Central Administrative Tribunal
Principal Bench, New Delhi

O.A. No. 3295/2012

Reserved on : 22.11.2016

Pronounced on : 29.11.2016

Hon'ble Mr. P. K. Basu, Member (A)
Hon'ble Mr. Raj Vir Sharma, Member (J)

1. M. K. Hans, S/o Late Shri M.C. Hans
R/o. A-5/15, Mainwali Nagar,
Paschim Vihar, New Delhi
Serving as EE (E &M),
Delhi Jal Board, New Delhi.

2. Anil Kumar Arora, S/o. Sh. Rajinder Pal,
R/o. 2518, St. No. 11, Behari Colony, Shahdara,
Delhi-110 032, Serving as EE (E &M),
Delhi Jal Board, New Delhi.

3. Praveen Kumar Gupta, S/o Sh. Shankar Dass,
R/o. 98-A, Pocket-B,
Dilshad Garden, Delhi-110 095.
Serving as EE (E &M), New Delhi.

4. Sheesh Ram Singh, S/o Sh. M. R. Singh
R/o. 18822, Outram Line,
Kingsway Camp, Delhi-110 009.
Serving as EE (E &M, New Delhi.

5. Vinod Bhardwaj, S/o Sh Suraj Bhan,
R/o. 354, Ambika Apartment,
Rohini, Sector-14, New Delhi
Serving as EE (E &M), New Delhi. ....Applicants

(By Advocate : Mr. M. K. Bhardwaj)

Versus

DJB & Ors, through

1. The Chief Executive Officer, Delhi Jal Board,
Varunalaya-II, Karol Bagh, New Delhi.

2. The Member (Administration),
Delhi Jal Board, Varunalaya-III, Karol Bagh,
New Delhi.

3. The Director (A&P),
Delhi Jal Board,
Varunalaya-III, Karol Bagh,
New Delhi.

4. Jaswant Kumar Singh,
S/o. Sh. J. R. Singh,
Varunalaya-III, Karol Bagh,
New Delhi.
Serving as EE (E&M), New Delhi.

5. Bhupesh Kumar,
S/o. Sh. R. P. Bhaskar
Varunalaya-III,
Karol Bagh, New Delhi.
Serving as EE (E&M), New Delhi.

6. K. C. Meena,
S/o. Sh. R. K. Meena,
Varunalaya-II, Karol Bagh,
New Delhi
Serving as EE (E&M), New Delhi. …Respondents

(By Advocate : Mr. Rajkumar Bhartiya for R-1 to 3 and Mr. Somya Chakravorty with Mr. Manoj Kumar for private respondents)

O R D E R

Mr. P. K. Basu, Member (A) :

The applicants are all Executive Engineers (E&M) in Delhi Jal Board. Their grievance is that the respondents have promoted the candidates belonging to SC and ST ignoring the law laid down by the Hon'ble Supreme Court in case of **M. Nagaraj & Ors v. Union of India and Ors.** (2006) 8 SCC 212, **Suraj Bhan Meena & Anr. Vs. State of Rajasthan & Ors.**,(2011) 1 SCC 46 and **UP Power Corpn. Ltd.** v. **Rajesh Kumar & Ors.,** (2012) 7 SCC 1. As a result, respondents no. 4 and 5, who are SC candidates and respondent no. 6, an ST candidate, have been promoted as Executive Engineers though, in the seniority list dated 29.05.2012, the seniority position was as follows :-

Sl. No.	Name/Father's Name S/Shri	Date of Birth	SC/ST / OBC	Educational qualification	Date of Apptt./ Promotion	Remarks
1.	Anil Kr. Arora/ Rajinder Pal Applicant No.2	17.10.61	---	AMIE(E)	20.10.89	EE(E&M) on ad-hoc
2.	Vinod Kumar/ Suraj Bhan Applicant No.-5	19.05.61	---	B.Sc (Mech.)	27.02.90	--do--
3.	M. K. Hans/ M. C. Hans Applicant No.-1	01.06.62	---	AMIE (E)/ AMIE (Elect.& Telecom Engg. PG-Diploma in Business Administration	21.03.90	--do--
4.	Jaswant Kr. Singh/ J.R. Singh Respondent No.4	06.06.61	SC	AMIE(E)	12.09.91	--do--
5.	Praveen Kumar/ Shankar Dass Applicant No.3	01.01.66	---	B.Sc (Mech.) Engg.	12.10.99	--do--
6.	Shesh Ram Singh/M.R. Singh Applicant No.-4	01.04.58	OBC	AMIE(M)	11.10.99	--do--
7.	Bhupesh Kumar/ R.P. Bhaskar Respondent No.5	26.10.68	SC	BE(E)	07.10.99	--do--
8.	K.C. Meena/R.M. Meena Respondent No.6	06.07.72	ST	BE(M)	28.10.99	--do--

2. Later, the respondents issued a seniority list vide circular dated 12.07.2012 for Executive Engineers in which the respondents no. 4, 5 and 6 have been shown at Sl. No. 14, 15 and 16 whereas the applicants have been shown below them at Sl. No. 17, 20, 21, 23 and 25. Vide office order dated 20.06.2012, consequent upon the recommendations of the Departmental Promotion Committee held in UPSC on 11.06.2012, 15 Assistant Engineers were promoted to the post of Executive Engineers on regular basis in which the name of respondents no. 4, 5 and 6 are shown at Sl. No. 2, 3 and 4 respectively and all the applicants are shown below them. The applicants are

primarily aggrieved by the order dated 20.06.2012 and 12.07.2012 and have made the following prayer in the O.A :-

> *"(a) To quash and set aside the impugned order dated 20.06.2012 & 12.07.2012 and declare the action of respondents in applying reservation in the matter of promotion to the post of EE (E &M) as illegal, arbitrary unconstitutional.*
>
> *(b) To declare the action of respondents in applying reservation in the matter of promotion as illegal being contrary to law laid down by the Hon'ble Supreme Court in the case of M. Nagraj Vs. UOI & set aside the consequential orders same being contrary to law laid down in the said case.*
>
> *(c) To direct the respondents to fix seniority in the grade of EE (E&M) without applying the reservation and going by the inter-se- seniority in the feeder category."*

3. When the matter was taken up for hearing today, the learned counsel for respondents no. 1, 2 and 3 were not present. However, their reply is on record filed on 05.03.2013.

4. Learned counsel Mr. Saumya Chakraborty, argued on behalf of respondents no. 4, 5 and 6.

5. In their reply, the respondents no. 1, 2 and 3 have stated that the orders dated 12.07.2012 as well as 20.06.2012 are subject to final outcome of Court case filed by Shri. A. K. Avasthi and Ors. and this has been mentioned in the orders It has been stated that A.K. Avasthi's case is now before the Hon'ble Supreme Court and thus the above two orders have not attained finality as the issue is still pending before the Hon'ble Supreme Court of India. It is argued that thus, the promotions vide order dated 20.06.2012 are in the nature of an ad hoc appointment and will not confer on the beneficiary any right to claim

regular promotion to the post of higher grade or any other service benefits. In their reply to para 5 the respondents no. 1, 2 & 3 have, however, stated that "as the question of applicability of the ratio in M. Nagaraja's case is applicable only when the promotions are made on adhoc basis and not in case of regular appointment as in the present case."

6. Learned counsel for the respondents no. 4, 5 and 6 Mr. Saumya Chakravorty placed before us the following arguments :-

"(i) The applicants in their O.A have stated as follows :-

> *" 4.1 That the instant O.A is being filed challenging the arbitrary action of respondents in giving benefit of reservation in the matter of promotion to SC/ST candidates and thereby making the applicants junior to said persons for no fault on their part.* ***Once the reservation itself cannot be given in the matter of promotion,*** *how can the respondents made junior reserved category candidates senior to applicants while regularizing adhoc promotion.*
>
> *4.5 That while doing so, the respondents failed to consider that in view of decision of Hon'ble Supreme Court in the case of M. Nagraj Vs. UOI decided on 19.10.2006, no benefit of promotion could be claimed on the basis of reservation.* ***Once the reservation itself was barred by the Hon'ble Supreme Court in 2006,*** *how could the respondents apply reservation in the matter of promotion"*

Learned counsel contends that the Hon'ble Supreme Court has upheld the constitutional amendments Article 16 (4A) and 16(4B) enabling the reservation in promotion and, therefore, the applicants' contention that reservation in promotion cannot be granted and is illegal and unconstitutional is a clear misunderstanding of the law of the land and

on this ground itself, the O.A is not maintainable and deserves to be dismissed.

(ii) The minutes of the meeting of the UPSC (Annexure R-2 to the reply of R-1 to 3), would show that the UPSC made its assessment for 6 vacancies, 3-UR, 2-SC and 1-ST for the year 2008-09. In the case of the applicants who are at Sl. No. 5, 8, 9, 14 and 15 of the UPSC's recommendations, the UPSC has recorded as follows :-

> "*not required to be assessed in view of DOP&T O.M. No. 35034/7/1997, dated February, 8, 2002"*

It is stated that respondents no. 4, 5 and 6 who are at Sl. No. 11, 16 and 17, are declared fit. It is argued that for the year 2008-09, when the respondents no. 4, 5 and 6 were recommended by UPSC and as a consequence of that promoted as Executive Engineers, the applicants were not within the zone of consideration as would appear from the minutes of the UPSC quoted above. It is, therefore, argued that since applicants were not even in the zone of consideration, they have no locus standi to file this O.A or challenge the decision taken in the case of respondents no. 4, 5 & 6. In this regard, learned counsel relied on judgment of the Hon'ble Supreme Court in **D. Nagaraj & Ors v. State of Karnataka and Ors. (1977) 2 SCC 148** and specifically to para 7 of the judgment in which the Hon'ble Supreme Court has clearly stated that *"*it is also well established that a person who is not aggrieved by the discrimination complained of cannot maintain a writ petition*"*.

(iii) The learned counsel for the respondents drew our attention to judgment of the Hon'ble Supreme Court in **(2000) 9 SCC 572 State of Karnataka Vs. State of Andhra Pradesh and others**,

and specifically to para 160 of the judgment wherein the Hon'ble Supreme Court has held as follows :-

> *"160. The submissions have been made out on a total perspective of the situation and without dilating any further I record my concurrence therewith. The law as regards the issuance of a mandatory order or writ depends upon the authority exercising the power as well as the nature of the function and obligations arising therefrom, It is settled law that such a direction cannot possibly be granted so as to compel an authority to exercise a power which has a substantial element of discretion. In any event the mandamus to exercise a power which is legislative in character cannot be issued and I am in full agreement with the submission of Mr. Solicitor General on this score as well. At best it would only be an issue of good governance but that by itself would not mean and imply that the Union Government has executive power even to force a settlement upon the State."*

7. It is, further stated that the same minutes would show that the applicants were considered for the year 2009-10 and were declared fit, when they came within the zone of consideration.

8. It is therefore, contended that Article 16(4A) and 16 (4B) are only enabling provisions and the Court may not direct the executive to exercise the power and the State cannot be forced to take that action.

9. Learned counsel drew our attention to the judgment of the Hon'ble Supreme court in **M. Nagaraj**(supra) and specially to para 115, 116, 117, 119, 123 which are quoted below for easy reference.

> *"115.Therefore, while judging the width and the ambit of Article 16(4A) we must ascertain whether such sub-classification is permissible under the Constitution. The sub-classification between "OBC" on one hand and "SC and ST" on the other hand is held to be constitutionally permissible in Indra Sawhney5. In the said judgment it has been held that the State could make such sub-classification between SCs and STs vis-`-vis OBC. It refers to*

sub-classification within the egalitarian equality (vide paras 802 and 803). Therefore, Article 16(4A) follows the line suggested by this Court in Indra Sawhney5 . In Indra Sawhney5 on the other hand vide para 829 this Court has struck a balance between formal equality and egalitarian equality by laying down the rule of 50% (ceiling-limit) for the entire BC as "a class apart" vis-`-vis GC. Therefore, in our view, equality as a concept is retained even under Article 16(4A) which is carved out of Article 16(4).

116. As stated above, Article 14 enables classification. A classification must be founded on intelligible differential which distinguishes those that are grouped together from others. The differential must have a rational relation to the object sought to be achieved by the law under challenge. In Indra Sawhney5 an opinion was expressed by this Court vide para 802 that there is no constitutional or legal bar to making of classification. Article 16(4B) is also an enabling provision. It seeks to make classification on the basis of the differential between current vacancies and carry-forward vacancies. In the case of Article 16(4B) we must keep in mind that following the judgment in R.K. Sabharwal8 the concept of post-based roster is introduced. Consequently, specific slots for OBC, SC and ST as well as GC have to be maintained in the roster. For want of candidate in a particular category the post may remain unfilled. Nonetheless, that slot has to be filled only by the specified category. Therefore, by Article 16(4B) a classification is made between current vacancies on one hand and carry-forward/backlog vacancies on the other hand. Article 16(4B) is a direct consequence of the judgment of this court in R.K. Sabharwal8 by which the concept of post-based roster is introduced. Therefore, in our view Articles 16(4A) and 16(4B) form a composite part of the scheme envisaged. Therefore, in our view Articles 16(4), 16(4A) and 16(4B) together form part of the same scheme. As stated above, Articles 16(4A) and 16(4B) are both inspired by observations of the Supreme Court in Indra Sawhney5 and R.K. Sabharwal8. They have nexus with Articles 17 and 46 of the Constitution. Therefore, we uphold the classification envisaged by Articles 16(4A) and 16(4B). The impugned constitutional amendments, therefore, do not obliterate equality.

117. The test for judging the width of the power and the test for adjudicating the exercise of power

by the concerned State are two different tests which warrant two different judicial approaches. In the present case, as stated above, we are required to test the width of the power under the impugned amendments. Therefore, we have to apply "the width test". In applying "the width test" we have to see whether the impugned amendments obliterate the constitutional limitations mentioned in Article 16(4), namely, backwardness and inadequacy of representation. As stated above, these limitations are not obliterated by the impugned amendments. However, the question still remains whether the concerned State has identified and valued the circumstances justifying it to make reservation. This question has to be decided case-wise. There are numerous petitions pending in this Court in which reservations made under State enactments have been challenged as excessive. The extent of reservation has to be decided on facts of each case. The judgment in Indra Sawhney5 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 concerned State 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.

119. Existence of power cannot be denied on the ground that it is likely to be abused. As against this, it has been held vide para 650 of Kesavananda Bharati13 that where the nature of the power granted by the Constitution is in doubt then the Court has to take into account the consequences that might ensue by interpreting the same as an unlimited power. However, in the present case there is neither any dispute about the existence of the power nor is there any dispute about the nature of the power of amendment. The issue involved in the present case is concerning the width of the power. The power to amend is an enumerated power in the Constitution and, therefore, its limitations, if any, must be found in the Constitution itself. The concept of reservation in Article 16(4) is hedged by three constitutional

requirements, namely, backwardness of a class, inadequacy of representation in public employment of that class and overall efficiency of the administration. These requirements are not obliterated by the impugned constitutional amendments. Reservation is not in issue. What is in issue is the extent of reservation. If the extent of reservation is excessive then it makes an inroad into the principle of equality in Article 16(1). Extent of reservation, as stated above, will depend on the facts of each case. Backwardness and inadequacy of representation are compelling reasons for the State Governments to provide representation in public employment. Therefore, if in a given case the court finds excessive reservation under the State enactment then such an enactment would be liable to be struck down since it would amount to derogation of the above constitutional requirements.

123. However, in this case, as stated, the main issue concerns the "extent of reservation". In this regard the concerned State 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 SC/ST 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 of 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."

10. It is his contention that the question of collection of quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance with Article 335 as mandated in this judgment of the Hon'ble Supreme Court is in the background of 'excessive reservation'. It is stated that in the minutes of the UPSC it would be seen that the

reservation for SC/ST is only 50% (2 SC & 1 ST out of 6 vacancies). Moreover, the final seniority list of Executive Engineers circulated vide circular dated 12.07.2012 also would reveal that out of 27 candidates there are only 5 SCs and 2 STs, which cannot be termed as 'excessive'. Therefore, in view of the fact that collection of quantifiable data etc have to be in the background of 'excessive reservation', since in this particular case reservation cannot be said to be excessive, there is no violation of the judgment of the Hon'ble Supreme Court in M. Nagaraja case and thus, the O.A deserves to be dismissed.

11. Heard the learned counsels, perused the pleadings as well as the judgments cited by both sides.

12. The issue before us is not whether reservation can be granted in promotion or not. That matter has been settled long ago in **M. Nagaraj's** case that the State has this power through enabling amendments under Article 16 (4A) and 16(4B). The question before us is whether the respondents have followed the law settled by the Hon'ble Supreme Court that the State has to collect the quantifiable data showing backwardness of the class and adequacy of representation of that class in public employment in addition to compliance with the Article 235. In its subsequent judgment in **U.P. Power Corporation Limited Vs. Rajesh Kumar & Ors.** dated 27.04.2012, the Hon'ble Apex Court has elaborated this. We quote below the relevant portions:-

> "79. In para 117, the Bench laid down as follows:
>
> > "117...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."

80. 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."

81. 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) Article16(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.

82. 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 (77tth Amendment, 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."

83. 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.

84. 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(4A) 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.

85. 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).

86. 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."

13. The above judgment clearly states that the State has to undertake the exercise of collecting quantifiable data etc before it chooses to invoke the reservations in promotion under the enabling provisions of Article 16 (4A) and (4B). In the present case, the facts would reveal that condition precedent has not been satisfied.

14. The contention of the learned counsel for respondents no. 4 to 6 that order dated 12.07.2012 as well as minutes of the UPSC would reveal that there is no 'excessive representation' and therefore, the exercise of collecting quantifiable data is not necessary cannot be accepted as it is clearly against the findings of the Hon'ble Supreme Court in M. Nagaraj, Rajesh Kumar as well as Suraj Bhan (Supra).

15. The contention of the respondents no. 1, 2 and 3 as stated earlier is that the benefit of ratio in **M. Nagaraj** arises only when the promotions are made on regular basis and order dated 20.06.2012 is an order of promotion to the post of Executive Engineer on ad hoc basis. Therefore, even as per their contention, the respondents concede that in case of regular promotions **M. Nagaraj's** case would apply. Their reply that the promotion dated 20.06.2012 is ad hoc is clearly misleading because the order itself says "regular basis". That the promotion is subject to final outcome of Court case in A. K. Avasthi and Ors. Vs. Delhi Jal Board does not make it an ad hoc promotion.

16. The arguments put forth by the learned counsel for the respondents no. 4 to 6 that applicants have no *locus standi* as they were not in the zone of consideration in the year 2008-09 and therefore, this O.A is not maintainable is rejected for the reason that in case the respondents no. 4 to 6 were not granted the promotion in the year 2008-09, they would have been definitely junior to the applicants for the year 2009-10, seniority list would not have got disturbed and it would not have affected future promotions of the applicants in the hierarchy. Thus, the decision of the respondents to grant reservation on promotion definitely affects the applicants as they lose seniority and they have a locus standi to file this O.A.

17. We, therefore, find merit in the O.A and it is allowed. Seniority list dated 12.07.2012 is quashed and set aside. Office order of promotion dated 20.06.2012 is also quashed and set aside qua the respondents no. 4, 5 and 6 namely Shri. Jaswant Kumar Singh, Shri. Bhupesh Kumar and Shri. K. C. Meena. The respondents are further directed to issue a fresh seniority list, in accordance with the original seniority position showing the applicants senior to the respondents no. 4, 5 and 6. We set a time frame of 90 days for compliance of this order from the date a certified copy of this order is received by the respondents. No costs.

(Raj Vir Sharma)
Member (J)

(P. K. Basu)
Member (A)

/Mbt/