Central Administrative Tribunal
Principal Bench, New Delhi

O.A.No.4683/2015

Reserved on 19th January 2016

Pronounced on 4th March 2016

Hon'ble Mr. A.K. Bhardwaj, Member (J)
Hon'ble Dr. B.K. Sinha, Member (A)

Mr. Lokendra Kumar & others

..Applicants

(Mrs. Meenu Mainee, Advocate)

Versus

Union of India through & others

..Respondents

(Mr. Shailendra Tiwary, Advocate for official respondents –
Nemo for private respondents)

O R D E R

Mr. A.K. Bhardwaj:

The issue of interim stay on reservation in promotion has been dealt with by us at length in M.A. No.400/2015 in O.A. No.4158/2013. The relevant excerpt of the order reads thus:-

> "20. In M. Nagaraj's case (supra), the Apex Court commented upon the concept of reservation in the following words:-
>
> > "31. Reservation as a concept is very wide. Different people understand reservation to mean different things. One view of reservation as a generic concept is that reservation is anti-poverty measure. There is a different view which says that reservation is merely providing a right of access and that it is not a right to redressal. Similarly, affirmative action as a generic concept has a different connotation. Some say that reservation is not a part of affirmative action whereas others say that it is a part of affirmative action.
> >
> > 32. Our Constitution has, however, incorporated the word 'reservation' in Article 16(4) which word is not there in Article 15(4). Therefore, the word 'reservation' as a subject of Article

16(4) is different from the word 'reservation' as a general concept.

33. Applying the above test, we have to consider the word 'reservation' in the context of Article 16(4) and it is in that context that Article 335 of the Constitution which provides for relaxation of the standards of evaluation has to be seen. We have to go by what the Constitution framers intended originally and not by general concepts or principles. Therefore, schematic interpretation of the Constitution has to be applied and this is the basis of the working test evolved by Chandrachud, J. in the Election Case14."

21. In paragraph 43 of the judgment, it was ruled that the reserved category candidates are entitled to compete for the general category posts but the fact that the considerable number of members of backward class have been appointed/promoted against general seats in the State services may be a relevant factor for the State Government to review the question of continuing reservation for the said class. Paragraph 43 of the judgment reads thus:-

"43. In Indra Sawhney Reddy, J. noted that reservation under Article 16(4) do not operate on communal ground. Therefore if a member from reserved category gets selected in general category, his selection will not be counted against the quota limit provided to his class. Similarly, in R.K. Sabharwal the Supreme Court held that while general category candidates are not entitled to fill the reserved posts; reserved category candidates are entitled to compete for the general category posts. The fact that considerable number of members of backward class have been appointed/ promoted against general seats in the State services may be a relevant factor for the State Government to review the question of continuing reservation for the said class."

22. In paragraphs 48 to 55 of the judgment, their Lordships commented upon the 'catch-up' rule. In paragraphs 57 to 64 of the judgment, amendment in the constitution concerning the scope of reservation was noted. Paragraphs 57 to 64 read thus:

"57. Before dealing with the scope of the constitutional amendments we need to recap the judgments in Indra Sawhney and R.K. Sabharwal. In the former case the majority held that 50% rule should be applied to each year otherwise it may happen that the open competition channel may get choked if the entire cadre strength is taken as a unit. However in R.K. Sabharwal, this court stated that the entire cadre strength should be taken into account to determine whether the reservation up to the quota-limit has been reached. It was clarified that the judgment in Indra Sawhney was confined to initial appointments and not to promotions. The operation of

the roster for filling the cadre strength, by itself, ensure that the reservation remains within the ceiling-limit of 50%.

58. In our view, 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 upper ceiling-limit of 50% is not violated. Further, roster has to be post- specific and not vacancy based. With these introductory facts, we may examine the scope of the impugned constitutional amendments.

59. The Supreme Court in its judgment dated 16.11.92 in Indra Sawhney stated that reservation of appointments or posts under Article 16(4) is confined to initial appointment and cannot extend to reservation in the matter of promotion. Prior to the judgment in Indra Sawhney reservation in promotion existed. The Government felt that the judgment of this court in Indra Sawhney adversely affected the interests of SCs and STs in services, as they have not reached the required level. Therefore, the Government felt that it was necessary to continue the existing policy of providing reservation in promotion confined to SCs and STs alone. We quote hereinbelow Statement of Objects and Reasons with the text of the Constitution (Seventy-Seventh Amendment) Act, 1995 introducing clause (4A) in Article 16 of the Constitution:

> "THE CONSTITUTION (SEVENTY-SEVENTH AMENDMENT) ACT, 1995 STATEMENT OF OBJECTS AND REASONS The Scheduled Castes and the Scheduled Tribes have been enjoying the facility of reservation in promotion since 1955. The Supreme Court in its judgment dated 16th November, 1992 in the case of Indra Sawhney v. Union of India, however, observed that reservation of appointments or posts under Article 16(4) of the Constitution is confined to initial appointment and cannot extend to reservation in the matter of promotion. This ruling of the Supreme Court will adversely affect the interests of the Scheduled Castes and the Scheduled Tribes. Since the representation of the Scheduled Castes and the Scheduled Tribes in services in the States have not reached the required level, it is necessary to continue the existing dispensation of providing reservation in promotion in the case of the Scheduled Castes and the Scheduled Tribes. In view of the commitment of the Government to protect the interests of the Scheduled Castes and the Scheduled Tribes, the Government have decided to continue the existing policy of reservation in promotion for the Scheduled Castes and the Scheduled Tribes. To carry out this, it is necessary to amend Article 16 of the Constitution by inserting a new clause (4A) in

the said Article to provide for reservation in promotion for the Scheduled Castes and the Scheduled Tribes.

2. The Bill seeks to achieve the aforesaid object.

THE CONSTITUTION (SEVENTY- SEVENTH AMENDMENT) ACT, 1995 [Assented on 17th June, 1995, and came into force on 17.6.1995] An Act further to amend the Constitution of India BE it enacted by Parliament in the Forty- sixth Year of the Republic of India as follows:-

1. Short title.- This Act may be called the Constitution (Seventy-seventh Amendment) Act, 1995.

2. Amendment of Article 16. - In Article 16 of the Constitution, after clause (4), the following clause shall be inserted, namely:- "(4A) Nothing in this Article shall prevent the State from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State."

The said clause (4A) was inserted after clause (4) of Article 16 to say that nothing in the said Article shall prevent the State from making any provision for reservation in matters of promotion to any class(s) of posts in the services under the State in favour of SCs and STs which, in the opinion of the States, are not adequately represented in the services under the State.

Clause (4A) follows the pattern specified in clauses (3) and (4) of Article 16. Clause (4A) of Article 16 emphasizes the opinion of the States in the matter of adequacy of representation. It gives freedom to the State in an appropriate case depending upon the ground reality to provide for reservation in matters of promotion to any class or classes of posts in the services. The State has to form its opinion on the quantifiable data regarding adequacy of representation. Clause (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(4). 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 come into force. The State can make provision for reservation only if the above two circumstances exist. Further in Ajit Singh (II)3 , this court has held that apart from 'backwardness' and 'inadequacy of representation' the State shall also keep in mind 'overall efficiency' (Article 335). Therefore, all the three factors

have to be kept in mind by the appropriate Government by providing for reservation in promotion for SCs and STs.

60. After the Constitution (Seventy-Seventh Amendment) Act, 1995, this court stepped in to balance the conflicting interests. This was in the case of Virpal Singh Chauhan1 in which it was held that a roster-point promotee getting the benefit of accelerated promotion would not get consequential seniority. As such, consequential seniority constituted additional benefit and, therefore, his seniority will be governed by the panel position. According to the Government, the decisions in Virpal Singh and Ajit Singh (I) bringing in the concept of "catch-up" rule adversely affected the interests of SCs and STs in the matter of seniority on promotion to the next higher grade. In the circumstances, clause (4A) of Article 16 was once again amended and the benefit of consequential seniority was given in addition to accelerated promotion to the roster-point promotees. Suffice it to state that, the Constitution (Eighty-Fifth Amendment) Act, 2001 was an extension of clause (4A) of Article 16. Therefore, the Constitution (Seventy-Seventh Amendment) Act, 1995 has to be read with the Constitution (Eighty-Fifth Amendment) Act, 2001.

61. We quote hereinbelow Statement of Objects and Reasons with the text of the Constitution (Eighty-Fifth Amendment) Act, 2001:

> "THE CONSTITUTION (EIGHTY-FIFTH AMENDMENT) ACT, 2001 STATEMENT OF OBJECTS AND REASONS The Government servants belonging to the Scheduled Castes and the Scheduled Tribes had been enjoying the benefit of consequential seniority on their promotion on the basis of rule of reservation. The judgments of the Supreme Court in the case of Union of India v. Virpal Singh Chauhan (1995) 6 SCC 684 and Ajit Singh Januja (No.1) v. State of Punjab AIR 1996 SC 1189, which led to the issue of the O.M. dated 30th January, 1997, have adversely affected the interest of the Government servants belonging to the Scheduled Castes and Scheduled Tribes category in the matter of seniority on promotion to the next higher grade. This has led to considerable anxiety and representations have also been received from various quarters including Members of Parliament to protect the interest of the Government servants belonging to Scheduled Castes and Scheduled Tribes.
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> 2. The Government has reviewed the position in the light of views received from various quarters and in order to protect the interest of the Government servants belonging to the Scheduled Castes and Scheduled Tribes, it has been decided to negate the effect of O.M. dated 30th January 1997 immediately. Mere withdrawal of the O.M. dated 30th will not meet the desired purpose and review

or revision of seniority of the Government servants and grant of consequential benefits to such Government servants will also be necessary. This will require amendment to Article 16(4A) of the Constitution to provide for consequential seniority in the case of promotion by virtue of rule of reservation. It is also necessary to give retrospective effect to the proposed constitutional amendment to Article 16(4A) with effect from the date of coming into force of Article 16(4A) itself, that is, from the 17th day of June, 1995.

3. The Bill seeks to achieve the aforesaid objects.

THE CONSTITUTION (EIGHTY-FIFTH AMENDMENT) ACT, 2001 The following Act of Parliament received the assent of the President on the 4th January, 2002 and is published for general information:-

An Act further to amend the Constitution of India.

BE it enacted by Parliament in the Fifty- second Year of the Republic of India as follows:-

1. Short title and commencement.- (1) This Act may be called the Constitution (Eighty-fifth Amendment) Act, 2001.

(2) It shall be deemed to have come into force on the 17th day of June 1995.

2. Amendment of Article 16.- In Article 16 of the Constitution, in clause (4A), for the words "in matters of promotion to any class", the words "in matters of promotion, with consequential seniority, to any class" shall be substituted."

Reading the Constitution (Seventy-Seventh Amendment) Act, 1995 with the Constitution (Eighty- Fifth Amendment) Act, 2001, clause (4A) of Article 16 now reads as follows:

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

The question in the present case concerns the width of the amending powers of the Parliament. The key issue is - whether any constitutional limitation mentioned in

> Article 16(4) and Article 335 stand obliterated by the above constitutional amendments.

62. In R.K. Sabharwal, the issue was concerning operation of roster system. This court stated that the entire cadre strength should be taken into account to determine whether reservation up to the required limit has been reached. It was held that if the roster is prepared on the basis of the cadre strength, that by itself would ensure that the reservation would remain within the ceiling-limit of 50%. In substance, the court said that in the case of hundred-point roster each post gets marked for the category of candidate to be appointed against it and any subsequent vacancy has to be filled by that category candidate alone (replacement theory).

The question which remained in controversy, however, was concerning the rule of 'carry-forward'. In Indra Sawhney this court held that the number of vacancies to be filled up on the basis of reservation in a year including the 'carry-forward' reservations should in no case exceed the ceiling-limit of 50%.

However, the Government found that total reservation in a year for SCs, STs and OBCs combined together had already reached 49=% and if the judgment of this court in Indra Sawhney5 had to be applied it became difficult to fill "backlog vacancies". According to the Government, in some cases the total of the current and backlog vacancies was likely to exceed the ceiling-limit of 50%. Therefore, the Government inserted clause (4B) after clause (4A) in Article 16 vide the Constitution (Eighty-First Amendment) Act, 2000.

63. By clause (4B) the "carry-forward"/"unfilled vacancies" of a year is kept out and excluded from the overall ceiling-limit of 50% reservation. The clubbing of the backlog vacancies with the current vacancies stands segregated by the Constitution (Eighty-First Amendment) Act, 2000. Quoted hereinbelow is the Statement of Objects and Reasons with the text of the Constitution (Eighty-First Amendment) Act, 2000:

> "THE CONSTITUTION (EIGHTY FIRST AMENDMENT) ACT, 2000 (Assented on 9th June, 2000 and came into force 9.6.2000) STATEMENT OF OBJECTS AND REASONS Prior to August 29, 1997, the vacancies reserved for the Scheduled Castes and the Scheduled Tribes, which could not be filled up by direct recruitment on account of non- availability of the candidates belonging to the Scheduled Castes or the Scheduled Tribes, were treated as "Backlog Vacancies". These vacancies were treated as a distinct group and were excluded from the ceiling of fifty per cent reservation. The Supreme Court of India in its judgment in the Indra Sawhney versus Union of India held that the number of vacancies to be filled up on the basis of reservations in a

year including carried forward reservations should in no case exceed the limit of fifty per cent. As total reservations in a year for the Scheduled Castes, the Scheduled Tribes and the other Backward Classes combined together had already reached forty-nine and a half per cent and the total number of vacancies to be filled up in a year could not exceed fifty per cent., it became difficult to fill the "Backlog Vacancies" and to hold Special Recruitment Drives. Therefore, to implement the judgment of the Supreme Court, an Official Memorandum dated August 29, 1997 was issued to provide that the fifty per cent limit shall apply to current as well as "Backlog Vacancies" and for discontinuation of the Special Recruitment Drive.

Due to the adverse effect of the aforesaid order dated August 29, 1997, various organisations including the Members of Parliament represented to the central Government for protecting the interest of the Scheduled castes and the Scheduled Tribes. The Government, after considering various representations, reviewed the position and has decided to make amendment in the constitution so that the unfilled vacancies of a year, which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) of Article 16 of the Constitution, shall be considered as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty percent, reservation on total number of vacancies of that year. This amendment in the Constitution would enable the State to restore the position as was prevalent before august 29, 1997.

The Bill seeks to achieve the aforesaid object.

THE CONSTITUTION (EIGHTY- FIRST AMENDMENT) ACT, 2000 (Assented on 9th June, 2000 and came into force 9.6.2000) An Act further to amend the Constitution of India.

BE it enacted by Parliament in the Fifty- first Year of the Republic of India as follows:-

1. Short title: This Act may be called the Constitution (Eighty-first Amendment) Act, 2000.

2. Amendment of Article 16: In Article 16 of the Constitution, after clause (4A), the following clause shall be inserted, namely: - "(4B) Nothing in this Article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any

> provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year."

The Constitution (Eighty-First Amendment) Act, 2000 gives, in substance, legislative assent to the judgment of this Court in R.K. Sabharwal. Once it is held that each point in the roster indicates a post which on falling vacant has to be filled by the particular category of candidate to be appointed against it and any subsequent vacancy has to be filled by that category candidate alone then the question of clubbing the unfilled vacancies with current vacancies do not arise. Therefore, in effect, Article 16(4B) grants legislative assent to the judgment in R.K. Sabharwal. If it is within the power of the State to make reservation then whether it is made in one selection or deferred selections, is only a convenient method of implementation as long as it is post based, subject to replacement theory and within the limitations indicated hereinafter.

As stated above, clause (4A) of Article 16 is carved out of clause (4) of Article 16. Clause (4A) provides benefit of reservation in promotion only to SCs and STs. In the case of S. Vinod Kumar and another v. Union of India and others this court held that relaxation of qualifying marks and standards of evaluation in matters of reservation in promotion was not permissible under Article 16(4) in view of Article 335 of the Constitution. This was also the view in Indra Sawhney.

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

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

This proviso was added following the benefit of reservation in promotion conferred upon SCs and STs alone. This proviso was inserted keeping in mind the judgment of this court in Vinod Kumar21 which took the view that relaxation in matters of reservation in promotion was not permissible under Article

> 16(4) in view of the command contained in Article 335. Once a separate category is carved out of clause (4) of Article 16 then that category is being given relaxation in matters of reservation in promotion. The proviso is confined to SCs and STs alone. The said proviso is compatible with the scheme of Article 16(4A).”

23. In paragraph 69 of the judgment, it could be held that there is no violation of the basic structure by any of the impugned amendments, including the Constitution (Eighty-Second) Amendment Act, 2000. Paragraph reads thus:-

> “69. Applying the above tests to the present case, there is no violation of the basic structure by any of the impugned amendments, including the Constitution (Eighty-Second) Amendment Act, 2000. 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 facts of each case. In our view, the field of exercise of the amending power is retained by the impugned amendments, as the impugned amendments have introduced merely enabling provisions because, as stated above, merit, efficiency, backwardness and inadequacy cannot be identified and measured in vacuum. Moreover, Article 16(4A) and Article 16(4B) fall in the pattern of Article 16(4) and as long as the parameters mentioned in those articles are complied-with by the States, the provision of reservation cannot be faulted. Articles 16(4A) and 16(4B) are classifications within the principle of equality under Article 16(4).
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> In conclusion, we may quote the words of Rubenfeld:
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> "ignoring our commitments may make us rationale but not free. It cannot make us maintain our constitutional identity".

24. Nevertheless, in paragraph 71 of the judgment, their Lordships ruled that if the State has quantified data to show backwardness and inadequacy then the State can make reservations in promotions keeping in mind maintenance of efficiency which is held to be a constitutional limitation on the discretion of the State in making reservation as indicated by Article 335. It was in terms of the view taken by the Apex Court in paragraph 71 of the judgment that a plea is raised by a segment of government employees that in the absence of there being quantifiable data regarding backwardness, inadequacy of representation and efficiency of service, there should be no reservation in promotion. The concerned Departments or the machinery associated with promotion of various posts is not in a position to have the data regarding backwardness of the categories and inadequacy on their representation, thus a vital question arises that “till the quantifiable data is collected regarding backwardness of the SC/ST categories, inadequacy of representation and efficiency of service, whether reservation in promotion should be held or whether

till then reservation should be given on the basis of the existing provisions. Pressure is built up by the candidates from unreserved categories that in view of the law declared by the Apex Court in M. Nagaraj's case (supra) in paragraph 71 of the judgment, the interim orders should be passed to stay the reservation in promotion.

25. On the other hand, it is espoused on behalf of the reserved category candidates that once there are provisions in the Constitution providing for reservation, it should be made in favour of the categories already classified as reserved categories. Besides the aforementioned judgment of Hon'ble Supreme Court, reliance is placed on behalf of the applicant on the judgment of Apex Court in Suraj Bhan Meena & another v. State of Rajasthan & others, (2011) 1 SCC 467 wherein their Lordships reiterated the law declared by themselves in M. Nagaraj's case (supra). Paragraph 46 of the judgment reads thus:-

> "46. The position after the decision in M. Nagaraj's case (supra) 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. The view of the High Court is based on the decision in M. Nagaraj's case (supra) as no exercise was undertaken in terms of Article 16(4-A) to acquire quantifiable data regarding the inadequacy of representation of the Schedule Castes and Scheduled Tribes 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 Castes and Scheduled Tribes communities and the same does not call for any interference. Accordingly, the claim of Petitioners Suraj Bhan Meena and Sriram Choradia in Special Leave Petition (Civil) No.6385 of 2010 will be subject to the conditions laid down in M. Nagaraj's case (supra) and is disposed of accordingly. Consequently, Special Leave Petition (C) Nos. 7716, 7717, 7826 and 7838 of 2010, filed by the State of Rajasthan, are also dismissed."

26. The position was further reiterated in U.P. Power Corporation Ltd. v. Rajesh Kumar & others, (2012) 7 SCC 1 and it could be ruled that once no exercise had been undertaken to prepare the quantifiable data, as has been held in M. Nagaraj's case (supra), the State cannot make provisions for reservation in promotion. Paragraph 41 of the judgment reads thus:-

> "41. As has been indicated hereinbefore, it has been vehemently argued by the learned senior counsel for the State and the learned senior counsel for the Corporation that once the principle of reservation was made applicable to the spectrum of promotion, no fresh exercise is necessary. It is also urged that the efficiency in service is not jeopardized. Reference has been

made to the Social Justice Committee Report and the chart. We need not produce the same as the said exercise was done regard being had to the population and vacancies and not to the concepts that have been evolved in M. Nagaraj (supra). It is one thing to think that there are statutory rules or executive instructions to grant promotion but it cannot be forgotten that they were all subject to the pronouncement by this Court in Vir Pal Singh Chauhan (supra) and Ajit Singh (II) (supra). We are of the firm view that a fresh exercise in the light of the judgment of the Constitution Bench in M. Nagaraj (supra) is a categorical imperative. The stand that the constitutional amendments have facilitated the reservation in promotion with consequential seniority and have given the stamp of approval to the Act and the Rules cannot withstand close scrutiny inasmuch as the Constitution Bench has clearly opined that Articles 16(4A) and 16(4B) are enabling provisions and the State can make provisions for the same on certain basis or foundation. The conditions precedent have not been satisfied. No exercise has been undertaken. What has been argued with vehemence is that it is not necessary as the concept of reservation in promotion was already in vogue. We are unable to accept the said submission, for when the provisions of the Constitution are treated valid with certain conditions or riders, it becomes incumbent on the part of the State to appreciate and apply the test so that its amendments can be tested and withstand the scrutiny on parameters laid down therein."

27. In Sushil Kumar Singh & others v. The State of Bihar & others (Civil Writ Jurisdiction Case No.19114/2012) decided on 04.05.2015, following the law declared by the Apex Court (ibid), the Hon'ble High Court of Patna ruled thus:-

"50. During the course of submission the respondents have laid emphasis by referring to different datas in the report that the quota reserved for S.Cs. and S.Ts. in different class (s) of services has not even been filled up. This submission cannot be accepted for the simple reason that the issue of adequate representation of Scheduled Castes/Scheduled Tribes government servants has to be determined by considering representation of Scheduled Castes/Scheduled Tribes government servants irrespective of the fact as to whether they are holding the posts on their own merits or on the basis of reservation. The data is to be considered cadre wise to find out the adequacy of representation of Scheduled Castes/Scheduled Tribes government servants. Article 16 (4-A) prescribes the test of adequate representation of Scheduled Castes/Scheduled Tribes government servants in the class (s) of services and not the adequacy of Patna High Court CWJC No.19114 of 2012 dt.04-05-2015 representation in the quota reserved for such government servants. A Scheduled Caste/Scheduled Tribe candidate might have got the appointment on merit and may be occupying unreserved post in the roster but if at any point in his

service he has taken the benefit meant for reserved category candidate then he cannot be treated as a candidate of unreserved category. The report contains no data with regard to such government servants. From the perusal of the data as contained in the report, it appears that in a number of cadres in different services the representation of Scheduled Castes/Scheduled Tribes government servants is adequate e.g. table 3.4 (department of industry), Table 3.5 (Department of Water Resources), Table 3.6 (Department of Home), Table 3.8 (Department of Public Health and Engineering) and in some cases the representation is cent percent. In the report, though the observation has been made that the adequacy of representation of Scheduled Castes/Scheduled Tribes government servants in those cadres have been achieved only because of the policy of reservation but that cannot be the basis for the decision to continue the reservation for all the class(s) of services, the requirement notwithstanding. The individual right of equality as envisaged under Art. 14 and 16 (1) of the Constitution cannot be overlooked by deducing the conclusion by combining together the datas of representation in different services /departments. In the Patna High Court CWJC No.19114 of 2012 dt.04-05-2015 present case exactly the same course has been adopted. If there is adequate representation in promotional posts in a particular service, the decision to continue the benefit of reservation to Scheduled Castes/Scheduled Tribes government servants in that service on the ground that there is inadequate representation in other service (s) cannot be legally countenanced for it would be also violating the 'numerical bench mark'. The respondent-State before coming to the conclusion to grant benefit of reservation in promotional posts with consequential seniority to Scheduled Castes/Scheduled Tribes employees was required to consider the adequacy of representation of such government servants in each class or classes of posts in government services and thereafter to take appropriate decision in terms of Article 16 (4-A) with respect to that class or classes of services. By issuing the impugned resolution in general and sweeping terms the State Government has clearly abdicated its function as required by Art. 16 (4-A) of the Constitution and the law laid down by the Constitution Bench in M. Nagaraj.

51. For the aforesaid reasons and discussions this Court comes to the conclusion that the impugned resolution dated 21.08.2012 (Annexure-13) cannot be legally sustained. The writ application is accordingly allowed and the impugned resolution dated 21.08.2012 (Annexure-13) is quashed with necessary consequences. Patna High Court CWJC No.19114 of 2012 dt.04-05-2015 The interlocutory applications also accordingly stand disposed of. It is, however, observed that in case the State Government proposes to invoke the power to grant benefit of reservation in promotion with consequential seniority to Scheduled Castes/Scheduled Tribes government servants, it will

have to act strictly in accordance with the requirements of Article 16(4-A) of the Constitution as well as the parameters and conditions laid down by the Constitution Bench in M. Nagaraj case as aforediscussed in this judgment."

28. In Rajbir Singh v. State of Haryana & others (C.W.P. No.25512/2012) (O&M) decided on 14.11.2014 again, the Hon'ble Punjab and Haryana High Court set aside the provisions regarding reservation in promotion and ruled thus:-

"26. The plea of the private respondents regarding locus of the petitioners to file the writ petitions is also merely to be noticed and rejected for the reason that in the bunch of petitions, challenge is to the policy framed by the Government, which runs contrary to the law laid down by Hon'ble the Supreme Court in M. Nagaraj's case (supra). Large number of employees are affected and the action of the State has been found to be in violation of the law laid down by Hon'ble the Supreme Court, hence, the petitions are held to be maintainable. All the employees, who may be affected have already been informed about the pendency of the present petitions in terms of the order dated 6.8.2013.

27. The contention of some of the counsels for the private respondents that promotions already granted to some of them should not be disturbed as they may be entitled to accelerated promotion after new policy is framed by the Government is also totally misconceived, as any promotion granted in terms of the 2006 and 2013 policies, which have been quashed, certainly deserves to be recalled. Acceptance of this argument would mean putting cart before the horse. As and when any policy is framed by the Government, whosoever will be entitled to any benefit thereunder, may claim and get the same. The benefit cannot be granted in anticipation as the provisions of Article 1 (4A) of the Constitution of India are merely enabling and not mandatory.

28. For the reasons mentioned above, the writ petitions are allowed. The 2013 policy, issued on 28.2.2013, providing for reservation in promotion is set aside. The 2006 policy, issued on 16.3.2006, had already been set aside by this court in Prem Kumar Verma's case (supra). Any accelerated promotion/seniority granted on the basis of the aforesaid policies, is liable to be reversed. Ordered accordingly. Necessary action be taken within a period of 3 months from the date of receipt of a copy of the judgment. From the facts of the case in hand, it is evident that the 2013 policy was issued by the then Chief Secretary, Haryana, despite being in knowledge of the judgments of Hon'ble the Supreme Court in M. Nagaraj's case (supra) and this court in Prem Kumar Verma's case (supra), I deem it appropriate to initiate proceedings for contempt against him. Let notice be issued to him to show cause as to why proceedings for contempt be not initiated against him. For that

purpose, the present petition be listed on 28.1.2015. It shall be the duty of the learned counsel for the State to apprise the then Chief Secretary about the order passed by this court."

29. Recently in Chairman & Managing Director, Central Bank of India & others v. Central Bank of India SC/ST Employees Welfare Association & others (Review Petition (Civil) No.891/2015 in Civil Appeal No.209/2015 with connected petitions) dated 08.01.2016. The plea put-forth on behalf of the applicant with reference to various judicial precedence mentioned in M.A. No.400/2015 has already been taken note of. Now we may proceed to note the view taken by the Hon'ble Supreme Court relied upon by Mrs. Meenu Mainee, learned counsel for original applicants.

"13) We would be candid in our remarks that once an error is found in the order/judgment, which is apparent on the face of record and meets the test of review jurisdiction as laid down in Order XLVII Rule (1) of the Supreme Court Rules, 2013 read with Order XLVII Rule (1) of the Code of Civil Procedure, 1908, there is no reason to feel hesitant in accepting such a mistake and rectify the same. In fact, the reason for such a frank admission is to ensure that this mind of patent error from the record is removed which led to a wrong conclusion and consequently wrong is also remedied. For adopting such a course of action, the Court is guided by the doctrine of ex debito justitiae as well as the fundamental principal of the administration of justice that no one should suffer because of a mistake of the Court. These principles are discussed elaborately, though in a different context, in A.R. Antulay v. R.S. Nayak.

14) We would also like to reproduce the following observations in S. Nagaraj v. State of Karnataka:-

"18. Justice is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can stand in its way. The order of the Court should not be prejudicial to anyone. Rule of stare decisis is adhered for consistency but it is not as inflexible in Administrative Law as in Public Law. Even the law bends before justice. Entire concept of writ jurisdiction exercised by the higher courts is founded on equity and fairness. If the Court finds that the order was passed under a mistake and it would not have exercised the jurisdiction but for the erroneous assumption which in fact did not exist and its perpetration shall result in miscarriage of justice then it cannot on any principle be precluded from rectifying the error. Mistake is accepted as valid reason to recall an order. Difference lies in the nature of mistake and scope of rectification, depending on if it is of fact or law. But the root from which the power flows is the anxiety to avoid injustice. It is either statutory or inherent. The latter is available where the mistake is of the Court. In

> Administrative Law the scope is still wider. Technicalities apart if the Court is satisfied of the injustice then it is its constitutional and legal obligation to set it right by recalling its order. Here as explained, the Bench of which one of us (Sahai, J.) was a member did commit an error in placing all the stipendiary graduates in the scale of First Division Assistants due to State's failure to bring correct facts on record. But that obviously cannot stand in the way of the Court correcting its mistake. Such inequitable consequences as have surfaced now due to vague affidavit filed by the State cannot be permitted to continue."

15) The argument of public policy pressed by the respondents is of no avail. We are conscious of the fervent plea raised by the respondent employees that employees belonging to SC/ST category should be made eligible for promotion by providing the reservation in the promotional posts as well, as their representation is abysmally minimal. However, whether there is any such justification in the demand or not is for the State to consider and make a provision in this behalf. This was so recorded in the judgment itself in the following manner:

> "24. In the first instance, we make it clear that there is no dispute about the constitutional position envisaged in Articles 15 and 16, insofar as these provisions empower the State to take affirmative action in favour of SC/ST category persons by making reservations for them in the employment in the Union or the State (or for that matter, public sector/authorities which are treated as State under Article 12 of the Constitution). The laudable objective underlying these provisions is also to be kept in mind while undertaking any exercise pertaining to the issues touching upon the reservation of such SC/ST employees. Further, such a reservation can not only be made at the entry level but is permissible in the matters of promotions as wells. At the same time, it is also to be borne in mind that Clauses 4 and 4A of Article 16 of the Constitution are only the enabling provisions which permit the State to make provision for reservation of these category of persons. Insofar as making of provisions for reservation in matters of promotion to any class or classes of post is concerned, such a provision can be made in favour of SC/ST category employees if, in the opinion of the State, they are not adequately represented in services under the State. Thus, no doubt, power lies with the State to make a provision, but, at the same time, courts cannot issue any mandamus to the State to necessarily make such a provision. It is for the State to act, in a given situation, and to take such an affirmative action. Of course, whenever there exists such a provision for reservation in the matters of recruitment or the promotion, it would bestow an enforceable right in favour of persons

> belonging to SC/ST category and on failure on the part of any authority to reserve the posts, while making selections/promotions, the beneficiaries of these provisions can approach the Court to get their rights enforced. What is to be highlighted is that existence of provision for reservation in the matter of selection or promotion, as the case may be, is the sine qua non for seeking mandamus as it is only when such a provision is made by the State, a right shall accrue in favour of SC/ST candidates and not otherwise."

16) Once we find an error apparent on the face of the record and to correct the said error, we have to necessarily allow these review petitions.

17) In view of the foregoing, the review petitions are allowed by deleting paragraph Nos. 33 to 36 of the judgment and the directions contained therein, as well as the directions contained in paragraph No. 37. Instead, after paragraph No. 32, following paragraph shall be inserted and numbered as 33, and paragraph No. 38 should be re-numbered as 34:

> "33. Result of the aforesaid discussion would be to allow these appeals and set aside the judgment of the High Court. While doing so, we reiterate that it is for the State to take stock of the ground realities and take a decision as to whether it is necessary to make a provision for reservation in promotions from Scale I to Scale II and upward, and if so, up to which post. The contempt petition also stands disposed of.
>
> 34. In the peculiar facts of this case, we leave the parties to bear their own costs."

18) All the interlocutory applications for impleadment/ intervention also stand disposed of.

19) Before we part with, we would like to observe that we have mentioned in para 15, which was also recorded in the main judgment, that the grievance of the employees belonging to SC/ST category is that there is negligible representation of employees belonging to their community in the officers' category at all levels. Keeping in view the statistical figures which have been placed on record showing their representation in officers' scales, it would be open to the concerned authority, namely, the State and the Banks to consider whether their demand is justified and it is feasible to provide reservation to SC/ST category persons in the matter of promotion in the officers' category and if so, upto which scale/level."

30. From the aforementioned judgments, it is amply clear that before giving reservation in promotion the quantified data regarding

backwardness, inadequacy of representation and efficiency of service need to be available. Nevertheless, the ramification of the law declared by the Apex Court, relied upon by learned counsels for the parties on a particular case, need to be assessed at the time of disposal of the controversy. In order to determine the controversy finally in all the cases, we had summoned the Joint Secretary from the concerned Department and we thought to evolve some instant formula with his assistance regarding satisfaction of three conditions to control the flood of litigations on the issue. Nevertheless, Mr. Gaya Prasad, Advocate for private respondents scandalized the Court proceedings on two consecutive dates of hearing and did not restrain himself even after our request and the request of members of the Bar.

31. The yardsticks to be applied for grant of interim stay are different from those to be applied at the time of final disposal of the controversy. At the time of passing interim orders, we need to be conscious about the balance of convenience and apprehension of irreparable loss. It is not gainsaid that there are constitutional provisions providing for reservation in promotion and the same can be applied only on fulfillment of certain conditions, i.e., availability of quantifiable data regarding backwardness and inadequacy of representation other categories to which the individual belong and the impact of reservation on efficiency of service. It may not be advisable to take a view regarding the condition at the threshold, i.e., on filing a petition by the UR category candidates."

2. In view of the aforementioned Order, it is directed that promotion to the post of Deputy Inspector of Tickets would remain subject to the outcome of the Original Application.

List on 27.05.2016.

(Dr. B.K. Sinha)
Member (A)

(A.K. Bhardwaj)
Member (J)

/sunil/