CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

O.A. No. 3827/2018

The 12th day of December, 2018

HON'BLE MR. V. AJAY KUMAR, MEMBER (J)
HON'BLE MR. A.K. BISHNOI, MEMBER (A)

Zaki Ahmed, Group 'C'
Working as Binder Grade-I,
Municipal Press, NDMC
Aged about 52 years,
S/o Shri Babar Ali,
R/o D-162, MCD Staff Quarters,
New Usman Pur, Delhi. .. Applicant

(By Advocate: Shri Anil Singal)

Versus

1. North DMC,
Through Commissioner,
4th Floor, Civic Centre,
New Delhi-2.

2. Director,
Printing & Stationer,
NDMC, 25th Floor,
Civic Centre, New Delhi-2.

3. Secretary, DOPT
Central Secretariat,
North Block, New Delhi-1.

4. Sushil Kumar,
Foreman (Bindery),
Through Director,
Printing & Stationery,
NDMC, 25th Floor,
Civic Centre, New Delhi-2. .. Respondents

(By Advocate : Ms. Saumyashree Mishra for
Ms. Pooja Makhija Wahal)

ORDER (ORAL)

By Mr. V. Ajay Kumar, Member (J)

The applicant, a Binder Grade-I in the respondent – North Delhi Municipal Corporation, filed the O.A. seeking the following relief(s):

> "(a) Call for the records of the matter;
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> (b) Quash and set aside the Order dt. 30.9.2016 and Order dt. 24.7.2018 giving benefit of reservation to SC/ST category candidates in the matter of promotion as Foreman (Bindery) as illegal and bad in law.
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> (c) Consider the claim of the applicant for promotion to the post of Foreman (Bindery) w.e.f. 20.9.2016 by holding review DPC and without applying rule of reservation and promote the applicant to the post of Foreman (Bindery) w.e.f. 20.09.2016 with all consequential benefits.
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> (d) to allow the OA with cost.
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> (e) Pass any other orders that this Hon'ble Tribunal may deem fit in the facts and circumstances of the case."

2. In short, the grievance of the applicant is that he belongs to General category and the respondents illegally promoted the 4th respondent, a Reserved category candidate, against the vacancy which, in fact, meant for the open category, by applying the principle of reservation in promotions. The O.A. No. 4206/2017 earlier filed by him was disposed of by this Tribunal on 30.11.2017, by directing the respondents to pass a speaking order. Accordingly, the respondents passed Annexure A-2 Speaking Order dated

24.07.2018 whereunder, while substantiating their action, it is also mentioned that "The matter is referred to Department of Personnel & Training, Govt. of India, for clarification and on receipt of the clarification, the case will be submitted for appropriate orders". Challenging the same, the applicant filed the instant O.A.

3. Heard Shri Anil Singal, learned counsel for the applicant and Ms. Saumyashree Mishra proxy for Ms. Pooja Makhija Wahal, learned counsel appearing for the respondents and perused the pleadings on record.

4. In ***M. Nagaraj & Ors. Vs. Union of India & Others,*** (2006) 8 SCC 212, the Constitution Bench of the Hon'ble Apex Court observed as under :-

> "2. The facts in the above writ petition, which is the lead petition, are as follows.
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> Petitioners have invoked Article 32 of the Constitution for a writ in the nature of certiorari to quash the Constitution (Eighty-Fifth Amendment] Act, 2001 inserting Article 16(4A) of the Constitution retrospectively from 17.6.1995 providing reservation in promotion with consequential seniority as being unconstitutional and violative of the basic structure. According to the petitioners, the impugned amendment reverses the decisions of this Court in the case of Union of India and others v. Virpal Singh Chauhan and others , Ajit Singh Januja and others v. State of Punjab and others (Ajit Singh-I), Ajit Singh and others (II) v. State of Punjab and others , Ajit Singh and others (III) v. State of Punjab and others , Indra Sawhney and others v. Union of India , and M. G. Badappanavar and another v. State of Karnataka and others . Petitioners say that the Parliament has appropriated the judicial power to itself and has acted as an appellate authority by reversing the judicial pronouncements of this Court by the use of power of amendment as done by the impugned amendment and is, therefore, violative of the basic structure of the Constitution. The said amendment is,

therefore, constitutionally invalid and is liable to be set aside. Petitioners have further pleaded that the amendment also seeks to alter the fundamental right of equality which is part of the basic structure of the Constitution. Petitioners say that the equality in the context of Article 16(1) connotes "accelerated promotion" so as not to include consequential seniority. Petitioners say that by attaching consequential seniority to the accelerated promotion, the impugned amendment violates equality in Article 14 read with Article 16(1). Petitioners further say that by providing reservation in the matter of promotion with consequential seniority, there is impairment of efficiency. Petitioners say that in the case of Indra Sawhney5 decided on 16.11.1992, this Court has held that under Article 16(4), reservation to the backward classes is permissible only at the time of initial recruitment and not in promotion. Petitioners say that contrary to the said judgment delivered on 16.11.1992, the Parliament enacted the Constitution (Seventy- Seventh Amendment) Act, 1995. By the said amendment, Article 16(4A) was inserted, which reintroduced reservation in promotion. The Constitution (Seventy-Seventh Amendment) Act, 1995 is also challenged by some of the petitioners. Petitioners say that if accelerated seniority is given to the roster-point promotees, the consequences would be disastrous...."

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

"121. 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 Sawhney5 , the concept of post-based Roster with in-built concept of replacement as held in R.K. Sabharwal.

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

123. However, in this case, as stated, 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.
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> 124. 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.
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> 125. We have not examined the validity of individual enactments of appropriate States and that question will be gone into in individual writ petition by the appropriate bench in accordance with law laid down by us in the present case.

5. In **Suresh Chand Gutam Vs. State of Uttar Pradesh and Others,** AIR 2016 SC 1321, a batch of Writ Petitions were preferred under Article 32 of the Constitution of India praying to issue a direction in the nature of mandamus commanding the respondent Government to enforce appropriately the constitutional mandate as contained under the provisions of Articles 16(4A), 16(4B) and 335 of the Constitution of India or in the alternative, for a direction to the respondents to constitute a Committee or appoint a Commission chaired either by a retired Judge of the High Court or Supreme Court in making survey and collecting necessary qualitative data of the Scheduled Casts and the Scheduled Tribes in the services of the State for granting reservation in promotion in the light of direction

given in **M. Nagaraj & Others** v. **Union of India & Others** (supra).

It was held as under:-

> "43. Be it clearly stated, the Courts do not formulate any policy, remains away from making anything that would amount to legislation, rules and regulation or policy relating to reservation. The Courts can test the validity of the same when they are challenged. The court cannot direct for making legislation or for that matter any kind of sub-ordinate legislation. We may hasten to add that in certain decisions directions have been issued for framing of guidelines or the court has itself framed guidelines for sustaining certain rights of women, children or prisoners or under-trial prisoners. The said category of cases falls in a different compartment. They are in different sphere than what is envisaged in Article 16 (4-A) and 16 (4-B) whose constitutional validity have been upheld by the Constitution Bench with certain qualifiers. They have been regarded as enabling constitutional provisions. Additionally it has been postulated that the State is not bound to make reservation for Scheduled Castes and Scheduled Tribes in matter of promotions. Therefore, there is no duty. In such a situation, to issue a mandamus to collect the data would tantamount to asking the authorities whether there is ample data to frame a rule or regulation. This will be in a way, entering into the domain of legislation, for it is a step towards commanding to frame a legislation or a delegated legislation for reservation.
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> 44. Recently in **Census Commissioner & others** v. **R. Krishnamurthy** a three-Judge Bench while dealing with the correctness of the judgment of the high court wherein the High court had directed that the Census Department of Government of India shall take such measures towards conducting the caste-wise census in the country at the earliest and in a time-bound manner, so as to achieve the goal of social justice in its true sense, which is the need of the hour, the court analyzing the context opined thus :-
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> > "Interference with the policy decision and issue of a mandamus to frame a policy in a particular manner are absolutely different. The Act has conferred power on the Central Government to issue notification regarding the manner in which the census has to be carried out and the Central Government has issued notifications, and the competent authority has issued directions. It is not within the domain of the court to legislate. The courts do interpret the law and in such interpretation certain creative process is involved. The courts have the jurisdiction to declare the law as unconstitutional. That too, where it is called for. The court may also fill up the gaps in certain spheres applying the doctrine of constitutional silence or abeyance.

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

and accordingly, dismissed the Writ Petitions.

6. The issue of "whether the judgment of ***M. Nagaraj*** needs to be revisited or not" was referred to a Constitution Bench in the matter of ***The State of Tripura & Others Vs. Jayanta Chakraborty & Ors.*** in Civil Appeal Nos.4562-4564 of 2017 and batch dated 14.11.2017. Finally, the said issue and the said Civil Appeals were decided by a Constitution Bench of the Hon'ble Apex Court in **Jarnail Singh and Others Vs. Lachhmi Narain Gupta and Others** in Special Leave Petition (Civil) No.30621/2011 and batch, by its common judgment dated 26.09.2018. The Constitution Bench, in the said order, observed as under:-

> "1. The present group of cases arises out of two reference orders – the first by a two-Judge Bench referred to in a second reference order, dated 15.11.2017, which is by a three-Judge Bench, which has referred the correctness of the decision in **M. Nagaraj v. Union of India**, (2006) 8 SCC 212, ("**Nagaraj**"), to a Constitution Bench.
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> 2. The controversy in these matters revolves around the interpretation of the following Articles of the Constitution of India:

"**16. Equality of opportunity in matters of public employment.—**

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

(4-B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4-A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year."

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"**335. Claims of Scheduled Castes and Scheduled Tribes to services and posts.—**

The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State:

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

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"**341. Scheduled Castes.—**(1) The President may with respect to any State or Union Territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be

Scheduled Castes in relation to that State or Union territory, as the case may be.

(2) Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification issued under clause (1) any caste, race or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification."

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"**342. Scheduled Tribes.—**(1) The President may with respect to any State or Union territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purposes of this Constitution be deemed to be Scheduled Tribes in relation to that State or Union territory, as the case may be.

(2) Parliament may by law include in or exclude from the list of Scheduled Tribes specified in a notification issued under clause (1) any tribe or tribal community or part of or group within any tribe or tribal community, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.‖

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17. Therefore, when **Nagaraj** (supra) applied the creamy layer test to Scheduled Castes and Scheduled Tribes in exercise of application of the basic structure test to uphold the constitutional amendments leading to Articles 16(4-A) and 16(4-B), it did not in any manner interfere with Parliament's power under Article 341 or Article 342. We are, therefore, clearly of the opinion that this part of the judgment does not need to be revisited, and consequently, there is no need to refer **Nagaraj** (supra) to a seven-Judge Bench. We may also add at this juncture that **Nagaraj** (supra) is a unanimous judgment of five learned Judges of this Court which has held sway since the year 2006. This judgment has been repeatedly followed and applied by a number of judgments of this Court, namely:

a. **Anil Chandra v. Radha Krishna Gaur**, (2009) 9 SCC 454 (two-Judge Bench) (See paragraphs 17 and 18).

b. **Suraj Bhan Meena & Anr. v. State of Rajasthan & Ors.**, (2011) 1 SCC 467 (two-Judge Bench) (See paragraphs 10, 50, and 67).

c. **U.P. Power Corporation v. Rajesh Kumar & Ors.**, (2012) 7 SCC 1 (two-Judge Bench) (See paragraphs 61, 81(ix), and 86).

d. **S. Panneer Selvam & Ors. v. State of Tamil Nadu & Ors.**, (2015) 10 SCC 292 (two-Judge Bench) (See paragraphs 18, 19, and 36).

e. **Chairman & Managing Director, Central Bank of India & Ors. v. Central Bank of India SC/ST Employees Welfare Association & Ors.**, (2015) 12 SCC 308 (two-Judge Bench) (See paragraphs 9 and 26).

f. **Suresh Chand Gautam v. State of U.P. & Ors.**, (2016) 11 SCC 113 (two-Judge Bench) (See paragraphs 2 and 45).

g. **B.K. Pavitra & Ors. v. Union of India & Ors.**, (2017) 4 SCC 620 (two-Judge Bench) (See paragraphs 17 to 22).

Further, **Nagaraj** (supra) has been approved by larger Benches of this Court in:

a. **General Categories Welfare Federation v. Union of India**, (2012) 7 SCC 40 (three-Judge Bench) (See paragraphs 2 and 3).

b. **Rohtas Bhankar v. Union of India**, (2014) 8 SCC 872 (five-Judge Bench) (See paragraphs 6 and 7).

In fact, the tests laid down in **Nagaraj** (supra) for judging whether a constitutional amendment violates basic structure have been expressly approved by a nine-Judge Bench of this Court in **I.R. Coelho (Dead) by LRs. v. State of Tamil Nadu and Ors.,** (2007) 2 SCC 1 (See paragraphs 61, 105, and 142). The entirety of the decision, far from being clearly erroneous, correctly applies the basic structure doctrine to uphold constitutional amendments on certain conditions which are based upon the equality principle as being part of basic structure. Thus, we may make it clear that quantifiable data shall be collected by the State, on the parameters as stipulated in **Nagaraj** (supra) on the inadequacy of representation, which can be tested by the Courts. We may further add that the data would be relatable to the concerned cadre.

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19. We have already seen that, even without the help of the first part of Article 16(4-A) of the 2012 Amendment Bill, the providing of quantifiable data on backwardness when it comes to Scheduled Castes and Scheduled Tribes, has already been held by us to be contrary to the majority in **Indra Sawhney (1)** (supra). So far as the second part of the substituted Article 16(4-A) contained in the Bill is concerned, we may notice that

the proportionality to the population of Scheduled Castes and Scheduled Tribes is not something that occurs in Article 16(4-A) as enacted, which must be contrasted with Article 330. We may only add that Article 46, which is a provision occurring in the Directive Principles of State Policy, has always made the distinction between the Scheduled Castes and the Scheduled Tribes and other weaker sections of the people. Article 46 reads as follows:

> **"46. Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections.**—The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."

This being the case, it is easy to see the pattern of Article 46 being followed in Article 16(4) and Article 16(4-A). Whereas "backward classes" in Article 16(4) is equivalent to the "weaker sections of the people" in Article 46, and is the overall genus, the species of Scheduled Castes and Scheduled Tribes is separately mentioned in the latter part of Article 46 and Article 16(4-A). This is for the reason, as has been pointed out by us earlier, that the Scheduled Castes and the Scheduled Tribes are the most backward or the weakest of the weaker sections of society, and are, therefore, presumed to be backward. Shri Dwivedi's argument that as a member of a Scheduled Caste or a Scheduled Tribe reaches the higher posts, he/she no longer has the taint of either untouchability or backwardness, as the case may be, and that therefore, the State can judge the absence of backwardness as the posts go higher, is an argument that goes to the validity of Article 16(4-A). If we were to accept this argument, logically, we would have to strike down Article 16(4-A), as the necessity for continuing reservation for a Scheduled Caste and/or Scheduled Tribe member in the higher posts would then disappear. Since the object of Article 16(4-A) and 16(4-B) is to do away with the nine-Judge Bench in **Indra Sawhney (1)** (supra) when it came to reservation in promotions in favour of the Scheduled Castes and Scheduled Tribes, that object must be given effect to, and has been given effect by the judgment in **Nagaraj** (supra). This being the case, we cannot countenance an argument which would indirectly revisit the basis or foundation of the constitutional amendments themselves, in order that one small part of Nagaraj (supra) be upheld, namely, that there be quantifiable data for judging backwardness of the Scheduled Castes and the Scheduled Tribes in promotional posts. We may hasten to add that Shri Dwivedi's argument cannot be confused with the concept of "creamy layer" which, as has been pointed out by us hereinabove, applies to persons within the Scheduled Castes

> or the Scheduled Tribes who no longer require reservation, as opposed to posts beyond the entry stage, which may be occupied by members of the Scheduled Castes or the Scheduled Tribes.
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> 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".

7. Shri Anil Singal, the learned counsel appearing for the applicant, who is a General Category employee, submit that the Constitution Bench of the Hon'ble Apex Court in **Jarnail Singh** (supra), has affirmed **M. Nagaraj** (supra), in its entirety and hence, the respondents cannot apply the rule of reservation in promotions.

8. On the other hand, the learned counsel appearing for the respondents would submit that **Jarnail Singh** (supra) has modified **M. Nagaraj** (supra) and that the State need not collect quantifiable data showing backwardness of the Scheduled Castes and Scheduled Tribes, before providing reservations in promotions to the said categories.

9. However, both the counsel are at *ad idem* that now the issue of rule of reservation in promotions attained finality, in view of the disposal of **Jarnail Singh** (supra) by the Constitution Bench of the Hon'ble Apex Court, and that the respondent authorities are

required to act in terms of the law decided by the Hon'ble Apex Court in **M. Nagaraj** (supra), as affirmed/modified in **Jarnail Singh and Others** (supra).

10. In these circumstances, and in view of the decisions of the Constitution Bench of the Hon'ble Apex Court in **M. Nagaraj** (supra) and **Jarnail Singh and Others** (supra), the O.A. is disposed of, without expressing any specific view on the impugned action of the respondent-authorities, by directing the respondents, after calling for fresh representation from both the applicant as well as the private respondent and also all other affected employees on their action or proposed action, to reconsider the issue of application of rule of reservation in promotions by duly keeping in view the law laid down by the Hon'ble Apex Court in **M. Nagaraj** (supra) and **Jarnail Singh and Others** (supra) and to pass appropriate speaking and reasoned orders, within four months from the date of receipt of a copy of this order. No costs.

(A.K. BISHNOI)
Member (A)

(V. AJAY KUMAR)
Member (J)

/Jyoti /