IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

CWP No. 13218 of 2009 (O&M)

Date of Decision: July 15, 2011

Lachhmi Narain Gupta and others

...Petitioners

Versus

Jarnail Singh and others

...Respondents

CORAM: HON'BLE MR. JUSTICE M.M. KUMAR

HON'BLE MR. JUSTICE A.N. JINDAL

Present:

For the petitioners: Mr. Rajiv Atma Ram, Sr. Advocate, with Mr. Vikas Kuthiala, Advocate.

For the respondent(s): Mr. M.K. Tiwari, Advocate, for respondent No. 1.

Mr. Deepak Sibal, Advocate, for respondent Nos. 2 and 3.

Ms. Renu Bala Sharma, Sr. Panel Counsel, UOI, for respondent No. 5.

Mr. A.S. Grewal, Sr. Panel Counsel, Income Tax Department, for respondent No. 6.

1. To be referred to the Reporters or not? YES

2. Whether the judgment should be reported in the Digest? YES

M.M. KUMAR, J.

1. The instant petition under Article 226 of the Constitution has been filed by the Income Tax Inspectors belonging to the General category, against the orders dated 11.12.2008 (P-6) and 7.5.2009 (P-9) passed by the Chandigarh Bench of the Central Administrative Tribunal (for brevity, 'the Tribunal'), in OA No. 519-

PB-2007 and RA No. 24 of 2009 respectively. The Tribunal has issued directions for consideration of the cases of the Income Tax Inspectors belonging to Scheduled Caste category for promotion to the posts of Income Tax Officer on the basis of their 'own merit' resulting in consumption of General category posts as against the roster point promotion, relaxed qualification promotion and other concessions. The necessary consequence is shrinking of General category seats for the inspectors belonging to General category and more posts becoming available to Schedule Caste category. The Tribunal has issued directions for consideration of their cases with effect from 11.6.1995 when 85th amendment of the Constitution came into operation.

2. Sarvshri Jarnail Singh, Balbir Singh and Som Parkash-respondent Nos. 1 to 3, who belong to the reserved category of Scheduled Caste, and working as Income Tax Inspectors filed O.A. No. 519-PB-2007 before the Tribunal with a prayer for quashing circular/order dated 5.7.2007 (P-1). It was vide circular and order dated 5.7.2007 that an eligibility list of Income Tax Inspectors was circulated, who were to be considered for promotion to the cadre of Income Tax Officer for the relevant year 2007-08, after their clearance by vigilance. The applicant-respondent Nos. 1 to 3 claimed that as a result of the proceedings held by the Departmental Promotion Committees from 1997 to December, 2006, no candidate belonging to Scheduled Caste category was promoted by complying with the rule of reservation. All the Scheduled Caste category candidates who had been promoted were those persons who got promotion on the basis of their own merit-

cum-seniority and not on account of grant of benefit of reservation. Referring to OM No. 36028/17/2001Estt (Res.), dated 11.7.2002 (R-1), the applicant-respondent Nos. 1 to 3 agitated before the Tribunal that they had to be adjusted against unreserved roster points belonging to General category post and then the roster points meant for reserved candidates are required to be filled up from amongst the candidates belonging to reserved categories. In case, this exercise is carried out then applicant-respondent Nos. 1 to 3 were likely to be benefited. Prior to filing of the original application, the applicant-respondent Nos. 1 to 3 sought information regarding proceedings of the DPC for promotion of Income Tax Officers held during the years 1997 to 11.12.2006 as well as copies of the panels. Those were accordingly supplied to them on 11.6.2007 and 25.4.2007 (P-2 and P-3). From the said information the following facts and data is revealed:-

> "Total Strength of ITO working in North West Region 322
>
> Name and Total No. of ITO belonging To SC Category working at present 59*
>
> [*The list does not include 3 SC category officers who were promoted as own Merit candidates.]"

3. It has further been stated by the applicant-respondent Nos. 1 to 3 that as per proceedings of the meeting dated 12.11.2006, the sanctioned strength of ITOs were raised to 329. Against 46 roster points, 62 points were being occupied by candidates belonging to Scheduled Caste category, which also includes 3 SC category officers who were promoted as per their own merit/seniority. In this manner, only 59 SC candidates were

working in the department against reserved points, which was in excess of the prescribed quota for SC category. In para 3(ix) of the OA, the applicant-respondent Nos. 1 to 3 have also furnished the detail of candidates who were selected on the basis of their 'own merit' during the period from July 1997 to October 2000. They claimed that out of 42 SC candidates, 20 SC candidates were promoted to the posts of ITO on the basis of their 'own merit' and without granting any relaxation in respect of qualification etc. because they had cleared the ITO Examination with standard prescribed for General category. The applicant-respondent Nos. 1 to 3 also filed representations dated 7.12.2006 (P-4) and 20.7.2007 (P-5) asserting that the SC category candidates who got their promotion as per their own merit must be held to have consumed the posts belonging to General category and promotion of additional SC candidates as per their quota is required to be ordered.

4. In the written statement filed on behalf of the official respondents the stand taken before the Tribunal was that eligibility list of Income Tax Inspectors was prepared by including those candidates who were eligible in terms of the recruitment rules and who were within the zone of consideration. The list included those officials who were having three years of service and who had qualified the Departmental Examination for Income Tax Officers. It has been asserted that there was already excess representation of Scheduled Caste category candidates as against the prescribed roster points and, hence, there was no need to extend the zone of consideration. The concept of 'Own Merit' was introduced in

promotion vide O.M. No. 36028/17/2001-Estt.(Res.), dated 11.7.2002 (R-1). Another O.M. No. 36028/17/2001-Estt.(Res.), dated 31.1.2005 (R-2) was issued clarifying that the O.M. dated 11.7.2002 would be effective from the date of its issue. Controverting the claim of the applicant-respondent Nos. 1 to 3, it has been submitted that the reservation has been provided to Scheduled Caste category candidates as per the instructions issued by the Department of Personnel and Training (DoPT).

5. In reply to para 3(ix) of the OA it has been highlighted that out of 20 officials named by the applicant-respondent Nos. 1 to 3, as many as 14 officials were promoted in the DPCs held prior to the issuance of the instructions dated 11.7.2002. For becoming eligible for promotion to the post of Income Tax Officer, the official is required to qualify the Departmental Examination for Income Tax Inspector for confirmation in that cadre. With regard to the officers pointed out by the applicant-respondent Nos. 1 to 3, it has been stated that Smt. Ritu Wariah had qualified the Departmental Examination for Income Tax Inspectors with relaxed standards, therefore, she was not considered as ‘own merit’ candidate for promotion to the post of Income Tax Officer. The remaining officers, who were promoted in DPCs held subsequent to the issuance of instructions dated 11.7.2002 on the basis of ‘own merit’, it has been pointed out that they were promoted by extending them the benefit of relaxed standards in qualifying the Departmental Examination as under:-

Sr. No.	Name of the Officers	Subject (Marks) and year in which benefit of Relaxed Standard
1.	Baldev Raj	Book Keeping (55) in the year 1996
2.	Ishar Dass	LT (88) in the year 1996
3.	Ramji Dass	OT (54) in the year 1994
4.	Roshan Lal	OT (55) in the year 1994
5.	Gurcharan Singh	BK (56) in the year 1996

6. It has been submitted that out of 20 candidates who according to the applicant-respondent Nos. 1 to 3 were to be treated as ‘own merit’ candidates, 14 candidates were promoted in the DPCs, which were held prior to the issuance of instructions dated 11.7.2002 and 6 candidates, who were promoted in DPCs held after issuance of instructions, had availed the benefit of relaxed standards. Therefore, those 20 candidates could not be treated as ‘own merit’ candidates.

7. In the rejoinder, the applicant-respondent Nos. 1 to 3 urged before the Tribunal that there was a shortage of 46 posts of ITO belonging to SC category upto the date of DPC held on 23.12.2005 and 49 were short in the category of SC at the time of DPC on 9.8.2007 on the basis of post based roster system. According to them, total 430 candidates were promoted to the post of ITO during the years 1996 to 2007. DPC proceedings were held on 23.4.1996, 11.11.1997, 13.11.2000, 18.6.2001, 15.1.2003, 4.12.2003, 15.7.2004, 28.10.2004, 7.4.2005, 4.10.2005, 23.12.2005, 18.7.2006, 11.12.2006 and 9.8.2007. It has also been submitted that a review DPC was held on 10.2.2003 reviewing DPCs held on 11.11.1997, 13.11.2000 and 18.6.2001. Out of 430 candidates promoted to the posts of ITO, 80 candidates belonging

to Schedule Caste category were promoted as per their own seniority-cum-fitness and only two SC candidates, namely, Shri Hans Raj and Shri Ram Dass Banga, were promoted as ITOs by giving benefits of relaxed standard following the rule of reservation, as per the DPC held on 23.4.1996.

8. It has further been submitted that once the posts earmarked for the reserved categories as per roster are filled up then the reservation is complete. The roster cannot operate any further and it should be stopped. Any post falling vacant, in a cadre thereafter, is to be filled up by promoting a person of that category who have caused the vacancy be it General, Scheduled Caste or Scheduled Tribe. According to the applicant-respondent Nos. 1 to 3 the concept of ‘own merit’ relates back to 10.2.1995 when 5-Judge Bench of Hon’ble the Supreme Court issued comprehensive directions in the case of **R.K. Sabharwal v. State of Punjab, (1995) 2 SCC 745**.

9. The official respondents also filed additional affidavit dated 20.11.2008 and reiterated the position qua vacancy based roster being converted to post based roster as also the factum of issuance of instructions dated 2.7.1997, 11.7.2002 and 31.1.2005.

10. On 11.12.2008, the Tribunal allowed the O.A. filed by the applicant-respondent Nos. 1 to 3 holding that the instructions dated 2.7.1997 were modified by the instructions dated 11.7.2002 (R-1), which are clarificatory in nature and, therefore, would relate back to the date of issuance, namely, 2.7.1997. On that basis, the Tribunal has held that w.e.f. 2.7.1997 all members of the reserved category are required to be promoted whether on reserved roster point or on

their ‘own merit’ which would consume General category vacancies, leaving reserved roster point post for other members of the SC category candidates, who may not make the grade on merit. The Tribunal further held that the stand of the official respondents concerning excess representation of the SC/ST candidates on the basis of post based roster is mis-conceived. The concept of ‘own merit’ is applicable since 1995 when the judgment in **R.K. Sabharwal’s case (supra)** was delivered. Accordingly, the Tribunal has issued mandamus to the official respondents for reconsideration of promotions with further directions that if on verification, it is found that the seniority list and the SC roster register is incorrect and that the representation of the SC category is less than the prescribed quota, then the official respondents would fill up the backlog of SC category according to their seniority on qualifying the departmental examination and further promotions of the persons belonging to the SC category to the posts of Income Tax Officer would be made from the due date with all consequential benefits. However, while doing so, persons likely to be affected would be afforded an opportunity of being heard in the matter.

11. On 21.1.2009, the Chief Commissioner of Income Tax-respondent No. 6 prepared a list of the officials to be considered for promotion in the cadre of ITO and forwarded the same to the concerned Chief Commissioner of Income Tax for securing clearance from Vigilance department in respect of the said officials (P-10).

12. The petitioners, who belong to the General category, were not impleaded as party respondents in the Original Application

before the Tribunal. Aggrieved by the orders dated 11.12.2008, passed by the Tribunal at their back, the petitioners had earlier filed CWP No. 4537 of 2009, which was disposed of by a Division Bench of this Court on 23.3.2009 (P-7) giving liberty to them to file a review application before the Tribunal highlighting their grievances. Their grievance was that they have not been heard and that they were necessary parties before the Tribunal.

13. The petitioners then filed review application bearing R.A. No. 24 of 2009 in O.A. No. 519/PB/2007. The Tribunal dismissed the review application vide its order dated 7.5.2009. The petitioners have also challenged the order dated 7.5.2009 in the instant petition. Their grievance is that instructions dated 11.7.2002 (R-1) fail to satisfy the mandatory pre-conditions before making reservation. It has been emphasised on the basis of Supreme Court judgments that - (a) an exercise is required to be undertaken by the competent authorities of the Union of India to conclude that there are compelling reasons for reservation concerning backwardness of Scheduled Caste category which would warrant grant of promotion to the members of the Scheduled Castes/Scheduled Tribes; and (b) grant of promotion to them would not in any way adversely affect the administrative efficiency and working of the office. Primarily, the plea has been raised that no such survey has been carried out and the instructions dated 11.7.2002 have been issued without any basis, which is against the mandate of law as incorporated by Article 16(4A) and interpreted by a Constitution Bench of Hon'ble the Supreme Court in the case of **M. Nagaraj v. Union of India, (2006) 8 SCC 212**.

14. It is pertinent to mention that after hearing the arguments the judgment was reserved vide order dated 20.7.2010. However, before the judgment could be pronounced, The Director, Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training, Government of India issued an office memorandum dated 10.8.2010 (P-16) on the issue concerning reservation in promotion and treatment of SC/ST candidates promoted on their 'own merit', which reads thus:

> " The undersigned is directed to refer to this Department's O.M. No. 36028/17/2001-Estt (Res.) dated 11th July 2002 which clarified that SC/ST candidates appointed by promotion on their own merit and not owing to reservation or relaxation of qualifications will be adjusted against unreserved points of the reservation roster and not against reserved points. It was subsequently clarified by the Department's O.M. No. 36028/17/2001-Estt.(Res.) dated 31.1.2005 that the above referred O.M. took effect from 11.7.2002 and that the concept of own merit did not apply to the promotions made by non-selection method.
>
> 2. Central Administrative Tribunal Madras Bench in O.A. No. 900/2005 (S. Kalugasalamoorthy V/S Union of India and others) has set aside the O.M. No. 36928/17/2001-Estt. (Res.) dated 31.1.2005 and held that when a person is selected on the basis of his own seniority, the scope of considering and counting him against quota reserved for SCs does not arise. The High

Court of judicature at Madras in the matter of UOI V/S S. Kalugasalamoorthy (WP No. 15926 of 2007) has upheld the decision of the Central Administrative Tribunal.

3. The matter has been examined in the light of the above referred judgments and it has been decided to withdraw O.M. No. 36028/17/2001 Estt (Res.) dated 31.1.2005 referred to above. It is clarified that SC/ST candidates appointed by promotion on their own merit and seniority and not owing to reservation or relaxation of qualifications will be adjusted against unreserved points of reservation roster, irrespective of the fact whether the promotion is made by selection method or non-selection method. These orders will take effect from 2.7.1997 on the dated on which post based reservation was introduced.

4. These instructions may be brought to the notice of all concerned."

15. It is obvious that the said office memorandum has been issued in purported compliance of the order passed by the Madras Bench of the Tribunal, passed in O.A. No. 900/2005, withdrawing the earlier office memorandum dated 31.1.2005. The office memorandum dated 10.8.2010 (P-16) has also clarified that the SC/ST candidates appointed by promotion on their 'own merit and seniority' and not owing to reservation or relaxation of qualifications would be adjusted against unreserved points of roster, irrespective of the fact whether the promotion is made by selection method or non-selection method. The said clarification

has been made effective retrospectively w.e.f. 2.7.1997 when the post based reservation was introduced.

16. In order to bring on record the office memorandum dated 10.8.2010 and to challenge the same either by filing a separate petition or by amending the pending petition a request was made. Accordingly, the Registry was directed to list the matter for re-hearing. Thereafter, the instant petition was amended by the petitioners after due permission of this Court.

17. Mr. Rajiv Atma Ram, learned counsel for the petitioners has argued that the Original Application in the instant case was filed on 9.7.2007 and no order passed beyond the period of 1½ years, as postulated by Section 21 of the Central Administrative Tribunals Act, 1985, could have been challenged. The submission is that the OA is badly hit by the delay and laches. Therefore, it suffers from the statutory bar created by Section 21 of the said Act. Mr. Atma Ram also urged that the original applicant-respondents became eligible for promotion to the post of ITO on 4.12.2004, 13.8.2004 and 24.12.2004 after completing three years minimum service on the post of Inspector and after passing the departmental examination. They could not have challenged any promotion made before acquiring eligibility by them. In support of his submission, learned counsel has placed reliance on the judgments of Hon'ble the Supreme Court rendered in the cases of **Chattar Singh v. State of Rajasthan, AIR 1997 SC 303; Roshni Devi v. State of Haryana, AIR 1998 SC 3268 and Union of India v. N. Y. Apte, AIR 1998 SC 2651**.

18. Learned counsel has also submitted that the order dated 14.9.2007 (R-3) and dated 29.11.2007 (R-4), passed by the Deputy

Commissioner of Income Tax have nowhere been challenged, which has resulted in rendering the OA as infructuous. In that regard, learned counsel has placed reliance on the observations made in para 7 of the judgment of Hon'ble the Supreme Court in the case of **Piare Lal v. Union of India, AIR 1975 SC 650**. He has further submitted that the option to amend the OA, which was available to the Original Applicants, has not been availed either before the Tribunal or before this Court. Therefore, the OA should have been dismissed as having been rendered infructuous.

19. According to the learned counsel the view taken by the Tribunal holding that there was no necessity to challenge office orders dated 14.9.2007 and 29.11.2007 (R-3 and R-4) is erroneous because these orders have taken the same view which was pleaded before the Tribunal in the written statement filed by the official respondents. Mr. Atma Ram contended that even a void order has to be necessarily challenged as has been held by Hon'ble the Supreme Court in the case of **State of Punjab v. Gurdev Singh, JT 1991 (3) SC 465**. In any case, the petitioners, who belongs to General category, were necessary parties before the Tribunal, as for making appointment on the basis of 'Own merit' of the candidate belonging to SC/ST category could have been possible only after replacing the General Category candidate. They would face reversion or would be on the road otherwise. Another limb of the argument is that the Tribunal has adopted absolutely unwarranted approach by saying that the petitioners were to be heard by the authorities while implementing the judgment.

20. Learned counsel has also relied upon the observations of Hon'ble the Supreme Court in the case of **M. Nagaraj (supra)**.

According to the learned counsel the power to make reservation must be preceded by an exercise which is to be undertaken in respect of each cadre of each department to show that there are compelling reasons on account of backwardness to make reservation, inadequacy of representation of such class keeping in mind the overall administrative efficiency in public administration. In that regard he has drawn our attention to the averments made in para 19 of the writ petition and reply to corresponding para 19 of the written statement of respondent Nos. 4 and 5 as well as the private respondents. It has been specifically averred that no exercise was undertaken for making reservation reach to a definite conclusion that there are compelling reasons of backwardness of Scheduled Castes and showing inadequacy of representation. In order to support his submission, learned counsel has placed reliance on paras 103 to 108 and paras 114 to 118 and 122 of the judgment of Hon'ble the Supreme Court in **M. Nagaraj's case (supra)**.

21. Mr. Rajiv Atma Ram has also argued that 'own merit' instructions concerning promotion have been issued for the first time on 11.7.2002 and specifically confined to operate prospectively vide letter dated 31.1.2005 (R-2). Therefore, the Tribunal could not have issued directions for operating these instructions with a retrospective date i.e. from 17.6.1995 when the 85th amendment was brought into effect. He has further submitted that even otherwise a general principle of law has to prevail that executive instructions can never operate retrospectively, as has been held by Hon'ble the Supreme Court in the case of **Sant Ram v. State of Rajasthan, AIR 1967 SC 1910**.

22. Learned counsel then argued that even if the instructions are made applicable, the Tribunal has miserably failed to consider the concept of 'Own Merit Promotion'. In the light of the factual position of the present case, the respondents who were the Original Applicants before the Tribunal, could not have claimed the benefit of the instructions because they have either been given 2-3 promotions on the roster point or have been granted relaxation in qualification like securing of marks etc. In support of his submission learned counsel has placed reliance on two judgments of Hon'ble the Supreme Court rendered in the cases of **Union of India** v. **Satya Prakash, 2006(3) SLR 56 and Jitender Singh** v. **State of U.P., JT 2010 (1) SC 177**. In any case, the instructions itself postulate the aforesaid situation.

23. He has also referred to the affidavit of the Deputy Commissioner of Income Tax in the form of written statement. According to sub-para IX and X of para 4, the details of various officers have been given with further clarification whether they have availed promotion on roster point by relaxed standard. The aforesaid position was not disputed by the respondents in their rejoinder dated 6.3.2008 filed before the Tribunal (P-3). The corresponding para of the rejoinder merely reads that the contents of the written statement filed by the department are denied being incorrect and those of the petition were reiterated. Even in the preliminary submissions, there is no rebuttal to the aforesaid averments made by the deponent in the written statement. In Entry No. 720 of 2008, merely roster register has been placed on record, which constituted the basis for the observation made by the Tribunal that the members belonging to reserved category have not

been adequately represented. The aforesaid is the legislative function and could not have been undertaken by the Tribunal. Learned counsel has also relied upon the following judgments on 'Own Merit Promotion':

Uday Pratap Singh v. State of Bihar, JT 1994 (6) SC 344;

Union of India v. Satya Parkash, JT 2006 (3) SLR 56;

Jitender Singh v. State of U.P., JT 2010 (1) SC 177;

Union of India v. Ramesh Ram, JT 2010 (5) SC 212;

Union of India v. Bharat Bhushan, 2008 (7) AC (Delhi) 420

24. Mr. Atma Ram has raised another issue, namely, that the appointment/promotions made long years ago cannot now be unsettled. He has pointed out that the petitioners were promoted fourteen years ago on the post of Income Tax Officers i.e. in the year 1996 and, therefore, the settled promotions on equitable consideration should not be reopened. In support of the submission, learned counsel has placed reliance on a Full Bench judgment of this Court rendered in the case of **Krishna Gopal v. State of Haryana, 2010 (1) SCT 538** and a judgment of Hon'ble the Supreme Court rendered in the case of **Roshni Devi v. State of Haryana, (1998) 8 SCC 59.**

25. Learned counsel has then argued that office Memorandum dated 10.8.2010 (P-16) purported to have been issued by the Government of India, Ministry of Personnel, Public Grievances and Pension, in fact, has been issued by the Director as is evident from the perusal of the aforesaid document. According to the learned counsel the business of the Government is required to be transacted in the manner postulated by the statutory rules framed under Article 77(3) of the Constitution, which are known as

‘Government of India (Transaction of Business) Rules, 1961 (for brevity, ‘the Transaction of Business Rules’). The aforesaid rules have also been placed on record (P-17). It has been emphasised that according to Rule 3 of the Transaction of Business Rules, disposal of business by Ministries has to be in consultation with other departments and submission of cases to the Prime Minister, the Cabinet and its Committees, and the President. All business allotted to a department under the Government of India (Allocation of Business) Rules, 1961 (for brevity, ‘the Allocation of Business Rules’) must be disposed of by or under the general of special directions of the Minister-in-charge. The argument is that as per Rule 4 of the Transaction of Business Rules inter-departmental consultations would be necessary where more than one department is involved. Learned counsel has drawn our attention to para 35(i) and (ii) where specific averments have been made that office memorandum dated 10.8.2010 has not been issued in accordance with and in furtherance of the Transaction of Business Rules. The written statement filed by respondent Nos. 5 and 6 (by the Union of India and Chief Commissioner of Income-tax) to the aforesaid averments would show that the assertion concerning incompetence of the Director to issue such an order has not been controverted. Likewise, the written statement filed by respondent Nos. 2 and 3 has also been read out to us showing that categorical averments made in para 35 by the petitioners have not been controverted, insofar as, the competence of the Director to issue such memorandum is concerned. Referring to the stand taken by respondent Nos. 2 and 3 on the basis of the Allocation of Business Rules, learned counsel has pointed out that the said Rules (R-2/2)

only talks of allocation of business but the manner in which the business is to be transacted is clarified by the Transaction of Business Rules (P-17). The submission in nutshell is that the executive power by virtue of Article 73 of the Constitution vests only in the Government and not in the Director who is merely an official of the Government. Accordingly, it has been submitted that there is neither any express delegation under Article 77 of the Constitution to any of the officers of the Government much less a Director.

26. The other submission made by Mr. Atma Ram is that in any case the office memorandum dated 10.8.2010, only at best is to be regarded as an executive order and it can operate prospectively and it cannot have any retrospective operation. According to the learned counsel executives have not been clothed with the power to issue executive orders to have retrospective effect. In that regard reliance has been placed on a judgment of Hon'ble the Supreme Court rendered in the case of **Uday Pratap Singh v. State of Bihar, JT 1994 (6) SC 344**.

27. The principal stand taken by respondent Nos. 5 and 6, namely, Union of India and the Chief Commissioner of Income Tax respectively is that instructions dated 11.7.2002 are prospective and it first time recognises the principle of 'own merit promotion'. Therefore, it has been submitted that these instructions cannot be regarded as clarificatory of earlier instructions issued on 2.7.1997. Accordingly, it has been pleaded that the Tribunal cannot give retrospective effect to the instructions issued on 11.7.1996 or from a date the amendment was made in the Constitution. In order to clarify the whole position, instructions dated 31.3.2005 have also

been issued which categorically provide that instructions dated 11.7.2002 are clarificatory in nature. It has, however, been admitted in the reply to para 3 of the writ petition that the members of the General category were bound to be affected on account of cancellation/quashing of their promotion order and that no member of the General category who is likely to be affected had been impleaded as party respondent before the Tribunal by the Original Applicant-respondent Nos. 1 to 3. It is only the official respondent Nos. 5 and 6 who were made parties.

28. Mr. A.S. Grewal and Ms. Renu Bala Sharma, adopts the arguments which have been submitted in the reply of respondent Nos. 5 and 6. Ms. Renu Bala Sharma has pointed out that in para (iii) of the letter dated 15.9.2010 (R-1) it has been stated that before issuing the office memorandum, the approval of the Secretary (Personnel) was obtained and, therefore, the argument that the instructions have been issued by the Director would not stand the scrutiny of law and the office memorandum dated 10.8.2010 has been issued by an authority who is competent to issue the same.

29. The private respondent No. 1 also filed a reply and separate written statement has been filed by private respondent Nos. 2 and 3. Mr. M.K. Tiwari, learned counsel for respondent No. 1 has argued that the instructions dated 10.8.2010 cannot be challenged before this Court as per the law laid down by Hon'ble the Supreme Court in the case of **Raj Kumar and others v. Hem Raj Singh Chauhan, (2010) 4 SCC 554**, and the only remedy is to file an original application before the Tribunal. It has also been submitted by Mr. Tiwari that the writ petitioners belonging to General category

has no locus standi to file a review application against the order dated 11.12.2008 passed by the Tribunal because they were not party to the litigation and they were not even affected persons as per the law laid down by Hon'ble the Supreme court in paras 14 and 18 of the judgment rendered in the case of **V.P. Shrivastava v. State of M.P., (1996) 7 SCC 759**. Mr. Tiwari has argued that the petitioners are not necessary party as an effective order can always be passed in their absence particularly when their interest has been take care of by the Tribunal requiring the official respondents to issue notice before touching their rights. Mr. Tiwari has submitted that the petitioners are junior to the private respondents and the present writ petition is nothing but it is an abuse of the process of the Court. The writ petition has been filed to delay the claim of the SC/ST candidates who have been denied their due claim of promotion to the post of Income-tax Officer for the last 16 years. Supporting the order of the Tribunal, Mr. Tiwari has submitted that as per the rules all the posts of Income Tax Officer are required to be filled up as backlog of excess candidates has been continuing. He has maintained that respondent Nos. 1, 2 and 3 are the Income Tax Inspectors and belong to SC category. They are eligible for promotion to the post of Income Tax Officer Grade-II on their own merit without consuming the vacancies of SC/ST category.

30. Similar stand has been taken in the similar reply filed by respondent Nos. 2 and 3. However, Mr. Deepak Sibal has argued on the basis the rules concerning Allocation of Business (R-2/2) that memorandum dated 10.8.2010 has been issued by an authority which is fully competent because the approval of the Secretary (Personnel) was obtained.

31. Having heard learned counsel for the parties and perusal of the paper book with their assistance, particularly the judgment of the Tribunal, we are of the view that the most fundamental issue raised by the learned counsel for the petitioners needs to be answered. It is well settled that all laws must take guidance from the Constitution. The present case present decades old controversy whether the provision for reservation in promotion could be made by the State/Union of India without imposing any conditions. The whole controversy was settled by a 9-Judge Constitution Bench of Hon'ble the Supreme Court in **Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217**. In that case the Constitution Bench interpreted Article 16(4) of the Constitution relating to the State's power for making provision for reservation in appointments/posts in favour of any Backward Class of citizen, which in the opinion of the State was not adequately represented in services of the State. Another principal question decided by the Constitution Bench in **Indra Sawhney's case (supra)** was whether such power is extended to making a provision on a promotional post. It was held that Article 16(4) did not permit provision for reservation in the matter of promotion. It was further held that such a rule was to be given effect only prospectively and would not affect the promotions already made whether on regular basis or any other basis. A direction was issued by the Constitution Bench that wherever reservation is provided in the matter of promotion, it was to continue for a period of five years from the date of the judgment and time was given to all the concerned authorities to amend their rules within the aforesaid period. However, by virtue of the Constitution (Seventy-seventh Amendment) Act, 1995, Article

16(4A) was added stipulating that the State is not prevented from making any provision for reservation in matters of promotion in any class or classes of posts in the services under the State in favour of the SC/ST which in their opinion are not adequately represented in the services. The aforesaid amendment came up on 17.6.1995.

32. Another question which was debated before Hon'ble the Supreme Court in the cases of **Union of India v. Virpal Singh Chauhan, (1995) 6) SCC 684** and **Ajit Singh Januja v. State of Punjab, (1996) 2 SCC 715**, was as to whether the benefit of accelerated promotion through reservation on roster point would give such promotees seniority over his senior General category promotees albeit promoted subsequently. In other words whether roster point promotee was entitled to retain his date of promotion as sacrosanct. The aforesaid principle became known as 'catch up principle'. In both the judgments it was held that the benefit of accelerated promotion through reservation or roster point would not result into conferring seniority over and above General category senior promotees who were promoted subsequently. A discordant note was struck when a 3-Judge Bench took a contrary view in the case of **Jagdish Lal v. State of Haryana, (1997) 6 SCC 538**. In the aforesaid judgment Hon'ble the Supreme Court placed reliance on the recruitment rules which provided for fixation of seniority according to the length of continuous service on a post in the service. The aforesaid view was overruled by the Constitution Bench in the cases of **Ajit Singh (II) v. State of Punjab, (1999) 7 SCC 209** and **Ram Prasad v. D.K. Vijay, (1999) 7 SCC 251**. The view taken by Hon'ble the Supreme Court in its earlier judgments rendered in the cases of **Virpal Singh Chauhan (supra)** and **Ajit Singh**

Januja (supra) was affirmed.

33. The controversy was reopened when the Parliament amended the Constitution on 4.1.2002 by brining in the Constitution (Eighty-fifth Amendment) Act, 2001, so as to restore the benefit of consequential seniority to the reserved categories w.e.f. 17.6.1995. The 77th and 85th amendments were challenged before Hon'ble the Supreme Court and the matter was decided in the case of **M. Nagaraj (supra)**. The Constitution Bench upheld the 77th, 81st, 82nd and 85th Amendment Acts and their retrospective effect. However, it proceeded to impose certain conditions. In the present case this Court is concerned with the conditions which are discernible from the perusal of following extracts of the judgment rendered in **M. Nagaraj's case (supra)**:

> " The Constitution Bench proceeded to determine the issues related to the:
>
> A. (i) validity, (ii) interpretation, and (iii) implementation of the 77th, 81st, 82nd and 85th Constitution Amendment Acts; and,
>
> B. action taken in pursuance thereof which sought to reverse decisions of the Supreme Court in matters relating to promotion in public employment and their application with retrospective effect.
>
> The key issue which arose for determination was whether by virtue of the impugned constitutional amendments, the power of Parliament was so enlarged so as to obliterate any or all of the constitutional limitations and requirements. Answering the reference

the Supreme Court held that in the matter of application of the principle of basic structure, twin tests have to be satisfied, namely, the "width test" and the test of "identity". The test for judging the width of the power and the test for adjudicating the exercise of power by the State concerned are two different tests which warrant two different judicial approaches.

Firstly, it is the width of the power under the impugned amendments introducing and amending Articles 16(4-A) and 16(4-B) that has to be tested. Therefore the "width test" has to be applied. The boundaries of the "width" of the power, namely, (1) the ceiling limit of 50% (quantitative limitation), (2) the principle of creamy layer (qualitative exclusion), (3) the compelling reasons, namely, backwardness, inadequacy of representation, and (4) the overall administrative efficiency are not obliterated by the impugned amendments. The constitution limitation under Article 335 is relaxed and not obliterated. These impugned amendments are confined only to SCs and STs and the sub-classification between OBCs on one hand and SCs and STs on the other hand as held in *Indra Sawhney*, 1992 Supp (3) SCC 217, and the concept of post-based roster with inbuilt concept of replacement as held in R.K. Sabharwal, (1995) 2 SCC 745, have also not been obliterated. (emphasis added)

Secondly, applying the test of "identity" there is no alteration in the existing structure of the equality

code (Articles 14, 15 and 16) in the Constitution by the impugned amendments. Equity, justice and efficiency are the limitations on the mode of the exercise of power by the State. None of these limitations have been removed by the impugned amendments. None of the axioms like secularism, federalism, etc. which are underlying principles have been violated by the impugned constitution amendments. There is no violation of the basic structure of the Constitution by any of the impugned amendments. The impugned constitutional amendments by which Articles 16(4-A) and 16(4-B) have been inserted flow from Article 16(4). They do not alter the structure of Article 16(4). Articles 16(4-A) and 16(4-B) form a composite part of the scheme envisaged and fall in the pattern of Article 16(4), and as long as the parameters mentioned in those articles are complied with by the States, the provision of reservation cannot be faulted. They are curative by nature. Article 16(4) is enacted as a remedy for the past historical discriminations against a social class. Articles 16(4-A) and 16(4-B) are both inspired by observations of the Supreme Court in Indra Sawhney, 1992 Supp (3) SCC 217 and R.K. Sabharwal, (1995) 2 SCC 745. They have nexus with Articles 17 and 46 of the Constitution. Articles 16(4-A) and 16(4-B) are classifications within the principle of equality under Article 16(4). Therefore, the classification envisaged by Articles 16(4-B) is upheld.

Thirdly, every discretionary power is not

necessarily discriminatory. Equality is not violated by mere conferment of discretionary power. It is violated by arbitrary exercise by those on whom it is conferred. This is the theory of "guided power". This theory is based on the assumption that in the event of arbitrary exercise by those on whom the power is conferred, the same would be corrected by the courts. This is the basic principle behind the enabling provisions which are incorporated in Articles 16(4-A) and 16(4-B). These enabling provisions are permissive in nature. They leave it to the States to provide for reservation. If the appropriate Government enacts a law providing for reservation without keeping in mind the parameters in Article 16(4) and Article 335 then the Supreme Court will certainly set aside and strike down such legislation. The field of exercise of the amending power is retained by the impugned amendments, as the impugned amendments have introduced merely enabling provisions because merit, efficiency, backwardness and inadequacy cannot be identified and measured in a vacuum. Articles 16(4-A) and 16(4-B) are enacted to balance equality with positive discrimination. Be it reservation or evaluation, excessiveness in either would result in violation of the constitutional mandate. This exercise, however, will depend on facts of each case. The constitutional law is the law of evolving concepts. Some of them are generic others have to be identified and valued. The enabling provisions of Articles 16(4-A) and 16(4-B) deal with the

concept, which has to be identified and valued as in the case of access vis-a-vis efficiency which depends on the fact situation only and not abstract principle of equality in Article 14 as spelt out in detail in articles 15 and 16. Equality before the law, guaranteed by the first part of Article 14, is a negative concept while the second part is a positive concept which is enough to validate equalizing measures depending upon the fact situation. (emphasis added)

The impugned provisions are enabling provisions. The State is not bound to make reservation for SCs/STs in matters of promotions. However, if they wish to exercise their discretion and make reservations in promotions, the States have to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment, keeping in mind maintenance of efficiency, as indicated by Article 335. The concepts of efficiency, backwardness, inadequacy of representation are required to be identified and measured. That exercise depends on availability of data. That exercise depends on numerous factors. It is for this reason that enabling provisions are required to be made because each competing claim seeks to achieve certain goals. How best one should optimize these conflicting claims can only be done by the administration in the context of prevailing local conditions in public employment. If the State concerned fails to identify and measure

> backwardness, inadequacy and overall administrative efficiency then in that event the provision for reservation would be invalid. Furthermore, 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 exclusion requirement or extend the reservation indefinitely. Ultimately the present controversy is regarding the exercise of the power by the State Government, as to whether the State concerned has identified and valued the circumstances justifying it to make reservation. When the State fails to identify and implement the controlling factors then excessiveness comes in, and this has to be decided on the facts of each case. In each case the Court has got to be satisfied that the State has exercised its discretion in making reservations in promotions for SCs and STs and for which the State concerned will have to place before the Court the requisite quantifiable data in each case and satisfy the Court that such reservations became necessary on account of inadequacy of representation of SCs/STs in a particular class or classes of posts without affecting general efficiency of service as mandated under Article 335 of the Constitution. (emphasis added)

34. Subject to the above limitations, 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, have been upheld in **M. Nagaraj's case (supra)**. It has also been observed that the compelling reasons, namely, backwardness, inadequacy of representation and the overall administrative efficiency are all constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse. Article 16(4) enables a State to provide for reservation in cases where it is satisfied on basis of quantifiable data that there exists backwardness of a class and inadequacy of representation in employment. Backwardness has to be based on objective factors whereas inadequacy has to factually exist. This is where judicial review comes in. However, whether reservation in a given case is desirable or not, as a policy, is not for the Court to decide as long as the parameters mentioned in Articles 16(4) are maintained.

35. On the question of necessity of quantifiable data it has been held that reservation is necessary for transcending caste and not for perpetuating it. Reservations has to be used in a limited sense otherwise it will perpetuate casteism in the country. The extent of reservation depends on facts of each case and in this regard the State concerned would have to show in each case the existence of backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation. If in a given case Court finds excessive reservation under the State enactment then such an enactment would be liable to be struck down. The need to balance the context specific independent variable requirements of equity, justice, and merit/efficiency on the basis of quantifiable date in each case, the

conflicting claim of individual rights under Article 16(1) and the preferential treatment given to a Backward Class has to be balanced. Therefore, in each case a contextual case has to be made out depending on different circumstances which may exist Statewise and the problem has to be examined on the facts of each case. Wheat needs to be found is a stable equilibrium between justice to the backwards, equity for the forwards and efficiency for the entire system.

36. In paras72, 73, 79, 81 and 102 of the judgment in **M. Nagaraj's case (supra)**, their Lordships' have dealt with the 'catch-up' rule, which had been explained in detail in para 26 of the judgment in **Virpal Singh Chauhan's case (supra)**. As per the 'catch-up' rule a reserved category candidate promoted on the basis of reservation earlier than his senior general category candidates in the feeder grade, shall necessarily be junior in the promoted category to such general category candidates. The 'catch-up' rule is not imlicit in Articles 16(1) to (4). The concept of the 'catch-up' rule and 'consequential seniority' are not constitutional requirements or limitations. They are judicially evolved concepts to control the extent of reservation, derived from service jurisprudence. They are not constitutional principles so as to be beyond the amending power of parliament. Principles of service jurisprudence are different from constitutional limitations. They are not axioms like, secularism, federalism, etc. Nor can these concepts be elevated to the status of an axiom like secularism, constitutional sovereignty, etc. it cannot be said that by insertion of the concept of 'consequential seniority' the structure of Article 16(1) stands destroyed or abrogated. Obliteration of these concepts or insertion

of these concepts do not change the equality code indicated by Articles 14, 15 and 16 of the Constitution. hence, the same cannot bind the amending power of Parliament and is not beyond the amending power of Parliament. However, whether weightage of earlier accelerated promotion with consequential seniority should be given or not are matters which would fall within the discretion of the appropriate Government, keeping in mind the backwardness, inadequacy and representation in public employment and overall efficiency of services.

37. The matter has been again considered by their Lordships' of Hon'ble the Supreme Court in the case of **Suraj Bhan Meena v. State of Rajasthan, (2011) 1 SCC 467**, wherein the aforesaid principles have been reiterated. Placing the whole history, Hon'ble the Supreme Court has held that the principles laid down in **M. Nagaraj's case (supra)** are binding. It has been found that the concepts of 'catch-up' rule and 'consequential seniority' are judicially evolved concepts and were not to be elevated to the status of a constitutional principle so as to place them beyond the amending power of the Parliament, however, the requirement of Articles 16(4A) and 16(4B) would have to be maintained and the tests indicated therein would have to be satisfied, which could only be achieved after an inquiry as to identity. In cases where no exercise was undertaken in terms of Article 16(4A) to acquire quantifiable data regarding the inadequacy of representation of SC/ST communities in public services, the Courts have rightly quashed the notifications.

38. When the principles laid down in the case of **M. Nagaraj (supra)** and **Suraj Bhan Meena (supra)** are applied to the notifications impugned in the present proceedings, namely, 11.7.2002, 31.1.2005 (R-1 and R-2) and further notification dated 21.1.2009 and 10.8.2010, it becomes clear that no survey has been undertaken to find out inadequacy of representation in respect of members of the SC/ST in the services. The aforesaid fact has been candidly admitted in the written statement filed by respondent Nos. 5 and 6. The aforesaid fact has also been conceded by the respondent-Union of India in the communication dated 15.9.2010. In para (iv) of the aforesaid communication it has been stated that no exercise was carried out to assess the inadequacy of representation of SC/STs in the services under the Government of India before issue of instructions dated 31.1.2005. The aforementioned communication has been placed on record along with CM No. 14865 of 2010. In the absence of any survey with regard to inadequacy as also concerning the overall requirement of efficiency of the administration where reservation is to be made alongwith backwardness of the class for whom the reservation is required, it is not possible to sustain these notifications. Accordingly, it has to be held that these notifications suffers from violation of the provisions of Articles 16(4A), 16(4B) read with Article 335 of the Constitution as interpreted by the Constitution Bench in **M. Nagaraj's case (supra)** as well as in **Suraj Bhan Meena's case (supra)**.

39. The net result is that no reservation in promotion could be made in pursuance to office memorandum dated 2.7.1997. We

are not dealing with many other contentions raised by the learned counsel for the petitioners for the reason that the core issue going to the roots of the matter has been determined in their favour and such a necessity is obviated.

40. As a sequel to the above discussion, the judgment of the Tribunal is set aside. The instructions dated 31.1.2005 (R-2) stands withdrawn on 10.8.2010 (P-10). Therefore, no order is required to be passed in respect of those instructions dealing with the subject of reservation in promotion and the treatment of SC/ST candidates promoted on their own merit. Likewise, the instructions dated 10.8.2010 (P-16) are hereby quashed because they are in direct conflict with the view taken by the Constitution Bench in **M. Nagaraj's case (supra)** and **Suraj Bhan Meena's case (supra)**. It is further directed that the seniority and promotion of the Income Tax Inspectors shall be made without any element of reservation in promotion.

41. The writ petition stands disposed of in the above terms.

(M.M. KUMAR)
JUDGE

(A.N. JINDAL)
JUDGE

July 15, 2011
Pkapoor