

**IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
HYDERABAD BENCH: HYDERABAD**

**Original Application No.021/0964/2017 &
MA 17/2018, MA 57/2018 with
O.A. No.020/636/2017 &
OA No.021/0738/2017 & MA Nos. 19/2018, 535/2018**

Date of CAV: 27.03.2019

Pronounced: 26.04.2019

OA No. 636 of 2017

Between:

1. M. Srinivas, S/o. Suryanarayana, aged 53 years,
Occ: Senior Section Engineer (Bridges),
O/o. The Senior Divisional Engineer (Co-ordination),
South Central Railway, Vijayawada Division, Vijayawada.
2. R. Ravi, S/o. S. Rama Murthy, aged 54 years,
Occ: Senior Section Engineer (Drawing),
O/o. The Deputy Chief Engineer (Construction),
Guntakal Division, South Central Railway, Guntakal.
3. T.M. Satyabhama, W/o. L. Karunakar, aged 55 years,
Occ: Senior Section Engineer (Drawing),
O/o. The Principal Chief Engineer,
South Central Railway, Secunderabad.
4. K. Srinivasa Rao, S/o. Purnananda, aged 53 years,
Occ: The Senior Section Engineer (Drawing),
O/o. The Principal Chief Engineer,
South Central Railway, Secunderabad.

... Applicants

And

1. The Union of India, Rep. by the Chairman,
Railway Board, Ministry of Railways, Rail Bhavan,
New Delhi.
2. The General Manager, South Central Railway,
Rail Nilayam, Secunderabad.
3. The Chief Personnel Officer,
South Central Railway, Rail Nilayam, Secunderabad.
4. The Principal Chief Engineer,
South Central Railway, Rail Nilayam, Secunderabad.

... Respondents

Counsel for the Applicants	...	Mr.K.R.K.V. Prasad, Advocate
Counsel for the Respondents	...	Mr. N. Srinatha Rao, SC for Railways

OA No. 738 of 2017

Between:

C. Amruthaiah, S/o. C. Narasimha, aged 57 years,
Occ: Senior Section Engineer (Works),
O/o. The Principal Chief Engineer,
South Central Railway, Rail Nilayam, Secunderabad.

... Applicant

And

1. The Union of India, Rep. by the Chairman,
Railway Board, Ministry of Railways, Rail Bhavan,
New Delhi.
2. The General Manager, South Central Railway,
Rail Nilayam, Secunderabad.
3. The Chief Personnel Officer,
South Central Railway,
Rail Nilayam, Secunderabad.
4. The Principal Chief Engineer,
South Central Railway,
Rail Nilayam, Secunderabad.
5. Rajamallu D., Occ: Senior Section Engineer (P.Way),
O/o. The Deputy Chief Engineer (Construction),
South Central Railway, Kazipet R.S.
6. Munnalal, Occ: Senior Section Engineer (P.Way), Moulali,
O/o. The Assistant Engineer (East), South Central Railway,
Secunderabad Division, Secunderabad.
7. Reddy Naik B., Occ: Senior Section Engineer (P.Way),
Yadgir, O/o. The Assistant Engineer, Raichur,
South Central Railway, Guntakal Division, Raichur R.S.,
Karnataka State.
8. Subba Rayudu K., Occ: Senior Section Engineer (P. Way),
Dhone, O/o. The Assistant Engineer, South Central Railway,
Guntakal Division, Dhone R.S., Kurnool District, A.P.
9. T. Suryanarayana, S/o. late Raghavulu,
Age: 49 years, Occ: SSE (Senior Section Engineer),
Track Machine, Secunderabad,
R/o. H. No. 10-6-42/3, Mamillagudem,
Khammam District – 507001.
10. B.B. Sharma, S/o. Ghan Shyamdas,
Age: 59 years, Working as SSE/PW/NED/Nanded Division,
Maharashtra State.

11. A. Balakrishna, S/o. Seetharama Bhrahmam,
Age: 48 years, Working as SSE/TM/TYP, Rayanapadu.
 12. G. Madan Mohan Rao, S/o. Chinna Sambaiah,
Age: 47 years, Working as SSE/TM/TYP, Rayanapadu.
 13. P. Ramesh Babu, S/o. Sadasivaiah,
Age: 57 years, working as SSE/TM/SC, Secunderabad Division.
 14. S. Krishna Reddy, S/o. Sidda Reddy,
Age: 58 years, working as SSE/W/SC, Secunderabad Division.
 15. B. Madhusudhan, S/o. B. Rosaiah,
Age: 55 years, working as SSE/RW/SW/KCG in
Hyderabad Division.
 16. B. Meghanath, S/o. Bhadraiah,
Age: 57 years, working as SSE/P. Way at
Mahabubabad, SC Division.
 17. MV Ramanjaneyulu, S/o. MV Narayana Rao,
Age: 51 years, working as SSE/PW/SC, Secunderabad.
 18. D. Venkataramana, S/o. Veeraghavaiah,
Age: 57 years, working as SSE/W/SC, Secunderabad.
 19. B. Chintaiyah, S/o. B. Nagabhushanam,
Age: 53 years, working as SSE/D/PCE/O/SC, Secunderabad.
 20. G. Srinivas, S/o. Krishna Rao,
Age: 56 years, working as SSE/Dr./SC, Secunderabad.
- ... Respondents

Counsel for the Applicant	...	Mr.K.R.K.V. Prasad, Advocate
Counsel for the Respondents	...	Mr. N. Srinatha Rao, SC for Railways Mr. M. Srinivasa Rao, Advocate for RR 5 to 20

OA No.964 of 2017

Between:

1. B. Srikanth, S/o. Venkata Rao, aged 58 years,
Occ: Senior Section Engineer (Designs),
O/o. The Chief Administrative Officer,
South Central Railway, Rail Nirman Nilayam,
Secunderabad.
2. M.R.K. Raju, S/o. M.S.N. Raju, aged 50 years,
Occ: Senior Section Engineer (P.Way/EC),

O/o. The Senior Divisional Engineer (Co-ordination),
Sanchalan Bhawan, Secunderabad Division, Secunderabad.

... Applicants

And

1. The Union of India, Rep. by the Chairman,
Railway Board, Ministry of Railways, Rail Bhavan,
New Delhi – 110 010.
2. The General Manager, South Central Railway,
Rail Nilayam, Secunderabad.
3. The Chief Personnel Officer,
South Central Railway,
Rail Nilayam, Secunderabad.
4. The Principal Chief Engineer,
South Central Railway,
Rail Nilayam, Secunderabad.
5. Singh Ravi C.P., Occ: Senior Section Engineer (TM),
O/o. The Assistant Divisional Engineer (TM),
Hyderabad Division, South Central Railway, Hyderabad.
6. Y. Ramana Rao, Occ: Senior Section Engineer (Works),
O/o. The Chief Administrative Officer, Construction,
Rail Nirman Nilayam, South Central Railway,
Secunderabad.
7. T. Suryanarayana, S/o. late Raghavulu,
Age: 49 years, Occ: SSE (Senior Section Engineer),
Track Machine, Secunderabad,
R/o. H. No. 10-6-42/3, Mamillagudem,
Khammam District – 507001.
8. B.B. Sharma, S/o. Ghan Shyamdas,
Age: 59 years, Working as SSE/PW/NED/Nanded Division,
Maharashtra State.
9. A. Balakrishna, S/o. Seetharama Bhrahmam,
Age: 48 years, Working as SSE/TM/TYP, Rayanapadu.
10. G. Madan Mohan Rao, S/o. Chinna Sambaiah,
Age: 47 years, Working as SSE/TM/TYP, Rayanapadu.
11. P. Ramesh Babu, S/o. Sadasivaiah,
Age: 57 years, working as SSE/TM/SC,
Secunderabad Division.
12. S. Krishna Reddy, S/o. Sidda Reddy,
Age: 58 years, working as SSE/W/SC,
Secunderabad Division.

13. B. Madhusudhan, S/o. B. Rosaiah,
Age: 55 years, working as SSE/RW/SW/KCG in
Hyderabad Division.
14. B. Meghanath, S/o. Bhadraiah,
Age: 57 years, working as SSE/P. Way at
Mahabubabad, SC Division.
15. MV Ramanjaneyulu, S/o. MV Narayana Rao,
Age: 51 years, working as SSE/PW/SC,
Secunderabad.
16. D. Venkataramana, S/o. Veeraghavaiah,
Age: 57 years, working as SSE/W/SC, Secunderabad.
17. B. Chintaiyah, S/o. B. Nagabhushanam,
Age: 53 years, working as SSE/D/PCE/O/SC,
Secunderabad.
18. G. Srinivas, S/o. Krishna Rao,
Age: 56 years, working as SSE/Dr./SC, Secunderabad.
19. R. Satyam, S/o. R. Subba Rao,
Age: 57 years, working as SSE/P.Way/BZA,
Rajahmundry, East Godavari District.
20. P. Ramakrishna, S/o. Kutumbarao,
Age: 58 years, working as SSE/P.Way/BZA,
Tenali, Guntur District.

... Respondents

Counsel for the Applicants	...	Mr.K.R.K.V. Prasad, Advocate
Counsel for the Respondents	...	Mr. N. Srinatha Rao, SC for Railways Mr. M. Srinivasa Rao, Advocate for RR 5 to 20

CORAM:

Hon'ble Mr. Justice R. Kantha Rao, Judicial Member

Hon'ble Mr. B.V. Sudhakar, Administrative Member

COMMON ORDER

{As per Hon'ble Mr. B.V. Sudhakar, Administrative Member}

2. The OAs are filed challenging the notification dated 26.7.2017 read with the integrated seniority list issued vide lr dt. 18.7.2017 in the context of the Tribunal order in OA 1263/2010 and those of the Hon'ble High Court in W.P

No. 9942/2014 and C.C No.166/2016 in W.P. No. 9942/2014. The relief sought and the respondents being one and the same, a common order is issued.

3. Applicants who belong to the UR category while working as Senior Section Engineers in the respondents' organisation were considered for promotion to the Group B post of Asst Exec. Engineer/Assistant Div. Engineer (for brevity Asst. Engineers –AE), as they were in the zone of consideration in respect of UR vacancies against 70% quota in pursuance of 2010 notification to fill up 22 vacancies with the breakup of 12 UR, 8 SC and 2 ST vacancies respectively. Applicants after qualifying in the written exam, viva voce and medical tests with the aggregate qualifying mark were not empanelled in the select panel dt. 3.12.2010, on the grounds that the UR vacancies were filled up by SC/ST employees. Of the 12 UR vacancies, 6 were filled by SC/ST employees as per the select panel dt 3.12.2010 based on the principle of own merit albeit they were juniors to the applicants. The promotion of junior SC/ST employees being an eye sore was challenged in OA 1263/2010. Besides, after enlisting 6 SC/ST candidates against UR vacancies, 2 SC and 1 ST employee respectively were selected against SC/ST roster points, leaving 6 SC and 1 ST vacancy unfilled for want of qualified candidates. The 6 SC/ST candidates who were adjusted against UR vacancies were made private respondents in OA 1263/2010 which was allowed on 30.8.2013, by ordering that the applicants being senior and qualified need to be considered. The orders of the Tribunal were challenged in the Hon'ble High court of Judicature at Hyderabad in W.P. No.9942/2014 and WP No. 15138/2014. Hon'ble High court dealt with the above 2 W.Ps along with others in regard to the issue of reservation in promotions at length by referring to the Hon'ble Supreme Court Judgments in M.Nagaraj, U.P Power Corporation, K. Manorama and on 29.4.2015 upheld the

orders of the Tribunal to the extent of declaring the action of the respondents in providing reservation in promotion without fulfilling the parameters laid down in M.Nagaraj as incorrect. Hon'ble High court has also directed the respondents to complete the exercise of gathering data, and forming its opinion on the parameters laid down by the Hon'ble Supreme Court in M.Nagaraj within 6 months, leaving it open to the respondents in the interregnum period to make in-charge arrangements purely as a temporary measure till an opinion is formed in regard to reservation in promotion in consonance with Nagaraj judgment. As the respondents did not rescind the promotion of private respondents despite Hon'ble High Court orders contempt petition was filed vide Contempt Case No.166 of 2016 in WP no 9942 of 2014. In the meanwhile respondents issued an order dated 24.6.2015 indicating that the promotion of the private respondents against UR vacancies in the panel dated 3.12.2010 has to be treated as purely adhoc/in-charge basis till further orders. Hon'ble High court while disposing of the contempt petition on 23.3.2016 observed that the permission granted to make in-charge arrangements did not enable the respondents to cause adhoc promotion or regularise the promotion made earlier and that even if promotions were to be regularised the same shall be from a date after the collection of data and not preceding it. The contempt was closed after the respondents issued a corrigendum stating that the adhoc promotion given was treated as in-charge arrangement and the orders of regularisation were withdrawn along with tendering an unconditional apology. Applicants did file another CP bearing No. 020/170 of 2014 in OA 1263/2010 before the Tribunal, which was closed giving liberty to the applicants to revive the same, if necessary, after the expiry of the time granted to implement the order of the Hon'ble High Court in W.P No.9942 of 2014 dated 29.4.2015.

4. The contentions of the applicants are that the Hon'ble High Court has given 6 months time to continue the in-charge arrangements from the date of receipt of the order dt 29.4.2015 in WP 9942/2014 but the in-charge arrangements made on 24.6.2015 were continued beyond the said period granting pay fixation benefits as per 7th CPC, as if the original promotions given by the respondents were undisturbed as AEs. Not only pay fixation but the employees were upgraded to the next higher grade of senior scale based on the roster point of SC/ST on the grounds that they were regularly working as AEs in Group B cadre, which is against the office order dated 24.6.2015. Consequent to issue of the office order dated 24.6.2015 Contempt Petition No.166 of 2016 was closed and since the respondents have acted against the office order cited a Miscellaneous Petition No.253 of 2017 was filed to recall the order dated 3.3.2016 in CP referred to. The same is under adjudication. The junior SC/ST employees who were supposed to be working on in charge basis are being continued on a regular basis and one of them by name Sri Thangaiyan has retired on 31.7.2016 with retiral benefits as are allowed to regularly promoted employees in the said cadre. In addition, respondents issued an integrated seniority list of Senior Section Engineers which is the feeder cadre to AEs, in which the names of the 6 SC/ST employees were not shown implying that the said employees were regularly promoted and not on in-charge basis as AEs in utter disregard of the office order dt.24.6.2015 issued with the purported intention of complying with the observations of the Hon'ble High Court in the W.P no. 9942/2014 and the corresponding contempt petition 166/2016. Applicants represented on 22.7.2017 requesting that the junior SC/ST employees who were made AEs on in-charge basis be shown as juniors in the Integrated Seniority list of the Sr section Engineer and that their names should replace the

SC/ST employees in the panel dated 3.12.2010. Further, the SC/ ST employees have to appear for selection in case they have to be promoted on a regular basis. Instead of acting on the representations of the applicants, respondents issued two notifications on 26.7.2017, one proposing to hold a selection to fill up 26 vacancies of AEs against 70% quota with the communal break up of 7 SC, 1 ST and 18 UR and the other notification was to cancel the notification dt 2.1.2013 by referring to WP 16280 of 2014 relating to OA 203/2013 filed by UR employees challenging the notification dt. 2.1.2013 in regard to the issue of reservation in promotions. The OA 203/2013 was allowed and the WP 16280/2014 was decided along with other WPs on 29.4.2015 by the Hon'ble High court. Applicants further contend that the respondents have concealed the fact, that the Hon'ble High Court in WPMP 39928/2016 through which some UR employees impleaded themselves in WP 11724/2013 filed by some SC/ST employees, consequent to their filing OA 392/2013 seeking extension of the zone of consideration for promotion to AEs against 70% quota in notification dt 2.1.2013 being dismissed by the Tribunal, has ordered that the 8 vacancies listed in the notification dt 2.1.2013 which was a subject matter of OA 203/2013, should be treated as UR vacancies. Therefore, instead of considering the applicants in OA 1263/2010 for the UR vacancies by revising the select panel dt 3.12.2010 showing them in the zone of consideration for AE promotion in the notification issued on 26.7.2017 is blatantly illegal. More than being illegal it would imply that the applicants in OA 1263/2010 would have to again appear for selection. One more irregularity as claimed by the applicants is that the respondents were supposed to show the 8 vacancies of 2.1.2013 notification as UR but they have shown them as 7 SC and 1 ST vacancy in the impugned notification dated 26.7.2017 against the orders of the Hon'ble High Court in WP

11724/2013 on 22.12.2016. The applicants find fault with the decision of the respondents in showing them in the zone of consideration against notification dt. 26.7.2017 instead of deleting the names of the SC/ST employees from the select panel dt 3.12.2010 and showing the SC/ST employees in the zone of consideration, if eligible as per seniority. Respondents have not settled the issue by including the names of the applicants in the panel dt 3.12.2010 even after 4 years of filing of the OA and 2 years since the Hon'ble High court decision. Another aspect pointed out by the applicants is that the office order dated 24.6.2015 was not challenged by employees who were provided with in charge arrangements and the common order dt 29.4.2015 which comes in the way of the SC/ST employees enlisted against roster points of SC/ST was also not challenged by Junior SC/ST employees listed at sl no 12 to 14 in the panel dt 3.12.2010. Therefore the two aforesaid orders are binding on the respondents. Applicants cited the judgment dt 11.3.2016 of the Hon'ble Supreme Court in Suresh Chand Goutham v State of Uttar Pradesh reported in WP (c) No 690 of 2015, in support of their arguments. It was held in the cited judgment that no mandamus can be given to frame a rule or regulation for the purpose of reservation for SC/ST in the matter of promotion. As per the verdict of the Hon'ble High Court in the Contempt petition, SC/ST employees who have been given promotion in the panel dt 3.12.2010 have lost the promotion since it has to be given prospectively after collecting the data required. Therefore they have to apply for selection afresh. The action of the respondents has been discriminative by extending benefit of promotion to ineligible employees and denying the same to eligible employees. Admittedly, against the clear directions of the Hon'ble High Court.

In regard to integrated seniority list, applicants claim that it was prepared based on consequential seniority and own merit, which is against Nagaraj judgment and undertaking given by the learned Solicitor General to the Hon'ble Supreme Court. Applicants quoted several Supreme Court judgments in support of their assertions.

5. Respondents in their reply take objection for making the Chairman of the Railway Board as a party though no order of the Railway Board has been challenged. Applicants are seeking a direction to promote them as AEs in Group B cadre w.e.f. 3.12.2010 after 7 years from the date of panel under the guise of notification dt 26.7.2017 and integrated seniority list dated 18.7.2017. Therefore the OA is time barred. Further, the instant OA is not maintainable based on the principle of res-judicata since the OA 1263/2010 wherein similar relief of promotion as AEs on being allowed was contested in the Hon'ble High Court and the same was decided in WP no 9942/2014 and CC no 166/2016. Similarly CP 170/2014 in OA 170/2014 was also closed by the Tribunal. Therefore nothing survives in the present OA to adjudicate. Respondents have cited the Hon'ble Supreme Court observation in Shankar Das v U.O.I (1991) 3 SCC 47 in support of their assertion that the applicants have no right to be appointed against select list just because their names appear in the select list. One another judgment of the Hon'ble Apex Court in union Territory of Chandigarh v Dilbagh Singh and Ors (1993) 1 SCC 154 wherein it was held that a candidate who finds a place in the select list may have no vested right to be appointed to any post, in the absence of any specific rules entitling him to the same, he may still be aggrieved of his non-appointment if the authority concerned acts arbitrarily or in a malafide manner. Moreover, as per Para 205 of Railway Establishment Manual Vol-1 the currency of a panel will be current for a period of 2 years from the date

of the approval of the competent authority or till a fresh panel on the basis of next selection becomes available whichever is earlier. Hence the panel prepared on 3.12.2010 is no longer valid and therefore applicants can make no claim to include their names in this panel. Coming to details, based on 2010 notification to fill up 22 vacancies of AEs, 7 SC, 1 ST and 4 UR candidates who were senior and qualified were adjusted against 12 notified UR vacancies. Against 8 SC and 2 ST vacancies, 2 SC and 1 ST employee were empanelled leaving 6 SC and 1 ST vacancy unfilled which were carried forward to the next selection initiated vide notification dated 2.1.2013. The 15 employees were empanelled and promoted as AEs on 30.12.2010. However, some of the reserved community employees were made as in-charge AEs as per Hon'ble High Court order and subsequently regularised. The exercise commenced with the Tribunal allowing OA 1263/2010 on 30.8.2013 directing to promote applicants there in based on original seniority which was challenged in WP 9942/2014 in the Hon'ble High Court. Writ petition referred to was decided directing respondents on 29.4.2015 to form an opinion based on Supreme Court directives in M. Nagaraj case, within a period of 6 months and in the interregnum period make in charge arrangements for administrative convenience. In accordance with the orders of the Hon'ble High Court promotions ordered in favour of the private respondents in OA 1263/2010 were treated as purely adhoc /in-charge basis till further orders vide proceedings dated 24.6.2015. In the meanwhile, some of the applicants moved the Tribunal for contempt in CP 170/2015 but since the Hon'ble High Court has decided the matter in WP 9942/2014 & WP 39158/2013, it was closed giving liberty to the applicant to revive the same, if necessary, after the expiry of the time granted by the Hon'ble High Court in the said writ petitions. Chief Personnel Officer of the respondents organisation complying with the Hon'ble

High Court Order has issued proceedings dt 9.12.2015 in regard to formation of opinion as per M.Nagraj judgment for promoting SC/ST employees as AEs and concluded that the reservation in promotion was in order. Consequent to this development contempt in CC no 166 of 2016 was filed in Hon'ble High Court which was closed on 23.3.2016 keeping in view the proceedings dated 24.6.2015 and 9.12.2015. Therefore orders of Hon'ble High Court being fully complied, relief sought by the applicants to include them in panel dated 3.12.2010 is infructuous. The 6 months time granted by the High Court in WP 9942/2014 was for formation of opinion and not in regard to making in charge arrangements of the SC/ST employees. Claim of the applicants that they will get the contempt petition reopened is not possible since it is impermissible under law as per observation of the Hon'ble Apex Court in *Sudhir Vasudeva, Chairman CMD ONGC & Ors v M. George Ravi Shekaran & Ors* (2014) 3 SCC 373 wherein it was held that once Tribunal disposes a contempt petition after recording its satisfaction about compliance, it has become functus officio and therefore MA in CP for issuing further or additional directions or orders, cannot be entertained. In the absence of any orders of the Hon'ble High Court to revert the 6 SC/ST employees (Private respondents) or restrict their in-charge arrangements up to 6 months in OA 1263/2010, they were continued as AEs and regularised on 18.7.2017. Accordingly the pay and allowance of the promoted SC/ST employees were regulated. Respondents also clarify that pay and allowance would be one and the same for working as in- charge or on a regular basis. Also including the name of the applicants in the zone of consideration against notification dated 26.7.2017 is in order, since the applicants were not promoted as AEs on 3.12.2010. The notification dated 2.1.2013 was cancelled in view of the dismissal of WP 11724/2013 filed by SC/ST employees and to abide by the

decision in WP no 16280/2014 of the Hon'ble High Court vide common order dated 29.4.2015.

Respondents, in regard to integrated seniority list states that they have followed the Railway Board instructions contained in RBE 46/2010. The relative seniority of employees coming from different streams will be determined with reference to length of non-fortuitous service. SC/ST employees are entitled to consequential seniority and accordingly Integrated seniority list dt. 18.7.2017 was prepared. They have quoted RBE (33/2002), RBE (29/2008), RBE (46/2010) in support of their contentions. The undertaking given by Id. Solicitor General on 29.9.2016 was in regard to future promotions based on reservation and therefore, there is no violation of RBE 117/2016. Railway Board, which is the apex body to frame policy guidelines has not issued any instructions to deviate from the existing instructions in regard to reservation in promotion and consequential seniority. Relief sought are plural in nature.

6. Heard Ld. counsel representing respondents, SC/ST employees in OA 964/2017 and the applicants. We have gone through the reply statement, rejoinder and the other documents plus the material papers submitted, in depth.

7. I) The issues are about reservation in promotions and release of integrated seniority list. The OAs have originated consequent to the observations of the Hon'ble High Court in Contempt Case No.1646 of 2015 & 166 of 2016 wherein it was held as under:

“As an exercise has been undertaken by the Railways, and in terms of said exercise they have now effected promotions, all questions, regarding the manner in which the data was gathered, whether such an exercise accords with the law declared by the Supreme Court in M. Nagaraj or not, and whether promotions made, after such exercise, in favour of the scheduled castes is valid or not, are again matters which can only be examined in independent proceedings, and not in proceedings under the Act.”

In the context of the Hon'ble High Court observation stated supra, applicants being aggrieved that the directions in Nagaraj concerning reservations in promotion have not been followed, approached the Tribunal through the instant OAs seeking the relief of placing them in the select panel dated 3.12.2010 and quashing of the notification dated 27.7.2017 as well the integrated seniority list issued on 18.7.2017.

II) Before, going into the issue in its virgin form, preliminary objections raised by the respondents need to be looked into.

Respondents claimed that the Chairman, Railway Board should not have been made a party to the OA, since no Railway Board order has been challenged. True, no railway Board order has been challenged but the OA is all about challenging reservation in promotion which is a policy matter. No authority other than the Railway Board is competent to formulate a policy for the respondents organisation as per the submission of the respondents in OA Nos. 738 & 964/2017. Besides, respondents need to bear in mind that Railway Board has issued RBE 117/2016 which covers the matter in question. Hence Railway Board is a proper and necessary party to the OA. Therefore, objection raised is overruled.

The other preliminary objection is about the OA being time barred because the panel issued on 3.12.2010 cannot be called into question after 7 years. Case details bring forth the fact that the OA 1263/2010 has been admitted within the life span of 2 years of the select panel dated 3.12.2010, which in fact constitutes the eye of the cyclone. The dispute on being adjudicated by the Tribunal in OA 1263/2010, was dealt at length by Hon'ble High Court of Judicature at Hyderabad, on being contested by the respondents in WP No.

9942/2010 & batch and in the contempt petition 166/ 2016. Aggrieved that the orders of the Hon'ble High Court have not been complied with, the present OA has been filed. Besides, a Miscellaneous Petition No.253 of 2017 in regard to non-implementation of the orders of the High Court in W.Ps. cited supra, is pending adjudication by the Hon'ble High Court. Therefore, litigation lingers. Thus, the OA cannot be construed to be time barred. It is alive and kicking.

A corollary to the above preliminary objection is that the filing of the instant OA is against the principle of res judicata. Respondents affirm that the issue has been settled as per orders of the Hon'ble High Court whereas applicants counter the said submission by claiming that the very genesis of the instant OA is non compliance of Hon'ble High Court Order. Therefore, there is an inherent disagreement between the two, which has to be resolved by examining as to which side the angel of justice showers her divine grace. Till a conclusion is arrived at, it cannot be said that the principle of res judicata was infringed.

Respondents have also cited the Hon'ble Apex Court verdict in *Shankar Das v U.O.I* (1991) 3 SCC 47 in support of their assertion that the applicants have no right to be appointed against select list just because their names appear in the select list. We agree with the contention of the respondents but it should not be forgotten that they have a right to be considered. This right is indefeasible. Also they have quoted the observation of Hon'ble Supreme Court observation in *Union Territory of Chandigarh v Dilbagh Singh and Ors* (1993) 1 SCC 154 to buttress their stand. However, a specific rule namely para 203.5 of IREM which is statutory in nature has not been followed by the respondents and their action has been alleged to be arbitrary by the applicants, the said judgment is thus not relevant to the present case.

III) Having responded to the preliminary objections, we would now focus our attention to the nucleus of the issue namely reservation in promotions. The issue has been prefaced with the submissions of the Ld. Counsel as under.

a) Senior Counsel for the respondents :

Ld counsel has argued that from among the applicants in OAs 636,738 & 964/2017 excepting for Sri K.Srinivas Rao who cleared the exam, others have either failed or did not appear in the exam held pursuant to the notification dated 26.7.2017 and thus have no *locus standi* to agitate for any promotion. However, the exam referred to was set aside in OA 486/2018 and on being challenged, Hon'ble High Court of Judicature at Hyderabad in WP No.37990/2018 suspended the Tribunal order and a final decision is awaited. When an order is stayed/suspended, it does not mean that the order is erased out of existence as observed by Hon'ble Supreme Court in *Shree Chamundi Mopeds Ltd. v. Church of South India Trust Assn., (1992) 3 SCC 1*. The order is in suspended animation which is akin to being in coma till it is resurrected to life or put to final rest depending on the view taken by the Hon'ble High Court in the matter. It exists but inoperable. Besides, applicants being aggrieved that despite Hon'ble High Court order being in their favour in WP 9942/2014 & batch, respondents ignoring the same is a matter under scrutiny in the instant OA. Hence the submission of the Sr. Respondent counsel is not in the realm of reason. Sr Counsel further claims that as per the Hon'ble High Court order, requirements as stipulated in Nagaraj judgement have been adhered to and promotions granted. The Ld. Sr. Counsel argued that since orders of the High Court have been complied there is nothing left in the issue to adjudicate excepting for some academic interest. Learned counsel cited observations of Hon'ble Supreme Court in 3 cases, wherein it was held that Courts should not engage themselves in

issues of academic interest. Is it or not, in the present case, would be an aspect which will reveal itself as we progress covering the contours of the case. If required, Ld Sr Counsel has also submitted that 6 posts can be kept vacant till the issue is resolved so that the process of promotions can be carried on.

b) Senior Counsel for the private respondents in OA 964/2017

Ld. senior counsel has submitted that grievances are of three types. Firstly, where there are reasons, secondly where there are none and thirdly where reasons exist but not projected. Instant case comes under the 3rd category. The letter dated 9.12.2015 has not been challenged in OAs 738/2017 and 964/2017. There are no pleadings challenging the notification dated 18.7.2017. The seniority list pertains to Group C and the private respondents promoted as AEs belong to Group B and any challenge to Group C seniority list should not impact the positions held by the private respondents. The SC/ST employees have been promoted as AEs on own merit. The applicants have no case as the orders of the Hon'ble High Court have been complied with in promoting the private respondents as AEs. Looks simplistic on the face of it but in the issue on hand there are many legal connotations which demand a proper and appropriate response. The letter dated 9.12.2015 was issued confirming that the Chief Personnel Officer has formed an opinion as per the dictates of Nagaraj Judgment. Reservation in promotion is a policy matter, as explained above, and therefore it is for the Railway Board to formulate an opinion and not the CPO. Incidentally, the decision of the CPO in arriving at an opinion is against the Railway Board order 117/2016. Therefore, the letter dt 9.12.2015 does not require a challenge since it is not in accordance with rules and law. Now let us come to the integrated seniority list of 18.7.2017. Seniority list is issued so that it becomes the basis for career planning of the employees. Hence the rule, that objections, if

any, are to be obtained from the employees and then the seniority list is to be finalised. Applicants have serious reservations in respect of integrated seniority list on many grounds. The important one being non adherence to the pre-conditions laid in Nagraj and the OAs totally hinge on this aspect. Therefore, issues revolving around reservation in promotion be it seniority list, promotions etc are encompassed by the OAs filed. At this juncture it is to be mentioned that the promotion of the private respondents i.e. 6 SC/ST employees is still under adjudication. Therefore the presumption of the Ld. Sr. Counsel that since SC/ST employees now belong to the elevated Group B grade and any pleading forwarded to show them in the lower grade of Group C is irrational, in our view, is not based on a logical premise. The Courts are to unveil the mask of an administrative decision to scrutinize as to whether such a decision would withstand a sizzling legal scrutiny. We would touch upon this aspect from different dimensions as we meander through the case in the paras that follow.

c) Counsel for the applicants

Ld counsel for the applicants has submitted that there has been flagrant violation of the orders of the Hon'ble High Court. Repeatedly respondents have been taking decisions which go against the lawful claims of the applicants leading to filing of a spate of OAs seeking justice. Action of the respondents is unlawful and there has been hostile discrimination of the applicants.

iv) Submissions of learned counsel and documents submitted would indicate that the entire dispute is fixated around the decision to provide reservation in promotions. Hon'ble High court, while dealing with the issue, in WP 39158/2013 & batch on 29.4.2015 has ordered as under :

VIII. CONCLUSION:

“As the Tribunal has merely followed the law laid down by the Supreme Court in M. Nagaraj, in allowing the O.As, the orders of the Tribunal, to the extent it declared the action of the Railways in providing reservation in promotion without fulfilling the parameters laid down in M. Nagaraj to be illegal, do not necessitate interference. The fact however remains that, despite the amendment to the Constitution by insertion of Articles 16(4-A) and (4-B) nearly fourteen years ago, the members of the Scheduled Castes and the Scheduled Tribes still face uncertainty on whether or not they are entitled for reservation in promotion, and to be extended the benefit of consequential seniority. This predicament, they find themselves in, is for no fault of theirs but is on account of the failure of the Union of India to gather data, and form its opinion, on the parameters laid down by the Supreme Court in M. Nagaraj. The prevailing uncertainty can only be put an end to if the petitioner-Railway is directed to undertake the aforesaid exercise, and take a decision, within a specified time frame.

The Writ Petitions are, accordingly, disposed of directing the petitioner-Railways to undertake and complete the exercise of gathering data, and forming its opinion on the parameters laid down by the Supreme Court in M. Nagaraj, with utmost expedition and, in any event, not later than six months from the date of receipt of a copy of this Order. As this stalemate cannot be permitted to effect railway administration, and the services it renders to the public at large, it is open to the petitioner-Railways to make in-charge arrangements in the interregnum, making it clear to those, who are given charge of the posts, that this arrangement is temporary and would continue only till the exercise of formation of opinion, on the need to provide reservation in promotion, is completed. The miscellaneous petitions pending, if any, shall also stand disposed of. No costs.”

The most important observation is that the respondents have been directed by the Hon’ble High Court to undertake and complete the exercise of gathering data, and form its opinion on the parameters laid down by the Hon’ble Supreme Court in M. Nagaraj Vs. Union of India, 2006 (8) SCC 2012. It is thus to be assessed as to whether the respondents have acted as directed by the Hon’ble High Court. The parameters which are to be worked upon as set out in Nagaraj judgment are extracted here 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.

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."

Thus the Nagaraj judgment of Hon'ble Supreme Court makes it clear that the State must establish that there exists compelling reasons to provide reservations in promotions. The reasons in brief are:

- i) The data regarding inadequacy of their representations has to be collected and thereafter a decision need to be taken
- ii) Overall efficiency of the State administration under Art 335 has to be borne in mind
- iii) The concept of creamy layer has also to be dealt with.

- iv) To collect quantifiable data showing backwardness of the Scheduled Castes and the Scheduled Tribes.

Further, to make things vivid on the issue of reservation in promotion, Hon'ble Supreme Court in Manoram's Case, (2010) 10 SCC 323, has held that

“ When a member belongs to SC/ST caste gets selected in the open competition field on the basis of his own merit, he will not be counted against the quota reserved for Scheduled castes, but will be treated as open candidate, will apply only in regard to recruitment by open competition and not to the promotion effected on the basis of seniority –cum-suitability.”

Hon'ble Supreme Court has further reinforced the observations made in Nagaraj in B.K.Pavitra & Ors vs Union Of India & Ors on 9 February, 2017, in Civil Appeal no. 2368 of 2011, which makes it imperative on part of the respondents to act as per the conditions laid down therein for providing reservation as under.

“We are of the firm view that a fresh exercise in the light of the judgment of the Constitution Bench in M. Nagaraj is a categorical imperative. The stand that the constitutional amendments have facilitated the reservation in promotion with consequential seniority and have given the stamp of approval to the Act and the Rules cannot withstand close scrutiny inasmuch as the Constitution Bench has clearly opined that Articles 16(4-A) and 16(4-B) are enabling provisions and the State can make provisions for the same on certain basis or foundation. The conditions precedent have not been satisfied. No exercise has been undertaken. What has been argued with vehemence is that it is not necessary as the concept of reservation in promotion was already in vogue. We are unable to accept the said submission, for when the provisions of the Constitution are treated valid with certain conditions or riders, it becomes incumbent on the part of the State to appreciate and apply the test so that its amendments can be tested and withstand the scrutiny on parameters laid down therein.

It is clear from the above discussion that exercise for determining ‘inadequacy of representation’, ‘backwardness’ and ‘overall efficiency’, is a must for exercise of power under [Article 16\(4A\)](#). 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 promotes 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\(4A\)](#), it is the 'catch up' rule which is fully applies. It is not necessary to go into the question whether the concerned Corporation had adopted the rule of consequential seniority.

One another relevant observation of the Hon'ble Apex Court [In S. Panneer Selvam & Others v. State of Tamil Nadu](#) & Ors, 2015 (10) SCC 292, which has a bearing on the instant case is reproduced for reference to take a view on the dispute in the OA.

The question before the Hon'ble Apex Court was whether in the 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 :

“34. 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 promotes who were promoted following the rule of reservation. It is to be noted that the SC ST employees 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.

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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 promotes 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 promotes and the judgment of the Division Bench cannot be sustained.”

The observation in regard to assessment of the backwardness of the sections of the society belonging to Schedule castes and Schedule Tribes fell for consideration before the Hon’ble Supreme court in the context of the constitution perse providing reservation to such sections. The issue was adjudicated by the Hon’ble Supreme Court in *Jarnail Singh & Ors Vs. Lachhmi Narain Gupta & Ors*, 2018 (10) SCC 396, as under :

“ 21. Thus, we conclude that the judgment in *Nagaraj* (supra) does not need to be referred to a seven–Judge Bench. However, the conclusion in *Nagaraj* (supra) that the State has to collect quantifiable data showing backwardness of the Scheduled Castes and the Scheduled Tribes, being contrary to the nine-Judge Bench in *Indra Sawhney* (1) (supra) is held to be invalid to this extent.”

On application of the legal principles laid down by the Hon’ble Supreme court in various judgments cited supra, to the decision of the respondents we can evaluate the variance or congruence to decide the issue under dispute. As pointed out by learned Sr counsel during the submissions, respondents need not collect

quantifiable data in regard to backwardness of the Scheduled castes and Scheduled Tribes employees as per Jarnail Singh verdict. However, other parameters, which continue to hold ground, have to be adhered to.

V) In this regard, we find that in assessing the adequacy of representations of SC/ST employees, Chief Personnel officer of the respondents organisation vide letter dated 18.7.2017 claims that the data has been collected and that there is inadequacy of their representation in the cadre in question. In statistical terms it is advanced in the said letter that in the cadre of AEs the representation of SCs is 27.61 % and that of the STs is 10.47 %. Together, the percentage of representation is less than 50%. Two vital factors which deserve mention is that primarily reservation in promotion is a policy matter which has to be decided by the Railway Board. A decision in this regard is not within the competence of the Chief Personnel Officer of a Zone. Railways are made of a number of Zones. Each zone cannot have a policy of its own. Therefore, the Railway Board, which is the Apex body of the respondents organisation, lays down the policy. This is common knowledge and need not be further emphasized since learned counsel for the respondents profess day in and day out before the bench that the policy laying body for the respondents is the Railway Board and its orders reign supreme. Besides, issue disputed is an All India issue which calls for an All India solution and not a zonal one from the Chief Personnel Officer. Railway Board order 117/2016 does not, in essence, permit such initiatives by the subordinate formations of the respondents organisation. The CPO letter has one more dissonance of asserting that the combined representation of SC and ST employees in the AE cadre is less than 50% glossing over the fact that reservation provided for BCs, OBCs etc have also to be reckoned in order to assess as to whether total reservation percentage is

within 50% as stated in Nagraj Judgment. Without the reservation percentage provided to other communities being indicated, it is statistically inaccurate to affirm that the total percentage of reservation was within the ceiling limit of 50%. In fact this Tribunal on 11.1.2019, while dealing with an identical issue in OA 1162 /2013 and batch, involving the same respondents, continued its consistent stand on the issue by directing them as under:

“Unless and until a decision at the level of Ministry of Railways and Railway Board is taken as regards the implementation of the reservation in promotions, the same shall not be effected at the lower levels.”

The signal sent to the respondents was clear and loud and yet respondents' misreading the signal is paving the way for protracted litigation.

VI) Now let us evaluate the second aspect of efficiency. Respondents in the same letter referred to, have stated that the AE posts belong to safety category and hence candidates are subjected to a written test, viva voce and medical tests. Unless a candidate clears the tests, he would not be empanelled. There is no relaxation for reserved candidates in regard to the marks to be obtained. The 6 SC/ST employees were promoted as AEs only after passing tests prescribed without any lowering of marks to be obtained. Therefore it has to be construed that they are efficient and capable. Consequently, efficiency in administration has not been compromised. There can be no two views about the fact that the SC/ST employees have cleared the exams prescribed but the grievance is that they are junior to the UR employees who have also cleared the exams and are eligible to be promoted like the reserved community employees. When the legitimate promotion of UR employees is denied by the respondents, it would lead to frustration and demoralisation, which would in turn mar the efficiency of the respondents organisation. The contra effect in terms of morale and efficiency on others was not reckoned by the respondents. Observations of

the Full Bench of Hon'ble High Court of Bihar while dealing with the issue of efficiency in the context of reservation in promotion in *State of Bihar & Others vs Sushil Kumar Singh & others* presented hereunder clears the mist in regard to understanding the factor of efficiency.

“From this what can be culled out is that the important factors that guide the reservations under Article-16(4A) are; (a) backwardness, (b) inadequacy of representation and (c) overall efficiency of the State administration under [Article-335](#). It is also important to note that while providing reservation or making other provisions, the State must ensure that a) the facility so created does not lead to excessiveness so as to breach the ceiling limit of 50%, b) the creamy layer excluded and denied the benefit of reservation, and c) the facility is not extended indefinitely. In effect, 6 indicia were identified and stipulated.

It is essential to bear in mind that the reservation provided for under [Article-16\(4\)](#) is substantially different from the one under [Article-16\(4A\)](#). The former is a facility that enables persons to enter the State service by relaxing the norms of selection or the parameters of merit which are stipulated for the posts, in general. Through that process, a person who is otherwise not eligible to be appointed, is enabled to enter service under the State. The target group for this is unemployed persons, of a certain categories. In contrast, [Article-16\(4A\)](#) deals with the situation where the target group is already enjoying the benefit of employment on the basis of reservation under Patna High Court LPA No.1066 of 2015 dt. 30-07-2015 [Article-16\(4\)](#), and the effort is only to push them to higher places in the hierarchy. In a way, it can be said that while [Article-16\(4\)](#) deals with the primary and basic aspect of protective discrimination, i.e. reservation, the one under [Article-16\(4A\)](#) is about the secondary aspect. Obviously, for this reason the Parliament as well as the constitutional courts have made subtle distinction and have chosen to stipulate different parameters for the two.

For example, the benefit under Clause-16(4) is in respect of "services under the State" whereas the objective underlying [Article-16\(4A\)](#) is to ensure representation of the SC/ST in the "class or classes of posts in the service under the State". Similarly, the necessity to ensure that the efficiency in administration does not suffer, is applied with a bit of greater emphasis for the reservations under [Article-16\(4A\)](#) than the one under [Article-16\(4\)](#). These are only the broader aspects.

The argument advanced on behalf of the appellants that the situation obtaining at a particular time may not remain the same and after a few years it may not be possible to keep pace with changing scenario classwise or servicewise, cannot be accepted. The reason is that the facility under [Article-16\(4A\)](#) is not aimed at ensuring mere survival or livelihood. It results in pushing of a person most junior in the service to higher positions by stealing march over his seniors. That can be done only when

the circumstances explained by the Hon'ble Supreme Court are Patna High Court LPA No.1066 of 2015 dt. 30-07-2015 found to be existing.

The appellants cannot ignore the specific language employed in Clause-4(A) indication that the reservation under it shall be in a class or classes in a service, under the State, and the service as a whole as indicated in Clause (4) of [Article-16](#).

That the reservation under [Article-16\(4A\)](#) of the Constitution is with reference to class or classes of posts in the service under the State is evident not only from the text of the provision, but also the various judgments rendered on the subject.

It is also essential to keep in mind that the makers of the Constitution sounded a note of caution in [Article-335](#) that the special measures taken for the benefit of persons belonging to SC/ST category must be such that the efficiency in the administration is not compromised. Induction at the entry level through reservation may not pose any serious problem to administrative efficiency. The reason is that once a person with basic qualifications is inducted into service he would be subject to some training and methods as are applicable to anyone. On contrast, the reservation in promotion would render the concept such as seniority, merit irrelevant and enable a person belonging to Patna High Court LPA No.1066 of 2015 dt. 30-07-2015 SC/ST category to get promotion out of turn, that too with the consequential seniority.

An out of turn promotion may certainly make the person happy. However, the element of frustration or dissatisfaction in the person who is superseded cannot be ignored. The efficiency of administration which is adequately protected in [Article-335](#) of the Constitution is likely to suffer a double dent on account of out of turn promotions. The first is that a relatively inexperienced person would occupy a higher position, and second is that an otherwise experienced and senior person is subjected to an element of frustration and he may not be able to execute with the same amount of interest as he used to do in the normal circumstances. It cannot be examined from the point of view of the beneficiary alone.

The creamy layer is another vexed question vis-à-vis the reservations under [Article-16\(4A\)](#). It is true that in Indra Sawhney's case (supra), the Hon'ble Supreme Court held that the concept of creamy layer does not apply to the reservations in favour of persons belonging to SC/ST category. However, in Nagraj's case (supra), their Lordships observed at more places than one, that the creamy layer must be excluded from the purview of reservation under Patna High Court LPA No.1066 of 2015 dt. 30-07-2015. That provision, not only from the body of the judgment, but also from the last sentence of the judgment, this aspect is clear."

Therefore, in the context of the observation of the full bench of the Hon'ble High Court of Bihar, the respondents did make a perfunctory study of

the impact of reservations in promotions on efficiency and not in its entirety and that too, by an incompetent authority. We need to remember that an organisation is made of a group of people who form a team. Efficiency of the organisation depends on team work. If some of the team members are discriminated even though they are entitled for certain benefits, then, those discriminated would be de-motivated and disenchanted leading to inefficiency. This requires a close study and it is for the respondents to make an effort in this direction and that too at the Apex level. Passing the exam could be one parameter to assess efficiency but not necessarily the only parameter to decide efficiency. Therefore, even in this regard the orders of the Honourable High Court of A.P have not been carried out.

Besides, the aspect of creamy layer has not been delved upon by the respondents in their reply statement, as this is an integral and intrinsic part of the Nagraj Judgment.

VII) The principle of promoting SC/ST employees based on own merit is only in recruitment through open competition, but not for promotions effected on the basis of seniority –cum-suitability, as enunciated in Manorama Case by the Hon’ble Apex Court. In the instant case promotion was granted on the basis of Seniority cum Suitability. Therefore, UR employees who were qualified as per 2010 notification being senior should have been considered as per law but contravened by the respondents.

VIII) Another interesting aspect of the letter of the chief Personnel officer dated 18.7.2017 is that the 6 SC/ST employees who were shown against the UR vacancies in the select panel dt 3.12.2010 are now shown against SC/ST vacancy. Any modification in the Group B promotion approved by the GM has

to be ratified by the Railway Board. Respondents did not produce any such document ratifying their decision. Therefore, letter dated 18.7.2017 is invalid. Respondents did attempt to seek post facto approval of their decision vide their letter dated 3.4.2017, but till date Railway Board has not responded in writing. Besides, the whole issue in OA 1263 was about promoting SC/ST employees who were junior to the applicants, against UR vacancy. Respondents by attempting to adjust the 6 SC/ST employees against SC/ST vacancies vide letter dated 18.7.2017 have conceded that the select panel dated 3.12.2010 is not in order. Albeit, the letter did not have the stamp of approval of the Railway Board, it also suffered from one another major inadequacy of not complying with the orders of the Hon'ble High Court, wherein it was held that regular promotion can be granted only by fulfilling the parameters specified in Nagaraj Case. Such compliance which is a must, being absent, regular promotions ordered vide letter dated 18.7.2017 are irregular. Promotions even to SC/ST vacancies without addressing the core aspects of Nagaraj judgment are illegal. In fact they contravene the High Court orders to the extent that they are not in conformity with Nagaraj judgment.

IX) One another allied and intricate issue which has been thrown open by the letter dated 18.7.2017 of the respondents is that the Hon'ble High Court has ordered that after collecting the data, respondents need to form an opinion and then issue orders of promotion with prospective effect. Respondents, instead of doing so, have retrospectively regularised the promotion of the private respondents in OA 1263/2010 from 30.12.2010, which is not in resonance with the directions of the Hon'ble High Court in CC 166 of 2016 as under:

“Even if, as is now contended before us by Sri L. Ravi Chander, learned Senior Counsel appearing on behalf of the Railways, the data gathered show the need to provide reservation, the Railways could not have

regularised the promotions made earlier, and could only have effected promotions afresh after the data, gathered in terms of the judgment of the Supreme Court in M. Nagaraj, showed the need to provide reservation, for members of the scheduled castes, in promotion posts. ”

After the contempt case CC 166/2016 was filed, the error being noticed, respondents have issued corrigenda to the earlier proceedings, and have informed the employees concerned that the adhoc promotions given to them earlier must be treated as an in-charge arrangement; and the earlier order, regularising their services, was being withdrawn. To this extent respondents have corrected the mistake of showing the promotion as in-charge and not as regular. However, the order of the Hon'ble High Court of granting promotions afresh from a date after the exercise of gathering the data was glossed over. In short granting promotion to the private respondents in OA 1263/2010 vide order dated 18.7.2017 by asserting that the promotion order issued through O.O no 326/2010 dt 30.12.2010 is in order and accordingly continuing the promotion on regular basis from the date of issue, is flagrant violation of the orders of the Hon'ble High Court in Contempt petition 1646 of 2015 & 166 of 2016.

X) Complication in the issue is further aggravated by the respondents in cancelling the orders of promotion and issue of fresh orders of selection on 18.7.2017 since it leads to another legally valid question, as to whether the respondents are empowered to issue such orders. Promotion to the post of AE is on selection basis through a written exam, viva voce etc. If once a selection is cancelled, then fresh orders could be given only after one were to go through the selection process prescribed, lest it would be irregular. It is not explained in the reply statement as to under what rule such orders were issued. However, respondents, on their part approached the Railway Board vide letter dated 3.4.2017 by presenting the background of the case in terms of litigation in OA

1263/2010 and the Hon'ble High Court Orders thereon, for approval of the following:

“Since Hon'ble CAT /Hyd has ordered against empanelling reserved employees under UR vacancies and Hon'ble High Court, Hyderabad has confirmed the Hon'ble CAT's order, the next 7 UR employees are to be now included in the panel against UR vacancies and the 6 reserved employees (5 SC & 1 ST) who were earlier promoted against UR vacancies on own merit and were made as in charge arrangement are to be adjusted against SC/ST vacancies.

As per extant instructions for modifications in any Group B panel should have the approval of Railway Board, since the panel has been approved by the General Manger. In case it is decided to include the names of 7 more employees in the panel dated 3.2.2010, then the revised panel would be as indicated in Annexure -12.”

The communication gives an inkling that the respondents are veering round to the point of view that the orders of the Tribunal and the Hon'ble High Court are to be abided by. Nevertheless, approval of the Board has not been received in writing, though the respondents claim that they have received oral permission to act as indicated above, by submitting a letter dated 20.11.2018 from Dy CPO to the learned standing counsel for the respondents. It is difficult to appreciate that in matters of National policy having litigative significance, the Railway Board would give oral permission. Even, if given, in certain emergency circumstances they are backed by written orders on a later date. Public institutions are manned by issue of formal orders and not by Informal ones, since the later go against the basic tenets of organisational management, particularly so, when a humungous organisation like the Railways is involved. Till date, respondents have failed to produce any document to the effect that the Railway Board has approved the promotion effected vide letter dated 18.7.2017. Hence, the order of promoting the SC/ST employees needs a relook since it portends modification of Group B promotions for which Railway Board approval is a must and only after

complying with the pre-conditions of Nagraj as ordered by the Hon'ble High Court in W.P No.9942/2014 & batch.

XII) Having come half the distance, a recapitulation of the gist of the case along with other associated legal battles fought not referred to so far would help in keeping focus on the main issue. The factual matrix of the issue will reveal that the applicants have been put to disadvantage all along for reasons best known to the respondents. To begin with OA 1263 of 2010 was allowed with a direction to fill up 7 UR vacancies with UR qualified senior employees instead of SC/ST employees who were juniors to the applicants. When challenged in Hon'ble High Court in W.P 9942/2014 and batch, respondents were given 6 months time to form an opinion keeping in view the directions contained in Nagraj case and decide the issue. Accordingly, respondents claim that they have followed the orders of Nagraj and issued orders favouring SC/ST employees on 18.7.2017 but it was found to be in gross violation of Nagraj Judgment as expounded in paras supra. Contempt petition 166 of 2016 wherein Hon'ble High Court has faulted the decision of the respondents by observing that in-charge arrangement, which was permitted, do not enable respondents to either effect promotions on adhoc basis or grant promotions retrospectively. Erroneous orders of the respondents issued earlier were cancelled and consequently contempt case was closed. Nevertheless, in the process respondents have kept open the legal issue as to whether, after cancelling the orders of promotion granted to the 6 SC/ST employees, are they competent to issue fresh orders of selection without subjecting the candidates to go through the selection procedure of clearing the exams etc without being backed by any rule and admittedly by an incompetent authority. Thereafter, 2013 notification was issued to fill up 7 SC/ST and 1 UR unfilled backlog vacancies of 2010. UR employees filed OA 203/2013 to set

aside the notification which was allowed and on being challenged in the High Court in WP no 16280/2014, Hon'ble High Court has upheld Tribunal order. Later, SC/ST employees filed OA 392/2013 for extending zone of consideration which was dismissed. Tribunal order was challenged in W.P no 11724 of 2014 in which UR employees got themselves impleaded and the Hon'ble High Court upheld the decision of the Tribunal directing respondents to treat the 8 vacancies as UR. Instead of complying with the orders of High Court respondents, cancelled the notification of 2013 on 26.7.2017 and on the same day issued fresh notification by showing 7 SC/ST vacancies indicated in 2013 as SC/ST backlog vacancies instead of showing them as UR vacancies. Thereby, once again infringing the orders of the Hon'ble High Court. However, the explanation given by the respondents was that they implemented the relevant High Court orders. When they did cancel, respondents ought to have shown the 8 vacancies notified in 2013 as UR. Further, the notification of 2017 indicated 18 UR and 8 SC/ST vacancies. In the 8 SC/ST vacancies, 7 back log unfilled vacancies of 2010 which were notified in 2013 figure. They were ordered to be shown as UR along with one more UR, totalling to 8 vacancies by the Hon'ble High Court, but has not been adhered to. In compliance with the orders of the High Court in WP 11724/2014 the vacancies notified in 2017 ought to be 18 + 8 UR. It is not explained in clear terms as to why the orders of the Hon'ble High Court have not been followed. Cancellation of the 2013 notification would not mean that the Hon'ble High Court order has been complied with. It is difficult to comprehend such a decision when the orders are crystal clear in the matter. Applicants have been fighting a legal battle to place them in the select panel dt. 3.12.2010 and the respondents on their part not only denied the same but made it more injurious to the cause of the applicants by showing them in the zone of consideration for

2017 notification. Aggrieved applicants filed the instant OAs challenging the order of the respondents for not including their names in the select panel dt 3.12.2010 and issue of integrated seniority list dt 18.7.2017 showing them in the zone of consideration and excluding the 6 junior SC/ST employees as if there promotion to AE is regular.

XIII) Besides, OA 964/2017 and OA 738 of 2017 were filed challenging the integrated seniority list and the zone of consideration prepared based on the said list, as the erstwhile junior SC/ST employees names have been placed above the names of erstwhile senior UR employees in violation of Railway Board order No 117 of 2016 and against law relating to reservation in promotion. Seniority is the main foundation which decides the eligibility of employees to appear in examination held for selection posts and for further career progression vertically or horizontally. Instead of concentrating on measures to resolve the issues raised in the OAs and the WPs respondents have been issuing a flood of notifications inviting serious legal challenges.

XIV) Against the backdrop of the above recapitulation with the concurrent developments, response of the respondents and the submissions of the counsel, if analysed, would enable us to take a fair view on the issue. The Ld. Senior counsel for the respondents has vehemently argued that the issue on hand is only of academic nature since the High Court orders on the subject have been implemented lock, stock and barrel. In support of his submission Ld Counsel cited the judgment of the Hon'ble Supreme Court in Loknath Padhan vs Bireender Kumar Sahu in 1974 AIR 505, 1974 SCR (3) 114 wherein it was held that:

“We are, therefore, of the view that, the Orissa Legislative Assembly being dissolved during the pendency of this appeal, it is now wholly

academic to consider whether the respondent was disqualified under [s. 9A](#) at the date of nomination and since that is the only ground on which election of the respondent is challenged, we think it would be futile to hear this appeal on merits. We accordingly dismiss the appeal with no orders as to costs all throughout.

The other citation is in regard to Ramdas Athawale vs Union of India and ors in W.P (civil) no 86 of 2004, wherein Hon'ble Apex Court has held as under:

34. One more aspect of the matter. The petitioner in this writ petition under [Article 32](#) of the Constitution has challenged the validity of proceedings in the Lok Sabha commencing from 29th January, 2004 on the grounds stated hereinabove, with which we have dealt with in the preceding paragraphs. The petition has become anfractuious, since the Lok Sabha was dissolved and thereafter two elections have been held. The issue raised in the petition is purely a hypothetical question. There is no existing lis between the parties. It is settled practice that this Court does not decide matters which are only of academic interest on the facts of a particular case.

The third one is in Moti Ram vs Param Dev and Anr reported in 1993 AIR 1662, 1993 SCR (2) 250 wherein Hon'ble Supreme Court has observed as follows:

A preliminary objection was raised on behalf of the respondent to the appeal that in view of the dissolution of the assembly it was academic to decide whether or not the respondent was disqualified under [section 9A](#). Upholding the said preliminary objection, this court has held that the court should not undertake to decide an issue unless it is a living issue between the parties and if an issue is purely academic, in that its decision one way or the other would have no impact on the position of the parties, it would be waste of public time and indeed not proper exercise of authority for the court to engage itself in deciding it.

As can be seen the judgments cited are not relevant to the instant case since the issues therein are about challenging related events which occurred before the dissolution of the Lok Sabha and assembly referred to and therefore no purpose would be served when the bodies themselves have been dissolved. Hence they are academic which the courts should not undertake. However, Hon'ble Supreme Court in the same citation has held that the courts should take up live issues. The case of the applicants is live, since the cause for promotion continues since the filing of OA 1263/2010 and followed by a series of OAs and orders of

Honourable High Court in WPs 9942/2014 and batch culminating in the present OAs. Therefore, the issues raised by the applicants are very much live and not academic, calling for a genuine resolution. Besides, the learned Sr Respondent Counsel has also submitted that one applicant passed, another one did not appear in the exam and the rest of the applicants failed in the exam conducted in pursuance of 2017 notification. Therefore, only the case of the applicant who has passed the exam has to be adjudicated and not in regard to the others. At this juncture, it is to be pointed out that this Tribunal in OA 636/2017 on 3.8.2017 has observed when the applicants sought interim relief as under:

“In view of the above, we are not inclined to interdict the Notification dated 26.7.2017 at this stage. However, any promotion in pursuance of Annex.A-1 Notification dated 26.7.2017 shall be subject to the result of the OA and that the participation of the applicants in the selection process in pursuance of the notification is without prejudice to their rights in the OA.”

The Tribunal has observed that the applicants participating in the selection process in pursuance of the notification of 2017 will not prejudice the reliefs sought in the OA. Hence the presentation of the Ld. Sr. Standing Counsel referred to, has no legs to stand since the climax has not been reached. The applicants hope to persuade the respondents that their claim stems from justice in as-is-where-in condition when it started, which, true to speak, is being kept alive by oxygenating it with the intervention of the judicial forums in accordance with law. Committing a wrong and perpetuating the same on the applicants years on is unfair to say the least. Nevertheless, we are still at the interval stage and there is long way to go. Applicants have filed Miscellaneous Petition no 253 of 2017 to recall the order in CC 166 of 2016 which is to be adjudicated by the Hon'ble High Court. The continuous cause of action arose because of the respondents issuing letters dated 18.7.2017 & 26.7.2017 and hence their validity or otherwise is still under judicial scrutiny.

XV) As we continue our journey through the maze of alleys by which the case traverses, we are confronted with the assertion of the respondents that as per para 205 of IREM, the life of a select panel is only two years. If it be so, it is not explained as to how the respondents could promote on 18.7.2017 the 6 SC/ST employees, private respondents in OA 1263/2010, as AEs based on the select panel of 2010. Rules are to be followed uniformly but not selectively. Forget not, that there is another part of the IREM which is extracted below:

“ Para 205 - Currency of Panel.—The panel will be current for a period of 2 years from the date of approval of the competent authority or till a fresh panel on the basis of next selection becomes available whichever is earlier. Where provisional panels are drawn the currency will count from the date of approval of the provisional panel. If the operation of an approved panel has been held in abeyance either wholly or partly as a result of injunction from the Court of Law the currency of the panel should be reckoned after excluding the period covered by the Court's directive. Before operating the panel after the vacation of the junction/after disposal of the case by the Court of Law, the personal approval of the General Manager should be taken.

The sum and substance of the para is that when the panel is under judicial study it will continue to breathe life till a finality is arrived on the matter. In fact, OA 1263/2010 was filed before the expiry period of 2 years from the date of issue of select panel on 3.12.2010 and the litigation on the issue is live to this date.

XVI) To be precise the action of the respondents is against Hon'ble Supreme Court observation on the issue and in utter disregard of the railway Board order RBE 117/2016, wherein it was instructed not to issue any orders of promotion based on reservation. RBE 117 /2016 was issued based on an undertaking given to the Hon'ble Apex Court by the Ld. Solicitor General of India. Respondents disregarding their own instructions is strange and is violative of the legal principle laid down by the Hon'ble Apex Court in a catena of judgments dealing with the need to follow rules. In fact, Hon'ble Supreme Court

has taken a serious view of violation of instructions and rules as brought out here under.

The Hon'ble Supreme Court observation in **T.Kannan and ors vs S.K. Nayyar (1991) 1 SCC 544** held that "*Action in respect of matters covered by rules should be regulated by rules*". Again in **Seighal's case (1992) (1) supp 1 SCC 304** the Hon'ble Supreme Court has stated that "*Wanton or deliberate deviation in implementation of rules should be curbed and snubbed.*" In another judgment reported in (2007) 7 SCJ 353 the Hon'ble Apex court held "*the court cannot de hors rules*"

The Railway Board order RBE 117 of 2016 is reproduced hereunder in view of the its intrinsic significance to the instant case.

"The aforesaid Contempt Petition (C) No. 314/2016 in SLP (C) No. 4831 of 2012 came up for hearing on 29.09.2016. In follow up of hearing of the above mentioned contempt case, Shri Ranjit Kumar, the Learned Solicitor General of India vide its letter No. SG/2/2016-262(I) dated 29.09.2016, has communicated and advised M/o. Railways as under:-

".. After hearing the matter for some time, the Court felt that the main matter is required to be decided and therefore, adjourned the Contempt Petition to be decided along with the main matters and fixed the date of hearing for 22.11.2016 as the first case. The court stated that if the Solicitor General wants to make a statement that no further promotions of reserved category persons to unreserved posts will be made relying on the circulars dated 10.08.2010/ 14.09.2010, then they would not pass any further interim order. I informed the court that the Government would not pass any further order of promotion relying upon either of these two circulars or on the basis thereof. I also conveyed to the Court that I will write a letter informing of about my statement to the Court to you and to the Secretary, DOP&T and the Chairman, Railway Board. That is why I am addressing this letter to you so that all the Departments are conveyed of the assurance given in the Court that in the matter of making any promotion of a reserved category officer/ employee the Department concerned would not rely upon or make the basis of such promotion to an unreserved post based on the circulars dated 10.08.2010 and 14.09.2010 and that any violation thereof will bring about a definite contempt...."

(Circular dated 14.9.2010 as quoted by the Ld. SG be read as 01.09.2010 which is RBE 126/2010 dated 01.09.2010 issued based on DOP&T's OM dated 10.8.2010)

In view of the above assurance, received from the Ld. Solicitor General of India, it is advised that Railway Board's RBE No. 126/2010 dated 01.09.2010, is held in abeyance with immediate effect till further advice, and all further

promotions of reserved category persons to unreserved posts will not be made by ignoring Railway Board's RBE No. 126/2010 dated 01.09.2010 which in turn was based upon the DOP&T OM dated 10.08.2010 & under reference No. (i) & (ii) above. However, all promotions order henceforth shall be subject to outcome of the main SLPs and the above mentioned contempt petition which are still pending.

The above may please be brought to the notice of all concerned for information and strict compliance.”

The above undertaking was given by the Id. Solicitor General on 29.9.2016 and the respondents issued the letter purporting to promote the SC/ST employees on 18.7.2017. Therefore, the promotion ordered is consequent to the undertaking and hence, invalid.

XVII) Incidentally, it is an issue on which other divisions of the (SCR) South Central Railway Zone of the respondents organisation have taken a decision by reverting the SC/ST employees who were promoted without adhering to the norms of Nagraj and the undertaking given to the Hon'ble Supreme Court by the Id. Solicitor General. To be specific, Vijayawada division coming under the jurisdiction of the SCR has issued orders vide letter dt 4.12.2015, withdrawing the regular promotion as per the directions of the Hon'ble High Court. It is obviously beyond comprehension as to why Secunderabad and Guntakal divisions under the same Zone failed to follow suit. The respondents from 2 to 4 have a precedent to adopt. Not doing so is against the observation of Hon'ble Supreme Court of having one policy for different railway zones in **Abid Hussain v. Union of India, (1987) 1 SCC 532**, which reads as under:-

It is not disputed that the Air-conditioned Coach-In-Charges-Attendants are being paid overtime allowances for extra duty hours exceeding 96 hours in two weeks in the Western Railway, Central Railway and Eastern Railway. There is no justification for denying

overtime allowances on the same basis to the Air-conditioned Coach-In-Charges-Attendants in the Northern Railway. We accordingly direct the Union of India and the Railway Administration to pay with effect from July 1, 1984 the overtime allowances to the Air-conditioned Coach-In-Charges-Attendants working in the Northern Railway on the same basis on which the Air-conditioned Coach-In-Charges-Attendants in the other three Railways, referred to above, are paid. All arrears of such allowances up to date shall be paid as early as possible and in any event not later than four months from today. The benefit of this order shall be extended to all such employees including those who have retired and those who have not joined as petitioners herein.

In G.C. Ghosh vs Union of India (1991) supp. 2 SCC 497, Hon'ble Supreme court has further held that when one zonal railway has taken a stand, the other zonal railway need to go by the same. Surprisingly, in the present case, different divisions in the same zone have taken different stands, which go against the directives of the Hon'ble Supreme Court referred to. Not only they have taken a different stand but upgraded the 6 SC ST employees to a higher grade, though they were supposed to be in-charges till the Nagaj exercise is completed and that too, in administrative interests, thereby raising a question on the intent of the order dated 24.6.2015.

XVIII) Further, respondents have cancelled notification dated 2.1.2013 for filling up of 8 AE vacancies, on 26.7.2017, as per Hon'ble High Court order in WP 16280/2014 wherein fulfilling the parameters laid down in Nagaraj's case is necessary to provide reservation in promotion. On the same date coming up with a fresh notification for filling up 26 posts of AE without complying with the orders of the Hon'ble High Court of Judicature at Hyderabad of showing 8 posts of 2013 notification as UR and without completing the exercise of Nagaraj in its entirety as ordered by the Hon'ble High Court in W.P 9942/2014 and batch dated 29.4.2015, does not stand the test of reason.

XIX) An associate issue related to reservation in promotion is the publication of integrated seniority list, by the respondents which has been challenged in OAs 738/2017 & 964/2017. After the Hon'ble High Court passed orders in WP No 11724 of 2013 on 22.12.2016, the earlier notification issued on 2.1.2013 for selection to the post of AE has been cancelled on 26.7.2017. Simultaneously, on the same day another notification was issued to fill up 26 posts of AEs, including SC/ST vacancies was published. To take the exercise forward, integrated seniority list was issued. Based on the integrated seniority list, the final eligibility list was issued on 10.10.2017. The grievance of the applicants is that, despite prevailing instructions and law : not permitting reservation in promotions, consequential seniority and own merit for SC/ST employees; respondents have issued integrated seniority list placing the SC/ST category employees above the applicants in the OAs referred to based on the consequential seniority granted to them by virtue of accelerated promotions given earlier. On the basis of the said integrated seniority, eligibility list was issued by placing SC/ST employees above the applicants without obtaining the willingness/unwillingness of the employees coming within the zone of consideration and also including the names of the employees who are going to retire within 2 months. The final eligibility list has thus once again been wrongly drawn up again with juniors to the applicants finding a place above them. The patent illegality resorted to will enable the erstwhile juniors to the applicants to get selected against UR vacancies, leaving the applicants who are seniors not getting selected as it had happened in the past forcing the UR employees to contest in OA 1263/2010 which was allowed and confirmed by the High Court in WP 9942 & batch to the extent of directing the respondents to abide by the parameters in Nagraj judgment. At this juncture, we recall the submission of the

Ld. Sr. Counsel for the private respondents that the grievances of the applicants have not been projected, as is required, falls flat since the applicants, as expounded above, have been periodically agitating stating their grievance in no uncertain terms. It is also pertinent to add that executive instructions communicated through Railway Board orders cited by the respondents cannot overrule law laid by the Hon'ble Supreme Court in judgments cited. If the Railway Board has not given any instructions on consequential seniority, it would not mean that the respondents from 2 to 4 can act against law. Constructive restraint is the hallmark of administrative efficacy when matters of administrative jurisdiction are involved with implicit legal implications.

Continuing on the subject of integrated seniority list, it must be stated that employees from different streams of the respondents organisation are eligible to appear for selection as AE. Hence drawing up a common seniority is required which is termed as integrated seniority list. In an integrated seniority list feeder cadre employees from different streams like works and permanent way streams to which the applicants belong to and from other streams like drawing, Bridges, Track Machine, EWS, design etc are shown. Seniority has to be based on the length of service as laid down in para 203.5 of the IREM vol-1 which reads as under:

“Para 203.5 of IREM: Since employees from the different streams will be eligible to appear for the selection, their integrated seniority for purposes of the selection should be determined on the basis of total length of non-fortuitous service rendered in grade Rs. **6500-10500** (R.S.) and above. In other words the date of appointment to the grade Rs. **6500-10500**(R.S.) on a non fortuitous basis will be the criterion. ”

The UR employees though senior based on length service but they are shown as junior to SC/ST employees because of accelerated promotions. By doing so,

respondents are disregarding their own instructions as laid down in Para 203.5 of IREM which is statutory in nature.

XX) In addition, as cited in paras supra, Hon'ble Apex court observation in K. Manorama case, that an SC employee getting selected in open competition on own merit can be shown against UR vacancy but not in respect of promotion effected on the basis of seniority cum suitability. The selection to AE is based on seniority cum suitability and therefore Manorama case applies, which the respondents failed to follow. The Hon'ble High Court of Rajasthan in WP no 2773 of 2012 has quashed Railway Board order RBE no 126/2010 wherein SC/ST employees were ordered to be adjusted against UR vacancy on own merit or reservation roster irrespective of the fact whether the promotion is made by selection method or non selection method. The order of the Hon'ble High Court of Rajasthan when challenged in SLP 219 of 2015 filed by the Railways, the SLP was dismissed by the Hon'ble Supreme Court on 12.1.2015. Therefore, respondents have to comply with the said judgment without any iota of doubt, which is in favour of the applicants.

An identical matter was adjudicated by Hon'ble Principal Bench of this Tribunal in OA no 221/2008 dated 2.12.2010, wherein, it was held as under:

“ We have applied our mind to the pleadings and the contentions raised by the learned counsel representing the applicants on the issues as mentioned above, but are of the view that once, in brevity, it is the case of the applicants that when no compliance of pre-conditions are spelled out in M. Nagaraj's case has been done, reservation in promotion with the accelerated seniority shall have to be worked out in the way and manner as per the law settled earlier on the issue. If that be so, we need to have to labour on the issues raised by the applicants, as shrewdly, if the position is already settled, the only relevant discussion and adjudication in this case can be and should be confined to non observation of the pre-conditions for making accelerated promotions as valid. We have already held above that the respondents have not worked out or even applied their mind to the pre-conditions as mentioned above

before giving effect to the provisions of Art 16(4A); for that reason, circular dated 29.2.2008 vide which the seniority of SC/ST railway servants promoted by virtue of rule of reservation /roster has to be regulated in terms of the Railway Boards letter dated 8.3.2002 and 13.1.2005 has to be quashed. There is a specific prayer to quash instructions dated 8.3.2002 & 13.1.2005 as well, but there would be no need to do as the same have been discussed in the case of Railways itself in the matter of Virpal Singh Chauhan (supra), and commented upon. While setting aside instructions dated 29.2.2008, our directions would not give accelerated seniority to SC & ST employees till such time pre-conditions on which alone Article 16 (4 A) of the constitution is to operate, are complied with.”

Thus the SC/ST employees are not entitled for accelerated seniority till such time the pre-conditions laid down in Nagraj judgement are strictly followed. We have observed in the aforesaid paras that the respondents have not adhered with any of the parameters laid in M. Nagraj case. By keeping in view the observation of the Hon’ble Principal Bench, this Tribunal in 1263/2010 has held that the applicants therein shall be considered on the basis of their performance in the written test and interview and on the basis of their original seniority and not treating the private respondents as seniors to the applicants for the purpose of promotion to the post of AE. The Tribunal order has been upheld by the Hon’ble High Court of A.P in W.P 9942/2014 and batch. Hence issue of the integrated seniority list goes against the very grain of the observation of this Tribunal in OA 1263/2010 which was upheld by the Hon’ble High Court.

XXI) Respondents did issue RBE No 117/2016 directing the subordinate formation not to follow the orders issued in RBE 126/2010. Therefore, the issue of the integrated seniority list is against the very essence of RBE 117/2016, which was issued in compliance with the undertaking given to the Hon’ble Apex Court.

Till date the respondents have not framed a rule or any policy as to how to go about in regard to reservation in promotions by fulfilling the pre-conditions

in Nagraj. In the absence of a rule or a policy from the Railway Board, the policy formulator, issue of integrated seniority list is not as per law.

XXII) Even the order of this Tribunal to follow Nagraj in OA 333 of 2013 which was upheld by the Hon'ble High Court of A.P in WP no 20809/2014, was carried to the Hon'ble Supreme Court in CC no 3196 of 2015 but was dismissed. Hence respondents adhering to preconditions of Nagraj has attained finality and therefore issue of integrity seniority list which is not in tune with the spirit of Nagraj shall have to go.

Similar verdicts delivered by the Hon'ble Ernakulam and Mumbai Benches of this Tribunal in OAs 98/2014 dated 15.11.2016 and 727/2013 & batch dt. 9.1.2019 respectively, Hon'ble High Court of Delhi in WP No. 3490/2010 favour the cause of the applicants. The law in regard to reservation in promotion has attained finality with the vivid observations of the Hon'ble Supreme Court in M. Nagraj, B.K.Pavitra, Manorama, U.P.Power Corporation as has been discussed in paras supra. Hon'ble Jabalpur Bench of the Tribunal in OA 143 of 2017 has directed the respondents therein to proceed with selection without the rule of reservation or issue fresh notification.

The respondents claim that the applicants are seeking plural reliefs. We do not agree with the same since seniority decides promotion and any infringement of the promotion which was legally due to the applicants would be a continuous cause of action. Hence, the relief sought are consequential and not plural.

XXIII) To sum up, respondents have acted against the orders of the Hon'ble High Court of Judicature at Hyderabad in WP No. 9942/2010 and batch, by granting promotion to the 6 SC/ST employee without satisfying the

preconditions laid down in Nagraj. Further orders of the Hon'ble High Court in WP No.11724/2013 to show all the 8 vacancies as UR were not followed. The orders of the Hon'ble High Court were crystal clear that even if preconditions of M. Nagraj case were to be followed the SC/ST employees shall be promoted prospectively and not retrospectively. However, respondents have chosen to promote the SC/ST employees retrospectively from 2010 instead of 2017. Legal principles laid down by the Hon'ble Supreme Court in M.Nagraj, Pavitra, Manorama, Palaniswamy and U.P. Power Corporation have not been adhered to. Railway Board instructions contained in RBE 117/2016 have been violated. This is a serious violation as the Ld. Solicitor General of India has given an undertaking to the Hon'ble Supreme Court as adduced in RBE 117/2016 that reservation in promotions will not be resorted to as per orders of the DOPT vide letters dated 10.8.2010 and 1.9.2010. The later letter dt 1.9.2010 was circulated by the Railway Board as RBE/126/2010. Learned Solicitor General has also stated that any action taken on the basis of letters dated 10.8.2010/1.9.2010 will be construed as contempt of the Supreme Court. Respondents, we are sure, are aware of the consequences of going against the advice of the Ld. Solicitor General. Para 203.5 of IREM has not been followed. IREM instructions are statutory in nature and therefore violating such instructions is a matter of serious concern. Vijayawada division of SCR has reverted the SC/ST employees for not fulfilling the preconditions of Nagraj case, where as Secunderabad and Guntakal divisions of SCR have not reverted the SC/ST employees albeit they too have not complied with the preconditions of Nagraj. In the process, the law laid down by the Hon'ble Supreme Court that there shall be a uniform policy for Railways was brazenly ignored. Respondents have disobeyed their own instructions which the Hon'ble Supreme Court has not taken to kindly as per citations cited supra.

XXIV) Respondents, being a model employer, should not discriminate employees. On one hand to favour a section of employees they have violated law, rules and the orders of the Hon'ble High Court of Judicature at Hyderabad on the subject and on the other hand applicants have been denied the legitimate benefits which they are eligible by gross violation of rules and law. Such action of the respondents fringes on hostile discrimination. Any decision which is discriminatory has to be struck down, lest equals would be made unequal's. Applicants in the instant case being more than equals to the 6 SC/ST employees by being senior to them were made juniors i.e. unequals by taking a decision which is not supported by rules or law. Respondents have not shown any valid principle to term their decision as rational. Our view is supported by the Hon'ble Supreme Court as under:

27. In *Ramana Dayaram Shetty v. International Airport Authority of India*(1979) 3 SCC 489 again this Court observed that a discriminatory action of the Government is liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory.

Therefore the discriminatory decision of the respondents in not promoting the applicants has to be repudiated.

An addendum to the discriminative approach of the respondents was the arbitrariness in taking a wrong decision. Hon'ble High Court has brought out legal certainty in the issue by directing to abide by the Nagraj pre-conditions before proceeding in the matter. Respondents having admitted that it is the Railway Board which decides the policy and that they have not received any instructions on the matter in question, the lower formation proceeding in the matter was ill advised. By giving some margin to the respondents that the urge to resolve the issue was the prompter, yet it was not explained as to how an

incompetent authority like the CPO can lay down the policy in the absence of instructions from the Railway Board and that too, in a way deviating from the orders of the Hon'ble High Court. The discernable principle that emerges from the impugned orders referred to does not pass the test of reasonableness. More so in the context of the facts and circumstances of the case. A mode and procedure was prescribed by the Hon'ble High Court which was apparently not adhered to. State action has to be based on reason. It is beyond comprehension as to why without fully engaging the Railway Board in the matter, local authorities have proceeded without any authorial jurisdiction. Governance has to be by rule of law and not as per the whims and fancies of those in power, however mighty they may be. Hon'ble High Court has set the legal principles with many clear instructions, perfect to the full stop and the coma. Yet not following them is a matter of serious concern. Respondents gave many interpretations but the ones which were expected to uphold the legal principles postulated by the Hon'ble High Court are missing. Thus the reply statements were hollow bereft of the substance required. There are certain general principles which govern exercise of power in constitutional democracies. These principles are like reasonableness in taking a decision, application of mind, non discrimination, consistency, fairness and so on. The said principles form the bed rock of administration. Decisions incongruent to the principles spoken of, would come under the domain of arbitrariness. While making the above observations we are guided by the interpretations given by the Hon'ble Apex Court in *East Coast Railway & Anr. v. Mahadev Appa Rao & Ors, and K. Surekha v. Mahadev Appa Rao & Ors.* decided on July 7, 2010, in CA No. 4964 of 2010 & Civil Appeal Nos. 4965-4966 of 2010, which is reproduced hereunder:

18. There is no precise statutory or other definition of the term "arbitrary". ***In Kumari Shrilekha Vidyarthi and Ors. v. State of U.P. and Ors. (AIR 1991 SC 537)***, this Court explained that the true import of the expression "arbitrariness" is more easily visualized than precisely stated or defined and that whether or not an act is arbitrary would be determined on the facts and circumstances of a given case. This Court observed:

"The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that 'be you ever so high, the laws are above you'. This is what men in power must remember, always."

19. Dealing with the principle governing exercise of official power Prof. De Smith, Woolf & Jowell in their celebrated book on "Judicial Review of Administrative Action" emphasized how the decision-maker invested with the wide discretion is expected to exercise that discretion in accordance with the general principles governing exercise of power in a constitutional democracy unless of course the statute under which such power is exercisable indicates otherwise. One of the most fundamental principles of rule of law recognized in all democratic systems is that the power vested in any competent authority shall not be exercised arbitrarily and that the power is exercised that it does not lead to any unfair discrimination. The following passage from the above is in this regard apposite:

"We have seen in a number of situations how the scope of an official power cannot be interpreted in isolation from general principles governing the exercise of power in a constitutional democracy. The courts presume that these principles apply to the exercise of all powers and that even where the decision-maker is invested with wide discretion, that discretion is to be exercised in accordance with those principles unless Parliament clearly indicates otherwise. One such principle, the rule of law, contains within it a number of requirements such as the right of the individual to access to the law and that power should not be arbitrarily exercised. The rule of law above all rests upon the principle of legal certainty, which will be considered here, along with a principle which is partly but not wholly contained within the rule of law, namely, the principle of equality, or equal treatment without unfair discrimination."

Any arbitrary decision infringing law has to be quashed since it is illegal. We find the decisions of the respondents in not selecting the applicants in 2010 and publishing the integrated seniority list in 2017 as arbitrary and irrational. Therefore they for aforesaid reasons they get branded as illegal. Observations of the Hon'ble Supreme Court when applied to the decisions of the respondents they get marked as arbitrary without any iota of doubt.

When we delve deep into the issue from the aspect of equality we cannot resist in observing that equality is a born enemy to arbitrariness. An arbitrary decision, like the respondents decision, lacks constitutional logic thereby defying Article 14 of the constitution. Non-arbitrariness pervades Article 14 like a flower in full bloom with the splendour of different hues of colour and irresistible fragrance. Article 14 dictates equal and fair treatment to the citizens. We find neither, in the decisions of the respondents, despite the leading answers provided by the Hon'ble High Court on the issue. There was a sweeping discretion invoked by an authority other than the incompetent authority in taking the decision, thereby decision taken decaying into un-explainable arbitrariness leading to an absence

of a fair procedure to be followed, which is the soul of Article 21. A body without a soul is as good as dead wood. So too, the decisions of the respondents on the issue in question, given the background of the case and legal position as expounded by the higher judicial fora in the matter. We draw inspiration in observing, as we did, from the directions of the Hon'ble Supreme Court in Royappa, Maneka Gandhi and Charles Shobraj cases as inscribed below

3. In *E.P. Royappa v. State of T.N.*(1974) 4 SCC 3 this Court observed as under: (SCC p. 38, para 85)

“85. ... From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is, therefore, violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment.”

24. In *Maneka Gandhi v. Union of India*(1978) 1 SCC 248 this Court observed as under: (SCC pp. 283-84, para 7)

“7. ... Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits. ... Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence....”

Charles Sobraj v. Supdt., Central Jail, (1978) 4 SCC 104

Fair procedure is the soul of Article 21, reasonableness of the restriction is the essence of Article 19(5) and sweeping discretion degenerating into arbitrary discrimination is anathema for Article 14.

Going forward, albeit we do not like to use strong expressions, but facts and circumstances of the case, compel us to state strongly with all the force which English language can command, that respondents have repeatedly

wronged the applicants by denying promotion due to the them. Allowing the respondents to take advantage of the wrong done by them would tantamount to perpetuating injustice rather than doing justice to the persons wronged. Hon'ble Supreme Court observation in *Somesh Tiwari v U.O.I & Ors* in CA 7308 of 2008, given hereunder, is relevant to the instant case.

“27. This Court in [Commissioner, Karnataka Housing Board v. C. Muddaiah](#), [(2007) 7 SCC 689] laid down the law, thus :-

"32. The matter can be looked at from another angle also. It is true that while granting a relief in favour of a party, the Court must consider the relevant provisions of law and issue appropriate directions keeping in view such provisions. There may, however, be cases where on the facts and in the circumstances, the Court may issue necessary directions in the larger interest of justice keeping in view the principles of justice, equity and good conscience. Take a case, where ex facie injustice has been meted out to an employee. In spite of the fact that he is entitled to certain benefits, they had not been given to him. His representations have been illegally and unjustifiably turned down. He finally approaches a Court of Law. The Court is convinced that gross injustice has been done to him and he was wrongfully, unfairly and with oblique motive deprived of those benefits. The Court, in the circumstances, directs the Authority to extend all benefits which he would have obtained had he not been illegally deprived of them. Is it open to the Authorities in such case to urge that as he has not worked (but held to be illegally deprived), he would not be granted the benefits? Upholding of such plea would amount to allowing a party to take undue advantage of his own wrong. It would perpetrate injustice rather than doing justice to the person wronged."

XXV) Respondents have ex facie done injustice to the applicants. Representations did not evoke a just response. Facts do establish that the respondents have unfairly denied the due promotion to the applicants. Taking advantage of the wrong committed by the respondents in promoting the SC/ST employees they are perpetuating the wrong by issuing notification and integrated seniority list in 2017 against the legal principles laid down by the Hon'ble Supreme Court, Hon'ble High Courts, Hon'ble Principle Bench and

other Hon'ble benches of this Tribunal. Unless such actions are interdicted, grave injustice would be done to the applicants.

XXVI) From the aforementioned facts, evidently, the action of the respondents is against rules, discriminative, arbitrary and hence illegal.

a) This Tribunal is of the considered view that the applicants should have been placed in the select panel dated 3.12.2010 against 2010 notification. However, since a stay is in operation in regard to the exam conducted with reference to an interlinked issue in W.P Nos.40693/2018 & 37990/2018 filed in the Hon'ble High Court of Judicature at Hyderabad, the placement of the applicants in the panel dated 03.12.2010 has to necessarily wait till the disposal of the WPs and depending upon the final outcome of the writ petition. In the event of their placement against the 2010 notification, as a logical corollary, they would also be entitled to notional seniority from 3.12.2010 and allowed to draw pay and allowances from the date of joining the promoted posts on notional basis and their pay re-fixed from the date of their actual joining and arrears thereof being paid.

Placement of the applicants with retrospective date shall apparently result in the reversion of 6 SC/ST employees who got their promotion. In the case of those who are still in service, that exercise has to be carried out and after putting them to notice, reversion orders be passed and their pay be re-fixed. However, excess payment be not recovered in view of the dictum of the Apex Court in the case of State of Punjab vs Rafiq Masih (2015) 4 SCC 334. So is the case with reference to revision of pension to those who have already retired in that there cannot be any recovery of excess pension paid, and downward revision is also subject to availability of any provisions in the Rules of Pension; otherwise not.

The respondents ought to draw the integrated seniority list and process the selection in regard to the notification dt.26.07.2017 by adhering to the preconditions laid down in Nagraj case and IREM instructions on the subject, subsequent to the Railway Board laying down the policy in regard to policy of reservation in promotions. Proper adherence to the orders of the Hon'ble High Court on the subject is of paramount importance. Interpretive logic when it goes against the essence of law, will not hold good, as is seen in the instant case. Respondents may register the same.

(b) While we were scribing the judgment, we had the opportunity to go through the order of the Hon'ble Supreme Court pronounced on 15.4.2019 dealing with the same subject in SLP (C) No. 30621/2011 & batch which reads as under:

“Issue notice in the fresh matters.

Until further orders, status quo, as it exists today, shall be maintained.

List all the matters on 15.10.2019.”

Thus, the decision that shall be arrived at by the respondent being contingent upon the final outcome of the cases presently under consideration of the High Court of Judicature at Hyderabad in respect of stay of the examination as stated above and of the Apex Court in respect of reservations in promotion in respect of SC/ST category, they shall await the pronouncement of the verdict by

the Courts and consider the case of the applicants in tune with the final decision by the Courts. Periodical intimation to the applicants at a regular interval of three months be also given.

(c) Since the wheels of administration cannot be retarded by keeping any future vacancies unfilled the Hon'ble High Court has already directed to fill up the future vacancies on "in charge " basis, and thus, the respondents shall abide by the said directions of the High Court.

(d) With the above directions the OAs are disposed of. No order as to costs. MAs shall stand disposed of.

(B.V. SUDHAKAR)
ADMINISTRATIVE MEMBER

(JUSTICE R. KANTHA RAO)
JUDICIAL MEMBER

Dated, the 26th day of April, 2019

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