

Central Administrative Tribunal
Principal Bench
New Delhi

O.A.No.4281/2014
with
O.A.No.727/2015
O.A.No.1946/2015
O.A.No.3671/2015
O.A.No.3713/2015
O.A.No.3802/2015

Order Reserved on: 04.05.2016
Order pronounced on 03.06.2016

Hon'ble Shri V. Ajay Kumar, Member (J)
Hon'ble Shri Shekhar Agarwal, Member (A)

O.A.No.4281/2014:

1. All India Federation of Customs, Central Excise & Service Tax SC/ST Employees Welfare Organisation (Regd.)
Through, Shri K.P.S.Rai, President
Reg. Office: 229-C, Pocket-C
Mayur Vihar Phase-II
Delhi.
2. Virendra Singh
S/o Late Shri Prem Singh
229-C, Pocket-C
Mayur Vihar Phase-II
Delhi.
3. Hardwari Lal
S/o Late Shri Ami Chand
E-30, Ground Floor
Preet Vihar
Delhi – 110 092.
4. Babu Lal Baswal
S/o Shri Ram Prasad
R/o House No.545, Sector-19
Faridabad ... Applicants.

Versus

1. The Union of India
Through its Secretary
Ministry of Finance
Department of Revenue
North Block
New Delhi.
2. The Chairman
Central Board of Excise & Customs
New Delhi.
3. The Chief Commissioner Central Excise Delhi-I
CR Building
New Delhi.
4. Union of India
Through its Secretary
Department of Personnel & Training
Ministry of Personnel, Public Grievances & Pensions
North Block
New Delhi. Respondents.

with

O.A.No.727/2015:

1. Shri M.S.Meena, Superintendent
R/o H.No.4092-C, Sector-37-A
Chandigarh.
2. Shri Ramji Lal Meena, Superintendent
Aged about 53 years
R/o 4096-C, Sector 37-C
Chandigarh Applicants.

Versus

1. The Union of India
Through its Secretary
Ministry of Finance
Department of Revenue
North Block
New Delhi.

2. The Chairman
 Central Board of Excise & Customs
 New Delhi.

3. Union of India
 Through its Secretary
 Department of Personnel & Training
 Ministry of Personnel, public Grievances & Pensions
 North Block
 New Delhi. ... Respondents

O.A.No.1946/2015:

1. P. Chinnasamy
 S/o M. Periyasamy
 9/13, Srinagar Colony
 B.K.Pudur, Kuniamuthur
 Coimbatore-641008.

2. K. Uthirapathi
 S/o U.Kattari
 No.16, 6th Cross Extension
 Anna Nagar
 Pondicherry-605 005. ... Applicants

Versus

1. The Union of India
 Through its Secretary
 Ministry of Finance
 Department of Revenue
 North Block
 New Delhi.

2. The Chairman
 Central Board of Excise & Customs
 New Delhi.

3. Union of India
 Through its Secretary
 Department of Personnel & Training
 Ministry of Personnel, Public Grievances & Pensions
 North Block , New Delhi. ... Respondents.

O.A.No.3671/2015:

Mr. Sunil Sobti
S/o late Shri A.K. Sobti
R/o 222-C, Pocket A, Mayur Vihar Phase-II
Delhi – 110 092
Aged about 55 years
Presently posted as Superintendent at Tax Audit-I
IAEA House, IP Estate, New Delhi-92. ... Applicant

Versus

1. Union of India through Secretary
Ministry of Finance, North Block
New Delhi.
2. Ministry of Personnel, Public Grievances and Pension
Through its Secretary
North Block
New Delhi.
3. Department of Revenue,
Ministry of Finance through its
Secretary
North Block
New Delhi.
4. Central Board of Excise and Customs
Through Chairman
Ministry of Finance, North Block
New Delhi.
5. Directorate General of HRD
409/8, Deepshikha Building
Rajendra Place
New Delhi – 110 008.
6. Chief Commissioner of Customs and Central Excise
(Cadre Controlling Authority)
C.R. Building, I.P.Estate
New Delhi – 110 002.
7. All India Federation of Customs
Central Excise & Service Tax
SC/ST Employees Welfare Organization
(Registered) through its President
Shri K.P.S.Rai
229-C, Pocket C, Mayur Vihar Phase-II
Delhi.

8. Shri Hardwari Lal
E-30, Ground Floor, Preet Vihar
Delhi.
9. Shri Virendra Singh
229-C, Pocket C, Mayur Vihar Phase-II
Delhi.
10. Shri Duli Chand
S/o late Shri Nirmal Singh
House No.10, Pehlad Pur (Banger) Delhi.
11. Shri Komal Prasad
S/o Shri Revati Ram
15/972, 2nd Floor, Vasundhara
Ghaziabad.
12. Shri Satya Parkash Sangwan
Aged about 59 years
S/o Mange Ram
R/o 16/422, Lodhi Colony
New Delhi.
13. Shri Jasbir Singh Audkhasi
Aged 60 years
S/o Shri Maiya Singh
R/o 36 AD 36C
Shalimar Bagh
New Delhi – 110 088. Respondents.

O.A.No.3713/2015:

1. All India General Category
Central Excise Gazetted Executive Officers Association & Ors.
Rajiv Kumar Shrivastva, President, All India General Category Central
Excise Gazetted Executive Officers Association
Office at Block No.23, H.No.156, Lodhi Colony,
New Delhi -3.
2. Anil Kumar Chandela (Astt. Commissioner)
Aged about 56 years
S/o Shri Chandra Mohan Chandela
R/o A-6D, Vatika MIG Apartments
G-8 Area Mayapuri, Delhi-64.

3. Mangal Singh (Astt. Commissioner)
Aged about 57 years
S/o Shri Ram Gopal Singh
R/o E-590, R.K.Puram, Sector-IV
New Delhi.

4. Sheopat Singh (Suprintendent)
Aged about 54 years
S/o Late Shri Brij Lal
R/o 9/7176 Lodhi Colony
New Delhi -3.

5. Jagdish Lal Sehgal (Suprintendent)
Aged about 53 years
S/o Late Shri M.L.Sehgal
R/o 151, Indra Vihar
Delhi – 110 009.

... Applicants

Versus

1. Union of India through
Secretary
Ministry of Finance
South Block
New Delhi – 110 008.
2. Ministry of Personnel, Public Grievances and Pension
DOPT, through its Secretary
North Block, New Delhi.
3. Central Board of Excise and Customs
Through Chairman
Ministry of Finance, North Block,
New Delhi.
4. Chief Commissioner of Customs and Central Excise
(Cadre Controlling Authority)
C.R.Building, I.P.Estate
New Delhi – 110 002.
5. Director General
Directorate General of Human Resources Development
407, Deepshikha Building
Rajendra Place
New Delhi

O.A.No.3802/2015:

1. Mr. Parthasarthi De
S/o late Shri P.K.De
R/o D-99, (DF) South City-II, Gurgaon
Aged about 59 years
Presently posted as AC
Central Excise Audit-II, Gurgaon.
2. Mr. Chandrapal Singh Teotia
S/o Late Shri Pritam Singh
R/o 12/216, Lodhi Colony, New Delhi
Presently posted as Assistant Commissioner
Custom ICD, Tughlakabad, New Delhi.
3. Mr. Manbir Singh
S/o S.Jeewan Singh
R/o 9/754, Lodhi Colony, New Delhi.
Aged about 53 years presently posted as AC
At, Central Excise Commissionerate,
NOIDA Phase-I.'
4. Mr. Sudhir Kumar
S/o Shri Khairati Lal
R/o 323, Phase II, Pocket-I Sector-13
Dwarka, New Delhi
Aged about 51 years
Presently posted as Superintendent at legal branch
Central Excise, Delhi-I.
5. Mr. Pradeep Kumar Manderna
S/o Shri C.R.Manderna
R/o 75, Triveni Apartments West Enclave
Pitam Pura, Delhi
Aged about 52 years
Presently posted as Superintendent GST Police Wing
CBEC, North Block, New Delhi.
6. Mr. Chhidda Singh Sharma
S/o Late Shri M.R.Sharma
R/o 9/768, Lodhi Colony, New Delhi
Aged about 53 years
Presently posted as Superintendent Central Excise
Audi-I, Commissionerate, CR Building, New Delhi.
7. Mr. Ravi Joshi
S/o Late Shri G.D.Joshi
R/o 75, Jagriti Enclave, Vikas Marg, Delhi
Aged about 57 years
Presently posted as Superintendent at
Custom ICD Export, Tughlakabad, New Delhi.

8. Mr. Mayank Sharma
 S/o Shri Vidyanand Sharma
 R/o B-123, Kendriya Vihar, Sector-51, NOIDA, UP
 Aged about 53 years
 Presently posted as Superintendent at
 Custom ICD export, Tughlakabad, New Delhi Applicant

VERSUS

1. The Union of India, Ministry of Finance
 Department of Revenue, through its Secretary
 North Block, New Delhi.
2. Ministry of Personnel, Public Grievances & Pensions
 DOPT, through its Secretary
 North Block
 New Delhi.
3. Central Board of Excise & Customs
 Through its Chairman
 Ministry of Finance, North Block
 New Delhi.
4. Director General of HRD, Deptt. of Revenue
 409/8, Deepshikha Building
 Rajindra Place, New Delhi.
5. The Chief Commissioner Customs & Central Excise
 (Cadre Controlling Authority)
 CR Building, IP Estate
 New Delhi.
6. All India Federation of Customs, Central Excise & Service Tax
 SC/ST Employees Welfare
 Organisation (Regd.), Through its President
 Shri K.P.S.Rai
 229-C, Pocket C, Mayur Vihar Phase-II
 Delhi.
7. Shri Hardwari Lal
 E-30, Ground Floor, Preet Vihar
 Delhi. Respondents.

Presence: Shri Ajesh Luthra, Ms. Jasvinder Kaur, Sh. Arun Bhardwaj, Sh. S.Hariharan, Ms. Charu Sangwan, Shri Gyanendra Singh, Sh. Rajeev Sharma, along with Shri A. Subba Rao, Sh. Hanu Bhaskar.

O R D E R (Common)

By V. Ajay Kumar, Member (J):

Being the facts and law, involved in all these OAs, are identical, the same are disposed of by way of this common order.

O.A.No.4281/2014:

2. The 1st Applicant is the All India Federation of Customs, Central Excise and Service Tax SC/ST Employees Welfare Organization. Applicants No.2 to 4 are presently working as Superintendents and belongs to SC/ST categories. They filed the OA, seeking the following relief(s):

- (a) to quash and set aside the impugned order dated 22.10.2014 as illegal and unconstitutional.
- (b) to issue direction to the respondent to implement the reservation as applicable for SC & ST against the post of Asstt. Commissioner Custom and Excises.
- (c) to issue directions to the respondents to consider afresh the proposals of promotion to the post of Asstt. Commissioner after implementing the reservation for SC & ST and further consider the applicants who are coming within the zone of consideration as per the applicable rules.
- (d) the Hon'ble Tribunal may pass any other order/direction as deemed fit and proper in the circumstances of the present case and in the interest of justice.

O.A.No.727/2015:

3. Both the applicants in this OA belongs to ST category and presently working as Superintendents of Central Excise, and they have filed the OA, seeking the following relief(s):

- (a) To quash and set aside the impugned order dated 22.10.2014 as illegal and unconstitutional.
- (b) to issue direction to the respondent to implement the reservation as applicable for SC & ST against the post of Asstt. Commissioner Customs and Excises.
- (c) to issue directions to the respondents to consider afresh the proposals of promotion to the post of Asstt. Commissioner after implementing the reservation for SC & ST and further consider the applicants who are coming within the zone of consideration as per the applicable rules.
- (d) the Hon'ble Tribunal may pass any other order/direction as deemed fit and proper in the circumstances of the present case and in the interest of justice.

O.A.No.1946/2015:

4. Both the applicants in this OA are working as Superintendents and belongs to SC category, and they filed the OA, seeking the following relief(s):

- a. to issue directions to the respondent to implement the reservation as applicable for SC & ST in respect of promotions both ad hoc and regular to the post of Assistant Commissioner of Central Excise and Customs.
- b. to consider and promote the applicants to the post of Assistant Commissioner of Central Excise and Customs as per the applicable rules with effect from the date of promotion of their immediate junior;
- c. and pass any other order/direction as deemed fit and proper in the circumstances of the present case and in the interest of justice.

O.A.No.3671/2015:

5. The sole applicant is working as Superintendent and belongs to General Category. Respondents 1 to 6 are the official respondents and the 7th Respondent is the All India Federation of Customs, Central

Excise and Service Tax SC/ST Employees Welfare Organization. Respondents No.8 to 11 belongs to SC/ST category. Respondents No.12 and 13 belongs to General Category.

The applicant filed the OA seeking the following relief(s):

- A. Quash and set aside the impugned O/o dated 24.09.2015 (Annexure A-1) and O/o dated 29.09.2015 (Annexure A-2);
- B. Direct the Respondents to constitute and conduct DPc in pursuance of O/o dated 24.08.2015 to fill the vacant post of Assistant Commissioner Custom & Excise for the year 2013-14; 2014-15 and 2015-16 without any reservation;
- C. And, may pass such other further orders/direction deem fit and proper in facts and circumstances of the case in favour of the Applicant.
- D. Allow the present applicant with costs.

O.A.No.3713/2015:

6. The 1st Applicant is the All India General Category, Central Excise Gazetted Executive Officers' Association and Applicants No.2 and 3 are working as Assistant Commissioners and Applicants No.4 and 5 are working as Superintendents. Applicants No.2 to 5 belongs to General category and Applicant No.1-Association is representing such officers of General Category of the Central Excise Department. They have filed the OA seeking the following relief(s):

- (a) quash and set aside the decision of the respondents reflected in impugned letter dated 24.09.2015 (Annexure A/1) whereby the respondents intend to admit and grant caste based reservation in matter of promotion of SC/ST candidates to the post of JTS (Astt. Commissioner) and

- (b) direct the respondents to hold and convene the DPC for promotion to the post/grade of JTS (Astt. Commissioner) in Central Excise & Customs Department without admitting caste based reservations and act upon the letter dated 24.08.2015 and consider and promote the applicants accordingly, with all consequential benefits.
- (c) Award costs of the proceedings; and
- (d) Pass any order/relief/direction (s) as this Hon'ble Tribunal may deem fit and proper in the interest of justice in favour of the applicants.

O.A.No.3802/2015:

7. Applicants No.1 to 3 are working as Assistant Commissioners and Applicants No.4 to 8 are working as Superintendents and all of them are belongs to General Category. Respondents No.1 to 5 are official respondents and Respondent No.6 is the All India Federation of Customs, Central Excise and Service Tax SC/ST Employees Welfare Association, and Respondent No.7 is working as Superintendent and belongs to SC/ST category.

The applicants in this OA, filed the same, seeking the following relief(s):

- A. Quash and set aside the portion of granting reservation in promotion vide impugned O/o dated 24.08.15, 24.09.2015, 29.09.15, 01.10.15 and 03.10.15 (Annexure A-1 to 5);
- B. Direct the Respondents to constitute and conduct DPC without any reservation in promotion to fill the vacant post of Assistant Commissioner Custom & Excise for the year 2013-14; 2014-15 and 2015-16;
- C. And, may pass such other further orders/direction deem fit and proper in facts and circumstances of the case;
- D. Allow the present application with costs.

8. In short, the applicants in OA Nos.4281/2014, OA No.727/2015 and OA No.1946/2015 belongs to SC/ST reserved categories and their Associations, praying for directions to the respondents to implement the reservations in promotions to various categories as applicable for SC/ST employees and to quash certain orders/proceedings issued by the official respondents without providing reservations in promotions on the ground of violation of the Constitutional guarantees to the SC/ST employees.

9. On the other hand, the applicants in OA Nos.3671/2015, 3713/2015 and 3802/2015 belongs to the General Category, Assistant Commissioners/ Superintendents under the Central Excise Department and their Associations, praying for directions to the official respondents to effect promotions to various categories in the Central Excise Department without providing reservations to the reserved categories on the ground that the pre-conditional exercise as mandated by the Hon'ble Apex Court in **M. Nagaraj and Others v. Union of India & Others**, (2006) 8 SCC 212 was not done in the Central Excise Department, and for quashing of certain orders issued by the official respondents, alleging that they are in violation of the said mandate of the Hon'ble Apex Court and also in violation of the dicta in **Suraj Bhan Meena and Anr. v. State of Rajasthan and Others**, (2011) 1 SCC 467 and **Rohtas Bhankhar and Others v. Union of India and Another**, (2014) 8 SCC 872.

10. This Tribunal in OA No.3713/2015, by its interim order dated 14.10.2015 stayed further promotions to the post of Assistant Commissioner (Customs and Excise), initially for a limited period and the same was extended till date. Similar interim stay orders were issued in OA No.3802/2015 and OA No.3671/2015 on 14.10.2015.

11. Heard Shri Ajesh Luthra, Ms. Jasvinder Kaur, Sh. Arun Bhardwaj, Sh. S.Hariharan, Ms. Charu Sangwan, Shri Gyanendra Singh, Sh. Rajeev Sharma, along with Shri A. Subba Rao, Sh. Hanu Bhaskar, learned counsel appearing for the parties. and perused the pleadings on record.

12. On 03.05.2016, when this batch of OAs were partly heard, Shri Gaya Prasad, the learned counsel sought leave of this Tribunal to advance arguments on behalf of certain person(s)/Association(s) representing the SC/ST Superintendents/Assistant Commissioners of the Respondent-Central Excise Department, who are not parties in any of these batch of OAs, and since they have not filed any MA to implead/intervene in any of the OAs, matters are listed on 04.05.2016, to enable them to file appropriate MA(s), if they chooses so. However, since even on 04.05.2016, though he appeared again, as he has not filed any MA to implead/intervene, and since the interest of the employees belonging to SC/ST categories, were adequately represented by other counsels appearing in this batch of OAs, as applicants in some OAs and also as private respondents in some other OAs, the request of the said counsel was not acceded to.

13. The learned counsels on both sides have advanced lengthy arguments in support of their respective parties on the issue whether reservations for SC/ST categories can be effected in promotions but all of them mainly drawn our attention to the following decisions of the Hon'ble Apex Court, in addition to the decisions of various High Courts and Tribunals:

- i) **Indra Sawhney & Others v. Union of India & Others**, (1992) Supp.3 SCC 217.
- ii) **R.K.Sabharwal v. State of Punjab**, (1995) 2 SCC 745.
- iii) **M. Nagaraj and Others v. Union of India & Others**, (2006) 8 SCC 212.
- iv) **Suraj Bhan Meena and Anr. v. State of Rajasthan and Others**, (2011) 1 SCC 467.
- v) **U. P. Power Corporation Ltd. v. Rajesh Kumar and Others**, (2012) 7 SCC 1.
- vi) **Suresh Chand Gautam v. State of Uttar Pradesh and Others**, AIR 2016 SC 1321.

14. In our considered view, a detailed examination of the latest decision of the Hon'ble Apex Court in **Suresh Chand Gautam** (supra), wherein the entire case law, including the aforesaid decisions were considered elaborately, will answer the various questions raised in the present batch of OAs, without there being a necessity to examine the said cases separately.

15(a). In **Suresh Chand Gautam** (supra), a batch of Writ Petitions were preferred under Article 32 of the Constitution of India praying to issue a direction in the nature of mandamus commanding

the respondent Government to enforce appropriately the constitutional mandate as contained under the provisions of Articles 16(4A), 16(4B) and 335 of the Constitution of India or in the alternative, for a direction to the respondents to constitute a Committee or appoint a Commission chaired either by a retired Judge of the High Court or Supreme Court in making survey and collecting necessary qualitative data of the Scheduled Casts and the Scheduled Tribes in the services of the State for granting reservation in promotion in the light of direction given in **M. Nagaraj & Others v. Union of India & Others** (supra).

15(b). The brief contentions of the applicants therein, who belongs to the SC/ST categories, are stated by the Hon'ble Apex Court at Paragraphs 2 and 3, as under:

2. At the commencement of the hearing, Dr. K.S. Chauhan, learned counsel appearing for the petitioner in Writ Petition (Civil) No. 715 of 2015, had submitted that the decision in **M. Nagaraj** (supra) by the Constitution Bench requires reconsideration. For the said purpose, he has made an effort to refer to certain passages from **Indra Sawhney & others v. Union of India & others** and **R.K. Sabharwal v. State of Punjab**. We are not inclined to enter into the said issue as we are of the considered opinion that the pronouncement in **M. Nagaraj** (supra) is a binding precedent and has been followed in number of authorities and that apart, it has referred to, in detail, all other binding previous authorities of larger Benches and there does not appear any weighty argument to convince us, even for a moment, that the said decision requires any reconsideration. The submission on the said score is repelled.

3. The principal submission of Mr. Salman Khurshid, Mr. K.V. Vishwanathan, learned senior counsel and Dr.K.S. Chauhan learned counsel appearing for the respective petitioners is the alternative submission which can be put in three compartments:- (i) the decision rendered in **M. Nagaraj** (supra) has not been appositely applied (ii) the authority in Rajesh Kumar (supra) has to apply prospectively and cannot have retrospective effect, and (iii) even if it is assumed, as interpreted in **M. Nagaraj** (supra), Articles 16(4-A) and 16(4-B) are enabling constitutional provisions, the concept of power coupled with duty requires the authorities to perform the duty and they are obliged to collect the quantifiable data to enable them to take a decision on reservation in promotion and hence,

a mandamus should be issued to all authorities to carry out the constitutional command. We have permitted Dr. Rajiv Dhavan to argue the matter as he had appeared for some of the respondents in the case of **Rajesh Kumar** (supra).

15(c). While considering the rival contentions, the Hon'ble Apex Court explained the decisions in **M. Nagaraj** (supra) and **Rajesh Kumar** (supra) in Paragraphs 5 to 7, as under:

"5. In **M. Nagaraj** (supra), the Court has encompassed the facts in the following manner:-

"The petitioners have invoked Article 32 of the Constitution for a writ in the nature of certiorari to quash the Constitution (Eighty-fifth Amendment) Act, 2001 inserting Article 16(4-A) of the Constitution retrospectively from 17-6-1995 providing reservation in promotion with consequential seniority as being unconstitutional and violative of the basic structure. According to the petitioners, the impugned amendment reverses the decisions of this Court in *Union of India v. Virpal Singh Chauhan, Ajit Singh Januja v. State of Punjab* (Ajit Singh-I), *Ajit Singh (II) v. State of Punjab, Ajit Singh (III) v. State of Punjab*, *Indra Sawhney v. Union of India* (supra) and *M.G.Badappanavar v. State of Karnataka*. The petitioners say that Parliament has appropriated the judicial power to itself and has acted as an Appellate Authority by reversing the judicial pronouncements of this Court by the use of power of amendment as done by the impugned amendment and is, therefore, violative of the basic structure of the Constitution. The said amendment is, therefore, constitutionally invalid and is liable to be set aside. The petitioners have further pleaded that the amendment also seeks to alter the fundamental right of equality which is part of the basic structure of the Constitution. The petitioners say that the equality in the context of Article 16(1) connotes "accelerated promotion" so as not to include consequential seniority. The petitioners say that by attaching consequential seniority to the accelerated promotion, the impugned amendment violates equality in Article 14 read with Article 16(1). The petitioners further say that by providing reservation in the matter of promotion with consequential seniority, there is impairment of efficiency. The petitioners say that in *Indra Sawhney* (supra) decided on 16-11-1992, this Court has held that under Article 16(4), reservation to the Backward Classes is permissible only at the time of initial recruitment and not in promotion. The petitioners say that contrary to the said judgment delivered on 16-11-1992, Parliament enacted the Constitution (Seventy-seventh Amendment) Act, 1995. By the said amendment, Article 16(4-A) was inserted, which reintroduced reservation in promotion. The Constitution (Seventy-seventh Amendment) Act, 1995 is also challenged by some of the petitioners. The petitioners say that if accelerated seniority is given to the roster-point promotees, the consequences would be disastrous. ..."

6. After referring to a series of authorities, the Court concluded as follows:-

"121. The impugned constitutional amendments by which Articles 16(4-A) and 16(4-B) have been inserted flow from Article 16(4). They do not alter the structure of Article 16(4). They retain the controlling factors or the compelling reasons, namely, backwardness and inadequacy of representation which enables the States to provide for reservation keeping in mind the overall efficiency of the State administration under Article 335. These impugned amendments are confined only to SCs and STs. They do not obliterate any of the constitutional requirements, namely, ceiling limit of 50% (quantitative limitation), the concept of creamy layer (qualitative exclusion), the sub-

classification between OBCs on one hand and SCs and STs on the other hand as held in *Indra Sawhney* (supra), the concept of post-based roster with inbuilt concept of replacement as held in *R.K. Sabharwal* (supra).

122. We reiterate that the ceiling limit of 50%, the concept of creamy layer and the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency are all constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse.

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 matters 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.

125. We have not examined the validity of individual enactments of appropriate States and that question will be gone into in individual writ petition by the appropriate Bench in accordance with law laid down by us in the present case."

7. In **Rajesh Kumar**'s case, a two-Judge Bench, apart from referring to the paragraphs we have reproduced hereinabove, also adverted to paragraphs 44, 48, 49, 86, 98, 99, 102, 107, 108, 110, 117, 123 and 124 and culled out certain principles. We think it absolutely appropriate to reproduce the said principles:-

"(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 the backwardness and inadequacy keeping in mind the efficiency of service as required under Article 335.

(ii) Article 16(4) which protects the interests of certain sections of the society has to be balanced against Article 16(1) which protects the interests of every citizen of the entire society. They should be harmonised because they are restatements of the principle of equality under Article 14.9

(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 (4-A) of Article 16 is an enabling provision. It gives freedom to the State to provide for reservation in matters of promotion. Clause (4-A) of Article 16 applies only to SCs and STs. The said clause is carved out of Article 16(4-A). Therefore, clause (4-A) will be governed by the two compelling reasons—"backwardness" and "inadequacy of representation", as mentioned in Article 16(4). If the said two reasons do not exist, then the enabling provision cannot 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 timescale has to be imposed in the interest of efficiency in administration as mandated by Article 335. If the timescale 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 optimise 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."

15(d) It was further observed that

"42. In the case at hand, we are concerned with the enabling power as engrafted under Articles 16, 16(4-A) and 16(4-B). The said Articles being enabling provisions, there is no power coupled with duty. In **Ajit Singh (II)** (supra), it has been held that no mandamus can be issued either to provide for reservation or for relaxation. Recently, in **Chairman & Managing Director, Central Bank of India & Ors. v. Central Bank of India SC/ST Employees Welfare Association & Ors.** it has been held thus:-

"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 well. 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 Civil Appeal No. of 2015 & Ors. (arising out of SLP (C) No. 4385 of 2010 & Ors.) 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."

The aforesaid passage makes its luminescent that existence of a provision for reservation in the matter of selection or promotion is the sine qua non for seeking mandamus. The right accrues in favour of the Scheduled Castes and the Scheduled Tribes candidates when there is a provision. We are absolute in conscious that the controversy before us is quite different. The relief is not sought on the basis of existence of a provision. The grievance pertains to steps being not taken to collect the quantifiable data as has been envisaged in **M. Nagaraj** (supra). To appreciate the relief in its quintessence, it is imperative to clearly understand the ratio laid down in **M. Nagaraj** (supra). The Constitution Bench while opining that Articles 16(4-A) and (4-B) are enabling provisions had observed thus:-

"...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."

After so stating, the larger Bench has clearly held that Article 16(4-A) and 16 (4-B) do not alter the structure of Article 16(4). The said Articles are confined to the Scheduled Castes and the Scheduled Tribes and do not obliterate any of the constitutional requirements, namely, ceiling limit of 50% (quantitative limitation), the concept of creamy layer (qualitative exclusion), the sub-classification between OBCs on one hand and SCs and STs on the other hand as held in **Indra Sawhney** (supra), the concept of post-based roster with inbuilt concept of replacement as held in **R.K.Sabharwal** (supra). After so stating, the Court has adverted to the concept of "extent of reservation". In that regard, it has been opined that the State concerned is required 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. It has been clearly laid down that the State is not bound to make reservation for SCs/STs in matters of promotion. However, if the State wishes to exercise the discretion and make such provision, it 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. The expression of the opinion clearly demonstrates that the regard being had to the enabling provisions of Articles 16(4-A) and (4-B), the State is not bound to make reservation. It has a discretion to do so and the State's discretion can only be exercised on certain conditions being satisfied. In **Rajesh Kumar's**

case, after culling out the principles stated in **M. Nagaraj** (supra) the Court has graphically stated that a fresh exercise in accord with the law laid down in **M. Nagaraj** (supra) is a categorical imperative. It has been held that the State can make provisions for reservation in promotion with consequential seniority on certain basis or foundation and conditions precedents have to be satisfied. The Court has declared Section 3(9) of the 1994 Act and Rule 8-A of the 2002 Rules as unconstitutional as no fresh exercise had been undertaken. The submission of the learned counsel for the petitioners is that a command should be issued to the State of Uttar Pradesh to collect the data as enshrined in the Constitution Bench decision in **M. Nagaraj** (supra) so that benefit of reservation in promotion can be given. The relief sought may appear innocuous or simple but when the Court thinks of issue of a writ of mandamus, it has to apprise itself of an existing right or a power to be exercised regard being had to the conception of duty. The concept of power coupled with duty is always based on facts. If we keenly scrutinize the relief sought, the prayer is to issue a mandamus to the State and its functionaries to carry out an exercise for the purpose of exercising a discretion. To elucidate, the discretion is to take a decision to have the reservation, and to have reservation there is a necessity for collection of data in accordance with the principles stated in **M. Nagaraj** (supra) as the same is the condition precedent. A writ of mandamus is sought to collect material or data which is in the realm of condition precedent for exercising a discretion which flows from the enabling constitutional provision. Direction of this nature, in our considered opinion, would not come within the principle of exercise of power coupled with duty. A direction for exercise of a duty which has inherent and inseparable nexus with the constitutional provision like Article 21 of the Constitution or a statutory duty which is essential for prayer as laid down in **Julius** (supra) where a power is deposited with a public officer but the purpose of being used for the benefit of persons who are specifically pointed out with regard to whom a discretion is applied by the Legislature on the conditions upon which they are entitled. We are inclined to think so as the language employed in **M. Nagaraj** (supra) clearly states that the State is not bound to make reservation in promotion. Thus, there is no constitutional obligation. The decisions wherein this Court has placed reliance on **Julius** (supra) and the other judgments of this Court and issued directions, the language employed in the statute is different and subserves immense public interest in the said authorities, the purpose and purport are quite different.

43. Be it clearly stated, the Courts do not formulate any policy, remains away from making anything that would amount to legislation, rules and regulation or policy relating to reservation. The Courts can test the validity of the same when they are challenged. The court cannot direct for making legislation or for that matter any kind of sub-ordinate legislation. We may hasten to add that in certain decisions directions have been issued for framing of guidelines or the court has itself framed guidelines for sustaining certain rights of women, children or prisoners or under-trial prisoners. The said category of cases falls in a different compartment. They are in different sphere than what is envisaged in Article 16 (4-A) and 16 (4-B) whose constitutional validity have been upheld by the Constitution Bench with certain qualifiers. They have been regarded as enabling constitutional provisions. Additionally it has been postulated that the State is not bound to make reservation for Scheduled Castes and Scheduled Tribes in matter of promotions. Therefore, there is no duty. In such a situation, to issue a mandamus to collect the data would tantamount to asking the authorities whether there is ample data to frame a rule or regulation. This will be in a way, entering into the domain of legislation, for it is a step towards commanding to frame a legislation or a delegated legislation for reservation."

"44. Recently in **Census Commissioner & others v. R. Krishnamurthy** a three-Judge Bench while dealing with the correctness of the judgment of the high court wherein the High court had directed that the Census Department of Government of India shall take such measures towards conducting the caste-wise census in the country at the earliest and in a time-bound manner, so as to achieve the goal of social justice in its true sense, which is the need of the hour, the court analyzing the context opined thus :-

"Interference with the policy decision and issue of a mandamus to frame a policy in a particular manner are absolutely different. The Act has conferred power on the Central Government to issue notification regarding the manner in which the census has to be carried out and the Central Government has issued notifications, and the competent authority has issued directions. It is not within the domain of the court to legislate. The courts do interpret the law and in such interpretation certain creative process is involved. The courts have the jurisdiction to declare the law as unconstitutional. That too, where it is called for. The court may also fill up the gaps in certain spheres applying the doctrine of constitutional silence or abeyance. But, the courts are not to plunge into policy-making by adding something to the policy by ways of issuing a writ of mandamus."

We have referred to the said authority as the court has clearly held that it neither legislates nor does it issue a mandamus to legislate. The relief in the present case, when appositely appreciated, tantamounts to a prayer for issue of a mandamus to take a step towards framing of a rule or a regulation for the purpose of reservation for Scheduled Castes and Scheduled Tribes in matter of promotions. In our considered opinion a writ of mandamus of such a nature cannot be issued."

and accordingly, dismissed the Writ Petitions.

16. The categorical finding by the Hon'ble Apex Court in **M. Nagaraj** (supra), as explained in the aforesaid latest decision in **Suresh Chand Gautam**, is that the State is not bound to make reservation for SCs/STs in matters of promotion and, however, if the State wishes to exercise the discretion and make such provision, it 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.

17. Admittedly, in the present batch of cases, no such exercise, as mandated in the aforesaid decisions was conducted by the respondent-State.

18. Hence, the impugned action in OA Nos.3671/2015, 3713/2015 and 3802/2015, whereunder the respondents are proceeding to effect promotions to various posts in the Central Excise Department by

providing reservations, without conducting any exercise, is in clear violation of the law as enunciated by the Hon'ble Apex Court. In view of the categorical declaration of law by the Hon'ble Apex Court, the other contentions advanced and the decisions of various Hon'ble High Courts and of this Tribunal, cited by both sides, need not be gone into.

19. However, before concluding, it is necessary to consider one of the contention of Shri Arun Bhardwaj, the learned counsel for the official respondents. While not disputing the purport and affect of the law as declared by the Hon'ble Apex Court in **M. Nagaraj** (supra), it was contended by him that the Department of Personnel and Training issued O.M.No.36012/17/88-Estt.(SCT), on 25.04.1989 (Annexure R1 to the counter of official respondents in O.A.No.3802/2015) providing reservations in posts by promotion to all grades or services, in which the element of direct recruitment, if any, does not exceed 75% and since the said O.M. is still in operation and that no Court interfered with, they are required to follow the same. When in **M.Nagaraj** (supra), the Hon'ble Apex Court categorically held that if the State wish to exercise their discretion and make a provision for providing reservations in promotions, it has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class, and when admittedly the respondents have not conducted the said pre-mandated exercise, the O.M. dated 25.04.1989 is inoperative and respondents cannot give effect to the same, till they conduct the pre-mandated exercise.

OA No.4281/2014, OA No.727/2015 and OA No.1946/2015:

20. These OAs were filed questioning the Order dated 22.10.2014 of the respondents wherein they have affected promotions without providing reservations. In view of the above findings, the OAs are dismissed. No costs.

OA Nos. 3671/2015, 3713/2015 and 3802/2015

21. In view of the above findings, the OA Nos. 3671/205, 3713/2015 and 3802/2015 are allowed and the respondents are directed to effect promotions in accordance with the law as enunciated by the Hon'ble Apex Court in **M. Nagaraj** (supra) and as explained in **Suresh Chand Gautam** (supra). The interim stay orders are vacated.

22. Pending MAs, if any, stands disposed of. No costs.

(Shekhar Agarwal)
Member (A)

(V. Ajay Kumar)
Member (J)

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