

**CENTRAL ADMINISTRATIVE TRIBUNAL
CHANDIGARH BENCH**

...

ORIGINAL APPLICATION NO.060/00254/2017

Chandigarh, this the 8th day of February, 2018

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**CORAM: HON'BLE MR. JUSTICE M.S. SULLAR, MEMBER (J)
HON'BLE MS. P. GOPINATH, MEMBER (A)**

...

Maheshinder Singh Dhindsa, aged 48 years, S/o S. Ravinder Singh, Superintendent of Customs (Preventive), O/o Commissioner of Customs, Customs Commissionerate, ICD GRFL, G.T. Road Sahnewal, District Ludhiana, (Group-A).

....APPLICANT

(Present: **Mr. R.K. Sharma, Advocate**)

VERSUS

1. Union of India through Secretary to Government of India, Ministry of Finance, Department of Revenue, North Block, New Delhi.
2. Central Board of Excise and Customs, North Block, New Delhi.
3. Directorate General of Human Resource Development, Customs and Central Excise, 507/8, Deep Shikha Building, Rajendra Place, New Delhi-110008.
4. Chief Commissioner of Customs, Mumbai Zone-I, New Custom House, Ballard Estate, Mumbai-01.
5. Principal Commissioner of Customs (General), New Custom House, Ballard Estate, Mumbai-01.
6. Secretary to Government of India, Ministry of Personnel Public Grievances and Pension, Department of Personnel and Training, North Block, New Delhi.
7. Karre Ravi Kumar, Assistant Commissioner of Customs, O/o Chief Commissioner of Customs, Zone-I, New Customs House, Ballard Estate, Mumbai-400001.

8. Sachin Shreekar Pagare, Assistant Commissioner of Customs, O/o Chief Commissioner of Customs, Zone-I, New Customs House, Ballard Estate, Mumbai-400001.
9. Pushpraj Mahadeo Dahiwale, Assistant Commissioner of Customs, O/o Chief Commissioner of Customs, Zone-I, New Customs House, Ballard Estate, Mumbai-400001.
10. Rajendra Prabhakar Borker, Assistant Commissioner of Customs, O/o Chief Commissioner of Customs, Zone-III, Terminal-II, CSI Airport, Sahar, Andheri East, Mumbai-400099.
11. Harish R. Rao, Assistant Commissioner of Customs, O/o Chief Commissioner of Customs, Zone-II, Jawahar Lal Nehru Customs House, Post Office Nhava Sheva, Tehsil Uran, District Raigadh, Maharashtra-400702.
12. Santosh M. Sonawane, Assistant Commissioner of Customs, O/o Chief Commissioner of Customs, Zone-I, New Customs House, Ballard Estate, Mumbai-400001.
13. Amar Prakash, Assistant Commissioner of Customs, O/o Chief Commissioner of Customs, Zone-I, New Customs House, Ballard Estate, Mumbai-400001.
14. Ashok Kumar-II, Chief Commissioner of Customs, Zone-II, Jawahar Lal Nehru Customs House, Post Office Nhava Sheva, Tehsil Uran, District Raigadh, Maharashtra-400702. (Ex parte vide order dated 22.08.2017).
15. Ashok Kumar-III, Assistant Commissioner of Customs, O/o Chief Commissioner of Customs, Zone-I, New Customs House, Ballard Estate, Mumbai-400001.
16. Shashikant Madhaorao Borkar, Assistant Commissioner of Customs, O/o Development Commissioner, SEEPZ SEZ, MIDC, Andheri East, Mumbai-400096.

....RESPONDENTS

(Present: **Mr. K. Radha Krishnan, Sr. Advocate with
Mr. Sanjay Goyal, Advocate for respondents no.1to6.
Mr. Raheel Kohli, Advocate with Mr. Manuj Kaushik,
Advocate, counsel for respondents no.7, 10to12&15.
Dr. K.S. Chauhan, Mr. Chand Kiran, Mr. Ravi
Prakash & Ms. Jyoti Rani, Advocates for
Respondents No.8,9,13&16)**

ORDER**HON'BLE MR. JUSTICE M.S. SULLAR, MEMBER (J):-**

The challenge in the instant Original Application (OA), instituted by applicant, Maheshinder Singh Dhindsa, Superintendent of Customs (Preventive), is to the impugned instructions dated 21.01.2002 (Annexure A-1/2) of DoP&T; seniority list dated 20.05.2016 (Annexure A-3), prepared by the competent authority, by ignoring the catch-up principle & orders dated 10.02.2017 (Annexure A-1), as conveyed to him, vide letter dated 21.02.2017 (Annexure A-1/1), and order dated 23.02.2017 (Annexure A-2), by means of which promotions of private respondents, from the Cadre of Superintendent of Customs (Preventive) to the posts of Assistant Commissioners of Customs and Central Excise, have been made, by the competent authority, without following the catch up Rule, & by wrongly applying the policy of reservation in promotion and by ignoring the mandate of Hon'ble Supreme Court in the cases of **M. Nagraj & Others vs. Union of India etc.** reported as (2006) 8 SCC 212, read with (i) **Union of India versus Veerpal Singh Chauhan**, reported as JT 1995 (7) SC 231; (ii) **S.B. Meena versus State of Rajasthan**; (iii) **S. Panneer Selvam and others versus Government of Tamil Nadu and Others**, reported as (2015) 1 SCC 292 and (iv) **B.K. Pavitra & Others Vs. Union of India & Others**, (2017) 4 SCC 620, invoking the provisions of Section 19 of the Administrative Tribunals Act, 1985 (hereinafter to be referred to as the "Act").

2. The matrix of the facts and material, culminating into the commencement, relevant for deciding the instant OA, and exposit

from the record, is that the applicant and private respondents have initially joined in the year 1992, as Preventive Officers (Customs). The merit position of the applicant in the basic feeder cadre, as per merit determined by the Staff Selection Commission was at Serial no.33, whereas, the private respondents were placed at Serial no.150, 155, 159, 161, 162, 166, 199 and of respondent no.16 was at Serial No.177 respectively, as per order of merit (Annexure A-4). Similarly, the respondents no.14 and 15, who came on inter-commissionerate transfers, were placed at the bottom of the seniority list. However, the Administrative Control and Cadre Controlling Powers were vested with the Commissioner of Customs (G) Zone-I, Mumbai, as per letters dated 05.06.1971 (Annexure A-5) and dated 04.06.2014 (Annexure A-6).

3. The case set up by the applicant, in brief, in so far as relevant, is that on the basis of reservation, all the private respondents, who were junior to him (applicant), in order of merit, in the feeder cadre, were promoted as Superintendents of Customs (Preventive), vide order dated 17.10.2002 (Annexure A-7). Whereas, the applicant, who was senior to them, was promoted against the general category, vide order dated 13.05.2005 (Annexure A-8) by the Competent Authority. Thereafter, the applicant and all the private respondents, remained in the cadre of Superintendent of Customs (Preventive), and as such, the applicant became entitled to the benefit of catch up rule for drawing the seniority of Superintendent of Customs (Preventive) in terms of the mandate of the Hon'ble Supreme Court in case of ***Veerpal Singh Chauhan*** (supra). Instead of following the catch up rule and without correctly

re-fixing the seniority, the respondents issued a tentative seniority list of Superintendent of Customs (Preventive) and called for the objections, to which various objections were raised, and those were not decided by the Competent Authority. However, the eligibility list was issued by the Office of Director General, Human Resource Development for making further promotions to the cadre of Assistant Commissioner, which necessitated the applicant to file OA No.060/00028/2014, challenging the action of the respondents, in not following the catch up rule, in which the applicant moved an application for interim injunction. The same was decided vide order dated 09.10.2015 by the Tribunal. The order reads as under:-

“Ld. Counsel for respondents, on instructions from Mr. B.B. Dabral, Assistant Commissioner, Central Excise, Chandigarh, makes a statement at the Bar that no meeting of DPC for promotion to the post of Assistant Commissioner has been scheduled as yet and that as and when it is fixed, the date will be informed to the applicant. He further submits that objections with regard to relevant tentative seniority will be dealt with and decided before the next date of hearing.”

4. The case of the applicant, further proceeds that, thereafter, the matter was sufficiently prolonged and respondents came up with the plea that they have convened DPC and the seniority list was likely to be finalized and in pursuance thereof, they convened Review DPC for promotion, from the post of Preventive Officer to that of Superintendent of Customs and ante-dated the promotion of the applicant from 13.05.2005 to 14.10.2002. However, the applicant was again retained below the reserve category candidates, who had been promoted as Superintendent of Customs (Preventive) by applying rule of reservation, as per the circular dated 20.04.2016 (Annexure A-9), despite the objections dated

29.04.2016 (Annexure A-10) by the applicant. Without meeting objections raised by the applicant, the respondents again finalized the seniority list, vide impugned circular dated 20.05.2016 (Annexure A-3). Thereafter, the following order was passed on 27.09.2016 by this Tribunal, in earlier OA:-

“Ld. Counsel for respondents no.2 to 5 has stated that first part of relief claimed by the applicant has been granted by granting upgraded notional promotion to applicant w.e.f. 14.10.2002 instead of from 11.05.2005. It is stated that as regards the applicability of catch up rule to determine seniority, the matter has been referred to DOPT being nodal agency.”

5. The pointed O.A was ultimately disposed of, vide order dated 23.01.2017 (Annexure A-11), by this Tribunal, wherein it was specifically ruled that the respondents will decide the matter of catch up rule before making any promotion detrimental to the rights of the applicant, in any manner. According to the applicant, that instead of applying the catch up rule, the respondents have made further promotion in the cadre of Assistant Commissioner of Customs & Central Excise, on adhoc basis, by illegally applying the rule of reservation, without following the catch up rule and in that process, respondents no.7 to 16, who were junior to the applicant in the feeder cadre of Superintendent Customs (Preventive), have been further promoted as Assistant Commissioners (Customs & Central Excise) vide impugned order dated 23.02.2017 (Annexure A-2).

6. Aggrieved thereby the applicant has preferred the instant OA challenging the impugned seniority list / instructions / orders and actions of the respondents, inter-alia, on the following grounds:-

“(i) That undisputedly the action of the respondents is in violation of the mandate of the Hon’ble Supreme Court starting from M. Nagraj culminating into B.K. Pavitra,

which categorically laid down that there cannot be any reservation in promotion unless three tier exercise is carried out and till that exercise is carried out, rule of catch up will be applicable and there is no escape for the Government in any manner to bye pass the same. Admittedly no exercise has been carried out by the respondent Union of India so far as they are merely relying upon the constitutional mandate which were duly considered by the Hon'ble Apex Court in M. Nagraj and catena of judgments relying upon M. Nagraj having upheld the catch up rule starting from Veerpal Singh Chauhan onwards. Thus action of the respondents is contemptuous and illegal and liable to be set aside on this ground alone.

ii) That action of the respondents is malafide in as much as they prolonged earlier case of the applicant for sufficiently long period on one pretext or the other and the moment case was disposed of with the directions to consider catch up rule, they have bye-passed the directions by issuing contumacious order by holding that catch up rule is not applicable, they have given benefit of reservation to the private respondents without resorting to the catch up rule.

iii) That it was quite clear to the respondents during the proceedings that they had to follow catch up rule which was binding and they were seeking time for following the same but after the case was disposed of they have brushed aside all the judicial pronouncements and mandate of the Hon'ble Supreme Court by passing the impugned orders.

iv) That promotion is an important aspect in one's life. Ignoring senior person by choosing junior amounts to illegality and making them to work under junior. In the present case numerous candidates are much junior to the applicant. Due to such wrong promotions, the applicant will be suffering both in the matter of status and emoluments.

v) That the action of the respondents is harsh, discriminatory, illegal, arbitrary, against the principles of natural justice, violative of Article 14 and 16 of the Constitution of India as well as mandate of Hon'ble Supreme Court in Veerpal Singh Chauhan, M. Nagraj, S. Paneer Selvam and B.K. Pavitra. Hence the whole action is bad in law."

7. Levelling a variety of allegations and narrating the sequence of events in detail, in all, the applicant claims that the action of the respondents to promote the private respondents, who were junior to him, by illegally ignoring the catch up rule and by wrongly applying the policy of reservation in promotion, is not legally permissible. On the strength of the aforesaid grounds, the

applicant seeks to quash the impugned orders & seniority list, in the manner indicated hereinabove.

8. On the contrary, the respondents have refuted the claim of the applicant and filed their respective written statements. The official Respondents No.1 to 6 have filed their reply, wherein it was pleaded that in view of decision in the case of **Union of India vs. Virpal Singh Chauhan (supra)**, the DoPT had issued instructions dated 30.1.1997 (Annexure R-1), providing for catch-up principle. The Constitution was amended retrospectively by Constitution (Eighty Fifth) Amendment Act, 2001, by virtue of which the catch-up principle was repealed by issuance of an O.M. dated 21.1.2002 (Annexure R-2). Thus, seniority of the government servants shall be determined and revised, as if OM dated 30.1.1997 (Annexure R-1), for following catch-up principle, was never issued and, therefore, catch-up rule does not exists for determination of seniority. Accordingly, it was decided vide letter dated 10.2.2017 (Annexure R-4), that catch up rule cannot be applied in the case of the applicant. After decision in the case of B.K. Pavitra (supra), no fresh guidelines have been issued by DoPT regarding the indicated principle.

9. The case of the official respondents, further proceeds, that three pre-requisites for reservation in promotion with consequential seniority i.e. inadequacy, backwardness and efficiency of a class, are to be addressed by the appropriate government. Since the SCs and STs are included in the scheduled list, so they will be deemed to be backward and no authority/court can go into the question of their backwardness. As regards the

efficiency aspect is concerned, it was pleaded that the Administrative Department has conducted this exercise and there may not be any difficulty in giving effect to the provisions of reservation in promotion, without violating the principle of equality. It was further claimed that the minutes of the Departmental Promotion Committee (DPC) meeting held on 31.7.2002 and 14.10.2002, for promotion to the posts of Superintendents of Customs (Preventive), indicates that the representation of the SCs/STs was in-adequate in that cadre. As per the minutes, there were total 333 vacancies considered for promotion and the DPC gave the category-wise break-up of the same, as 259 for general, 49 for SCs and 25 for STs. It was alleged that the DPC note establishes the fact that the representation of the SCs/STs in the cadre of Superintendent of Customs (Preventive) was not adequate. It was alleged that no relaxation, whatsoever, was granted to the promoted officers of the SC category. In all, the official respondents claim that although, the private respondents were junior to the applicant, in order of merit, but they were promoted by applying the reservation in promotion, in view of the pointed DoPT instructions (Annexure R-2), and as per the provisions of Article 16(4A) of the Constitution of India.

10. Sequelly, the private Respondents No.8,9,13&16 and No.7,10,11,12&15 have filed their separate written statements, raising certain preliminary objections of maintainability of the O.A and limitation. It is submitted that the catch-up principle as laid down in the case of Veerpal Singh Chauhan (supra) was not in vogue between 2002 to 2005, when promotions of applicant and

private respondents were made. The indicated principle cannot be applied after the Constitution (85th Amendment) Act. As per rules 5 and 7 of Indian Revenue Service (Customs and Central Excise) Group 'A' Rules, 2012, as well as O.M. dated 21.1.2002 issued by DoPT, the members of SC/ST are entitled to consequential seniority also, on promotion based on reservation. The members of SC/ST remain under-represented, as against the allotted posts. The DPC had duly satisfied itself about inadequacy of representation of SC/ST in the relevant cadre, before making promotion. As per formula adopted by official respondents, the quota of SC & ST cannot exceed 15% and 7.5% respectively, so the question of their over-representation does not arise. Even as per law laid down by the Hon'ble Apex Court in the case of **S. Panneer Selvam** (supra), where there are specific rules for consequential seniority, the catch-up principle would not apply.

11. Instead of reproducing the entire contents of the written statements, and in order to avoid repetition of facts, suffice it to say, that while, toeing the same line of defence, as pleaded by the official respondents, by the private respondents, and reiterating the validity of impugned seniority list, instructions and orders, all the respondents have stoutly denied all other allegations and grounds, contained in the OA, and prayed for its dismissal.

12. Controverting the pleadings of the written statements filed by the respondents and reiterating the grounds contained in the OA, the applicant has filed the replications and prayed the acceptance of the OA. That is how, we are seized of the matter.

13. We have heard the learned counsel for the parties and have gone through the record with their valuable help.

14. At the very outset, it would be expedient to deal with the objection of limitation raised on behalf of the private respondents. In this regard, the cosmetic argument of the learned counsel that since the private respondents were promoted in the year 2002, so the O.A filed by the applicant is beyond the period of limitation, as contemplated under section 21 of the Act, is not only devoid of any merit, but mis-placed, as well. Admittedly, the applicant made various representations and even filed earlier O.A. for redressal of his grievances, in which the respondents have extraordinarily, delayed the matter and made different contradictory statements, reproduced herein-below, which are not, at all, expected from such higher officers (competent authority).

15. Admittedly, the earlier O.A was disposed of, with a liberty to the applicant, to file a fresh one, at subsequent appropriate stage, to challenge the decision in the matter of catch-up rule and validity of the current seniority list, if necessary, as per the undertaking given by the respondents. But strangely enough, without considering the objections, the impugned final seniority list was prepared, without deciding the matter of catch-up rule in the cadre of Superintendent of Customs (Preventive). Not only that, the competent authority has promoted the private respondents, who were junior to the applicant, as Assistant Commissioners Customs & Central Excise, vide impugned order dated 23.2.2017 (Annexure A-2), on the basis of the impugned order dated 10.2.2017 (Annexure A-1).

16. Meaning thereby, the cause of action to the applicant has accrued / arisen only after the passing of the impugned order dated 23.2.2017 (Annexure A-2). In that eventuality, it cannot possibly be said, by any stretch of imagination, that the present O.A. filed by the applicant on 8.3.2017, in any manner, is time barred. On the contrary, it is held that the O.A. filed by the applicant is well within the period of limitation, as envisaged under section 21 of the Act.

17. Having heard the learned counsel for the parties, having gone through the record and legal provisions, with their valuable assistance and after bestowal of thought over the entire matter, we are of the firm view that instant OA, deserves to be accepted in the manner and for the reasons, mentioned herein below.

18. What cannot possibly be disputed here is that the merit position of the applicant was higher in order of merit, than the private respondents, in the cadre of Preventive Officers (Customs), as per the Merit List, Annexure A-4. The competent authority has not followed the principle of catch-up rule and applied the policy of reservation in promotion to the post of Superintendent of Customs (Preventive). Similarly, the private respondents were again promoted by ignoring the principle of catch-up rule & by wrongly applying the policy of reservation in promotion, and in violation of the mandate of the Hon'ble Apex Court in the indicated cases (supra), to the post of Assistant Commissioners, Customs & Central Excise.

19. Thus, it would be seen that the facts of the case are neither intricate, nor much disputed, and fall within a very

narrow compass, to decide the real controversy between the parties. Such being the material on record and legal position, now the short and significant question, that arises for our determination, in this case is as to whether the Competent Authority was legally required to follow the catch-up principle and not to apply the policy of reservation in promotion, in the given peculiar facts and special circumstances of this case or not?

20. Having regard to the rival contentions of the learned counsel for the parties, to our mind, the answer must obviously be in the affirmative, in this relevant connecton.

21. Ex-facie the main arguments of the learned counsel for the official respondents, that since the private respondent were promoted in view of the DoPT Instructions dated 21.1.2002 (Annexure R-2) and Article 16 (4A) of the Constitution, so the impugned orders/seniority list are valid, have no force and deserve to be repelled, for following, more than one, reasons.

22. At the first instance, possibly no-one can dispute that Article 16(4A) was inserted w.e.f. 17.6.1995, authorizing the State, to make any provision for reservation in the matter of promotion, with consequential seniority, to any class or classes of posts, in the services under the State. Admittedly, this amendment was challenged and examined by a Constitution Bench of the Hon'ble Supreme Court in the case of **M. Nagraj & Others Vs. Union of India & Others**, (2006)

8 SCC 212. While upholding the constitutional validity of the amendment, the Hon'ble Apex Court has ruled as under :-

"The impugned constitutional amendments by which Articles 16(4A) and 16(4B) 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 OBC on one hand and SCs and STs on the other hand as held in *Indra Sawhney*, the concept of post-based Roster with in-built concept of replacement as held in *R.K. Sabharwal*.

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.

However, in this case, as stated, the main issue concerns the "extent of reservation". In this regard the concerned State will have to show in each case the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation. As stated above, the impugned provision is an enabling provision. The State is not bound to make reservation for SC/ST in matter of promotions. However if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance of Article 335. It is made clear that even if the State has compelling reasons, as stated above, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling-limit of 50% or obliterate the creamy layer or extend the reservation indefinitely.

Subject to 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."

23. Meaning thereby, it is the mandatory duty of the State to prove in each case the existence of the compelling reasons for (a) ***backwardness*** (b) ***inadequacy of the representation*** and (c) ***administrative efficiency***, before making any provision for reservation in promotion. It was also held that the State is not

bound to make reservation for SC/ST in the matter of promotion. However, if they wish to exercise their discretion, and make such provision, the State has to collect **quantifiable data** showing the **backwardness of the class** and **inadequacy of the representation** of that class, in public employment, in addition to compliance with Article 335 of the Constitution. It is not a matter of dispute that the appropriate Government has neither made any specific provision in consonance with Article 16 (4A) of the Constitution nor got conducted the survey or collected the quantifiable data showing the backwardness of the class and inadequacy of the representation of SCs/STs, in the present case.

24. Sequelly, the main celebrated arguments of the learned Senior Counsel appearing for the official respondents, is that since the SC & ST categories are included in the Scheduled List, and it is mentioned in the DPC minutes dated 31.7.2002 and 14.10.2002, that there is shortage of representation of SC/ST in the cadre of Superintendent of Customs (Preventive), so it should be presumed that there is inadequacy and backwardness of the SC & ST class in the cadres in question.

25. At the first instance, these arguments, appeared somewhat cosmetically attractive, but when the same were analyzed with regard to the essential ingredients, as laid down in the case of M. Nagraj & Others (supra), by the Hon'ble Apex Court, then we cannot help observing that the contentions are not only devoid of merit but mis-conceived as well. As indicated hereinabove, there is a clear mandate in the case of M. Nagraj & Others (supra), by the

Hon'ble Supreme Court, for making a specific provision, in this regard. Not only that, the appropriate authority has to make a specific provision in this regard, but at the same time, it is also bound to collect the ***quantifiable data***, showing backwardness of the class, and ***inadequacy of the representation of that class*** in public employment, ***in addition to compliance with provisions of Article 335***. Concededly neither the State has made any specific provision nor conducted any survey, nor collected quantifiable data in this relevant connection. The mere fact that the SC & ST categories are mentioned in the Scheduled List, and that number of vacancies were mentioned in the proceedings of the DPC, ***ipso facto***, are not the grounds, much less cogent, to come to a conclusion that all the essential ingredients laid down by Hon'ble Apex Court in the case of M. Nagraj & Others (supra) have been complied with, in this case, as contrary urged on behalf of the respondents. Hence, all the pointed essential ingredients are totally lacking in the present case.

26. Likewise, the DoPT instructions, Annexure R-2, which were issued much prior to the mandate of the Constitution Bench of the Hon'ble Apex Court in M. Nagraj & Others' case (supra), will not nullify the mandate of the Apex Court and would not come to the rescue of the respondents, in the present case, in any manner and are held to be in-operative, in this regard. Thus, the impugned promotion order dated 10.2.2017 (Annexure A-1), dated 23.2.2017 (Annexure A-2), and seniority list dated 20.5.2016 (Annexure A-3), passed in complete violation of the mandate of the Hon'ble Apex

Court in the case of M. Nagaraj & Others (supra), indeed are arbitrary and cannot legally be maintained. Moreover, this matter is no more re-sintegra and is now well settled.

27. An identical question came to be decided in the case of in the case of **Uttar Pradesh Power Corporation Limited v. Rajesh Kumar & others** (2012) 7 SCC 1. The Hon'ble Apex Court, culled out the following principles, which had emerged from **M. Nagaraj's** case, in the following manner:-

“81. From the aforesaid decision in M. Nagaraj case and the paragraphs we have quoted hereinabove, the following principles can be carved out:

- (i) *Vesting of the power by an enabling provision may be constitutionally valid and yet “exercise of power” by the State in a given case may be arbitrary, particularly, if the State fails to identify and measure 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 harmonized because they are restatements of the principle of equality under Article 14.*
- (iii) *Each post gets marked for the particular category of candidates to be appointed against it and any subsequent vacancy has to be filled by that category candidate.*
- (iv) *The appropriate Government has to apply the cadre strength as a unit in the operation of the roster in order to ascertain whether a given class/group is adequately represented in the service. The cadre strength as a unit also ensures that the upper ceiling limit of 50% is not violated. Further, roster has to be post-specific and not vacancy based.*
- (v) *The State has to form its opinion on the quantifiable data regarding adequacy of representation. Clause (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 time-scale has to be imposed in the interest of efficiency in administration as mandated by Article 335. If the time-scale is not kept, then posts will continue to remain vacant for years which would be detrimental to the administration. Therefore, in each case, the appropriate Government will now have to introduce the duration depending upon the fact-situation.*

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

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

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

(x) Article 16(4), therefore, creates a field which enables a State to provide for reservation provided there exists backwardness of a class and inadequacy of representation in employment. These are compelling reasons. They do not exist in Article 16(1). It is only when these reasons are satisfied that a State gets the power to provide for reservation in the matter of employment.”

28. Sequelly, similar view was taken by Hon'ble Supreme Court in the case of **Central Bank of India v. SC/ST Employees Welfare Association** (2015) 12 SCC 308. The question raised therein was, as to whether in the absence of a Rule of reservation for promotion, such reservation was permissible merely because the banks were following reservation policy of the Government of India. The Madras High Court after considering the relevant facts found that there was no adequate representation of SCs and STs in higher scales and as such it directed that such representation be granted. The argument of the Bank that such reservation will affect efficiency in the administration was rejected. The Hon'ble Apex Court held that ***in absence of any specific provision for reservation in promotion, the Court could not issue a direction for reservation.*** It was ruled as under:-

“32. We have already noticed above that in matters of promotion within Group A posts, which carry an ultimate salary of Rs 5700 per month, there was no provision for any reservation. On a

conjoint reading of these two Office Memorandums dated 1-11-1990 and 13-8-1997, in the absence of any other provision or rule evidencing such a reservation in the matter of promotions, it cannot be said that there was reservation in promotion within Group A posts up to the ultimate salary of Rs 5700 per month. The High Court in the impugned judgment has gone by the lofty ideals enshrined in Articles 15 and 16 of the Constitution as well as the fact that in these Banks there is no adequate representation of SC/ST category of officers in Group IV and above. That may be so. It can only provide justification for making a provision of this nature. However, in the absence of such a provision, same cannot be read by overstretching the language of the Office Memorandum dated 13-8-1997. It is for the State to take stock of the ground realities and take a decision as to whether it is necessary to make provision for reservation in promotions to the aforesaid post as well."

29. Likewise, in the case of **S. Panneer Selvam v. State of Tamil Nadu**, 2015(10) SCC 292. The question before the Hon'ble Apex Court was whether in absence of any policy decision by the State for giving consequential seniority to candidates promoted on the basis of reservation prior to a senior general category candidate, claim for consequential seniority could be accepted. Answering the question in the negative, it was held that in absence of provision for consequential seniority, 'catch up' rule will be applicable and the roster point promotees cannot claim such consequential seniority. The senior general candidates will regain their seniority on being promoted. Observations relevant in this regard are as follows:

"33. ..If we look at the above comparative table of the service particulars of the appellants and the respondents, it is seen that the contesting respondents U. Palaniappan joined the service almost seven years after the appellants, his seniority is automatically accelerated at an unprecedented rate and as on 1-4-2004 his seniority rank as ADE is 150 and seniority of V. Appadurai is 120. The appellants who are qualified and senior than the contesting respondents are placed much below in rank in comparison to the person belonging to the reserved class promotees who were promoted following the rule of reservation.

It is to be noted that the private respondents in the present case have been promoted temporarily under Rule 39(a) and Rule 10(a)(i) of the General Rules with the condition that their inclusion in the promotional order shall not confer on them any right whatsoever in the service. Determination of seniority is a vital aspect in the service career of an employee and his future promotion is dependent on this. Therefore, determination of

seniority must be based on some principles which are just and fair. In the absence of any policy decision taken or rules framed by the State of Tamil Nadu regarding Tamil Nadu Highways Engineering Service, accelerated promotion given to the respondents following rule of reservation in terms of Rule 12 will not give them consequential accelerated seniority.

xxxx

36. In the absence of any provision for consequential seniority in the rules, the "catch-up rule" will be applicable and the roster-point reserved category promotees cannot count their seniority in the promoted category from the date of their promotion and the senior general candidates if later reach the promotional level, general candidates will regain their seniority. The Division Bench appears to have proceeded on an erroneous footing that Article 16(4-A) of the Constitution of India automatically gives the consequential seniority in addition to accelerated promotion to the roster-point promotees and the judgment of the Division Bench cannot be sustained."

30. Again, in the case of **B.K. Pavitra & Others Vs. Union of India & Others**, (2017) 4 SCC 620, the Hon'ble Apex Court, relying upon its earlier decisions, has ruled (in para 29), as under :-

"29. It is clear from the above discussion in S. Panneer Selvam case, that exercise for determining "inadequacy of representation", "backwardness" and "overall efficiency", is a must for exercise of power under Article 16(4-A). Mere fact that there is no proportionate representation in promotional posts for the population of SCs and STs is not by itself enough to grant consequential seniority to promotees who are otherwise junior and thereby denying seniority to those who are given promotion later on account of reservation policy. It is for the State to place material on record that there was compelling necessity for exercise of such power and decision of the State was based on material including the study that overall efficiency is not compromised. In the present case, no such exercise has been undertaken. The High Court erroneously observed that it was for the petitioners to plead and prove that the overall efficiency was adversely affected by giving consequential seniority to junior persons who got promotion on account of reservation. Plea that persons promoted at the same time were allowed to retain their seniority in the lower cadre is untenable and ignores the fact that a senior person may be promoted later and not at same time on account of roster point reservation. Depriving him of his seniority affects his further chances of promotion. Further plea that seniority was not a fundamental right is equally without any merit in the present context. In absence of exercise under Article 16(4-A), it is the 'catch up' rule which fully applies. It is not necessary to go into the question whether the Corporation concerned had adopted the rule of consequential seniority."

31. Not only that, Hon'ble High Court of Punjab and Haryana in the case of **Bharat Sanchar Nigam Limited & Another Vs. Shri Naveen Sharma and others**, CWP No. 26882 of 2016 decided on 23.12.2016, has held as under :

“5. After considering the matter in detail and relying upon the law laid down by the Apex Court in ***M.Nagraj's*** case (supra) and other judgments as noticed in its order dated 30.09.2016, it has been categorically recorded by the Tribunal that there can be no reservation in promotion without collecting quantifiable data of backwardness of the reserved classes and inadequacy of their representation in public employment. In the present case, no such data was held to be collected by the official respondents. Thus, the respondents could not grant reservation in promotion. It has been further recorded by the Tribunal that the reservation in promotion cannot be permitted merely on the basis of shortfall in vacancies of one category or one cadre of one department or one entity or unit only which would be against the principles laid down by the Apex Court. The relevant findings recorded by the Tribunal read thus:-

“13. We have carefully considered the matter. It was not necessary to implead the candidates of SC/ST categories as party to the O.A. because the O.A. was filed even before the examination was held and, therefore, candidates of those categories were not identifiable at that time. Moreover, the challenge is to policy of official respondents regarding reservation in promotion and for this reason also, it was not essential to implead the candidates of the reserved categories as party to the O.A. Accordingly objection of official respondents to this effect is overruled.

14. As regards merit, the applicants are entitled to succeed in view of judgments in the cases of ***M.Nagraj*** (supra), ***Suraj Bhan, Meena*** (supra), ***Lachhmi Narayan Gupta*** (supra), ***Rajesh Shukla and another*** (supra), ***Sukhwinder Singh*** (supra) and ***Narender Singh*** (supra). According to these judgments, there can be no reservation in promotion without collecting quantifiable data of backwardness of the reserved classes and inadequacy of their representation in public employment. No such data has however been collected by the official respondents. Consequently, the respondents cannot grant reservation in promotion.

15. Contention of respondents based on summary of vacancies as given in Annexure R.1 cannot be accepted. Firstly the said summary relates to the position as on 1.1.2015 and not of the year 2010-11 for which LDCE was held on 21.6.2015. Secondly even according to said summary, ST candidates were

over represented in the quota of promotion on the basis of seniority-cum-fitness whereas SC candidates were represented almost according to their quota. In the quota of promotion by LDCE, of course, there was shortfall in both reserved categories. However, the reservation in promotion cannot be permitted merely on the basis of shortfall in vacancies of one category or one cadre of one department or one entity or unit only. It would be completely against the letter, spirit, purport and intent of **M.Nagraj** (supra). Quantifiable data regarding public employment has to be collected as per dictum of Hon'ble Supreme Court in **M.Nagraj** (supra) but it has not been so done. BSNL is following OMs of DoPT and admittedly DoPT has not carried out any exercise to collect identifiable data in terms of **M.Nagraj** (supra). Even BSNL has not done so. For this reason, BSNL submitted in the case of SC/ST Welfare Association (supra) that they were disabled from taking steps to remove the shortfall in vacancies of reserved categories. However, official respondents have now taken U turn in the instant case. This cannot be permitted.

Accordingly, we conclude that there can be no reservation in promotion. Action of the respondents to the contrary cannot be sustained.”

32. Hence, in view of the law laid down by the Hon'ble Apex Dispensation, in the above mentioned judgments, the observations of the Principal Bench of this Tribunal, relied upon by the respondents, in O.A.No.4383 of 2015 titled **Kirori Lal & Another Vs. The Secretary, Ministry of Home Affairs etc.**

decided on 12.8.2016 (Annexure CA-1 coolly), will neither advance the cause of the respondents nor would come to their rescue, in any manner, whatsoever, in this regard.

33. Therefore, it is held that the competent authority has arbitrarily ignored the principles of catch-up rule with impunity and wrongly applied the policy of reservation, while promoting the private respondents, who were junior to the applicant, to the post of Assistant Commissioner Customs &

Central Excise, against the well settled mandate of the Hon'ble Apex Court in the pointed cases (supra), which is not legally permissible. Thus, the contrary arguments of the learned counsel for the respondents, ***stricto sensu***, deserve to be and are hereby repelled, in the present set of circumstances of the case. The ratio of law laid down by the Hon'ble Apex Court in the indicated judgments is, ***mutatis mutandis***, applicable to the instant controversy, and is the complete answer to the problem in hand.

34. In the light of the aforesaid prismatic reasons, the instant OA is hereby accepted. As a consequence thereof, impugned seniority list dated 20.5.2016 (Annexure A-3), orders dated 10.02.2017 (Annexure A-1), as conveyed to the applicant, vide letter dated 21.02.2017 (Annexure A-1/1), and order dated 23.02.2017 (Annexure A-2), whereby private respondents (junior to the applicants) were promoted to the post of Assistant Commissioner of Customs and Central Excise, by ignoring the principle of catch-up principle, by wrongly applying the policy of reservation in promotion and in complete violation of mandate of Apex Court in the pointed cases, are set aside, in the obtaining circumstances of the case. At the same time, the competent authority is also directed to prepare the fresh relevant seniority list in the cadre of Superintendent of Customs (Preventive), by following the principle of catch-up rule and only then to make promotions of eligible candidates, to the post of Assistant Commissioner of Customs & Central Excise, without applying

the policy of reservation in promotion & in consonance with mandate of Apex Court in the indicated cases, within a period of three months from the date of receipt of a certified copy of this order. However, the parties are left to bear their own costs.

(P. GOPINATH)
MEMBER (A)

(JUSTICE M.S. SULLAR)
MEMBER (J)

Dated: 08.02.2018

HC*

