

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL  
NEW DELHI

O.A. No. 2498/90 198  
T.A. No.

DATE OF DECISION 24.4.19

Sh. Tushar Ranjan Mohanty Applicant (s)

In person. Advocate for the Applicant(s)

U.O.I & ors. Versus Respondent (s)

Sh. P. H. Ramchandani, Sr. Advocate for the Respondent (s)

CORAM :

The Hon'ble Mr. Justice S. C. Mathur, Chairman

The Hon'ble Mr. P. T. Thiruvengadam, Member(A)

1. Whether Reporters of local papers may be allowed to see the Judgement ?
2. To be referred to the Reporter or not ?

Yes

  
( S. C. MATHUR )  
CHAIRMAN

(15)

CENTRAL ADMINISTRATIVE TRIBUNAL  
PRINCIPAL BENCH  
NEW DELHI

O.A. NO. 2498/90

New Delhi this the 24th day of April, 1995.

CORAM :

HON'BLE SHRI JUSTICE S. C. MATHUR, CHAIRMAN  
HON'BLE SHRI P. T. THIRUVENGADAM, MEMBER(A)

Tushar Ranjan Mohanty  
S/O Rabi Narayan Mohanty,  
Assistant Director,  
Central Statistical Organisation,  
422, Sardar Patel Bhawan,  
Sansad Marg,  
New Delhi-110001.

... Applicant

( In Person )

Versus

1. Union of India through  
the Secretary,  
Department of Statistics,  
Ministry of Planning,  
Government of India,  
Sardar Patel Bhawan,  
Sansad Marg,  
New Delhi.
  2. Ms. S. W. Wadhiwa,  
Deputy Director,  
Data Processing Centre,  
Data Processing Division,  
National Sample Survey Organisation,  
N.I.T. Building, Gokul Peth,  
Nagpur - 440010.
  3. Shri Shiv Kumar,  
Under Secretary,  
Cabinet Secretariat,  
Sardar Patel Bhawan,  
Sansad Marg,  
New Delhi-110001.
  4. Shri Pala Singh Tanck,  
Assistant Director General,  
Department of Posts,  
Dak Tar Bhawan,  
New Delhi - 110001.
  5. Shri Kishan Singh,  
Deputy Director,  
C/O The Secretary,  
Department of Statistics,  
Ministry of Planning,  
Sardar Patel Bhawan,  
New Delhi - 110001.
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6. Shri Amit Jyoti Roy,  
Deputy Director,  
Data Processing Division,  
National Sample Survey Organisation,  
25-A, Shakespeare Sarani,  
Calcutta - 700017.
7. Shri Mool Chandra,  
Deputy Director,  
Ministry of Health and Family  
Welfare, Nirman Bhawan,  
New Delhi - 110011.
8. Shri G. Mohan Rao,  
Deputy Director,  
Data Processing Division,  
National Sample Survey Organisation,  
202, Barrackpore Trunk Road,  
Calcutta - 700035.
9. Shri Mukat Singh,  
Deputy Director,  
Survey Design & Research Division,  
National Sample Survey Organisation,  
25-A, Shakespeare Sarani,  
Calcutta - 700017. ... Respondents

( By Sr. Advocate Shri P. H. Ramchandani for  
Union of India and Respondent No.7 in person)

O R D E R

Shri Justice S. C. Mathur —

Tushar Ranjan Mohanty, an officer of the Indian Statistical Service ( ISS for short ) has approached this Tribunal seeking quashing of the gazette notification No. G.S.R.109(E) dated 20.2.1989 (Annexure-D) whereby Rule 13 of the Indian Statistical Service Rules, 1961 (the Rules) has been amended retrospectively w.e.f. 27.11.1972. The retroactivity given to the amendment has already been quashed by their lordships of the Supreme Court in Union of India & Ors. vs. Tushar Ranjan Mohanty & Ors. : (1994) 5 SCC 450. The surviving grievance of the applicant is regarding constitutional validity of the amended rule itself. The effect of the amendment is to introduce reservation for Scheduled

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Castes and Scheduled Tribes at the stage of promotion also; earlier it was available only at the stage of entry into the Service by direct recruitment.

2. The applicant was recruited to ISS in the year 1981 through competitive examination conducted by the Union Public Service Commission. Respondents 2, 3 and 4 were also recruited in the same year and in the same manner. Respondents 5 to 9 were recruited in the year 1982 through the same process. The applicant belongs to the general category while respondents 2 to 9 belong to the reserved category (SC/ST). Method of recruitment to the ISS and other conditions of service are prescribed in the rules which have been framed in exercise of the power conferred by the proviso to Article 309 of the Constitution. Under these rules, the ISS is divided into seven grades — IV, III, II, I, Selection Grade, Super Time Scale-II and Super Time Scale-I. The entry point in the Service is Grade IV. 60 per cent of the vacancies are reserved for direct recruitment through the Union Public Service Commission and 40 per cent by selection from officers serving in offices under the Government in Statistical posts. Recruitment to the next higher grade III is made exclusively by promotion of officers who have put in not less than four years' regular service in grade IV. Appointment to grades II and I is by direct recruitment as well as by promotion. Appointment to the remaining grades is made by direct recruitment as well as by promotion according to prescribed quota. Rule 13 before its amendment read as follows :-

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"13. Reservation for Scheduled Castes and Scheduled Tribes etc. Appointments to the service made otherwise than by promotion will be subject to orders regarding special representation in the service for Scheduled Castes and Scheduled Tribes issued by the Govt. from time to time." (Emphasis supplied).

After amendment the rule reads thus :-

"13.... Appointments to the service shall be made subject to the orders relating to reservation for SCs and STs issued by the Central Government from time to time."

Material change brought about by the amendment is that the clause "otherwise than by promotion" has been deleted the consequence of which is that promotions which were free from the policy of the Government regarding reservation of vacancies in favour of SCs and STs have become subject thereto. The amended rule was made operative from 27.11.1972. It is this amendment which is under challenge in the present original application. At the foot of the notification is explanatory memorandum which reads as follows :-

"The Indian Statistical Service was constituted on 1.11.61 and Indian Statistical Service Rules, 1961 were also notified on the same date. Rule 13 of the said rules provides for reservation of SCs and STs being made except in respect of posts filled by promotion. This is because at that time in terms of Government's policy, there was no requirement of providing reservation for SCs/STs in vacancies filled by promotion. Rule 15 of the said rules however provides that in respect of matters for which no provision is made in the rules, the conditions of service will be the same as are applicable from time to time to officers of Central Services, Class I. Reservation in vacancies filled by promotion for SCs and STs was prescribed by the Department of Personnel, nodal authority for implementing

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the provisions of the Constitution regarding protection of backward sections of the society in 1972. The instructions have been given effect to in the promotions from Grade IV to Grade III of Indian Statistical Service made on non-selection basis since June, 1973. Before doing so, Rule 13 of the said rules were not formally amended to specifically bring out that reservation will be applicable for vacancies filled by promotion also. The action taken by the cadre authorities viz. the Department of Personnel and the Department of Statistics was, however, in conformity with the accepted Government policy regarding reservation for SCs and STs. This condition of service viz. reservation for SCs and STs, was applicable to other Central Services, Class I referred to in rule 15 of the said rules. It is seen that the absence of specific provisions in the statutory rules means that notwithstanding Govt.'s declared policy, there can be difficulties in implementing the provisions regarding reservations for SCs and STs in vacancies filled by promotion and such action can be contested in courts of law. Since 1973 and up to the end of 1987, promotions applying the reservation orders have been made from Grade IV to Grade III in respect of 33 SCs/STs officers and the vacancies for which such officers were not available have been carried forward. The absence of a statutory cover will jeopardise not only the promotions made but also the carrying forward of the reserved vacancies. This will result not only in non-implementation of the Government's declared objectives but also drastically affect the effective strength of officers belonging to these communities in service. As the reservation policy has in practice been applied, no officer belonging to the general category has in fact been appointed to vacancies to which SCs/STs officers should have been posted. Retrospective amendment of the rules will enable the SCs/STs officers promoted to continue to enjoy the benefits of the promotion and also ensure that the reserved vacancies carried forward are validly filled by candidates belonging to Scheduled Castes/Scheduled Tribes in future. To the extent that it could be argued that the promotions made in the past did not have the backing of the specific provisions in the rule, the

officers belonging to the general category have been denied promotion in the past and the retrospective amendment will confirm the position. The retrospective amendment has, therefore, become necessary to give effect to the Government's policy on reservation for Scheduled Castes/ Scheduled Tribes as enjoined on the Government by the Constitution. The retrospective amendment, however, will not have the effect of withdrawing any benefit of promotion actually enjoyed by any person belonging to the general category."

3. The background to this amendment may now be stated. Although prior to 20.2.1989, the Rules did not provide for reservation of vacancies for Scheduled Castes and Scheduled Tribes, promotions were actually made to Grade III by reserving vacancies in their favour. Promotion orders were issued on 22.5.1986, 1.9.1987 and 24.11.1987. The applicant was not affected by the first two promotions as no one junior to him was promoted. He was affected by the third promotion inasmuch as persons junior to him superseded him. Aggrieved by this action of the Government, the applicant filed OA No.336/88 at the Calcutta Bench of the Tribunal. This OA was decided on 28.11.1988. The applicant's plea that the reservation of vacancies was contrary to the statutory rules was upheld. However, instead of quashing the promotion orders, the Tribunal directed that the applicant will be deemed to have been promoted to Grade III with effect from 24.11.1987 when persons junior to him were promoted and he was directed to be placed above those juniors to him promoted by the said order. On 20.2.1989, the Government issued the

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impugned notification amending Rule 13 with effect from 27.11.1972. Thereafter, the Union of India filed Special Leave Petition No.5793 of 1989 in the Supreme Court to challenge the order of the Calcutta Bench of the Tribunal. The Special Leave Petition was allowed and was converted into Civil Appeal No.3844 of 1989. One of the pleas raised on behalf of the Government was that in view of the amendment effected by notification dated 20.2.1989, the claim of the applicant could not be sustained and the judgement of the Tribunal was liable to be set aside.

4. The applicant filed Writ Petition No.1030 of 1990 in the Supreme Court under Article 32 of the Constitution challenging the constitutional validity of the amended rule. On 9.11.1990, the writ petition was dismissed as withdrawn, reserving liberty to the applicant to approach the Tribunal for redressal of his alleged grievance. On 27.11.1990, the present OA was filed. Government's Civil Appeal No.3844 of 1989 was decided on 14.7.1994. The appeal was dismissed and it was held that the retroactivity given to amended Rule 13 was unconstitutional. Accordingly, the notification to the extent it gave retrospectivity to amended Rule 13 was quashed. Since the instant OA was filed before the decision of the Union of India's appeal by the Supreme Court, the applicant challenged the vires of the amended rule on the ground of retrospectivity also. He had raised other grounds also to challenge the constitutionality of the amended provisions which will be noticed

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hereinafter. After the decision of the Supreme Court, the challenge based on retroactivity of the Rule has become infructuous.

5. Regarding the unconstitutionality of the amended Rule, the challenge of the applicant is as follows:

(A) The amendment has been made in exercise of the power conferred by the proviso to Article 309 of the Constitution; the exercise of this power has to be in accordance with the well-settled principles of law; one of these principles is that there should be nexus between the exercise of power and the objective sought to be achieved; from the explanatory note to the amended Rule, it is evident that the objective of the amendment is to legalise the action of the Government which was otherwise illegal. This objective, the amendment fails to achieve as the Calcutta Bench of the Tribunal has already upheld the applicant's contention that the promotion of Scheduled Caste and Scheduled Tribe officers by reservation of vacancies in their favour was illegal and the judgment of the Tribunal has been affirmed by the Supreme Court;

(B) The amended rule itself does not provide for reservation of vacancies in favour of the Scheduled Castes and Scheduled Tribes. It provides for giving effect to the orders issued on the subject by the Government from time to time. Reservation in promotions

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is provided for in Office Memorandum dated 27.11.1972. This executive instruction provides for reservation in promotions where criterion for promotion is 'seniority-cum-fitness'. Substantive provision for promotion in the Rules is Rule 8(1)(b)(i) which prescribes the criterion of 'seniority rejection of the subject to <sup>rejection of the</sup>unfit'. The amendment neither ~~abrogates~~ the said rule nor dilutes its effect inasmuch there is no non-obstantate clause in the amendment. It is settled that law/an executive instruction cannot prevail over a statutory rule. Therefore, the impugned amendment achieves no purpose. In support of the proposition that executive instruction cannot supersede statutory rule or have precedence over it, the applicant cites:

- (1) Sant Ram Sharma Vs. State of Rajasthan and others ( AIR 1967 SC 1910);
- (2) Ghuman Singh Vs. State of Rajasthan ((1971) 2 SCC 452);
- (3) C.C. Padmanabhan and others Vs. The Director of Public Instruction and others ( 1980 (2) S.L.R. 599);
- (4) P.V.S. Janardhan Rao and others Vs. Union of India and others (1981(3) S.L.R. 614 );
- (5) Amar Singh Clare, Asstt. Excise and Taxation Officers & others Vs. State of Haryana & others (1987(3) S.L.R. 13);

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- (G) Union of India and others Vs. Somasundaram  
Viswanath and others ( (1989) 1 SCC 175) .
- (C) Proviso to Rule 8(1)(b)(i) has also not either been abrogated or diluted . Whenever reserved candidate is given promotion to reserved vacancy all persons senior to him will also have to be considered for promotion. The rule, therefore, achieves no purpose .
- (D) The posts in ISS are "Scientific and Technical" and in such posts, the policy of reservation cannot be applied . For the proposition that the posts are "Scientific and Technical", the applicant has placed reliance upon the opinion of eminent authors, dictionaries, judicial decision, Office Memoranda and affidavit filed on behalf of the Government in SLP(Civil) No.11543 of 1987( Cabinet Secretary and another Vs. Bhawani Shankar Kapila and others) . The Office Memoranda relied upon are No.9/2/73-Estt(SCT) dated 23.6.1975 and No.85/11/CF-61(1) dated 28.12.1961. The judicial decision relied upon is Indira Sawhney & ors. Vs. Union of India & others ( JT 1992(6) SC 273) .
- (E) Amendment is based on incorrect and misleading facts . The applicant has identified as many as 15 sentences in the explanatory memorandum which, according to him, contain incorrect or misleading statements.
- (F) The amendment is violative of Article 335 of the Constitution which requires the reservation to be made with due regard to maintenance of efficiency in service . The applicant has placed on record a chart showing the seniority position of general category officers in the seniority lists of 8.5.1986 and 27.1.1993 . With reference to the seniority positions reflected in these two lists, the

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applicant points out the extent of downgrading suffered by the general category officers on account of out of turn promotions given to Scheduled Caste and Scheduled Tribe officers by reservation of vacancies. The minimum downgrading, according to this chart, is to the extent of 139 and maximum to the extent of 325. It is pressed that this large scale supersession of general category officers by Scheduled Caste and Scheduled Tribe officers will lead to disenchantment, chaos, inefficiency, misgivings and misunderstandings in the service and it will also defeat the purpose of reservation which is to bring about equality and not inefficiency.

- (G) The amendment seeks to forfeit vested and accrued rights. Right of consideration for promotion is a vested right though promotion may not be.

6. The application has been opposed on behalf of the Central Government and on behalf of Respondents 3 & 7, Shri Shiv Kumar and Shri Mool Chandra respectively, who are officers belonging to the reserved category. On behalf of the Central Government, counter reply has been filed by Shri R.M.Sundaram. Respondents 3 & 7 have filed their separate reply. The applicant has filed separate rejoinders to the two replies.

7. In the counter reply of the Central Government, two preliminary objections have been raised, one relates to limitation and the other to non-exhaustion of alternative remedy. It is then stated that the ISS Rules, as originally enforced, did not contain a clause reserving vacancies at the stage of promotion as at that time the policy of the Government

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was to confine reservation at the stage of direct recruitment only. Later, the Government policy changed and the reservation was made applicable at the stage of promotion also. With effect from July 1973, criterion of promotion from Grade IV to Grade III was changed from 'selection' to 'non-selection' and reservation was also introduced at the stage of promotion. With effect from 15.8.1981, percentage of direct recruitment to Grade IV was fixed at 60% i.e. less than  $66\frac{2}{3}\%$  and the reservation became applicable in promotion to Grade IV also. Thus in promotion to Grade III reservation became applicable from July 1973 and in promotion to Grade IV from August 1981. Apart from raising these pleas, no attempt has been made in the reply to meet the challenge raised by the applicant on merit. It has been stated that the hearing deserves to be deferred as the matter was engaging the attention of the Supreme Court. It needs to be pointed out that the present application was filed after the applicant had withdrawn his Writ Petition which was pending in the Supreme Court with a view to file the present application. Even then the challenge raised by the applicant on merit was not met in the reply. The Supreme Court decided the appeal directed against the judgement of the Calcutta Bench on 14.7.1994. Thereafter, the case was listed on 3.2.1995 and 6.2.1995. No request was made for filing supplementary or additional reply. On 13.2.1995, arguments of the applicant were heard and were concluded. Even

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at this stage, no additional reply was filed nor a prayer was made for grant of time to file reply. At the conclusion of applicant's arguments, the only prayer made by the learned counsel for the Central Government was that he may be heard on the succeeding day. The case was adjourned to the succeeding day. On the next day, the learned counsel for the Government started his reply. It was only during the course of reply that he prayed for time to file supplementary reply. This prayer was rejected as we were of the opinion that the Central Government had sufficient time since the pronouncement of the judgement by the Supreme Court to file the supplementary reply.

8. We may now examine the written defence filed by Respondents 3 & 7. The preliminary objection of non-exhaustion of alternative remedy has been raised on behalf of these respondents also. It is then stated that the conditions of service are governed not only by rules framed in exercise of the power conferred by the proviso to Article 309 of the Constitution but also by the general orders issued by the Government from time to time, particularly the orders referable to Articles 16(4), 46 and 335. The orders referable to these Articles, the respondents contend, have statutory force. The further defence raised is as follows:

Prior to 27.11.1972, the policy of the Government was to confine reservation at the stage of direct recruitment only. Reservation was not applicable at the stage of promotion; it became applicable

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to promotion with the issue of Office Memorandum No.27/2/71-Estt/(SCT) dated 27.11.1972. In view of this Office Memorandum, reservation of Vacancies for Scheduled Caste and Scheduled Tribe officers became available at the stage of promotion in all Class I, Class II, Class III and Class IV posts, Grades or Services subject to two conditions:

- (i) criterion for promotion was seniority subject to fitness; and
- (ii) the element of direct recruitment did not exceed 50%.

In order to give effect to the Office Memorandum dated 27.11.1972, ISS Rules were amended on 7.7.1973 whereby the criterion for promotion to Grade III was changed from selection to seniority subject to rejection of the unfit. Even without amendment of Rule 13, the reservation in promotion became applicable in view of the Office Memorandum dated 27.11.1972. The amendment to Rule 13 does nothing except to remove the scope for misinterpretation.

On 18.3.1990, the Department of Personnel issued certain guidelines. It was provided when that/promotion is to be made on the basis of merit, the word 'selection' should be used and when it is to be made on the basis of seniority subject to rejection of the unfit, the word 'non-selection' may be used. In view of the

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amendment effected on 7.7.1973 read with guidelines dated 18.3.1990, the criterion for promotion from Grade IV to Grade III is "non-selection". The Government orders or Office Memoranda on reservation have to be read as incorporated in the Rules. The explanatory memorandum at the foot of amended Rule 13 does not contain any incorrect or misleading statement. The applicant has not acquired any vested right which may be said to have been forfeited by the impugned amendment. Cabinet Secretariat's order dated 28.12.1961 applies to posts which are Technical as well as Scientific. The classification of the posts as Scientific and Technical has to be done by the cadre controlling authority. In the present case, the cadre controlling authority has not classified the posts in ISS as Technical and Scientific. In the absence of such a classification, the ISS posts cannot be described as Scientific or Technical.

9. Limitation and non-exhaustion of remedies

Both these preliminary objections are misconceived. No statutory remedy is prescribed under the rules to challenge the vires of the rules. Accordingly, the applicant was not obliged to make any representation before any authority prior to approaching the Tribunal. Section 20(1) of the Administrative Tribunals Act, 1985, which is obviously relied upon by the contesting respondents

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reads as follows:

" A Tribunal shall not ordinarily admit an application unless it is satisfied that the applicant had availed of all the remedies available to him under the relevant service rules as to redressal of grievances."

( emphasis supplied)

From the emphasised portion, it is clear that the bar created by the above provision applies to alternative remedies prescribed under the service rules. Our attention has not been invited by the learned counsel for the respondents to any service rule which prescribes remedy for challenging constitutional vires before any authority.

10. The notification by which Rule 13 has been amended was issued on 28.2.1989. The applicant preferred Writ Petition before their Lordships of the Supreme Court to challenge the constitutional vires of the notification. The matter remained pending in the Supreme Court till 9.11.1990 when the applicant was permitted to withdraw the Writ Petition with liberty to approach the Tribunal. The applicant filed the instant application in the Tribunal on 27.11.1990. The amended provision provides a continuing cause of action to the applicant. Further, we are of the opinion that in the facts and circumstances of the present case the bar of Section 21 cannot be applied against the applicant as he was diligently pursuing his remedy before the Supreme Court. Since the applicant's grievance was based on alleged violation of Fundamental Rights, it cannot be said that his approach to Supreme Court was misconceived. Of course, their Lordships had the discretion to entertain the Writ Petition and

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proceed with its hearing or to direct examination of the applicant's grievance initially by the Tribunal. Their Lordships preferred examination of the grievance initially by the Tribunal.

11. In view of the above, both the preliminary objections are overruled.

12. We may now proceed to take up the applicant's grounds of challenge in the order in which they have been stated.

Ground 'A'

We are unable to accept the submission of the applicant that the object of the amendment is to legalise the action of the Government which was otherwise illegal. That may be true of the retroactivity given to the amendment but that is not the nature of the object of amending the rule. The object of amending the rule is to give statutory sanction to the policy of reservation in promotion which had already been adopted as far back as 1972. The ground raised is, therefore, misconceived.

Ground 'B'.

It is indeed true that an executive instruction cannot supersede a statutory rule but when an executive instruction is adopted by a statutory rule it ceases to be a mere executive instruction; it becomes a part of the rule. When the amended Rule 13 provides that appointments to the service shall be made subject to the orders relating to reservation for Scheduled Castes and Scheduled Tribes issued by the Central Government from time to time, such orders are deemed to be incorporated in Rule 13. Such orders by virtue of the impugned amendment have acquired statutory status. None of the authorities cited by the applicant lays down that even after adoption of the executive instruction through statutory notification, it will not acquire statutory status.

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The authorities cited do not, therefore, require detailed examination.

13. It also needs to be pointed out that an administrative order directing reservation of vacancies in favour of Scheduled Castes and Scheduled Tribes is referable to Articles 16(4), 46 and 335 of the Constitution. Such an order cannot be treated as a mere executive instruction. It has statutory status (See JT 1992 (6) S.C. 273 - Indira Sawhney and Ors. Etc., Etc. Vs. Union of India and Ors. Etc., Etc.) It has been observed in paragraph 736 at page 597 of the report as follows:-

"The words "order", "bye-law", "rule" and "regulation" in this definition are significant. Reading the definition of "State" in Article 12 and of "Law" in Article 13(3)(a), it becomes clear that a measure of the nature contemplated by Article 16(4) can be provided not only by the Parliament/Legislature but also by the executive in respect of Central/State services and by the local bodies and "other authorities" contemplated by Article 12, in respect of their respective services."

Again in paragraph 737 it is stated:-

"Even textually speaking, the contention cannot be accepted. The very use of the word "provision" in Article 16(4) is significant. Whereas clauses (3) and (5) of Article 16 - and clauses (2) to (6) of Article 19 - use the word "Law", Article 16(4) uses the word "provision". Regulation of service conditions by orders and Rules made by the Executive was a well known feature at the time of the framing of the Constitution. Probably for this reason, a deliberate departure has been made in the case of clause (4). Accordingly, we hold, agreeing with Balaji, that the "provision" contemplated by Article 16(4) can also be made by the executive wing of the Union or of the State, as the case may be, as has been done in the present case."

Ground 'C'.

It is a settled principle of interpretation that a

statute should be read as a whole and its different provisions should be so read as to bring about harmony and not discord. It is only when such a harmony is not possible to be brought about that obnoxious provision or the whole statute may be struck down. (See (1976) 4 SCC 830 - Municipal Corporation of City of Hubli Vs. Subha Rao Hanumatharao Prayag and Others). In paragraph 9 at page 836 of the report it is observed:-

"The statute must be read as a whole and every provision in the statute must be construed with reference to the context and other clauses in the statute so as, as far as possible, to make a consistent enactment of the whole statute."

Interpreting the rules in this manner, Rule 8 (1)(b)(i) will have to be confined to the class of officers from which promotion has been made. Thus if a general category officer is promoted to higher post, all officers senior to him in that category will also have to be considered for promotion. Similarly if a reserved category officer is promoted, all officers senior to him in that category will <sup>also</sup> have to be considered.

14. While considering the challenge of vires against an amending law the principles of interpretation enjoin upon the courts to identify the law prevailing prior to the amendment and the deficiency in that law or mischief therein which was sought to be removed through amendment and then to make such construction of the amending law as shall suppress the mischief, and advance the purpose thereof and to suppress subtle inventions and evasions for continuance of the mischief and add force and life to the amendment according to the true intent of the author thereof. (See AIR 1955 SC 66 Bengal Immunity Co. Ltd Vs. State of Bihar and others, paragraph 22). The law prevailing prior to amendment of Rule 13, as already noticed, was that the policy of providing reservation of posts for Scheduled Castes and Scheduled Tribes

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was not applicable in promotions. The policy of the Government changed and lack of provision for reservation in promotions became a deficiency or mischief in the old law. This deficiency or mischief was sought to be removed by amending Rule 13. If the interpretation of the applicant is accepted, the deficiency or mischief will continue despite amendment. Such an interpretation, the law prohibits and cannot, therefore, be accepted.

15. In view of the above, we are unable to accept the applicant's submission that the amendment of Rule 13 achieves no purpose.

Ground 'D'.

Annexure I to the application purports to be extract from the affidavit filed on behalf of the Cabinet Secretary, Union of India in SLP (Civil) No.11543 of 1987 - Cabinet Secretary and another Vs. Bhawani Shankar Kapila and others. Relevant portion of the extract reads as follows:-

"The Indian Economic Service, Rules, 1961 and the Indian Statistical Services Rules 1961, which are more or less identical, were notified on 1st November, 1961 and these services were constituted with effect from that date by encadring Statistical functions in the various Ministries of the Government of India. These Services were meant to comprise a pool of officers having appropriate qualifications for performing the aforesaid technical functions involved in various posts."

What functions were treated as technical is not clear from the extract. The extract is, therefore, of no assistance.

16. The subject of Office Memorandum No.85/11/Cf-61 (1) dated 28.12.1961, Annexure G issued from the Cabinet Secretariat is: "Classification of posts as scientific or technical for the purpose of granting extensions of service beyond the prescribed age of retirement." Material portion of this Memorandum reads as follows:-

"The undersigned is directed to invite a reference to the Joint Secretary to the Cabinet letter No.164/CP/59, 60 dated December 29, 1960 on above subject."

It was stated in that letter that the meeting of the Committee of Secretaries held on December 20, 1960, it has been decided that for the purpose of granting extensions of service beyond the prescribed age of retirement, the posts which should be classified as "Scientific or technical" should be those, the incumbents of the exact/natural sciences or of technology, in the discharge of their duties and are engaged in or in charge of research, development designing, construction, production, inspection, survey, testing or teaching. The Ministries/Departments were requested to prepare or revise the already prepared lists of posts and services under their administrative control in the light of the above decision and to forward them to this Secretariat for examination by the Committee of Secretaries.

2. On receipt of the revised lists from some of the Ministries/Department, the matter was re-examined by the Committee of Secretaries, Having regard to the present overall shortage of scientific and technical personnel of all descriptions in the country, it was decided that the definition of "scientific or technical" posts evolved by the Committee at its meeting held on December 20, 1960, should be liberalised so as to include all posts for which qualifications in the natural exact sciences, or applied sciences or in technology are prescribed and the incumbents of which have to use that knowledge in the discharge of their duties. The lists of posts received from the Ministries/Department, so far have been examined by the Committee in the light of the revised definition and the decision taken has been notified to the concerned Ministries/Departments, with copies to the Ministries of Home Affairs and Finance.

3. If the Ministries/Department have any further posts and services under their administrative control which they wish to recommend for being classified as "scientific or technical" in the light of the revised definition it is suggested that supplementary lists of those posts may be prepared in the attached proforma and 10 copies of the list forwarded to examination by the Committee of Secretaries.

The lists of posts which may be ready by now on the basis of the previous definition need not be held over pending re-examination. It is requested that those lists may be sent to this Secretariat for examination by the Committee of Secretaries." (Emphasis supplied).

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This Office Memorandum has nothing to do with reservation of posts. Under this Memorandum, scientific and technical posts are identified for the limited purpose of extension of service beyond the prescribed age of retirement. The reason for granting the extension is not that the post is technical or scientific; the reason is shortage of technical and scientific personnel. There may be shortage of such personnel in one technical or scientific speciality but there may not be shortage in another scientific or technical speciality. It is for the Government to decide to which speciality the benefit of the Office Memorandum will be extended. It is for this reason that the Office Memorandum contemplates notification of the scientific or technical posts which will be covered by it. The coverage does not flow automatically from the fact that the post involves scientific or technical knowledge or work of scientific or technical character. It is not the case of the applicant that the posts covered by I.S.S. Rules have been notified under this Office Memorandum. The Memorandum is, therefore, of no assistance to the applicant.

17. The subject of Office Memorandum No.9/2/73-Estt.(SCT) dated 23.6.1975 issued from the Department of Personnel and Administrative Reforms is indeed "Reservation in services for scheduled Castes and Scheduled Tribes - exemption of scientific and technical posts." Relevant portion of this Memorandum reads as follows:-

"According to the Ministry of Home Affairs O.M. No.9/2/63-SCT(I), dated 2nd November, 1963, and No.9/2/63-SCT (1) dated 17th July 1964 read with O.M. No.9/4/69-Estt.(SCT), dated 6th Oct. 1969, "scientific and technical" posts required for conducting research or for organising, guiding and directing research which satisfy the conditions laid down therein, can be exempted from the purview of the orders relating to reservations for Scheduled Castes and Scheduled Tribes. Under the above orders, exemption in respect of gazetted posts which fulfil conditions laid down in the O.M. referred to above,

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can be given by the Ministries/Departments themselves after obtaining the orders of the Minister concerned whereas in respect of non gazetted post of similar nature, the Department of Personnel and Administrative Reforms is to be consulted before exemption is granted. The question whether reservations should be introduced in respect of the scientific and technical posts which are so exempted from the purview of the reservations for Scheduled Castes and Scheduled Tribes under the existing orders has been under examination in this Department. In partial modification of the instruction referred to above, it has now been decided that the same scheme of reservation for Scheduled Castes and Scheduled Tribes should cover appointments made to scientific and technical posts upto and including the lowest grade of Class-I in the respective services wherever they have been hitherto exempt from the purview of the scheme of reservations so far on the ground that the posts were intended for conducting/ directing, guiding research work. It has also been decided that the reserved vacancies in scientific and technical posts which would thus be brought within the purview of the scheme of reservations for candidates from Scheduled Castes and Scheduled Tribes need be advertised only once, instead of twice, as prescribed in Ministry of Home Affairs O.M. No. 1/1/70-Estt. (SCT), dated 31.7.70. In the event of non-availability of candidates belonging to the reserved communities, the reserved vacancies may be treated as dereserved by the Ministry / Department concerned without obtaining the ~~appr~~ ~~val~~ of the Deptt. of Personnel and Administrative Reforms.

2. To give effect to the decisions mentioned in para 1 above, Ministries/Departments are requested to review the lists of scientific and technical posts under their control which are at present exempt from the purview of the orders relating to reservations for Scheduled Castes and Scheduled Tribes." (Emphasis supplied).

This Office Memorandum covers "scientific and technical posts required for conducting research or for organising, guiding and directing research." The incumbents of the posts covered by I.S.S. Rules do not conduct, organise, guide or direct research. At the most, they conduct surveys

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which is very much different from research. Even under this Memorandum a specific order of exemption is required to be passed and issued. The applicant does not assert that any such order was issued.

18. In Indira Sawhney's case (supra), their Lordships of the Supreme Court have referred to some of the posts in which reservation is not advisable. These posts mentioned in paragraph 861 are as follows:-

- (1) Defence Services including all technical posts therein but excluding civil posts;
- (2) All technical posts in establishments engaged in Research and Development including those connected with atomic energy and space and establishments engaged in production of defence equipment;
- (3) Teaching posts of Professors - and above;
- (4) Posts in super-specialities in Medicine, engineering and other scientific and technical subjects; and
- (5) Posts of pilots (and co-pilots) in Indian Airlines and Air India.

After enumerating these five categories of posts, their Lordships have observed that the list given above is merely illustrative and not exhaustive, and it is for the Government of India to consider and specify the service and posts to which the Rule of reservation shall not apply.

19. In order to take advantage of the observations of their Lordships, the applicant has indicated the nature of work performed by him and his colleagues in paragraph 4.22 of the application wherein it is stated:-

"The Training Schedule for the Indian Statistical Services Probationers, is very extensive and training is given in the above subjects and we use the said subjects during the discharge of our duties.

The members of the Indian Statistical Service are engaged amongst others in research, designing, inspection, survey and teaching. I was employed in

the National Sample Survey Organisation, <sup>28</sup>Field Operations Division from September 1983 to March 1987. The main duty was to conduct large scale Sample Surveys on various subjects and to conduct field inspections. Later from March 1987 to July 1988, I was posted in National Sample Survey Organisation, Survey Design and Research Division. The duties there comprised of designing the large Scale Sample Surveys conducted by the Field Operations Division and conducting research for better survey Designing Tabulation and analysis techniques. The duties in both the above offices includes training of Central as well as state Government staff. Further during my tenure as Assistant Director, National Sample Survey Organisation, Field Operations Division, A.S. Wing, Faridabad I was a member of the Nucleus Research Cell of the office. Besides at my present office my duties in short term forecasting of National Accounts Statistics is to conduct widespread research to evolve the optimism forecasting techniques. In my present office there ~~is~~ a training division which not only trains ISS Officers but also conducts courses for Students of Indian Statistical Institute and other professional Statistical Courses."

From the above statement, the nature of research work carried by the applicant and his colleagues is not clear. Even according to their Lordships not all teaching assignment can be said to be of technical and scientific nature. Their Lordships have used the expression "Professors and above". Accordingly from the mere fact that the applicant conducted courses for students of Indian Statistical Institute and other professional statistical courses, it cannot be said that he was holding a technical or scientific post. It is indeed for the Government to consider whether a particular post is of scientific or technical character or not. The material placed before us <sup>is</sup> insufficient for recording a positive opinion either way.

20. In his written note, the applicant has made reference to the academic qualification prescribed by the Union

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Public Service Commission for entry into Indian Statistical Service which is Graduation in Mathematics, Statistics or Economics. It is asserted that Mathematics and Statistics are natural/exact Sciences and Economics has been long accepted as an Applied Science. In support of his submission, he has cited the opinion of several authors and eminent scholars. One of the authors has observed that statistics "is the science of assembling, analyzing, characterizing, and interpreting collections of data. In this sense, statistics is a field of study, a doctrine concerned with mathematical characterizations of aggregates of items. Statistics, as a science, is fundamentally a branch of applied mathematics, just as mechanics is mathematics applied to problems connected with bodies subjects to forces." Another Prof. has observed-

"The Science of Statistics is essentially a branch of Applied Mathematics, and may be regarded as mathematics applied to observational data." It is not necessary for us to refer to all the opinions as in our opinion it is primarily for the Government to consider these opinions and pass appropriate orders.

21. In view of the above, we express no opinion on the question whether posts held by the officers governed by ISS Rules are scientific or technical and whether the work done by them is of scientific or technical nature. That may be considered by the Government if the applicant makes representation in that behalf or even otherwise.

Ground 'E'.

As mentioned hereinabove, the applicant has identified as many as 15 sentences in the explanatory memorandum, which according to him contain incorrect or misleading facts. These sentences and the applicant's comments thereon contained in his written note are as mentioned below: -

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Sentences

Applicant's comments.

1. Rule 13 of the said Rules provides for reservation of SCs and STs being made except in respect of posts filled by promotion. This is because at that time in terms of Government's policy, there was no requirement of providing reservation for SCs/STs in vacancies filled by promotion.

It is submitted that this is a false statement as the framers of the Indian Statistical Service Rules never intended to give reservation in promotion, as is evident from the language of Rule 13. Had the framers only desired to follow the general rules regarding reservation then these words were totally redundant. It may be noted that such an explicit exclusion of reservation in promotion was not existing in the service rules of any other Group 'A' (Class 1) service at that time. The intention of the legislature to exclude reservation in promotion for all times is further corroborated by the following fact:

On 27.11.72, the Department of Personnel, the then Cadre Controlling Authority of Indian Statistical Service issued Annexure E providing for reservation to SC/ST in posts filled by promotion on the basis of "seniority subject to fitness". On this day the promotion criteria to all Grades of the Indian Statistical Service was "merit with due regards to seniority" (for all other grades excepting Grade III.) However, on 7.7.1973 (approximately 8 months thereafter) the Department of Personnel amended the criteria for promotion from Grade IV to Grade III to "seniority subject to rejection of the unfit", thereby making a deliberate departure from the given language of Annexure E as to avoid reservation in promotion in the Indian Statistical Service. This is strengthened by the fact that 3 months and 20 days after this amendment, the Department of Personnel inserted a proviso to all rules for promotion providing that whenever a junior is considered for promotion his senior has to be also considered irrespective of the fact that he may not possess the eligible criteria for such promotion.

The above facts make it clear that the framers of the rule explicitly desired to exclude reservation in promotion and that the sentences 2 and 3 of the explanatory memorandum were incorrect.

2. Rule 15 of the said Rules however provide that in respect of matters for which no provision is made in the rules, the conditions of service will be the same as are applicable from time to time to officers of Central Services, Class I.

This statement, although correct, is redundant and has no bearing on the facts of the amendment and has no connection with any of the previous or following sentences. It, however, conveys a feeling, without saying it in so many words, that reservation in promotion is there in the other Class I services. This is not true as in no other Group A service has reservation in promotion ever been given. Further, Rule 15 is only applicable when a rule on any

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Particular issue is silent in the Indian Statistical Service Rules. However, in reservation in promotion in the Indian Statistical Service this is not so as Rule 13 specifically excluded reservation in matters of promotion. Interestingly, the rules are silent on terms of time scale promotion, as applicable in other Group A services. But it is regretted to say that the Union of India has not extended time bound promotion to the Indian Statistical Service and officers have spent more than 12 years in Grade IV in contrast to 4 years in other services.

3. Reservation in vacancies filled by promotion for SCs and STs was prescribed by the Department of Personnel, nodal authority for implementing the provisions of the Constitution regarding protection of backward sections of the society in 1972.

This sentence is not completely true as can be seen from Annexure E. Reservation in promotion was started w.e.f. 27.11.72 only for a limited category, i.e. only when the promotion criteria was "seniority subject to fitness." The whole truth was deliberately concealed to convey an impression on the President that reservation in promotion was to be applicable under all circumstances and it was only by oversight that it had not been provided for in the Indian Statistical Service. This deliberate concealment of facts has created an undue influence in the mind of the President.

4. The instructions have been given effect to in the promotions from Grade IV to Grade III of Indian Statistical Service made on non-selection basis since June, 1973.

It is totally false that reservation in promotion was given in the Indian Statistical Service since June, 1973. Besides, the fact that it could not be given under the Indian Statistical Service Rules, it was only given for the first time in the Department of Statistics order dated 22.5.86. This is clearly brought out in judgment in the Supreme Court in Union of India & Ors. Vs. Tushar Ranjan Mohanty & Ors. (1994) 5 SCC 450-59 at page 453 para 7):

"It is stated by Mohanty in his counter-affidavit that the reservation was for the first time introduced on May 22, 1986 and thereafter on September 1, 1987. According to him, the said two orders did not affect him. The order applying reservation quota was issued on November 24, 1987 when respondents 2 to 9 were promoted and the same was successfully challenged by Mohanty before the Tribunal. It has been categorically stated by Mohanty that until May 22, 1986 the reservation policy was not made applicable by the Cadre Controlling Authority in the service and in fact no Scheduled Caste or Scheduled Tribe officer was given out of turn promotion

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superseding the general category officers. These averments have not been specifically denied by the Union of India in its rejoinder."

This falsehood is sufficient to bias the mind of the President and the decision taken based on this is bound to be mala fide. It is also stated that promotion criteria from Grade IV to Grade III is made on non-selection basis. There can be nothing which is farther from the truth. Promotion from Grade IV to Grade III of the Indian Statistical Service is not, and never was, to be made on non-selection basis. Till 7.7.73, the promotion criteria was 'merit with due regard to seniority' and thereafter 'seniority subject to rejection of the unfit' (Annexure D, p 177 of the paper book), which is distinct from 'non-selection basis' as is brought out on pp 167-169 of Paper Book. Further the date June, 1993 is also irrelevant as it has no nexus with any object and purpose of any facts in the issue.

5. Before doing so, Rule 13 of the said rules were not formally amended to specifically bring out that reservation will be applicable for vacancies filled by promotion also. The action taken by the cadre authorities viz. the Department of Personnel and the Department of Statistics was, however, in conformity with the accepted Government policy regarding reservation for SCs and STs.

This is totally untrue. As explained earlier, the policy regarding reservation in promotion is not blanket and is applicable to only a limited category of promotion criteria. According to the policy, there can be no reservation in promotion in the Indian Statistical Service as it is a technical service. The sentences attempt to merely cover up the wrong actions of the Union of India (Respondent 1) by inducing the President to enact a legislation based on wrong facts.

6. This condition of service viz. reservation for SCs and STs, was applicable to other Central Services, Class I referred to in rule 15 of the said rules.

This statement is not true and was countered in para 4.11 (b). This has not been specifically denied by the Respondent 1 (Union of India).

7. It is seen that the absence of specific provisions in the statutory rules means that notwithstanding Govt.'s declared policy, there can be difficulties in implementing the provisions regarding reservations for SCs and STs in vacancies filled by promotion and such action can be contested in courts of law.

This statement is factually misleading whereas the sentence says that the "action can be contested in the courts of law", the fact was that this applicant had already won a case (OA 336 of 1988) in the Central Administrative Tribunal, Calcutta. Further, there was no absence of specific rules regarding reservation. Rule 13 specifically excluded reservation in promotion in the service. Thus, Respondent 1 has tried its best to misguide the President of India. This issue has been discussed at length at para 4.11 (c) and has not been countered by Respondent 1.

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8. Since 1973 and upto the end of 1987, promotions applying the reservation orders have been made from Grade IV to Grade III in respect of 33 SCs /STs officers and the vacancies for which such officers were not available have been carried forward.

This is not true and necessary averments in this regard have been made at para 4.11 (d), and this has not been denied by Respondent 1. The position of the applicant has been upheld by the Supreme Court in the judgment to C.A. 3844 of 1989 (Union of India & Ors Vs. Tushar Ranjan Mohanty & Ors, ((1994) 5 SCC 450-459 at page 453, para 7)).
9. The absence of a statutory cover will jeopardise not only the promotions made but also the carrying forward of the reserved vacancies.

This statement is false and reeks of the guilt complex of the Government who had wrongfully provided for reservation in promotion in one specific order (i.e. order dated 22.5.86) and have since been trying to cover up this illegal act. As already explained above, the policy provides that there would be no reservation in promotion in the Indian Statistical Service as the promotion criteria from Grade IV to Grade III is different than prescribed for giving reservation and further as it is a technical service.
10. This will result not only in non-implementation of the Government's declared objectives but also drastically affect the effective strength of officers belonging to these communities in service.

This statement is misconceived. As per Rule 2(k) of Indian Statistical Service Rules, 1961 "Service" is defined to mean the Indian Statistical Service constituted under Rule 4 and hence includes all grades of Indian Statistical Service (Annexure-L, pp 66 of the paper book). Therefore it is not understandable as to how the "effective strength" of the officers shall be affected by any change in Grades of the service officers (para 4.11 (2)). For example, in the Indian Statistical Service, there are 9 posts at the level of Senior Administrative Grade (equivalent to Joint Secretary) of which 8 are in position and among these 7 officers belong to the SC/ST category (amounting to 87.5% reservation). Further direct recruitment to the Indian Statistical Service in 1992 and 1993 provided for 50% and 67% reservation, which only goes to show that the effective strength of the service and proportional representation of SC/ST officers depends on the reservation in the service as a whole and not in any individual grade. Had this been so, the promotion of SAG level officers would have been declared ultra vires.
11. As the reservation policy has in practice been applied, no officer belonging to the general category has in fact been appointed to vacancies to which SCs/STs officers should have been posted.

As already stated earlier, and recognised by the Hon'ble Supreme Court in the case of Union of India & Ors. Vs. Tushar Ranjan Mohanty & Ors ((1994) 5 SCC 453, para 7) reservation policy was never applied in practice until 22.5.86. Further, if it had actually been applied, then according to Government of India guidelines the posts for which SC/ST officers were not available should have been de-reserved after 3 years, and not doing

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so would have been in violation of the "ordained policy" of the Government of India.

12. Retrospective amendment of the rules will enable the SCs/STs officers promoted to continue to enjoy the benefits of the promotion and also ensure that the reserved vacancies carried forward are validly filled by candidates belonging to Scheduled Castes/ Scheduled Tribes in future.

The retrospective amendment cannot validate the illegal promotions given to SC/ST officers, which is against the Rules and policies of the Government. Despite the retrospective amendment reservation in promotion cannot be given in the Indian Statistical Service as the Executive Instruction dated 27.11.72 cannot be made applicable to the Indian Statistical Service for various reasons explained earlier in Part B. Further, this sentence seems to be the objective of the Retrospective Amendment, i.e. to legalise the illegal promotions of the SC/ST officers. After the retrospective operation has been struck down by the Hon'ble Supreme Court in the case of Union of India & Ors Vs. Tushar Ranjan Mohanty & Ors (1994) 5 SCC, 450-459 and the promotions of the SC/ST officers being declared illegal, this declared objective of the amendment cannot be fulfilled. Thus this amendment needs to be struck down as it is redundant.

13. To the extent that it could be argued that the promotions made in the past did not have the backing of the specific provisions in the rule, the officers belonging to the general category have been denied promotions in the past and the retrospective amendment will confirm the position.

This sentence is not false but also proves the partisan attitude of Respondent No.1. It is stated at sentence 2 of the explanatory memorandum that 'Rule 13 of the said rules provides for reservation of SCs and STs being made except in respect of posts filled by promotion.', which contradicts the present sentence. This contradiction and inconsistency, as can be seen, is a clear case of administrative malafide. Further, the sentence is incomplete and makes no real sense.

14. The retrospective amendment has, therefore, become necessary to give effect to the Government's policy on reservation for Scheduled Castes/ Scheduled Tribes as enjoined on the Government by the Constitution.

This is not true as the Government policy regarding reservation in promotion in the Indian Statistical Service has already been explained and there can be no reservation in promotion in the Indian Statistical Service.

15. The retrospective amendment, however, will not have the effect of withdrawing any benefit of promotion actually enjoyed by any person belonging to the general category.

Respondent No.1 had been forced to include this sentence in the explanatory memorandum as it is a pre-requisite laid down by the Committee on Subordinate Legislation of the Parliament. This would imply that the promotion of this applicant declared by the Central Administrative Tribunal, Calcutta in O.A. No.336 of 1988 should have been implemented immediately. However, the Respondent No.1 filed a Special Leave Petition in Hon'ble Supreme Court challenging

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the promotion of the applicant, wherein they made a specific statement in their rejoinder affidavit that this applicant would not be covered by the amendment. But while arguing the case before the Hon'ble Supreme Court, they argued that the retrospective amendment would be applicable to the applicant ( (1994) 5 SCC, 450-459 at page 452, para 2). This contradicts what is mentioned in this sentence and thus proves the malafide intention of Respondent No.1.

It is submitted that the entire amendment is based upon wrong facts, irrelevant conjectures and false basis. Every sentence of the explanatory memorandum is incorrect and wholly irrelevant to the issue. The President of India has been totally misguided and the amendment is a colourable piece of legislation. Respondent 1 has made illegal promotions and then tried to legalise these by way of this colourable amendment, thereby trying to make a 'right' from 'two wrongs'. What they forgot was that two wrongs cannot make a 'right'. Thus the impugned amendment needs to be struck down.

The above sentences only give the background in which Rule 13 has been amended. Intrinsically they do not contain any incorrect fact. The incorrectness comes from the distorted meaning which the applicant gives to them. Not all the comments made by the applicant require examination as the hollowness of the applicant's claim is too apparent. Only two of the sentences may be examined.

22. The applicant seeks to establish the falsity of the sentence reproduced at 4 by stating that the first promotion by reservation of vacancies was made on 22.5.1986 and not in June, 1973 as stated in the impugned sentence. This is mere hair-splitting of the sentence by the applicant. Applicability of the reservation policy in promotion is one thing and actual promotion based thereon is quite another. While the sentence speaks of the time from which reservation policy became applicable to promotion from Grade IV to Grade III, the applicant speaks of the first actual action based on that policy. As already noticed hereinabove, in June, 1973, the rules were amended so as to change the criterion of promotion

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from selection to non-selection so that reservation policy becomes applicable. This is what the sentence refers to.

23. The applicant again misreads the statement at 8. The sentence only seeks to indicate broadly the period during which promotions were made taking into account the reservation policy which became effective from 1973 in the Statistical department. It does not seek to mention with accuracy and specification the period during which promotions were actually made by application of the reservation policy. Here also the applicant's comment is mere hair-splitting.

24. Apart from the fact that we are not satisfied that the above sentences contain any incorrect or misleading fact, we are also of the opinion that even by giving to these sentences, the interpretation given by the applicant, the validity of the rule is not affected.

Ground 'F'.

The effect of reservation in promotion on efficiency in service in the context of Article 335 has been dealt with by the 9-Judge Constitution Bench of the Supreme Court in Indira Sawhney's case (supra). Some of the observations made in that case bear reproduction. In the judgment written by Hon'ble B.P. Jeevan Reddy, J on behalf of himself, M.H. Kania, CJ., M.N. Venkatachalia and A.M. Ahmadi, JJ, the following passage from the judgment in General Manager, Southern Railway Vs. Rangachari, 1962 (2) SCR 586 in which right of the State to provide for reservation in promotion was upheld, has been reproduced in paragraph 851 at page 648:-

" "in providing for the reservation of appointments or posts under Art. 16(4), the State has to take into consideration the claims of the members of the backward classes consistently with the maintenance of the efficiency of administration. It must not be forgotten that the efficiency of administration is of such paramount importance that it would be unwise and impermissible to make any reservation at the cost of efficiency of administration. That undoubtedly is the effect of Art. 335. Reservation of appointments or

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posts may theoretically and conceivably mean some impairment of efficiency;" but then it explains it away by saying "but the risk involved in sacrificing efficiency of administration must always be borne in mind when any State sets about making a provision for reservation of appointments of posts."

Expressing dissent from the view that reservation is possible in promotion, their Lordships have observed in the same paragraph as follows:-

"We see no justification to multiply 'the risk', which would be the consequence of holding that reservation can be provided even in the matter of promotion. While it is certainly just to say that a handicap should be given to backward class of citizens at the stage of initial appointment, it would be a serious and unacceptable inroad into the rule of equality of opportunity to say that such a handicap should be provided at every stage of promotion throughout their career. That would mean creation of a permanent separate category apart from the main-stream - a vertical division of the administrative apparatus. The members of reserved categories need not have to compete with others but only among themselves. There would be no will to work, compete and excel among them. Whether they work or not, they tend to think, their promotion is assured. This in turn is bound to generate a feeling of despondence and 'heart-burning' among open competition members. All this <sup>is</sup> bound to affect the efficiency of administration. Putting the members of backward classes on a fast-track would necessarily result in leap-frogging and the deleterious effects of "leap-frogging" need no illustration at our hands. At the initial stage of recruitment reservation can be made in favour of backward class of citizens but once they enter the service, efficiency of administration demands that these members too compete with others and earn promotion like all others; no further distinction can be made thereafter with reference to their "birth-mark", as one of the learned Judges of this Court has said in another connection. They are expected to operate on equal footing with others. Crutches cannot be provided throughout one's career. That would not be in the interest of efficiency of administration nor in the larger interest of the nation."

That reservation in promotion has the potential to erode efficiency of administration was recognised in Rangachari's

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case as well as in Indira Sawhney's case. The difference between the two judgments is that while in the former, despite recognition of the potential, reservation in promotion was not held to be bad in law while in the latter it was held to be bad. All the other Hon'ble Judges forming the Bench, except Hon'ble Ahmadi, J. who has expressed no opinion on the subject have agreed with this view. Pandian, J has observed at page 355 as follows:-

" 10) As regards the reservation in the matter of promotion under Article 16(4), I am in agreement with conclusion No. (7) made in paragraph 121 in Part VII of the judgment of my learned brother B.P. Jeevan Reddy, J."

25. In paragraph 301 at page 380 Dr. T.K. Thommen, J has observed:-

"The state has a vital interest to uphold the efficiency of administration. To ignore efficiency is to fail the nation. Any step taken by the State in considering the claims of members of the Scheduled Castes and the Scheduled Tribes for appointment to public services and posts must be consistent with the maintenance of efficiency of administration. This principle, as stated in Article 335, must necessarily guide all affirmative action programmes for backward and other disadvantaged classes of people in matters of appointment to public services and posts. Likewise, efficiency being a compelling State interest, it must strictly guide affirmative action in matters of admission to academic institutions, and more so in specialised institutions of higher learning, for in the final analysis efficiency of public administration is governed by the quality of education and the skill of the scholars. To weaken efficiency is to injure the nation. Any reservation made without due regard to the command of Article 335 is invidious and impermissible."

After making this observation His Lordship has made further observations in paragraphs 303, 304 and 305 as follows:-

"It has been contended that reservation can be made not only at the time of initial appointment to a service, but also at the time of promotion to a higher post. Although this point does not directly arise from the impugned orders, it is too vital an aspect of the concept of reservation under Article

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16(4) to be overlooked, and it requires, therefore, to be dealt with, albeit briefly, and particularly in deference to the submissions at the bar. This important question must be considered with reference to the overriding principle of fairness and efficiency of administration.

304. To be overlooked at the time of promotion in favour of a person who is junior in service and having no claim to superior merits is to cause frustration and passionate prejudice, hostility and ill will not only in the mind of the overlooked candidate, but also in the minds of the generality of employees. Any such discrimination is unfair and it causes dissatisfaction, indiscipline and inefficiency.

305. Article 335 requires that "in the making of appointments to services and posts in connection with the affairs of the Union or of a State" the claims of the members of the Scheduled Castes and the Scheduled Tribes must be considered consistently with the maintenance of efficiency of administration'. If that is the constitutional mandate with regard to the Scheduled Castes and the Scheduled Tribes, the same principle must necessarily hold good in respect of all backward classes of citizens. The requirement of efficiency is an overriding mandate of the Constitution. An inefficient administration betrays the present as well as the future of the nation. "

26. Hon'ble Kuldip Singh, J has expressed himself in paragraph 381 at page 412 as follows:-

"Although there is no factual material before us but it would not be hypothetical to assume that the reservation in promotion - based on roster points - can lead to various anomalies such as the person getting the benefit of the reservation may jump over the heads of several of his seniors not only in his basic cadre but even in the higher cadres to which he is promoted out of turn. Even otherwise when once a member of the backward class has entered service via reserve post it would not be fair to keep on providing him easier ladders to climb the higher rungs of the State services in preference to the general category. Instead of reserving the higher posts for in-service members of the backward class the same should be filled by direct recruitment so that those

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members of backward class who are not in the State services may get an opportunity to enter the same."

27. The views of Hon'ble P.B. Sawant, J are contained in paragraph 418 at page 432 wherein it is observed:-

"For, whomsoever, therefore, reservation is made, the efficiency of administration is not to be sacrificed, whatever the efficiency may mean. That is the mandate of the Constitution itself."

In paragraphs 544, 545 and 547 at pages 481 and 482, His Lordship has observed:-

"544. It has been pointed out earlier that the reservations of the backward classes under Article 16(4) have to be made consistently with the maintenance of the efficiency of administration. It is foolhardy to ignore the consequences to the administration when juniors supersede seniors although the seniors are as much or even more competent than the juniors. When reservations are kept in promotion, the inevitable consequence is the phenomenon of juniors, however low in the seniority list, stealing a march over their seniors to the promotional post. When further reservations are kept at every promotional level, the juniors not only steal march over their seniors in the same grade but also over their superiors at more than one higher level. This has been witnessed and is being witnessed frequently wherever reservations are kept in promotions. It is naive to expect that in such circumstances those who are superseded, (and they are many) can work with equanimity and with the same devotion to and interest in work as they did before. Men are not saints. The inevitable result, in all fields of administration, of this phenomenon is the natural resentment, heart-burning, frustration, lack of interest in work and indifference to the duties, disrespect to the superiors, dishonour of the authority and an atmosphere of constant bickerings and hostility in the administration. When, further, the erstwhile subordinate becomes the present superior, the vitiation of the atmosphere has only to be imagined. This has admittedly a deleterious effect on the entire administration.

545. It is not only the efficiency of those who are thus superseded which deteriorates on account of such promotions, but those superseding have also no

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incentive to put in their best in work. Since they know that in any case they would be promoted in their reserved quota, they have no motivation to work hard. Being assured of the promotion from the beginning, their attitude towards their duties and their colleagues and superiors is also coloured by this complex. On that account also the efficiency of administration is jeopardised.

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547. The expression "consistently with the maintenance of efficiency of administration" used in Article 335 is related not only to the qualifications of those who are appointed, it covers all consequences to the efficiency of administration on account of such appointments. They would necessarily include the demoralisation of those already in employment who would be adversely affected by such appointments, and its effect on the efficiency of administration. The only reward that a loyal, sincere and hardworking employee expects and looks forward to in his service career is promotion. If that itself is denied to him for no deficiency on his part, it places a frustrating damper on his zeal to work and reduces him to a nervous wreck. There cannot be a more damaging effect on the administration than that caused by an unreasonable obstruction in the advancement of the career of those who run the administration. The reservations in promotions are, therefore, inconsistent with the efficiency of administration and are impermissible under the Constitution."

28. Agreeing with Hon'ble Kuldip Singh, J that reservation of vacancies cannot be made at the stage of promotion and that Rangachari's case was not correctly decided, Hon'ble R.M. Sahai, J. has observed in paragraph 622 at page 538 as follows:-

"Constitutional sanction is to reserve for backward class of persons. That is class or group interest has been preferred over individual. But promotion from a class or group of employees is not promoting a group or class but an individual. It is one against other. No forward class versus backward class or majority against minority. It would, thus, be contrary to the Constitution. Brother Kuldip Singh, for good and sound reasons has rightly opined, that, Rangachari cannot be held to be laying down good law."

29. In view of the above, the applicant is justified in submitting that the impugned amendment is violative of Article 335.

Ground 'G'.

In T.R. Kapur & Ors. Vs. State of Haryana & Ors, (1987) 1 SCR 584 it was held that the benefits acquired under existing service rules cannot be arbitrarily and unreasonably taken away by amendment of rules with retrospective effect and that such amendments are subject to judicial review. It was further held that amendment of service rules with retrospective effect must satisfy the test of Articles 14 and 16 (1). The same view was reiterated in P.D. Aggarwal and others Vs. State of U.P. and others, (1987) 3 SCC 622.

30. The submission of the applicant is that promotion may not be a vested right but consideration for promotion is a vested right and this vested right accrued to him when he entered the service and this right cannot be taken away by amendment of Rule 13.

31. There is a basic fallacy in the argument of the applicant. The amended Rule 13 does not deprive the applicant of his alleged vested right to be considered for promotion. That right remains intact. Only certain posts have been reserved in favour of a class of officers. The result of this reservation may be that the applicant's actual promotion may be delayed on account of non-availability of vacancies. The right of consideration may be taken away when eligibility qualification is altered but not only when certain vacancies are reserved in favour of a particular class.

32. In view of the above, amended Rule 13 cannot be faulted on the ground that it takes away a vested right of the applicant.

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Conclusion.

The consequence of our finding on Ground 'F' is that the amended Rule 13 will have to be quashed as ultra vires of Article 16(4) read with Article 335 of the Constitution. In paragraph 881 (8) of Indira Sawhney's judgment, their Lordships have observed as follows:-

"Reservation of appointments or posts under Article 16(4) is confined to initial appointment only and cannot extend to providing reservation in the matter of promotion. 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 do so."

In view of this observation the policy of reservation in promotion has to be continued for a period of five years from the date of judgment of their Lordships. Their Lordships' judgment was rendered on 16.11.1992. The period of five years will expire on 16.11.1997. The quashing of Rule 13 can, therefore be effective only from 16.11.1997.

Order:

In view of the above, the Original Application is allowed and the impugned Notification dated 20.2.1989 is

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hereby quashed with effect from 16.11.1997. The applicant shall get the cost of the proceedings from the Union of India, Respondent No.1, which is assessed at Rs.1000/- (Rupees one thousand only).

*P. J. Thiruvengadam*  
(P.T. THIRUVENGADAM)  
MEMBER(A)

*S. E. Mathur*  
(S.E. MATHUR)  
CHAIRMAN

SNS  
SKS