002 wherein the direction was given that the validity may be challenged and on such challenge, the same shall be decided in view of the final decision in ***M. Nagaraj*** (supra). The learned senior counsel has placed reliance on ***Ashok Kumar Thakur* v. *Union of India and others***[20] to highlight that any

[20] (2008) 6 SCC 1

privilege given to a class should not lead to inefficiency. Emphasis has also been laid on the term backwardness having nexus with the reservation in promotion and collection of quantifiable data in a proper perspective. He has drawn inspiration from various paragraphs in ***M. Nagaraj*** (supra) to show that when an enabling provision is held valid, its exercise can be arbitrary and in the case at hand, the provisions are absolutely arbitrary, unreasonable and irrational.

36. To appreciate the rival submissions raised at the bar and the core controversy, it is absolutely seemly to understand what has been held in ***M. Nagraj*** (supra) by the Constitution Bench. While assailing the validity of Article 16(4A) of the Constitution which provides for reservation in promotion with a consequential seniority, it was contended that equity in the context of Article 16(1) connotes accelerated promotion so as not to include consequential seniority and as consequential seniority has been attached to the accelerated promotion, the constitutional amendment is violative of Article 14 read with Article 16(1) of the Constitution. Various examples were cited about the disastrous affects that would be ushered in, in view of the amendment. After noting all the contentions, the

Constitution Bench addressed to the concept of reservation in the context of Article 16(4) and further proceeded to deal with equity, justice and merit. In that context, the Bench stated thus: -

> "This problem has to be examined, therefore, on the facts of each case. Therefore, Article 16(4) has to be construed in the light of Article 335 of the Constitution. Inadequacy in representation and backwardness of Scheduled Caste and Scheduled Tribes are circumstances which enable the State Government to act under Article 16(4) of the Constitution. However, as held by this Court the limitations on the discretion of the Government in the matter of reservation under Article 16(4) as well as Article 16(4A) come in the form of Article 335 of the Constitution."

While dealing with reservation and affirmative action, the Constitution Bench opined thus: -

> "48. It is the equality "in fact" which has to be decided looking at the ground reality. Balancing comes in where the question concerns the extent of reservation. If the extent of reservation goes beyond cut-off point then it results in reverse discrimination. Anti-discrimination legislation has a tendency of pushing towards *de facto* reservation. Therefore, a numerical benchmark is the surest immunity against charges of discrimination.
>
> 49. Reservation is necessary for transcending caste and not for perpetuating it. Reservation has to be used in a limited sense otherwise it will perpetuate casteism in the country. Reservation

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

37. The Bench referred to the cases of ***Indra Sawhney*** (supra), ***R.K. Sabharwal*** (supra), ***Vir Pal Singh Chauhan*** (supra), ***Ajit Singh (I)*** (supra) and ***Ajit Singh (II)*** (supra) and opined that the concept of catch-up rule and consequential seniority are judicially evolved concepts to control the extent in reservation and the creation of this concept is relatable to service jurisprudence. Thereafter, the Constitution Bench referred to the scope of the impugned amendment and the Objects and Reasons and, in paragraph 86, observed thus: -

> "Clause (4-A) follows the pattern specified in Clauses (3) and (4) of Article 16. Clause (4-A) of Article 16 emphasizes the opinion of the States in the matter of adequacy of representation. It gives freedom to the State in an appropriate case depending upon the ground reality to provide for reservation in matters of promotion to any class or classes of posts in the services. The State has to form its opinion on the quantifiable data regarding adequacy of representation. Clause (4-A) of Article 16 is an enabling provision. It gives freedom to the State to provide for reservation in matters of promotion. Clause (4-A) of Article 16 applies only to SCs and STs. The said clause is carved out of Article 16(4). Therefore, Clause (4-A) will be governed by the two compelling reasons - "backwardness" and "inadequacy of representation", as mentioned in Article 16(4). If the said two reasons do not exist then the enabling provision cannot come into force. The State can make provision for reservation only if the above two circumstances exist. Further in ***Ajit Singh (II)*** , this Court has held that apart from "backwardness" and "inadequacy of representation" the State shall also keep in mind "overall efficiency" (Article 335). Therefore, all the three factors have to be kept in mind by the appropriate Government in providing for reservation in promotion for SCs and STs."

Thereafter, the Bench referred to the 2000 Amendment Act, the Objects and Reasons and the proviso inserted to Article 335 of the Constitution and held thus: -

> "98. By the Constitution (Eighty-Second Amendment) Act, 2000, a proviso was inserted at the end of Article 335 of the Constitution which reads as under:

> "Provided that nothing in this article shall prevent in making of any provision in favour of the members of the Scheduled Castes and the Scheduled Tribes for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State."

99. This proviso was added following the benefit of reservation in promotion conferred upon SCs and STs alone. This proviso was inserted keeping in mind the judgment of this Court in *Vinod Kumar* which took the view that relaxation in matters of reservation in promotion was not permissible under Article 16(4) in view of the command contained in Article 335. Once a separate category is carved out of Clause (4) of Article 16 then that category is being given relaxation in matters of reservation in promotion. The proviso is confined to SCs and STs alone. The said proviso is compatible with the scheme of Article 16(4-A)."

In paragraph 102, their Lordships have ruled thus: -

> "Clause (4) of Article 16, however, states that the appropriate Government is free to provide for reservation in cases where it is satisfied on the basis of quantifiable data that backward class is inadequately represented in the services. Therefore, in every case where the State decides to provide for reservation there must exist two circumstances, namely, "backwardness" and "inadequacy of representation'. As stated above, equity, justice and efficiency are variable factors. These factors are context-specific. There is no fixed yardstick to identify and measure these three factors, it will depend on the facts and

> circumstances of each case. These are the limitations on the mode of the exercise of power by the State. None of these limitations have been removed by the impugned amendments. If the concerned State fails to identify and measure backwardness, inadequacy and overall administrative efficiency then in that event the provision for reservation would be invalid. These amendments do not alter the structure of Articles 14, 15 and 16 (equity code). The parameters mentioned in Article 16(4) are retained. Clause (4-A) is derived from Clause (4) of Article 16. Clause (4-A) is confined to SCs and STs alone. Therefore, the present case does not change the identity of the Constitution."

After so stating, it was observed that there is no violation of the basic structure of the Constitution and the provisions are enabling provisions. At that juncture, it has been observed as follows: -

> "Article 16(4) is enacted as a remedy for the past historical discriminations against a social class. The object in enacting the enabling provisions like Articles 16(4), 16(4-A) and 16(4-B) is that the State is empowered to identify and recognize the compelling interests. If the State has quantifiable data to show backwardness and inadequacy then the State can make reservations in promotions keeping in mind maintenance of efficiency which is held to be a constitutional limitation on the discretion of the State in making reservation as indicated by Article 335. As stated above, the concepts of efficiency, backwardness, inadequacy of representation are required to be identified and measured. That exercise depends on availability of data. That exercise depends on numerous

> factors. It is for this reason that enabling provisions are required to be made because each competing claim seeks to achieve certain goals. How best one should optimize these conflicting claims can only be done by the administration in the context of local prevailing conditions in public employment. This is amply demonstrated by the various decisions of this Court discussed hereinabove. Therefore, there is a basic difference between "equality in law" and "equality in fact" (See *Affirmative Action* by William Darity). If Articles 16(4-A) and 16(4-B) flow from Article 16(4) and if Article 16(4) is an enabling provision then Articles 16(4-A) and 16(4-B) are also enabling provisions. As long as the boundaries mentioned in Article 16(4), namely, backwardness, inadequacy and efficiency of administration are retained in Articles 16(4-A) and 16(4-B) as controlling factors, we cannot attribute constitutional invalidity to these enabling provisions. However, when the State fails to identify and implement the controlling factors then excessiveness comes in, which is to be decided on the facts of each case. In a given case, where excessiveness results in reverse discrimination, this Court has to examine individual cases and decide the matter in accordance with law. This is the theory of "guided power". We may once again repeat that equality is not violated by mere conferment of power but it is breached by arbitrary exercise of the power conferred."

In paragraph 108, the Bench analyzed the concept of application of the doctrine of guided power under Article 335 of the Constitution and, in that context, opined thus: -

> "Therefore, the question before us is - whether the State could be empowered to relax qualifying marks or standards for reservation in matters of promotion. In our view, even after insertion of this proviso, the limitation of overall efficiency in Article 335 is not obliterated. Reason is that "efficiency" is a variable factor. It is for State concerned to decide in a given case, whether the overall efficiency of the system is affected by such relaxation. If the relaxation is so excessive that it ceases to be qualifying marks then certainly in a given case, as in the past, the State is free not to relax such standards. In other cases, the State may evolve a mechanism under which efficiency, equity and justice, all three variables, could be accommodated. Moreover, Article 335 is to be read with Article 46 which provides that the State shall promote with special care the educational and economic interests of the weaker sections of the people and, in particular, of the scheduled castes and scheduled tribes, and shall protect them from social injustice. Therefore, where the State finds compelling interests of backwardness and inadequacy, it may relax the qualifying marks for SCs/STs. These compelling interests however have to be identified by weighty and comparable data."

Thereafter, the Constitution Bench proceeded to deal with the test to judge the validity of the impugned State Acts and opined as follows: -

> "110. As stated above, the boundaries of the width of the power, namely, the ceiling-limit of 50% (the numerical benchmark), the principle of creamy layer, the compelling reasons, namely, backwardness, inadequacy of representation and the overall administrative efficiency are not

obliterated by the impugned amendments. At the appropriate time, we have to consider the law as enacted by various States providing for reservation if challenged. At that time we have to see whether limitations on the exercise of power are violated. The State is free to exercise its discretion of providing for reservation subject to limitation, namely, that there must exist compelling reasons of backwardness, inadequacy of representation in a class of post(s) keeping in mind the overall administrative efficiency. It is made clear that even if the State has reasons to make reservation, as stated above, if the impugned law violates any of the above substantive limits on the width of the power the same would be liable to be set aside."

In paragraph 117, the Bench laid down as follows: -

"The extent of reservation has to be decided on facts of each case. The judgment in *Indra Sawhney* does not deal with constitutional amendments. In our present judgment, we are upholding the validity of the constitutional amendments subject to the limitations. Therefore, in each case the Court has got to be satisfied that the State has exercised its opinion in making reservations in promotions for SCs and STs and for which the State concerned will have to place before the Court the requisite quantifiable data in each case and satisfy the Court that such reservations became necessary on account of inadequacy of representation of SCs/ STs in a particular class or classes of posts without affecting general efficiency of service as mandated under Article 335 of the Constitution."

In the conclusion portions, in paragraphs 123 and 124, it has been ruled thus: -

> "123. However, in this case, as stated above, the main issue concerns the "extent of reservation". In this regard the State concerned will have to show in each case the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation. As stated above, the impugned provision is an enabling provision. The State is not bound to make reservation for SCs/STs in matter of promotions. However, if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance with Article 335. It is made clear that even if the State has compelling reasons, as stated above, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling-limit of 50% or obliterate the creamy layer or extend the reservation indefinitely.
>
> 124. Subject to the above, we uphold the constitutional validity of the Constitution (Seventy-Seventh Amendment) Act, 1995; the Constitution (Eighty-First Amendment) Act, 2000; the Constitution (Eighty-Second Amendment) Act, 2000 and the Constitution (Eighty-Fifth Amendment) Act, 2001."

38. From the aforesaid decision and the paragraphs we have quoted hereinabove, the following principles can be carved out: -

(i) Vesting of the power by an enabling provision may be constitutionally valid and yet 'exercise of power' by the State in a given case may be arbitrary, particularly, if the State fails to identify and measure backwardness and inadequacy keeping in mind the efficiency of service as required under Article 335.

(ii) Article 16(4) which protects the interests of certain sections of the society has to be balanced against Article 16(1) which protects the interests of every citizen of the entire society. They should be harmonized because they are restatements of the principle of equality under Article 14.

(iii) Each post gets marked for the particular category of candidates to be appointed against it and any subsequent vacancy has to be filled by that category candidate.

(iv) The appropriate Government has to apply the cadre strength as a unit in the operation of the roster in order to ascertain whether a given class/group is adequately represented in the service. The cadre strength as a unit also ensures that the upper ceiling-limit of 50% is not

violated. Further roster has to be post-specific and not vacancy based.

(v) The State has to form its opinion on the quantifiable data regarding adequacy of representation. Clause (4A) of Article 16 is an enabling provision. It gives freedom to the State to provide for reservation in matters of promotion. Clause (4A) of Article 16 applies only to SCs and STs. The said clause is carved out of Article 16(4A). Therefore, Clause (4A) will be governed by the two compelling reasons – "backwardness" and "inadequacy of representation", as mentioned in Article 16(4). If the said two reasons do not exist, then the enabling provision cannot be enforced.

(vi) If the ceiling-limit on the carry-over of unfilled vacancies is removed, the other alternative time-factor comes in and in that event, the time-scale has to be imposed in the interest of efficiency in administration as mandated by Article 335. If the time-scale is not kept, then posts will continue to remain vacant for years which would be detrimental to the administration. Therefore, in each case, the appropriate Government will now have to introduce the duration depending upon the fact-situation.

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

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

(ix) The concepts of efficiency, backwardness and inadequacy of representation are required to be identified and measured. That exercise depends on the availability of data. That exercise depends on numerous factors. It is for this reason that the enabling provisions are required to be made because each competing claim seeks to achieve certain goals. How best one should optimize these conflicting claims can only be done by the administration in the context of local prevailing conditions in public employment.

(x) Article 16(4), therefore, creates a field which enables a State to provide for reservation provided there exists

backwardness of a class and inadequacy of representation in employment. These are compelling reasons. They do not exist in Article 16(1). It is only when these reasons are satisfied that a State gets the power to provide for reservation in the matter of employment.

39. At this stage, we think it appropriate to refer to the case of ***Suraj Bhan Meena and another*** (supra). In the said case, while interpreting the case in ***M. Nagaraj*** (supra), the two-Judge Bench has observed: -

> "10. In *M. Nagaraj case*, this Court while upholding the constitutional validity of the Constitution (77th Amendment) Act, 1995 and the Constitution (85th Amendment) Act, 2001, clarified the position that it would not be necessary for the State Government to frame rules in respect of reservation in promotion with consequential seniority, but in case the State Government wanted to frame such rules in this regard, then it would have to satisfy itself by quantifiable data, that there was backwardness, inadequacy of representation in public employment and overall administrative inefficiency and unless such an exercise was undertaken by the State Government, the rule relating to reservation in promotion with consequential seniority could not be introduced."

40. In the said case, the State Government had not undertaken any exercise as indicated in ***M. Nagaraj*** (supra). The two-Judge Bench has noted three conditions in the said judgment. It was

canvassed before the Bench that exercise to be undertaken as per the direction in ***M.Nagaraj*** (supra) was mandatory and the State cannot, either directly or indirectly, circumvent or ignore or refuse to undertake the exercise by taking recourse to the Constitution (Eighty-Fifth Amendment) Act providing for reservation for promotion with consequential seniority. While dealing with the contentions, the two-Judge Bench opined that the State is required to place before the Court the requisite quantifiable data in each case and to satisfy the court that the said reservation became necessary on account of inadequacy of representation of Scheduled Castes and Scheduled Tribes candidates in a particular class or classes of posts, without affecting the general efficiency of service. Eventually, the Bench opined as follows: -

> "66. The position after the decision in *M. Nagaraj case* is that reservation of posts in promotion is dependent on the inadequacy of representation of members of the Scheduled Castes and Scheduled Tribes and Backward Classes and subject to the condition of ascertaining as to whether such reservation was at all required.
>
> 67. The view of the High Court is based on the decision in *M. Nagaraj case* as no exercise was undertaken in terms of Article 16(4-A) to acquire quantifiable data regarding the inadequacy of representation of the Schedule Caste and

> Scheduled Tribe communities in public services. The Rajasthan High Court has rightly quashed the notifications dated 28.12.2002 and 25.4.2008 issued by the State of Rajasthan providing for consequential seniority and promotion to the members of the Scheduled Caste and Scheduled Tribe communities and the same does not call for any interference."

After so stating, the two-Judge Bench affirmed the view taken by the High Court of Rajasthan.

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

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

42. In the ultimate analysis, we conclude and hold that Section 3(7) of the 1994 Act and Rule 8A of the 2007 Rules are ultra vires as they run counter to the dictum in ***M. Nagaraj*** (supra). Any promotion that has been given on the dictum of ***Indra Sawhney***

(supra) and without the aid or assistance of Section 3(7) and Rule 8A shall remain undisturbed.

43. The appeals arising out of the final judgment of Division Bench at Allahabad are allowed and the impugned order is set aside. The appeals arising out of the judgment from the Division Bench at Lucknow is affirmed subject to the modification as stated hereinabove. In view of the aforesaid, all other appeals are disposed of. The parties shall bear their respective costs.

.....J.
[Dalveer Bhandari]

.....J.
[Dipak Misra]

New Delhi;

April 27, 2012