THE HIGH COURT OF TRIPURA
A G A R T A L A

WP(C) 189 OF 2011
&
WP(C) 109 OF 2011
&
WP(C) 124 OF 2012

IN WP(C) NO. 189 OF 2011:

Petitioners :

1. Shri Jayanta Chakraborty,
   S/O. Joydev Chakraborty,
   A.K. Road, Ramnagar, Agartala.

2. Shri Bhanupada Chakraborty,
   S/O. Lt. Ram Ch. Chakraborty,
   Resident of Vill. Netajinagar,
   PS and PO-Teliamura, Tripura.

3. Smt. Sudeshna Bhattacharjee,
   D/O. Sri Satyabrata Bhattacharyya,
   Ramnagar Rd. no-10, Agartala.

4. Sri Kamalendu Bikash Das,
   S/O. Lt. Anil Bikash Das, of
   Pyaribabur Bagan, P.O.-Agartala,
   P.S.-West Agartala, District-West Tripura,
   PIN-799001.

– **Versus –**

Respondents :

1. The State of Tripura,
   (Represented by the
   Chief Secretary to the
   Govt. of Tripura), Agartala.

2. The Principal Secretary to the
   Govt. of Tripura, GA (P&T) Department,
   Agartala.

3(A). The Secretary to the
   Govt. of Tripura, SC, OBC & Minority
   Welfare Department,
   New Capital Complex,
   Agartala-799006.

3(B). The Commissioner and Secretary to the
   Govt. of Tripura, Tribal Welfare Department,
   New Capital Complex,
   Agartala-799006.

4. Shri Dilip Roy, (SC), TPS.
5. Shri Nagendra Debbarma (ST), TPS.
6. Shri Bijoy Debbarma (ST), TPS.
7. Shri Lalhruaia Darlong (ST), TPS.
8. Shri Dilip Debbarma (ST), TPS.
9. Shri Timir Das (SC), TPS.
10. Shri Hmangai sunga Darlong (ST), TPS.
11. Shri Manik Das (SC), TPS.

    All respondents from 4-11, C/O. Head of the Police Department, Govt. of Tripura, Agartala, Tripura, Pin:-799001.

Proforma Respondent :

12. The Tripura Public Service Comission,
    Represented by its Secretary,
    Akhaura Road, Agartala,
    PIN-799001.

IN WP(C) NO. 109 OF 2011:

Petitioners :

1. Sri Pankaj Chakraborty,
   Son of Sri Prasanta Chakraborty,
   Now posted as Sub-Divisional Magistrate,
   Sonamura, West Tripura.

2. Smti. Aditi Majumder,
   Wife of Sri Indraneel Bhowmik,
   Now posted as Sub-Divisional Magistrate,
   Kailashahar, North Tripura.

3. Sri Nripendra Chandra Sharma,
   Son of Late Bipin Sharma,
   Now posted as Sub-Divisional Magistrate,
   Khowai, West Tripura.

4. Md. Moslem Uddin Ahmed,
   Son of Late Charu Miah,
   Now posted as Sub-Divisional Magistrate,
   Sadar, West Tripura.

– **Versus –**

Respondents :

1. The State of Tripura,
   Represented by the Principal Secretary to the Government of Tripura,
   General Administration (Personnel & Training)

Department, Secretariat Complex,
P.O.-Kunjaban, Agartala-799006,
West Tripura.

2. The Principal Secretary to the
Government of Tripura,
General Administration (Personnel & Training)
Department, Secretariat Complex,
P.O.-Kunjaban, Agartala-799006,
West Tripura.

3. Tripura Public Service Commission represented by the
Secretary at Tripura Public Service Commission
Building, Akhaura Road, P.O. Agartala-799001,
West Tripura.

4. Sri Bimal Reang,
S/O. Late Khachandra Reang of
Village-Kalma, P.O.-Muhuripur,
P.S.-Baikhora, Dist.-South Tripura.

5. Sri Ratan Biswas,
S/O. Sri Premananda Biswas of
Village-Bairagipara, P.O.-Ishanpur,
P.S.- Sidhai, Dist.-West Tripura.

6. Sri Usa Jen Mog,
S/O. Sri Mongsajai Mog,
Bhagaban Thakur Chowmuhani,
North Banamalipur, Agartala,
P.O.-Agartala, P.S.-East Agartala,
Dist.-West Tripura.

IN WP(C) NO. 124 OF 2012:

Petitioners :

1. General Officers & Employees Welfare Society,
A Society, registered under the
Societies Registration Act, 1860, having office at
Old Kalibari Lane, Krishnanagar, P.O.-Agartala,
P.S.-West Agartala, Sub-Division-Agartala,
District-West Tripura, represented by its
Secretary, having his office thereat.

2. Sri Subrata Chakraborty,
Son of Sri Heramba Chakraborty, resident of
Jogendranagar, P.O.-Jogendranagar,
P.S.-East Agartala, District-West Tripura,
Holding the post of Superintendent of
Police (Traffic), TPS Grade-II.

3. Smt. Samita Bhattacharjee,
Wife of Dr. Ramendu Kumar Bhattacharjee,
Resident of Stadium Link Road,
Milanchakra, P.O.-Arundhuti Nagar,

P.S.-West Agartala, District-West Tripura,
Holding the post of Head Clerk, and posted in the
Department of Welfare for Scheduled Tribes,
Government of Tripura.

– **Versus –**

Respondents :

1. The State of Tripura,
   Represented by the Chief Secretary,
   Government of Tripura, in the
   General Administration (Personnel & Training)
   Department, having his office at
   New Secretariat Complex, Gurkhabasti,
   P.O.-Kunjaban, P.S.-East Agartala,
   District-West Tripura.
2. The Secretary,
   Department of Welfare of Scheduled Caste,
   Government of Tripura, having his office at
   New Secretariat Complex, Gurkhabasti,
   P.O.-Kunjaban, P.S.-East Agartala,
   District-West Tripura.
3. The Secretary,
   Department of Welfare of Scheduled Tribes,
   Government of Tripura, having his office at
   New Secretariat Complex, Gurkhabasti,
   P.O.-Kunjaban, P.S.-East Agartala,
   District-West Tripura.
4. The Secretary,
   Department of General Administration
   (Personnel & Training),
   Government of Tripura, having his office at
   New Secretariat Complex, Gurkhabasti,
   P.O.-Kunjaban, P.S.-East Agartala,
   District-West Tripura.
5. The Director,
   Department of Welfare of Scheduled Caste,
   Government of Tripura, having his office at
   New Secretariat Complex, Gurkhabasti,
   P.O.-Kunjaban, P.S.-East Agartala,
   District-West Tripura.
6. The Director,
   Department of Welfare of Scheduled Tribes,
   Government of Tripura, having his office at
   New Secretariat Complex, Gurkhabasti,
   P.O.-Kunjaban, P.S.-East Agartala,
   District-West Tripura.
7. The Tripura Tribal Officers' Welfare Forum,
   A society registered under the Societies

Registration Act, 1860, having its office at
Old Kalibari Lane, Krishnanagar, Agartala,
P.O.-Agartala, P.S.-West Agartala,
District-West Tripura, represented by its
General Secretary Sri Jogendra Debbarma.

8. All Tripura Scheduled Caste Officers'
Welfare Society, a society registered under the
Societies Registration Act, 1860, having its
Office at Ambedkar Bhawan, Melarmath,
P.O.-Agartala, P.S.-West Agartala,
District-West Tripura, represented by its
General Secretary Sri Bimal Das.

9. Sri Uttam Mandal,
S/O. Late Harendra Ch. Mandal,
Ramnagar Road No.4, Agartala,
P.O.-Agartala, P.S.-West Agartala,
District-West Tripura.

10. Sri Nabakumar Debbarma,
S/O. Bidya Kumar Debbarma,
Of village Kairai Para,
P.O.-Mandai, P.S.-Mandai,
District-West Tripura.

BEFORE
HON'BLE THE CHIEF JUSTICE MR. DEEPAK GUPTA
HON'BLE MR. JUSTICE U.B. SAHA
HON'BLE MR. JUSTICE S.C. DAS

For the petitioners (in all the petitions) : Ms. Kiran Suri, Sr. Advocate,
Mr. S. Deb, Sr. Advocate,
Mr. K.N. Bhattacharji,
Sr. Advocate,
Mr. B.B. Das, Advocate,
Mr. A. Bhowmik, Advocate,
Mr. Kohinoor N. Bhattacharji,
Advocate,
Mr. S. Dutta, Advocate,
Ms. Y. Taneja Bhattacharji,
Advocate.

For the respondents (in all the petitions) : Mr. B.C. Das,
Advocate General,
Mr. P.S. Patwalia,
Sr. Advocate,
Mr. A.K. Bhowmik,
Sr. Advocate,
Mr. S.M. Chakraborty,
Sr. Advocate,
Mr. Rajat Singh, Advocate,
Mr. T.D. Majumder, G.A.,
Mr. Rituraj Biswas, Advocate,

Ms. A.S. Lodh, Addl. G.A.,
Mr. S.C. Das, Advocate,
Mr. P. Dutta, Advocate,
Ms. R. Guha, Advocate,
Mr. R. Dutta, Advocate,
Mr. S. Bhattacharji, Advocate,
Ms. B. Chakraborty, Advocate.

Dates of hearing : 19.11.2014, 20.11.2014 & 21.11.2014.

Date of judgment : 09.04.2015.

Whether fit for reporting : **YES**.

JUDGMENT & ORDER

(Deepak Gupta, CJ)

This full Bench has been constituted to answer certain questions which we shall refer to hereinafter. The petitioners who belong to the general category claim that they have been deprived of the right to equality as the State has granted promotions to the reserved category candidates in total violation of the law laid down by the Apex Court in ***M. Nagaraj and others vs. Union of India and others, [(2006) 8 SCC 212]***.

2. The case of the petitioners is that promotions have been granted by the State to the persons belonging to the Scheduled Caste (SC) and Scheduled Tribe (ST) categories without taking into consideration the existence of the three essential compelling circumstances namely (i) backwardness of the class; (ii) inadequacy of representation in service; and (iii) overall administrative efficiency before making provisions for reservation. It is urged that the Act and rules framed by the State are unconstitutional and illegal as they violate the law laid down by the

Apex Court. It is also submitted that the State without collecting or considering the relevant and requisite quantifiable data, cadre-wise as required by law has granted reservation in promotion to the reserved categories. The petitioners contend that without assessing the backwardness or inadequacy of reservation promotions have been made much in excess of the cap of 50% ordained by law.

3. The contest is between the individual rights of people claiming that they are entitled to promotion on the basis of merit and those sections of society which have been deprived of their rights of equality for ages and who claim that it is now their time to get reservation at every level and that there can be no limitation on this power of reservation granted by the Constitution.

4. On the one hand, we have to balance the right of equality of the individual petitioners and on the other hand, we have to balance the preferential treatment which is available to those belonging to the reserved categories so that there is a level playing field in the matter of public employment. We have to ensure that the individuals belong to the reserved categories are not denied the benefits available to them under law but at the same time, there is no reverse discrimination against the individuals belonging to the general category.

The Constitutional History:

5. Before enumerating the questions referred to the larger Bench, it would be pertinent to give a brief background of the Constitutional history of reservation in promotion. We may make it

clear that this entire discussion is in respect of reservation in promotion only.

6. Article 16(4) of the Constitution reads as follows:-

> *"**16(4)**. Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State."*

7. The Apex Court in the celebrated case of ***Indra Sawhney & others v. Union of India & others [1992 Supp (3) SCC 217]*** held that reservation in promotion is invidious and not permissible. In paras-819 to 831 of the report, the Apex Court dealt with the question whether Clause (4) of Article 16 permits reservation in matter of promotions. The Apex Court summarized its views thus:-

> *"**859(7)**. Article 16(4) does not permit provision for reservations in the matter of promotion. This rule shall, however, have only prospective operation and shall not affect the promotions already made, whether made on regular basis or on any other basis. We direct that our decision on this question shall operate only prospectively and shall not affect promotions already made, whether on temporary, officiating or regular/permanent basis. It is further directed that wherever reservations are already provided in the matter of promotion—be it Central Services or State Services, or for that matter services under any Corporation, authority or body falling under the definition of 'State' in Article 12—such reservations may continue in operation for a period of five years from this day. Within this period, it would be open to the appropriate authorities to revise, modify or re-issue the relevant rules to ensure the achievement of the*

> *objective of Article 16(4). If any authority thinks that for ensuring adequate representation of 'backward class of citizens' in any service, class or category, it is necessary to provide for direct recruitment therein, it shall be open to it to do so. (Ahmadi, J expresses no opinion on this question upholding the preliminary objection of Union of India). It would not be impermissible for the State to extend concessions and relaxations to members of reserved categories in the matter of promotion without compromising the efficiency of the administration (Paras 819 to 831)."*

8. The Apex Court, however, permitted reservation in promotion to continue for 5(five) years, i.e. up to 16-11-1997. In ***Indra Sawhney***'s case, the Apex Court also held that at the most there can only be 50% reservation in each year including any carry forward in the reserved categories from previous years.

9. Thereafter, a five Judge Bench of the Apex Court in ***R.K.Sabharwal & others v. State of Punjab & others [(1995) 2 SCC 745]*** held that when the total number of posts in a cadre are filled up by operation of the roster and the backward classes are adequately represented, then the result envisaged by the laws providing for reservation in promotion is achieved. There is no justification for operating the roster and thereafter, the replacement system should operate. The Apex Court also held that reservation has to be made on the basis of the cadre strength and, therefore, has to be made post-wise and not vacancy-wise and if the roster is strictly applied as soon as the reserved category candidates are adequately represented, the roster has no further role to play and if such system is followed the reservation cannot exceed the prescribed quota.

10. Faced with the judgment in ***Indra Sawhney***'s case, the Parliament on 17-06-1995 amended the Constitution of India with the Constitution (Seventy Seventh Amendment) Act, 1995 whereby Clause (4A) was inserted permitting the State to make reservations in promotion for Scheduled Castes (SC) and Scheduled Tribes (ST) only. Thus, the legislature virtually nullified the judgment rendered in ***Indra Sawhney***'s case (supra) in this regard. Clause (4A), as originally inserted, read as follows:-

> *"**(4A)**. Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion 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."*

11. In ***Union of India & Others v. Virpal Singh Chauhan & others [(1995) 6 SCC 684]***, relying on a circular issued by the Railway Board, the Apex Court held that while the candidates belonging to the reserved category are entitled to accelerated promotion, they would not be entitled to consequential seniority and if the general category candidates catch up with the reserved category candidates at a higher post, then the original seniority *inter se* the general category candidates and the reserved category candidates would be restored. This has been referred to as the catch up rule. The Court upheld the circular issued by the Railways whereby the catch up rule had been inserted on the ground that this practice was being followed to maintain efficiency. The Apex Court, however, held that the catch up rule is not part of Article 16(1) to 16(4) of the Constitution of India.

12. Thereafter, in ***Ajit Singh Januja & others v. State of Punjab & others [(1996) 2 SCC 715]*** (hereinafter referred to as ***Ajit Singh(I)***] again the question which arose was whether the consequential seniority against general category post in the higher grade could be granted to the members of the SCs and STs who had got accelerated promotions. The Apex Court held that the catch up rule was a process adopted while making appointments by promotions because merit cannot be ignored. It held that for attracting the best and most meritorious candidates a balance had to be struck while making provisions for reservation. The Supreme Court mandated that the right to equality has to be preserved by preventing reverse discrimination. The Court finally took the view that the seniority between the promoted reserved category candidates and general category candidates promoted later shall be governed by their seniority in the original cadre.

13. Thereafter, on 16-09-1999 in ***Ajit Singh & others(II) v. State of Punjab & others [(1999) 7 SCC 209]*** (hereinafter referred to as ***Ajit Singh (II)***), a five Judge Bench of the Apex Court held that accelerated seniority was contrary to the concept of equality. In ***Ajit Singh(II)***, the Apex Court proceeded on the basis that Article 16(4A) was valid. While balancing the fundamental rights of the individual under Article 16(1) against the rights of the reserved category candidates under Article 16(4) and 16(4A), the Apex Court held that whereas Article 16(4) and 16(4A) are only enabling provisions, Article 16(1) deals with fundamental rights of a citizen and, therefore, the interest of the reserved classes must

be balanced against the interest of other segments of society. The Apex Court reiterated that accelerated seniority was contrary to the concept of equality.

On 13-12-1999, a three Judge Bench of the Apex Court in ***Indra Sawhney v. Union of India & others [(2000) 1 SCC 168]*** (hereinafter referred to as ***Indra Sawhney(II)***) again held that equality was part of the basic structure of the Constitution and that certain aspects of equality as enunciated in ***Indra Sawhney(I)*** were part of the basic structure and, therefore, immune from executive or legislative action and even from constitutional amendment.

14. Again Parliament stepped in and on 09-06-2000 vide the Constitution (Eighty First Amendment) Act, 2000, Clause (4B) was added to the Constitution of India permitting the State to carry forward the reserved vacancies so that reservation could be made even beyond the ceiling limit of 50% for that particular year. Clause (4B) reads as follows:-

> *"**(4B)**. 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 (4A) 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."*

15. On 08-09-2000, vide Constitution (Eighty Second Amendment) Act, 2000, Article 335 was amended and a proviso was added thereto whereby the State was permitted to make relaxation in qualifying marks and permitted to lower the standard of evaluation in favour of the members of the SCs and STs even in matter of promotions. The said proviso reads as follows:-

> *"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."*

16. Thereafter, on 01-12-2000 the Apex Court decided ***M.G. Badappanavar & another v. State of Karnataka & others [(2001) 2 SCC 666]***. In this case, the Apex Court held that equality is the basic feature of the Constitution and any treatment of equals as unequals or any treatment of unequals as equals violated the basic structure of the Constitution. Applying the creamy layer test, the Apex Court held that if roster point promotees are given consequential seniority, that would violate the equality principle which is a part of the basic structure of the Constitution. This judgment was based on the judgment rendered in ***Ajit Singh (II)***.

17. The Parliament on 04-01-2002 again amended the Constitution by the Constitution (Eighty Fifth Amendment) Act by adding the words "in matters of promotion, with consequential

seniority, to any class" in Clause (4A) of the Constitution w.e.f. 17th June, 1995. Amended clause (4A) reads as follows:-

> *"**(4A)**. 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."*

18. All these four amendments, i.e. the Seventy Seventh Amendment, Eighty First Amendment, Eighty Second Amendment and Eighty Fifth Amendment were the subject matter of the decision of the Apex Court in ***M. Nagaraj and others vs. Union of India and others, [(2006) 8 SCC 212]***. The Apex Court upheld the Constitutional validity of all the four amendments.

<u>The issues</u>:

19. Having set out the Constitutional history we may now set out the questions referred to the Full Bench:-

> *"(1) Whether the State is collecting quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment?*
>
> *(2) Whether the State has taken into consideration the efficiency of public service while making reservations in accordance with Article 335 of the Constitution of India?*
>
> *(3) Has the State conducted any exercise to find out whether reservation has led to any improvement or otherwise in administrative efficiency?*
>
> *(4) Whether the data collected by the State in terms of Rule 14 of the Tripura Scheduled Castes and*

*Scheduled Tribes Reservation Rules, 1992 is adequate data as contemplated in **Nagaraj's** case (supra)?*

(5) Whether even where the class or caste is not duly represented, should the quantifiable data be applied department-wise or cadre-wise or reservations should continue even in a department where the Scheduled Castes or Scheduled Tribes are adequately represented?

*(6) Whether the State can continue to apply the reservation roster in a department or cadre where the Scheduled Castes and Scheduled Tribes are adequately represented in a particular grade? In such cases, should the reservation roster be followed or should the principle of replacement as laid down in **R.K. Sabharwal's case [(1995) 2 SCC 745]** be followed?*

(7) Whether an employee who is promoted by giving benefit of reservation under the Tripura Scheduled Castes and Scheduled Tribes Reservation Act, 1991 and the rules framed thereunder can be treated to be an unreserved candidate for filling up the next higher post?

(8) Whether Rule 9(2) of the Tripura Scheduled Castes and Scheduled Tribes Reservation Rules, 1992 is violative of the Tripura Scheduled Castes and Scheduled Tribes Reservation Act, 1991 and the Constitution of India?"

20. All these questions arise out of the law laid down in ***M. Nagaraj's*** case and ***R.K. Sabharwal's*** case (supra) and, therefore, it would be apposite to refer to ***Nagaraj's*** case in detail. At the outset, we may state that in ***Nagaraj's*** case, the Apex Court did not decide any individual disputes and the only issue before the Apex Court was whether 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 were constitutionally valid.

Nagaraj's Case:

21. To appreciate what was said in ***Nagaraj's*** case, one must always remember that the Apex Court in ***Nagaraj's*** case was only deliberating on the constitutional validity of the four constitutional amendments and it upheld the amendments but clearly held that these amendments were permissive in nature giving power to the State to make provision for reservation with consequential benefit of seniority in promotion but the State while supporting the affirmative action taken by it must show to the Court that it had collected quantifiable data showing backwardness of the class, the inadequacy of representation of that class in public employment and balancing the needs of these backward classes with overall administrative efficiency.

22. We must bear in mind that the Apex Court in ***M. Nagaraj's*** case proceeded on the basis that there is a clear-cut demarcation and distinction between the existence of power and exercise of such power. The Apex Court held that the power to take affirmative action could not be held to be unconstitutional only because the power may be misused and what can be challenged is the misuse of this power in exercise of the power.

23. At this stage, it would be pertinent to mention that in ***M. Nagaraj's*** case, the stand of the Union of India was that Article 16(4A) and 16(4B) are only enabling provisions and the

constitutionality of the enabling powers is not to be tested with reference to the exercise of the powers or manner of exercise of such powers. In para-14, the Apex Court noted that the submission of the respondents before it, was that the State has taken care of the interest of the general category by placing a ceiling of 50% for filling up vacancies by reservation under Article 16(4A) of the Constitution. The only inroad in this concept of 50% was that if there are any carry forward vacancies, those would not be counted against the vacancies of a given year.

24. With these thoughts clearly in our mind, we now refer to various portions of the judgment in ***Nagaraj's*** case. This judgment is an extremely erudite and learned judgment and this Full Bench can do no better but to quote certain relevant portions of the judgment.

25. Dealing with the question as to whether equality is a part of the fundamental features of the basic structure of the Constitution, the Constitution Bench, after making reference to the judgment in ***Minerva Mills Ltd. & others v. Union of India & others [(1980) 3 SCC 625]***, held as follows:-

> *"**33**. From these observations, which are binding on us, the principle which emerges is that "equality" is the essence of democracy and, accordingly a basic feature of the Constitution."*

26. The Apex Court in no uncertain terms held that equality is the essence of democracy and, therefore, a basic feature of the Constitution. In ***Nagaraj's*** case, the Apex Court went on to hold that the rights conferred on the citizens and were not merely

individual or personal rights but had a larger social and political content because the objectives of the Constitution could not be realized if such social and political content was not read into these rights. The Apex Court held:-

> *"There can be no justice without equality."*

The Court then went on to hold:-

> ***"43**. xxx xxx xxx*
>
> *In the present case, we are concerned with the right of an individual to equal opportunity on one hand and preferential treatment to an individual belonging to a Backward Class in order to bring about an equal level-playing field in the matter of public employment. Therefore, in the present case, we are concerned with conflicting claims within the concept of "justice, social, economic and political", which concept as stated above exists both in Part-III and Part-IV of the Constitution. Public employment is a scarce commodity in economic terms. As the supply is scarce, demand is chasing that commodity. This is reality of life. The concept of "public employment" unlike the right to property is socialistic and, therefore, falls within the Preamble to the Constitution which states that WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC. Similarly, the preamble mentions the objective to be achieved, namely, justice, social, economic and political. Therefore, the concept of "equality of opportunity" in public employment concerns an individual, whether that individual belongs to the general category or Backward Class. The conflicting claim of individual right under Article 16(1) and the preferential treatment given to a Backward Class has to be balanced. Both the claims have a particular object to be achieved. The question is of optimization of these conflicting interests and claims."*

Thus, the Apex Court clearly held that the rights of the individuals guaranteed under Article 16(1) must be balanced with

the preferential treatment available to the backward classes under Articles 16(4), 4A and 4B.

27. On the concept of EQUITY, JUSTICE and MERIT, the Apex Court had this to say:-

> *"**44**. The above three concepts are independent variable concepts. The application of these concepts in public employment depends upon quantifiable data in each case. Equality in law is different from equality in fact. When we construe Article 16(4), it is equality in fact which plays the dominant role. Backward Classes seek justice. General class in public employment seeks equity. The difficulty comes in when the third variable comes in, namely, efficiency in service. In the issue of reservation, we are being asked to find a stable equilibrium between justice to the backwards, equity for the forwards and efficiency for the entire system. Equity and justice in the above context are hard concepts. However, if you add efficiency to equity and justice, the problem arises in the context of the reservation. This problem has to be examined, therefore, on the facts of each case. Therefore, Article 16(4) has to be construed in the light of Article 335 of the Constitution. Inadequacy in representation and backwardness of the Scheduled Castes and Scheduled Tribes are circumstances which enable the State Government to act under Article 16(4) of the Constitution. However, as held by this Court the limitations on the discretion of the Government in the matter of reservation under Article 16(4) as well as Article 16(4-A) come in the form of Article 335 of the Constitution."*

28. The Apex Court held that reservation is affirmative action moving beyond the concept of non-discrimination towards achieving equality. The observations of the Apex Court in para-49 are very important and read as follows:-

> *"**49**. Reservation is necessary for transcending caste and not for perpetuating it. Reservation has to be used in a limited sense otherwise it will perpetuate casteism in the country. Reservation is underwritten by a special justification. Equality in Article 16(1) is individual-specific whereas reservation in Article 16(4) and Article 16(4-A) is enabling. The discretion of the State is, however, subject to the existence of "backwardness" and "inadequacy of representation" in public 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 us to decide as long as the parameters mentioned in Articles 16(4) and 16(4-A) are maintained. As stated above, equity, justice and merit (Article 335)/efficiency are variables which can only be identified and measured by the State. Therefore, in each case, a contextual case has to be made out depending upon different circumstances which may exist Statewise."*

29. The Apex Court went on to hold in Para-60 of the report that both in ***Indra Sawhney***'s case as well as in ***R.K. Sabharwal's*** case, it had been held that while general category candidates are not entitled to fill the reserved posts, the contrary is not true and reserved category candidates are entitled to compete for general category posts. However, the fact that a considerable number of members of backward classes have been appointed/ promoted against general seats in the State services would be a relevant factor for the State Government to review the question of continuing reservation for the said class.

30. The Court in para-68 held that the Constitution (Eighty First Amendment) Act, 2000 adding Article 16(4B) in substance

gave legislative assent to the judgment of the Apex Court in ***R.K. Sabharwal's*** case. The Apex Court held as follows:-

> *"**96**. The Constitution (Eighty-First Amendment) Act, 2000 gives, in substance, legislative assent to the judgment of this Court in R.K. Sabharwal [(1995) 2 SCC 745]. Once it is held that each point in the roster indicates a post which on falling vacant has to be filled up by the particular category of candidate to be appointed against it and any subsequent vacancy has to be filled up by that category candidate alone then the question of clubbing the unfilled vacancies with current vacancies does not arise. Therefore, in effect, Article 16(4-B) grants legislative assent to the judgment in R.K. Sabharwal [(1995) 2 SCC 745]. If it is within the power of the State to make reservation then whether it is made in one selection or deferred selections, is only a convenient method of implementation as long as it is post based, subject to replacement theory and within the limitations indicated hereinafter."*

31. While dealing with the scope of the constitutional amendments which were challenged before it, the Apex Court held thus:-

> *"**83**. In our view, the appropriate Government has to apply the cadre strength as a unit in the operation of the roster in order to ascertain whether a given class/ group is adequately represented in the service. The cadre strength as a unit also ensures that upper ceiling-limit of 50% is not violated. Further, roster has to be post-specific and not vacancy based."*

Thus, what emerges is that after discussion of the entire law on the subject, the Apex Court held that the cadre strength is the unit in the operation of the roster in order to ascertain whether a given class or group is adequately represented in the service. The Apex Court further held that the cadre strength

as a unit also ensures that upper limit of 50% is not violated. It also held that the roster has to be post-specific and not vacancy based.

32. Thereafter, the Apex Court held that if the cap of 50% is to be lifted to fill up the backlog vacancies, then a time cap must be introduced, otherwise the posts would remain vacant for years (para-100).

33. Here it would be pertinent to reiterate that one phrase which is used repeatedly in ***Nagaraj's*** judgment and which permeates like a golden thread throughout the judgment and binds the entire judgment is that in every case where the State decides to provide reservation, there must exist backwardness of the class; inadequacy of representation of the class in service and this should be balanced with overall administrative efficiency.

34. The Apex Court in para-102 held as follows:-

> *"**102**. xxx xxx xxx*
>
> *Therefore, in every case where the State decides to provide for reservation there must exist two circumstances, namely, "backwardness" and "inadequacy of representation". As stated above, equity, justice and efficiency are variable factors. These factors are context-specific. There is no fixed yardstick to identify and measure these three factors, it will depend on the facts and circumstances of each case. These 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. 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. These amendments do not alter the structure of Articles 14, 15*

and 16 (equity code). The parameters mentioned in Article 16(4) are retained. Clause (4-A) is derived from clause (4) of Article 16. Clause (4-A) is confined to SCs and STs alone. Therefore, the present case does not change the identity of the Constitution. The word "amendment" connotes change. The question is— whether the impugned amendments discard the original Constitution. It was vehemently urged on behalf of the petitioners that the Statement of Objects and Reasons indicates that the impugned amendments have been promulgated by Parliament to overrule the decisions of this Court. We do not find any merit in this argument. Under Article 141 of the Constitution the pronouncement of this Court is the law of the land. The judgments of this Court in Virpal Singh [(1995) 6 SCC 684], Ajit Singh (I) [(1996) 2 SCC 715] , Ajit Singh (II) [(1999) 7 SCC 209] and Indra Sawhney [1992 Supp (3) SCC 217], were judgments delivered by this Court which enunciated the law of the land. It is that law which is sought to be changed by the impugned constitutional amendments. The impugned constitutional amendments are enabling in nature. They leave it to the States to provide for reservation. It is well-settled that Parliament while enacting a law does not provide content to the "right". The content is provided by the judgments of the Supreme Court. If the appropriate Government enacts a law providing for reservation without keeping in mind the parameters in Article 16(4) and Article 335 then this Court will certainly set aside and strike down such legislation. Applying the "width test", we do not find obliteration of any of the constitutional limitations. Applying the test of "identity", we do not find any alteration in the existing structure of the equality code. As stated above, none of the axioms like secularism, federalism etc. which are overarching principles have been violated by the impugned constitutional amendments. Equality has two facets - "formal equality" and "proportional equality". Proportional equality is equality "in fact" whereas formal equality is equality "in law". Formal equality exists in the rule of law. In the

> *case of proportional equality the State is expected to take affirmative steps in favour of disadvantaged sections of the society within the framework of liberal democracy. Egalitarian equality is proportional equality."*

35. From the above dictum, it is obvious that the Apex Court held that the limitations on the mode of exercise of power had not been removed by the impugned amendments. The Apex Court upheld the constitutional validity of the amendments subject to the exercise of the enabling power in accordance with law.

36. The Court while dealing with the role of the enabling provisions permitting reservation in the context of Article 14 of the Constitution which guarantees equality of treatment to all, again reiterated that the tests of backwardness, inadequacy of representation and administrative efficiency are required to be identified and measured. It further held that data has to be collected to objectively fulfill these criteria. The Court went on to hold as follows:-

> *"**107**. xxx xxx xxx*
>
> *However, when the State fails to identify and implement the controlling factors then excessiveness comes in, which is to be decided on the facts of each case. In a given case, where excessiveness results in reverse discrimination, this Court has to examine individual cases and decide the matter in accordance with law. This is the theory of "guided power". We may once again repeat that equality is not violated by mere conferment of power but it is breached by arbitrary exercise of the power conferred."*

37. Again and again, the Apex Court reemphasizes that the State must identify the compelling reasons namely backwardness

of the class and its inadequacy of representation and balance the same with overall administrative efficiency and only then would the State be entitled to make reservation if the factual situation so required. In para-100, the Court went on to hold as follows:-

> *"**100**. As stated above, Article 16(4-B) lifts the 50% cap on carry-over vacancies (backlog vacancies). The ceiling-limit of 50% on current vacancies continues to remain. In working-out the carry-forward rule, two factors are required to be kept in mind, namely, unfilled vacancies and the time factor. This position needs to be explained. On one hand of the spectrum, we have unfilled vacancies; on the other hand, we have a time-spread over a number of years over which unfilled vacancies are sought to be carried over. These two are alternating factors and, therefore, if the ceiling-limit on the carry-over of unfilled vacancies is removed, the other alternative time-factor comes in and in that event, the time-scale has to be imposed in the interest of efficiency in administration as mandated by Article 335. If the time-scale is not kept then posts will continue to remain vacant for years, which would be detrimental to the administration. Therefore, in each case, the appropriate Government will now have to introduce the time-cap depending upon the fact-situation. What is stated hereinabove is borne out by the Service Rules in some of the States where the carry-over rule does not extend beyond three years."*

38. These are the parameters by which we shall have to judge the validity of any State enactment or executive action. The Court in para-117 went on to hold as follows:-

> *"**117**. xxx xxx xxx*
>
> *Therefore, in each case the Court has got to be satisfied that the State has exercised its opinion 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."

39. The conclusions of the Apex Court are as follows:-

*"**121**. The impugned constitutional amendments by which Articles 16(4-A) and 16(4-B) have been inserted flow from Article 16(4). They do not alter the structure of Article 16(4). They retain the controlling factors or the compelling reasons, namely, backwardness and inadequacy of representation which enables the States to provide for reservation keeping in mind the overall efficiency of the State administration under Article 335. These impugned amendments are confined only to SCs and STs. They do not obliterate any of the constitutional requirements, namely, ceiling-limit of 50% (quantitative limitation), the concept of creamy layer (qualitative exclusion), the sub-classification between OBCs on one hand and SCs and STs on the other hand as held in Indra Sawhney [1992 Supp (3) SCC 217], the concept of post-based roster with inbuilt concept of replacement as held in R.K. Sabharwal [(1995) 2 SCC 745].*

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

***123**. However, in this case, as stated above, the main issue concerns the "extent of reservation". In this regard the State concerned will have to show in each case the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation. As stated above, the impugned provision is an enabling provision. The State is not bound to make reservation for SCs/STs in matters of promotions.*

> *However, if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance with Article 335. It is made clear that even if the State has compelling reasons, as stated above, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling-limit of 50% or obliterate the creamy layer or extend the reservation indefinitely.*
>
> ***124**. Subject to the above, we uphold the constitutional validity of the Constitution (Seventy-Seventh Amendment) Act, 1995; the Constitution (Eighty-First Amendment) Act, 2000; the Constitution (Eighty-Second Amendment) Act, 2000 and the Constitution (Eighty-Fifth Amendment) Act, 2001."*

<u>The law post Nagaraj's case</u>:

40. In ***Suraj Bhan Meena and another v. State of Rajasthan and others, [(2011) 1 SCC 467]***, the question before the Apex Court was whether those candidates belonging to the SC and ST who had been promoted against reserved quota would also be entitled to consequential seniority of such promotion, or would the "catch-up" rule prevail. After making reference to the judgments in ***Indra Sawhney***, ***Virpal Singh***, ***Ajit Singh(I)***, ***Ajit Singh(II)***, ***Jagdish Lal v. State of Haryana, [(1997) 6 SCC 538]*** and ***Nagaraj***, the Apex Court held as follows:-

> *"**62**. The Constitution Bench went on to observe that the Constitutional equality is inherent in the rule of law. However, its reach is limited because its primary concern is not with efficiency of the public law, but with its enforcement and application. The Constitution Bench also observed that the width of the power and the power to amend together with its limitations, would have to be found in the Constitution itself. It was held that the*

extension of reservation would depend on the facts of each case. In case the reservation was excessive, it would have to be struck down.

***63**. It was further held that the impugned Constitution Amendments, introducing Article 16(4-A) and 16(4-B), had been inserted and flow from Article 16(4), but they do not alter the structure of Article 16(4) of the Constitution. They do not wipe out any of the Constitutional requirements such as ceiling limit and the concept of creamy layer on one hand and Scheduled Castes and Scheduled Tribes on the other hand, as was held in Indra Sawhney's case [1992 Supp. (3) SCC 217].*

***64**. Ultimately, after the entire exercise, the Constitution Bench held that the State is not bound to make reservation for Scheduled Castes and Scheduled Tribes candidates in matters of promotion but if it wished, it could collect quantifiable data touching backwardness of the applicants and inadequacy of representation of that class in public employment for the purpose of compliance with Article 335 of the Constitution.*

xxx xxx xxx

***66**. The position after the decision in M. Nagaraj's case [(2006) 8 SCC 212] is that reservation of posts in promotion is dependent on the inadequacy of representation of members of the Scheduled Castes and Scheduled Tribes and Backward Classes and subject to the condition of ascertaining as to whether such reservation was at all required."*

41. In the case of ***Uttar Pradesh Power Corporation Limited v. Rajesh Kumar & others [(2012) 7 SCC 1]*** the Apex Court culled out the principles which had emerged from ***M. Nagaraj's*** case in the following terms:-

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

(i) Vesting of the power by an enabling provision may be constitutionally valid and yet "exercise of power" by the State in a given case may be arbitrary, particularly, if the State fails to identify and measure the backwardness and inadequacy keeping in mind the efficiency of service as required under Article 335.

(ii) Article 16(4) which protects the interests of certain sections of the society has to be balanced against Article 16(1) which protects the interests of every citizen of the entire society. They should be harmonized because they are restatements of the principle of equality under Article 14.

(iii) Each post gets marked for the particular category of candidates to be appointed against it and any subsequent vacancy has to be filled by that category candidate.

(iv) The appropriate Government has to apply the cadre strength as a unit in the operation of the roster in order to ascertain whether a given class/group is adequately represented in the service. The cadre strength as a unit also ensures that the upper ceiling limit of 50% is not violated. Further, roster has to be post-specific and not vacancy based.

(v) The State has to form its opinion on the quantifiable data regarding adequacy of representation. Clause (4-A) of Article 16 is an enabling provision. It gives freedom to the State to provide for reservation in matters of promotion. Clause (4-A) of Article 16 applies only to SCs and STs. The said clause is carved out of Article 16(4-A). Therefore, Clause (4-A) will be governed by the two compelling reasons - "backwardness" and "inadequacy of representation", as mentioned in Article 16(4). If the said two reasons do not exist, then the enabling provision cannot be enforced.

(vi) If the ceiling limit on the carry-over of unfilled vacancies is removed, the other alternative time factor comes in and in that event, the time-scale has to be imposed in the interest of efficiency in administration as mandated by Article 335. If the time-scale is not kept, then posts will continue to remain vacant for years which

would be detrimental to the administration. Therefore, in each case, the appropriate Government will now have to introduce the duration depending upon the fact-situation.

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

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

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

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

42. The State does not have unbridled power to make provisions for reservation. The reservation must be in accordance with the Constitutional scheme. The Government must engage in a continuous process of identifying the socially backward class of citizens. Reference may be made to the judgment of the Apex

Court in ***Ram Singh & ors. Vs. Union of India [WRIT PETITION (CIVIL) NO. 274 OF 2014 & OTHER CONNECTED MATTERS]*** decided on 17-03-2015 wherein the Apex Court held as follows:-

> ***"53. xxx xxx xxx***
>
> *We may, therefore, understand a social class as an identifiable section of society which may be internally homogenous (based on caste or occupation) or heterogeneous (based on disability or gender e.g. transgender). Backwardness is a manifestation caused by the presence of several independent circumstances which may be social, cultural, economic, educational or even political. Owing to historical conditions, particularly in Hindu society, recognition of backwardness has been associated with caste. Though caste may be a prominent and distinguishing factor for easy determination of backwardness of a social group, this Court has been routinely discouraging the identification of a group as backward solely on the basis of caste. Article 16(4) as also Article 15(4) lays the foundation for affirmative action by the State to reach out the most deserving. Social groups who would be most deserving must necessarily be a matter of continuous evolution. New practices, methods and yardsticks have to be continuously evolved moving away from caste centric definition of backwardness. This alone can enable recognition of newly emerging groups in society which would require palliative action. The recognition of the third gender as a socially and educationally backward class of citizens entitled to affirmative action of the State under the Constitution in National Legal Services Authority vs. Union of India is too significant a development to be ignored. In fact it is a path finder, if not a path-breaker. It is an important reminder to the State of the high degree of vigilance it must exercise to discover emerging forms of backwardness. The State, therefore, cannot blind itself to the existence of other forms and instances of backwardness. An affirmative*

> *action policy that keeps in mind only historical injustice would certainly result in under-protection of the most deserving backward class of citizens, which is constitutionally mandated. It is the identification of these new emerging groups that must engage the attention of the State and the constitutional power and duty must be concentrated to discover such groups rather than to enable groups of citizens to recover "lost ground" in claiming preference and benefits on the basis of historical prejudice."*

The Apex Court in this case set aside the decision taken by the Union Government whereby Jats were included in the Central list of other backward classes in 9 states.

43. It is in the light of this enunciation of law by the Apex Court that we have to decide the issues aforesaid. From the discussion made hereinabove and from the principles laid down in ***Nagaraj's*** case as very succinctly culled out in ***Rajesh Kumar's*** case, it is obvious that the State is empowered to provide for reservation in promotion with consequential benefit of seniority to the SCs and STs who are backward but while making a provision for reservation, the State must ensure that there exists backwardness of a class, inadequacy of representation in employment and these must be balanced with the requirements of administrative efficiency.

<u>The law of reservation in Tripura</u>:

44. It would be pertinent to give the history of reservation as provided for in the State of Tripura. Reservation in Government employment in Tripura for SCs and STs was introduced in the year

1974. Thereafter, in 1977 reservation in promotion was introduced. This reservation was granted by administrative orders. In the year 1991, the Legislative Assembly of the State of Tripura enacted the Tripura Scheduled Castes and Scheduled Tribes (Reservation of vacancies in services and posts) Act, 1991. Section 12 of the Act empowered the State Government to frame rules and accordingly, the Tripura Scheduled Castes and Scheduled Tribes (Reservation of vacancies in services and posts) Rules, 1992 were framed. This Act extended the benefit of reservations not only to Government servants but also to Public Sector Undertakings and local authorities. Reservation as per the 1991 Act was provided both in direct recruitment and promotion.

45. Section 4(1) empowers the State Government to provide reservation for SCs and STs in services and posts under the State by direct recruitment and reads as follows:-

> *"**4.(1)** Reservation for the Scheduled Castes and the Scheduled Tribes in any vacancy or vacancies in services or posts in an establishment which are to be filled up by direct recruitment shall be regulated in the following manner, namely –*
>
> *(a) There shall be seventeen percent reservation for the Scheduled Castes and thirty one percent reservation for the Scheduled Tribes in the manner as set out in the schedule;*
>
> *Provided that the State Government may from time to time review the implementation of the reservation policy and take adequate measures including increase of percentage mentioned in sub-section (a) above;*
>
> *(b) The candidates belonging to the Scheduled Castes and the Scheduled Tribes who qualify for*

selection on merit shall be included in the general list and not against reserved quota ;

(c) Fees, if any, prescribed for any examination for selection to any service or post shall be reduced to one-fourth in the case of candidates belonging to the Scheduled Castes and the Scheduled Tribes ;

(d) The members of the Scheduled Castes and the Scheduled Tribes shall be entitled to a concession of five years over the prescribed maximum age limit for appointment to any service or post and also for admission to educational institutions and undergoing any kind of training."

46. Section 4(2) of the Act provides for similar reservation in promotional posts in the State Government and reads as follows:-

*"**4.(2)** Reservation for Scheduled Castes and Scheduled Tribes in any vacancy or vacancies in services or posts under the State to be filled up by promotion.*

Reservation for the Scheduled Castes and the Scheduled Tribes in any vacancy or vacancies in services or posts under the State to be filled up by promotion in any establishment shall be regulated in the following manner, namely :-

(a) There shall be seventeen percent reservation for the Scheduled Castes and thirty-one percent reservation for the Scheduled Tribes as set out in the schedule;

Provided that the State Government may from time to time review the implementation of the reservation policy and take adequate measures including increase of percentage mentioned in sub-section (a) above.

(b) The candidates belonging to the Scheduled Castes and the Scheduled Tribes who qualify for selection on merit shall be included in the general list and not against reserved quota."

47. The schedule to the Act provides that the 100 point roster should be followed while filling the posts to be reserved. With regard to posts having cadre strength of 3 or less, a separate replacement roster has been provided in para-1(b) which reads as follows:-

"Cadre Strength	*Initial Recruitment*	*To be replaced by*
1.	*UR*	*UR*
2.	*ST*	*SC*
3.	*UR*	*UR"*

Paras-6, 8, 9 and 13 of the schedule read as follows:-

> *"**6**. Where the number of posts in any service or cadre permits reservation to be made for all the reserved categories, the 100-point roster as shown at para-1(a) above shall be applicable and where the number of posts in any service or cadre is too small to permit reservation to be made for all the reserved categories, the replacement roster as shown at para-1(b) above shall be applicable.*
>
> ***8**. At the time of initial operation of the roster the actual percentage of representation of the reserved categories in any service or post shall be determined afresh and if the total representation of any particular reserved category exceeds the prescribed percentage or if the total representation of all the reserved categories exceeds 50%, the excess shall be adjusted in future recruitments and the existing incumbents shall not be disturbed.*
>
> ***9**. For the purpose of calculation of the representation of the reserved category of persons in any service or post the total number of direct recruits and promotes in the services or posts shall be taken into account.*
>
> ***13**. Isolated individual posts and small cadres may be grouped together with the posts of the same class for the purpose of reservation taking into account the*

status, salary and qualifications prescribed for the posts in question."

48. The Act permits the State Government to frame rules and the rule relating to recruitment by promotion is Rule 9 which reads as follows:-

*"**9**. **Recruitment by Promotion**:*

(1) The appointing authority while making a request to the Selection Committee/Selection Board/ Departmental Promotion Committee for recommending candidates for promotion shall communicate to the Selection Committee/Selection Board/Departmental Promotion Committee the details about reservation for Scheduled Castes and Scheduled Tribes and shall also furnish details about the number of candidates required against reserved vacant posts and unreserved vacant posts in accordance with the provisions of the concerned service rules. Where there is no rules for the post or service to which promotion is to be made the appointing authority will furnish the details about the candidates within the zone of consideration according to normal procedure. The particulars about reserved vacant posts available shall be based on an inspection report of 100-point roster in respect of the concerned post or service to be furnished jointly by the Director for Welfare of Scheduled Castes and Other Backward Classes and by the Director for Welfare of Scheduled Tribes as mentioned in Rule 8(1).

(2) The Selection Committee/Selection Board/ Departmental Promotion Committee will consider the suitability of the candidates, the details of whom are furnished by the appointing authority and recommend a combined list of all categories of candidates found suitable for promotion in order of their merit which shall be the determining factor about the inter se seniority of the candidates after promotion.

Provided that a Scheduled Caste or Scheduled Tribe candidate who occupies on merit or seniority or seniority-cum-fitness etc. an unreserved point of the 100

-point roster in the combined list, shall not be shown against any reserved point.

Provided further that at the time of recommending candidates for promotion to any post, the names against unreserved vacant posts shall first be recommended in order of their merit or seniority or seniority-cum-fitness etc., as the case may be, and then the names against reserved vacant posts shall be recommended.

(3) In addition to the combined list mentioned in Sub-Rule (2) the Selection Committee/Selection Board/ Departmental Promotion Committee shall furnish separate lists of candidates belonging to Scheduled Castes and Scheduled Tribes and a list of candidates of unreserved category in order of their merit for promotion against the vacant posts shown as reserved or unreserved as the case may be.

(4) The inspection report of the 100 Point Roster as furnished by the Director for Welfare of Scheduled Castes and Other Backward Classes and the Director for Welfare of Scheduled Tribes shall form a part of the record of the minutes/proceedings of the Selection Committee/Selection Board/Departmental Promotion Committee etc.

(5) The appointing authority shall consider the recommended list in accordance with the provisions of the respective service rules and shall, after consultation with the Commission where such consultation is necessary finally approve the list.

(6) The appointing authority shall thereafter make promotion in accordance with the 100 Point Roster as shown in the Schedule to the Act in order of merit /preference as indicated in the list. A Scheduled Caste or Scheduled Tribe candidate who occupies an unreserved point of the 100 – Point Roster in the combined list of candidates shall not be fitted against any reserved point.

(7) In case of non-availability of required number of Scheduled Caste or Scheduled Tribe candidates against the reserved vacancies, the vacancies shall be carried

forward. In such case the appointing authority may take action under rule 8(8) and 8(9) if considered necessary."

49. Rule 14 of the rules provides for the submission of annual report and reads as follows:-

*"**14**. Submission of Annual Report.*

An Annual Report showing the position regarding appointment of candidates belonging to the Scheduled Tribes and the Scheduled Castes against direct recruitment and promotion, shall be submitted by each appointing authority to the Director for Welfare of Scheduled Castes and Other Backward Classes and the Director for Welfare of Scheduled Tribes in the following manner:-

(a) The Annual Report shall be for a period of one year from the 1st day of April to the 31st day of March next.

(b) The Annual Report shall be submitted separately for direct recruitment and promotion, separately for technical and non-technical posts and separately for each category of posts in Form-4."

The aforesaid Act was amended by second amendment of 2005 w.e.f. 14-02-2006 and several new provisions were incorporated. The name of the Act was amended to the Tripura Scheduled Castes and Scheduled Tribes Reservation Act, 1991 and the Act was extended to include admission in Educational Institution also. The reservation for SCs and STs was increased from 15 percent to 17 percent and 29 percent to 31 percent respectively. Certain penal provisions were also introduced making the Act most stringent. Rule 14 of the rules was also amended and Clause (c) was introduced but that is not relevant for our purpose because that relates to providing a report with regard to admission in Educational Institution.

The contentions:

50. On behalf of the petitioners various contentions have been raised. We are not dealing with the contentions which are case specific because we are not deciding any one of the individual petitions but we are only deciding the questions referred to the Full Bench.

51. The petitioners have challenged Section 4(2) of the Act and rule 9 of the rules, especially the second proviso thereto and urged that the same is unconstitutional and is also ultra vires the Act and against the law laid down in ***Nagaraj's*** case.

52. The main thrust of the arguments of the petitioners is that the State has not conducted any exercise to collect quantifiable data as required by law laid down in ***Nagaraj's*** case. It is urged that the State has made reservation in promotions in total violation of the law laid down in ***Nagaraj's*** case without first coming to the conclusion whether the backward classes are, in fact, backward and whether they are adequately represented in service.

53. On behalf of the petitioners, it is contended that the data collected in terms of rule 14 is not sufficient data and reference has been made to the final report sent to the State which does not give cadre-wise situation of the various categories, i.e. SCs, STs and unreserved categories but only gives the state-wise data.

54. It is urged on behalf of the petitioners that the creamy layer test as envisaged in ***Indra Sawhney***'s case in respect of

Other Backward Classes (OBCs) should also be made applicable to SCs and STs. In this regard, the petitioners urge that the Apex Court in ***Nagaraj's*** case and subsequent judgments has while dealing with the issue of reservations clearly laid down that one of the most important parameters which the State must satisfy is backwardness of class. It is further urged that the Apex Court was aware that reservation in promotion is only available to SCs and STs and when the Apex Court still emphasized that backwardness of class should be determined, it clearly means that even amongst the SCs and STs, backwardness should be determined. It was also urged by some of the learned counsel that the creamy layer test as envisaged in ***Indra Sawhney***'s case for OBCs should also be applied to SCs and STs because it is now established that the benefit of reservation even amongst SCs and STs is being garnered by a few caste or communities amongst the SCs and STs and the more backward of these classes and communities are denied the benefit of reservation. It has been urged that almost a quarter of century has elapsed since ***Indra Sawhney***'s case was decided, times have changed and, therefore, the concept of creamy layer should also be made applicable to SCs and STs. It is also contended that the founding fathers had initially envisaged reservation only for a period of 10 years and this is being extended from time to time and these extensions cannot be raised to such a level that they destroy the concept of equality which is the basic structure of the Constitution.

55. The petitioners also contend that in ***Indra Sawhney***'s case, the Apex Court had held that there can be no reservation in promotion and the creamy layer test was not applied to SCs and STs because the reservation was limited to direct recruitment. It is, therefore, contended that if Parliament has enabled reservation in promotion, then the judgment in ***Indra Sawhney***'s case relating to the inherent backwardness of SCs and STs is not applicable, especially in cases of Government employees.

56. On the other hand, on behalf of the State it is urged that the Apex Court in ***Indra Sawhney***'s case clearly held that the concept of creamy layer would not be applicable to SCs and STs because they inherently are backward classes and nothing further is to be done. It is also contended that even in ***Nagaraj's*** case, the Apex Court did not introduce the concept of creamy layer.

57. It is contended on behalf of the State that the data collected in terms of Rule 14 referred to hereinabove is sufficient data within the meaning of ***Nagaraj's*** case. It is urged that this data gives a complete position with regard to all the posts in the State and, therefore, the State has complied with the requirements of getting quantifiable data as laid down in ***Nagaraj's*** case.

58. According to the State, even prior to 1991 when the Tripura Scheduled Castes and Scheduled Tribes Reservation Act was enacted, the State had collected quantifiable data to determine the percentage of reservation in the peculiar demographical situation in the State. According to the State, every year the

Department for welfare of SCs and Department for welfare of STs undertake an annual exercise to ascertain the representation of SCs and STs in services under the State Government, Government undertakings, PSUs etc. Under rule 14 of the Rules, the departments are collecting year-wise data from each department with regard to their representations of SCs and STs. It is contended that this data enables the Government to ascertain the exact representation of the SCs and STs in public employment. The State has also placed voluminous material on record to show that departments are collecting this data. At the same time, we must add that Mr. P.S. Patwalia, learned Sr. Counsel appearing for the State, has very fairly and candidly admitted before us that after the decision in ***Nagaraj's*** case, no specific exercise was done but he urges that the data collected is sufficient for the State to decide whether reservation is to be provided or not.

59. It has been urged on behalf of the private respondents that the 50 percent ceiling limit laid down by the Apex Court in ***Indra Sawhney's*** case is relaxable in far flung States like Tripura where SCs and STs together constitute 48 percent of the population. We cannot accept such argument because even as per the stand of the State, the law laid down by the Apex Court and the provisions of the Constitution reservation cannot exceed 50 percent except in any particular year when carry forward vacancies are included. This, however, clearly indicates that total reservation in a cadre cannot exceed 50 percent.

60. One argument has been made by Sri A.K. Bhowmik, learned Sr. Counsel appearing for the SC and ST employees, which deserves to be rejected outright. The argument is that the purport and meaning of Article 16(4) and Article 16(4-A) is the same and the difference in language makes no difference. We are not at all inclined to accept this argument in view of the law laid down by the Apex Court.

61. Article 16(1) provides that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Article 16(2) prohibits discrimination in respect of any employment or office under the State on the grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them. Article 16(4) enables the State to make a provision for reservation in appointment in favour of the backward class of citizens not adequately represented in services. Articles 16(1) and 16(4) are totally different. Whereas Article 16(1) guarantees equality, Article 16(4) carves out an exception enabling the State to make provision for reservation in favour of the backward classes. Article 16(4) makes a provision for reservation in promotional posts. They all are totally different. Therefore, we are unable to accept the argument of Sri Bhowmik.

Is the concept of creamy layer applicable to SCs & STs:

62. As far as this issue is concerned, we are not in agreement with the petitioners. In ***Indra Sawhney's*** case dealing

with the question as to what is meant by the expression "backward class of citizens", the Apex Court held as follows:-

> *"**781**. At the outset, we may state that for the purpose of this discussion, we keep aside the Scheduled Tribes and Scheduled Castes (since they are admittedly included within the backward classes), except to remark that backward classes contemplated by Article 16(4) do comprise some castes—for it cannot be denied that Scheduled Castes include quite a few castes.*
>
> ***788**. Further, if one keeps in mind the context in which Article 16(4) was enacted it would be clear that the accent was upon social backwardness. It goes without saying that in Indian context, social backwardness leads to educational backwardness and both of them together lead to poverty which in turn breeds and perpetuates the social and educational backwardness. They feed upon each other constituting a vicious circle. It is a well known fact that till independence the administrative apparatus was manned almost exclusively by members of the 'upper' castes. The Shudras, the Scheduled Castes and the Scheduled Tribes and other similar backward social groups among Muslims and Christians had practically no entry into the administrative apparatus. It was this imbalance which was sought to be redressed by providing for reservations in favour of such backward classes. In this sense Dr. Rajiv Dhawan may be right when he says that the object of Article 16(4) was "empowerment" of the backward classes. The idea was to enable them to share the state power. We are, accordingly, of the opinion that the backwardness contemplated by Article 16(4) is mainly social backwardness. It would not be correct to say that the backwardness under Article 16(4) should be both social and educational. <u>The Scheduled Tribes and the Scheduled Castes are without a doubt backward for the purposes of the clause; no one has suggested that they should satisfy the test of social and educational backwardness</u>.*
>
> ***796-797**. The test or requirement of social and educational backwardness cannot be applied to*

Scheduled Castes and Scheduled Tribes, who indubitably fall within the expression "backward class of citizens"."

(emphasis supplied)

This enunciation of law has not been disturbed in ***Nagaraj's*** case or any other case. In a judicial system like ours, the High Court is bound by the law laid down by the Apex Court. The aforesaid law laid down in ***Indra Sawhney***'s case holds the field and SCs and STs are deemed to be backward and nothing further is required. At the same time, this Court cannot ignore the fact that despite the clear-cut enunciation of law by the Apex Court in ***Indra Sawhney***'s case, in ***Nagaraj's*** case the Supreme Court in almost every part of the discussion has again reemphasized that the State must determine backwardness. Whether the judgment in ***Indra Sawhney***'s case requires reconsideration or not is not for this Court to decide. We are bound by judicial discipline and, therefore, we cannot even entertain an argument that the concept of creamy layer must be applied to the SCs and STs also.

Can there be any further sub-classification of the SCs or STs:

63. We shall now deal with the second limb of the argument of the petitioners that even if the creamy layer test is not to be applied those categories, classes and castes amongst the SCs and STs who have cornered almost all the benefits at the cost of the more depressed classes of the SCs and STs should be excluded by the State from getting this benefit. In this behalf, it is submitted that as far as the State of Tripura is concerned, the ST community of "*Debbarmas*" has garnered more than 90% of the

posts in the upper echelons of service. It is further submitted that the "*Debbarmas*" and one other community, i.e. the "*Jamatias*" are virtually occupying all the posts and out of the 17 other tribal communities about 12 or 13 have virtually no representation in the services of the State. We cannot agree with this submission in view of the law laid down by the Apex Court in ***E.V. Chinnaiah v. State of Andhra Pradesh and others, [(2005) 1 SCC 394]***.

64. The State of Andhra Pradesh promulgated the Andhra Pradesh Scheduled Castes (Rationalisation of Reservations) Act, 2000. By this Act, the State divided the reservation of 15% amongst the SC by further subdividing the SC into four categories; Group-A, Group-B, Group-C and Group-D. The main issue before the Apex Court in ***Chinnaiah's*** case was whether the State had the right to subdivide the SCs and STs as declared in the Presidential Order into further subcategories. The Apex Court held as follows:-

> *"**19**. This part of the Constituent Assembly Debate coupled with the fact that Article 341 makes it clear that the State Legislature or its executive has no power of "disturbing" (term used by Dr. Ambedkar) the Presidential List of Scheduled Castes for the State. It is also clear from the Articles in part XVI of the Constitution that the power of the State to deal with the Scheduled Castes List is totally absent except to bear in mind the required maintenance of efficiency of administration in making of appointments which is found in Article 335. Therefore any executive action or legislative enactment which interferes, disturbs, re-arranges, re-groups or re-classifies the various castes found in the Presidential List will be violative of scheme*

> *of the Constitution and will be violative of Article 341 of the Constitution.*
>
> *xxx xxx xxx*
>
> ***26**. Thus from the scheme of the Constitution, Article 341 and above opinions of this Court in the case of N.M. Thomas [(1976) 2 SCC 310], it is clear that the castes once included in the Presidential List, form a class by themselves. If they are one class under the Constitution, any division of these classes of persons based on any consideration would amount to tinkering with the Presidential List.*
>
> *xxx xxx xxx*
>
> ***37**. We have already held that the members of Scheduled Castes form a class by themselves and any further sub-classification would be impermissible while applying the principle of reservation."*

65. The Apex Court has clearly held that the States have no right to further classify the SCs or STs into different categories and, therefore, we cannot accept this argument made on behalf of the petitioners.

<u>What is meant by "backwardness" in the context of Nagaraj's case</u>:

66. Though we have rejected the argument of the petitioners that the State even in case of SCs and STs must determine the backwardness of the class, we cannot totally ignore the dictum of ***Nagaraj's*** case. In ***Nagaraj's*** case, as pointed out above, the phrase "backwardness of class" has been used time and again. Some meaning will have to be given to this concept of backwardness. The Apex Court was aware that it was dealing with the issue raised about the validity of the constitutional amendments whereby provision for reservation in promotion with

consequent benefit of seniority was made in favour of the SCs and STs only. This benefit is only available to SCs and STs but still the Apex Court again and again used the phrase "backwardness of class". According to us backwardness of SCs and STs in the context of promotion in Government service will be closely interlinked to their inadequacy of representation in that particular Government service. We are of the view that this backwardness would be directly related to the inadequacy of the representation of the SCs and STs in the promotional cadres. In case, the SCs and STs are adequately represented in the cadre whether by means of reservation or on the basis of merit, then they cease to be backward for the purposes of getting benefit of reservation in promotion and this will have to be determined on cadre to cadre basis.

67. One of the essential conditions which must be satisfied before a provision for reservation is made is that the State must determine the backwardness of the class by determining that they are not adequately represented in the services under the State.

68. While determining whether the reserved categories are adequately represented in service, the State cannot ignore those SC or ST candidates who have come in on their own merit because the backwardness of the class can only be determined by assessing whether it is adequately represented in service and furthermore, reservation can only be provided to that backward class which is not adequately represented in service.

Whether adequate material has been collected:

69. We may point out that from the material placed on record, it does appear that the SCs and STs Welfare departments collect data from each and every department and, therefore, data is available with regard to the representation of the SCs and STs in different departments. However, the manner in which the data is finally collated is not proper. What is finally sent to the Government is the overall representation of SCs and STs in the State. The Apex Court in a large number of judgments, especially in ***Nagaraj's*** case and ***Rajesh Kumar's*** case has clearly laid down that it is the cadre which has to be taken as a unit to determine reservation. One Government service may consist of various cadres. It has to be seen whether the SCs and STs are adequately represented in a particular cadre or not. Once the SCs and STs have adequate representation in a particular cadre, then obviously there should not be any further reservation in that cadre because if reservation is continued after the roster has outlived its utility and the result envisaged by the rules has been achieved, it would amount to reverse discrimination because then general category candidates would not be able to get promoted.

70. We are of the view that the data collected by the State may be sufficient to meet the requirement of ***Nagaraj's*** case. However, at the same time we are of the considered view that while making the provision for reservation, the State must not only

collect the data but it also must consider the data cadre-wise and then decide whether the SCs and STs are adequately represented in a cadre or not. This would also help in determining the concept of backwardness as expounded in ***Nagaraj's*** case. In those cadres where the SCs and STs are not adequately represented, they would be deemed to be backward. Where they are adequately represented, it would mean that they are not backward for the purpose of promotion.

Whether Adequacy of Representation has been determined:

71. We may also point out that there is no ambiguity about the settled position of law that a person belonging to the SCs or STs who is appointed on his own merit will occupy a post meant for the unreserved category in accordance with his merit and will not occupy the post meant for the reserved category. This, however, will not mean that he ceases to be member of the SCs or STs. For the next higher post, he can claim benefit of reservation. Such a person does not cease to be a member of the SCs and STs. Therefore, while determining whether the SCs and STs are adequately represented, even those members of the SCs and STs who have been appointed strictly on merit will have to be taken into consideration to decide whether the SCs or STs are adequately represented in the cadre. Therefore, if a cadre consists of 100 posts and there are 35 members of the SCs and STs who have been promoted on the basis of reservation and 20 members of the SCs and STs have been promoted on their own merit, the representation of the SCs and STs would be 55% which would

mean that they are adequately represented in the cadre. Adequate representation is not limited to those members of the SCs and STs who have been appointed/promoted on the basis of reservation only but will encompass all members belonging to the SCs and STs. We must remember that in ***R.K. Sabharwal's*** case, the Apex Court held that once the number of reserved category candidates in a cadre is more than their percentage, then they are adequately represented in service.

72. We have already pointed out above that Sri P.S. Patwalia, learned Sr. Counsel, very fairly submitted before us that after the judgment was delivered in ***Nagaraj's*** case, the State of Tripura did not carry out any exercise as envisaged by the Apex Court. Not only is the data not properly collated but the State has failed to produce before us any material to show that even the data collected under Rule 14 has been considered in the light of the law laid down in ***Nagaraj's*** case and on consideration of the data the authority concerned has formed an opinion or come to the conclusion that this data shows that the reserved categories are inadequately represented in any cadre in the service.

73. Another fallacy in the data is that the employees belonging to the SC and ST occupying posts meant for unreserved category candidates have not been reflected in the data as SC and ST candidates. There are two inherent defects in this data- (i) all SC and ST candidates occupying UR posts are excluded; (ii) it is not expressly shown that those SC and ST candidates have come in on their own merit throughout the career.

74. One of the essential conditions which must be satisfied before a provision for reservation is made is that the backward class of citizens is not adequately represented in the services under the State. This determination has to be done by taking each cadre as a unit. No such exercise has been carried out in the State of Tripura.

75. It was contended by the learned Advocate General that in terms of the law laid down by the Apex Court in ***Indra Sawhney's*** case that the issue whether the backward classes are adequately represented or not is to be decided by the Government. There can be no quarrel with this proposition. However, this will be subject to the law laid down in ***Nagaraj's*** case and also in ***Indra Sawhney's*** case that reservation cannot exceed 50 percent and in cases of promotion, the State must satisfy itself on the basis of quantifiable data whether the backward classes are inadequately represented in the service, i.e. the cadre concerned.

76. We are clearly of the view that after ***Nagaraj's*** case was decided on 19-10-2006, the State of Tripura was required to do some homework. The State of Tripura was required to collect the quantifiable data, thereafter analyse it properly, form an opinion whether the SCs and STs are inadequately represented in any cadre and then provide for reservation in that cadre where the SCs and STs are not adequately represented. This exercise should have been conducted immediately after ***Nagaraj's*** judgment was announced. No such exercise has been conducted and the State of Tripura has failed to show before us the compelling reasons which

weighed with it while providing reservation in different cadres. Furthermore, we are clearly of the view that the approach of the State of Tripura in analyzing the data state-wise and not cadre-wise is totally illegal. Individual right of equality of each citizen cannot be decided by compiling and combining the data of 60 services/departments.

77. To give an example, supposing the SCs and STs are adequately represented in the promotional posts under Health Service, merely because they are not adequately represented in the Police Service is no ground to continue reservation for them in the Health Service.

To give a counter argument, supposing there are 20,000 posts under all the Services in the State and 10,000 of these posts are in the lowermost cadre. If all these 10,000 posts are filled in by the reserved categories, it cannot be said that they are adequately represented in the higher posts. To protect the rights of the SCs and STs and with a view to ensure that they get adequate representation at all levels, each cadre will have to be treated as a separate unit and the State is required to carry out the exercise in terms of ***Nagaraj's*** case with respect to each and every cadre under the State. The State cannot abdicate its function in this regard.

78. While considering whether the reserved categories are adequately represented in service, the State cannot ignore those SC or ST candidates who have come in on their own merit because

the backwardness of the class can be determined by seeing whether it is adequately represented in service and furthermore, reservation can only be provided to that backward class which is not adequately represented in service.

79. No material whatsoever has been placed on record to show that after ***Nagaraj's*** case was decided, the State ever carried out any exercise to collect the data and appreciated the said data in the context of the judgment of the Apex Court in the said case. No exercise has been carried out to determine whether the SCs and STs are adequately represented in the posts in a particular cadre.

80. In this view of the matter, we are clearly of the view that the State has not complied with the law laid down in ***Nagaraj's*** case and has failed to determine whether the SCs and STs are adequately represented in service with reference to particular cadres.

Efficiency of service:

81. The law has now crystallized that it is for the administration to decide how the level of efficiency has to be maintained but it is also settled position of law that one of the critical factors which is absolutely relevant to maintain efficiency is that reservation does not exceed 50%. That is why if members of the SCs and STs come in on their own merit, they occupy the posts meant for general category candidates. These candidates have come in on their own merit and do not impact efficiency in any

manner. On the other hand, if candidates who are less meritorious come in on the basis of reservation, then efficiency may be affected. To strike a balance, the Apex Court held that reservation could not exceed 50%. The Parliament by amendment again limited reservation to 50% but the only rider was that when carry forward posts are concerned, they shall not be counted for determining the 50%. There can be no quarrel with this proposition because this ensures that as far as the cadre is concerned, not more than 50% people can be promoted or appointed on the basis of reservation.

Who are SC and ST candidates appointed on merit:

82. One of the main issues raised before us is "who are the members of the reserved categories who are to be treated to be appointed on merit" and, therefore, are permitted to occupy a post meant for the general category.

83. The first proviso to Rule 9 lays down that a Scheduled Caste or Scheduled Tribe candidate who occupies on merit or seniority or seniority-cum-fitness, an unreserved point of the 100 point roster in the combined list, shall not be shown against any reserved point. The second proviso provides that when names are being recommended for promotion to any post, the names against unreserved vacant post shall first be recommended in order of their merit or seniority or seniority-cum-fitness etc. and then the names against reserved vacant post shall be recommended.

84. The Government of India had issued a memorandum regarding maintenance of reservation registers and roster registers. Clause 5.13 provides that only such SC/ST/OBC candidates who are selected on the same standard as applied to general candidates shall be treated as own merit candidates. If any SC/ST/OBC candidate is selected by getting any relaxation in experience, qualification, number of permitted chances in written examination, enlargement of zone of consideration, such candidate has to be counted against a reserved vacancy and cannot be considered for appointment against unreserved vacancy. Clause 5.14 provides that SC/ST candidates appointed on their own merit and adjusted against unreserved points will retain their SC/ST status and would be eligible to get benefit of reservation in future further promotion, if any. We are clearly of the view that only those SC and ST candidates who have not got the benefit of being members of SC and ST at any stage of their career can be considered to be own merit candidates and can be adjusted against the general category posts. To give an example, if a service consists of 5 (five) levels or cadres and a SC candidate tops the examination for direct recruitment and is promoted at every level without the aid of any benefit meant for reserved category candidates, he even at the highest level in the service can be termed to be a general category candidate. On the other hand, the same candidate if at the time of promotion to the second or third level gets benefit either of reservation, or of relaxation in the years of service put in, or of expanding the zone of consideration so that he falls within the zone of consideration, he will cease to be an own

merit candidate for the rest of his service career. Therefore, if a candidate belonging to the reserved category takes benefit or advantage of belonging to the reserved category at the second or third level but is thereafter promoted to the fourth level strictly in accordance with the seniority when he is to be promoted to the fifth level, he cannot be considered to be an own merit candidate and has to be treated as a reserved category candidate.

85. A candidate belonging to the reserved category who is selected on the same standard which is applied to general category candidates and who appears in the general merit list is to be treated as an own merit candidate. He will be treated against the unreserved post in the roster. When a relaxed standard is applied in selecting an SC, ST or OBC candidate at any stage of service, he loses the status of being an own merit candidate. Therefore, when such candidate is given the benefit of change of age limit, experience, qualification, permitted more number of chances in written examination, extended zone of consideration larger than what is provided for a general category candidate, lesser years of experience or any other such relaxation, then this candidate has to be counted towards the reserved category and would be deemed to be unavailable for consideration against unreserved category or vacancy of post.

Operation of the Tripura Scheduled Castes and Scheduled Tribes Reservation Act, 1991:

86. One of the main disputes which has arisen is that according to the petitioners the State is operating the provisions of

the reservation Act and Rules in such a manner that the principle of equality is being impinged and the members of the general categories are suffering reverse discrimination. None of the petitioners has challenged the power of the Government to make provision for reservation in the promotional posts. They have not even challenged the right of such promoted candidates to get benefit of consequent seniority. Their only grievance is that the manner in which the roster is being operated and reservation made is totally violative of the law laid down in ***Nagaraj's*** case.

87. The Union of India had issued a brochure relating to reservation and Chapter-V of the said brochure deals with reservation and roster registers. Clause 5.1 provides that in cases of cadres having more than 13 posts, all appointing authorities should maintain reservation register in format given in Annexure-1. The format given in Annexure-2 is to be followed where the number of posts in a cadre is less than 14.

88. Even in the Tripura Act, the schedule to the Act referred to earlier clearly lays down that in respect of recruitment or promotion for a post the cadre strength of which is up to 3 posts, a separate replacement roster should be followed. We are *prima facie* of the view that the replacement roster should be applied in all those cases where the number of posts is 3 or less as laid down in the Schedule to the Act. Operating the 100 point roster where the number of posts is 3 or less would be violative of the Act.

89. We may again refer to para-6 of the schedule in this behalf which clearly lays down that where the number of posts in any service or cadre is too small to permit reservation to be made for all the reserved categories, the replacement roster at para-1(b) should apply. We are of the considered view that this replacement roster should apply in all cases where the number of posts in a cadre is 3 or less. Therefore, we hold that para-6 will be valid only if a 100 point roster is followed where the number of posts is more than 3 and where the posts are 3 or less, then the replacement roster as provided in the Schedule should be followed.

90. We may also refer to para-8 of the schedule which lays down that if at the time of initial operation of roster the number of reserved categories in any service or post must be determined afresh and if the total representation of any particular reserved category exceeds the prescribed percentage or if the total representation of all reserved categories exceeds 50%, the excess shall be adjusted in future replacements but the existing incumbents shall not be registered. This only means that if the cap of 50% has been breached, then in future the reservation will stop.

91. Para-13 of the schedule provides that isolated individual posts in small cadres may be grouped together with the posts of the same class for purposes of reservation taking into account the status, salary and qualifications prescribed for the posts in question. We are clearly of the view that this paragraph is totally violative of the law laid down by the Apex Court. Reservation has to be cadre-wise and individual posts and small

cadres cannot be grouped together because that would defeat the purpose of creating a replacement roster for small cadres. Therefore, we hold that paragraph-13 is illegal and void and ultra vires the Act and the Constitution.

92. Section 4(2) is only permissive in nature. There can be no quarrel with the power of the State to provide for reservation. The percentages of reservation provided are also a policy decision and the Court cannot normally interfere unless the reservation exceeds 50%. There can be no quarrel with sub-section (b) which provides that SCs and STs who qualify for selection on merit shall be included in general list and not against reservation quota. Therefore, we are of the view that section 4(2) is valid and the challenge to the validity of section 4(2) is rejected.

93. Though we have upheld the validity of section 4(2) in respect of the schedule, we are clearly of the view that the 100 point roster can be followed only where the number of pots is more than 3 and the replacement roster should be followed where the number of posts is 3 or less. We further hold that para-13 of the Schedule is totally illegal and invalid because individual posts and small cadres cannot be grouped together.

Operation of the Tripura Scheduled Castes and Scheduled Tribes Reservation Rules, 1992:

94. The dispute is with regard to the provisos to Rule 9(2). The first proviso lays down that an SC or ST candidate who occupies on merit or seniority or seniority-cum-fitness etc. in the combined list shall not be shown against any reserved point. There

can be no quarrel with this proposition also as long as the concept of merit is clearly understood. The second proviso complicates the position further. It provides that at the time of recommending candidates for promotion to any post, the names against unreserved vacant posts shall first be recommended in order of their merit or seniority or seniority-cum-fitness etc. as the case may be, and then the names against reserved vacant posts shall be recommended. As long as the representation of the reserved categories is inadequate and the roster has not outlived its utility, there is no quarrel with this proviso. However, once the reserved categories are adequately represented in the promotional cadre, then this proviso creates a problem because general category candidates are denied the right to be promoted against posts which they would occupy if the replacement system was to be followed.

95. We are clearly of the view that once reverse discrimination starts, then reservation must come to an end. In case, reservation under Article 16(4) or 16(4A) is taken to such an extent that the right of equality vested in every citizen of the country under Article 16(1) is infringed, then the reservation being beyond the permissible limits must come to an end.

96. Having carefully analyzed the Rule 9 of the rules, we are clearly of the view that sub-rule (2) of Rule 9, especially the two provisos thereto would be violative of the law laid down by the Constitution and, in fact, the provisos go beyond the Act and are ultra vires of the Act. The first proviso to the rule lays down that whoever occupies on merit or seniority or seniority-cum-fitness

etc., an unreserved point of the 100 point roster in the combined list shall not be shown against any reserved point. As far as those persons who are appointed only on merit are concerned, they may not be shown against any reserved point but as discussed by us earlier under the heading of "Who are SC and ST candidates appointed on merit", if any of these SC or ST candidates occupies roster point meant for the unreserved, he cannot be considered to be an own merit candidate unless it is shown that such candidate has never taken the benefit of belonging to the SC or ST throughout his career. If such candidate has taken such a benefit, then he must be shown as a reserved category candidate.

97. As far as the second proviso is concerned, it appears innocuous at first glance. However, the benefit of the proviso can only be given to those who are either appointed on merit or on the basis of consequential seniority as referred to in Article 16(4A). Again we will reiterate that even in respect of these candidates if they have ever taken the benefit of reservation, they must be adjusted against the reserved category posts.

As discussed hereinafter, the 100 point roster cannot be applied in each and every case and to that extent also the first proviso is contrary to the schedule of the Act and to the law laid down by the Apex Court.

98. There are two options before us. Either we can strike down the two provisos or we can read them down in such a

manner that they are held valid but no injustice is caused to those candidates belonging to the general category.

99. It is well settled principle of law that when a provision in a statute or the rules can be read down to make it valid, then such interpretation should be followed rather than following an interpretation which makes the rule void.

100. There can be no manner of doubt that a provision can be made for reservation of SCs and STs in promotion. There can also be no manner of doubt that such promoted candidate being a SC or ST candidate is also entitled to the consequential benefit of seniority. As held by us above, the persons who qualify solely on the basis of merit can be included in the general list and not against the reserved quota. However, while working section 4(2) and rule 9, the State must ensure that in terms of the judgment in ***Nagaraj's*** case, the cadre-wise strength of each cadre is assessed and on the basis of the cadre strength, the reservation can be provided. The reservation cannot be made on the basis of the strength of the service or on the basis of the number of posts in the State but strictly in accordance with the strength of the cadre, post wise, as has been repeatedly laid down by the Apex Court.

101. Furthermore, we hold that only those SC and ST candidates shall be included in the general list and not in the reserved quota who have never taken the benefit of any advantage which may be available to the SCs and STs at any stage of their career.

102. As far as the first proviso of Rule 9 is concerned, we would like to clarify that the 100 point roster may not apply in each and every case. Where the strength of the cadre is 3 or lower, then the 3 point roster as contained in the schedule shall apply. By applying the 100 point roster in a combined manner, the State is combining all the posts in the service which is not permissible. Therefore, while upholding the rule, we make it clear that it is not the 100 point roster which will apply in every case but where the 100 point roster is applicable, the same may apply and where there are 3 or lesser posts, then the 3 point replacement roster shall apply.

The Time Cap:

103. The Apex Court in ***Nagaraj's*** case also clearly laid down that reserved posts cannot be allowed to remain vacant indefinitely just because the candidates from the reserved category are not available. The Apex Court introduced the principle of time cap and held that the State Government must keep an upper time limit in which the posts must be filled in from the reserved category. In case, the posts within that time period cannot be filled in from the reserved categories, then general category candidates can be appointed against such posts. This is essential to maintain efficiency in service. This Court can take judicial notice of the fact that posts are created and sanction granted to create posts only after an exercise is conducted and it is determined that such posts are necessary for efficiently running the administration. In case, these posts are not filled up, this would result in inefficiency. A

post may be kept vacant for a year or two years but if posts are kept vacant indefinitely, then efficiency is definitely going to be adversely affected. As noted by the Apex Court in ***Nagaraj's*** case (supra), in many States a time cap of three years has been laid down.

104. In Tripura, there is no time cap. This again shows that the State of Tripura did not take into consideration ***Nagaraj's*** judgment and there is no application of mind after this judgment was delivered. We are aware that the State is the best judge of what should be the time cap. There can be a different time cap for different categories of posts. If posts of Peons remain vacant for years, that may not affect efficiency of administration but if posts of Specialists in hospitals, Engineers, Professors, Teachers are kept vacant for years on end, this will not only affect the efficiency of the administration but it will also affect the health of the people and violate the human rights of the citizen in as far as they shall be denied of their right to live a proper and adequate life where their health and educational reliefs are taken care of.

105. In view of the above discussion, we are clearly of the view that para-11 of the schedule to the Act is not valid and the State must fix a time cap in this regard. We direct the State to ensure that taking into consideration the nature of the post and the law laid down in ***Nagaraj's*** case and subsequent judgments, the time cap must be laid down for separate categories of posts.

The wrong application of the Act & the Rules:

106. During the pendency of the petitions, the petitioners filed additional affidavit and along with the affidavit annexed the Scheduled Castes Sub-Plan (SCSP) 2012-2013 issued by the Department for Welfare of SCs & OBCs, Government of Tripura. In Clause 5.12 (1) of the said document, it is mentioned that the percentage of representation of the various categories is as follows:-

Category of Post	**Percentage of representation**	
	SCs	**STs**
Group 'A'	18.05	39.42
Group 'B'	13.42	50.37
Group 'C'	18.33	37.00
Group 'D'	17.76	34.07

On this basis, it is contended that the SCs and STs are more than adequately represented in the services under the State. According to the State, this document does not reflect the correct position. The petitioners have also filed certain other documents to show that the SCs and STs are more than adequately represented and are, in fact, occupying the posts meant for unreserved categories. It is contended on the basis of these figures that reverse discrimination has started and hence, it is urged that the State has violated the law laid down in ***Nagaraj's*** case inasmuch

as the State has not taken into consideration the backward of its class and its adequacy or inadequacy in representation while making promotions.

107. We may make it clear that these are individual disputes which will have to be decided in individual cases but to highlight the issue that the State is obviously not following the ***Nagaraj's*** judgment inasmuch as the State is not taking into consideration the adequacy of representation of the SCs and STs in the cadre, it would be pertinent to refer to some of these documents.

In the Tripura Engineering Service Grade-I, there are 33 sanctioned posts out of which only 17 are filled in. Out of these, 7 persons appointed belong to the SC, 3 to the ST and only 7 to the unreserved category which shows that even considering the men in position, the number of SC and ST are holding almost 59% of the posts. In the Cooperative Department, at the level of the Deputy Registrar of Cooperative Societies, there are 7 sanctioned posts out of which 3 are meant to be for SCs and STs and 4 for unreserved categories. Only 4 posts are filled and all are manned by SC and ST employees but in the vacancy position, 2 posts are shown for SCs and STs and one for unreserved. It appears that even out of the 4 ST and SC candidates appointed, 3 have been shown to be appointed against unreserved category posts, i.e. presumably on merit and, therefore, in the vacancy position 2 further vacancies have been shown for SCs and STs.

The position is much worse in the Tripura Secretariat Service. At the level of Joint Secretary, there are 5 sanctioned posts, 1 for SC, 1 for ST and 3 for UR. All the posts are manned by reserved category candidates but still the vacancy position for UR is shown as nil. Even at the level of Deputy Secretary, there are 16 posts, out of which 3 have been distributed to SC, 5 to ST and 8 to UR but actually only 3 posts are filled in, one by SC candidate and 2 by ST candidates. There are no unreserved candidates at the level of Joint Secretary or Deputy Secretary. Surprisingly, even at the level of Deputy Secretary, all the 3 posts filled in have been shown to be filled in on merit and, therefore, the vacancy position of SCs and STs remains unchanged, but all the 3 reserved category candidates appointed have been adjusted against UR posts leaving only 5 vacancies for UR candidates. It may be true that reserved category candidates appointed on merit are entitled to consequential seniority. However, the law is very clear that this must not lead to reverse discrimination wherein unreserved category candidates are not even considered for promotion. Assuming that the reserved category candidates have come in strictly on merits, then also the Supreme Court has clearly held that where the reserved categories are more than adequately represented in service, reservation should end and, therefore, if the State had followed ***Nagaraj's*** judgment, it would have had to reconsider the question as to whether reservation in promotion should be provided for in these cadres or not.

108. We may also point out that the manner in which the promotions have been made indicates that candidates belonging to the reserved category who have at some stage of their career got benefit of being reserved category candidates and are not own merit candidates have got undue benefit in promotions. In this behalf, reference may be made to a document filed by the petitioners relating to the Tripura Police. A number of persons were appointed in the year 1981. The unreserved candidates were much higher in the list at Sl. Nos.154, 156, and 158 whereas the reserved category candidates were at Sl. Nos. 160, 165 and 176. The unreserved category candidates have only got two promotions, the first in the year 2005 and the second in the year 2013. On the other hand, the reserved category candidates who were appointed along with the unreserved category candidates in 1981 were promoted for the first time in the year 1991/1992. They got their second promotion to TPS Grade-II in 1996, seventeen years before the unreserved category candidates. They got their third promotion to TPS Grade-I in 2006 and they have all been inducted in the IPS in the year 2012. As stated by us above, we are not deciding individual disputes in this case but these examples have been mentioned only to show that the system being followed by the State of Tripura is not in accordance with the law laid down by the Apex Court as is apparent from the factual situation depicted in a large number of departments. The facts clearly indicate that reserved category candidates have been treated to be own merit candidates even when they have got promotion to the next post on the basis of reservation.

109. On going through these various documents, we find that in the State of Tripura, in some departments a stage has been reached that where there are 5 grades in a service, the general category candidates have only been promoted till the second grade or at the most to the third grade with the result that there are no eligible general category candidates to be considered for promotion to the fourth and fifth grade. It is not disputed that these general category candidates were appointed at the same time as the reserved category candidates and many of the general category candidates were placed higher than the reserved category candidates. However, by misinterpreting the law and treating the reserved category candidates to be appointed against unreserved posts, they have been promoted up to the highest level and the general category candidates have virtually been shut out from competing for the highest levels in the service because they are not even promoted till the second highest level. This, in our opinion, amounts to clear reverse discrimination and shows lack of application of mind by the State.

110. We may make it clear that the observations are not on the merits of these cases because we do not have the entire facts before us but this is only with a view to indicate that the State has not taken into consideration the three criteria laid down by the Apex Court in ***Nagaraj's*** case, i.e. backwardness of class, adequacy in representation and efficiency of service.

111. We reiterate that we are not deciding the individual disputes since these have to be decided in the individual cases but

we are clearly of the view that the manner in which the State has applied the law of reservation is totally illegal since the reservations have not been made cadre-wise.

The concept of reservation:

112. The Apex Court in ***Indra Sawhney's*** case also held as follows:-

> *"**838**. While on Article 335, we are of the opinion that there are certain services and positions where either on account of the nature of duties attached to them or the level (in the hierarchy) at which they obtain, merit as explained hereinabove, alone counts. In such situations, it may not be advisable to provide for reservations. For example, technical posts in research and development organisations/departments/ institutions, in specialities and super-specialities in medicine, engineering and other such courses in physical sciences and mathematics, in defence services and in the establishments connected therewith. Similarly, in the case of posts at the higher echelons e.g., Professors (in Education), Pilots in Indian Airlines and Air India, Scientists and Technicians in nuclear and space application, provision for reservation would not be advisable.*
>
> ***839**. As a matter of fact, the impugned Memorandum dated August 13, 1990 applies the rule of reservation to "civil posts and services under the Government of India" only, which means that defence forces are excluded from the operation of the rule of reservation though it may yet apply to civil posts in defence services. Be that as it may, we are of the opinion that in certain services and in respect of certain posts, application of the rule of reservation may not be advisable for the reason indicated hereinbefore. Some of them are: (1) Defence Services including all technical posts therein but excluding civil posts. (2) All technical posts in establishments engaged in Research and*

> *Development including those connected with atomic energy and space and establishments engaged in production of defence equipment; (3) Teaching posts of Professors - and above, if any. (4) Posts in super-specialities in Medicine, engineering and other scientific and technical subjects. (5) Posts of pilots (and co-pilots) in Indian Airlines and Air India. The list given above is merely illustrative and not exhaustive. It is for the Government of India to consider and specify the service and posts to which the Rule of reservation shall not apply but on that account the implementation of the impugned Office Memorandum dated August 13, 1990 cannot be stayed or withheld."*

Though the question does not strictly arise before us, we are referring to these paragraphs since these were cited by the learned Advocate General who relied upon them to indicate that it is for the State to decide these issues. We have no quarrel with this statement. However, the State has failed to place any material before us to show that the State of Tripura at any time has considered the aforesaid observations made by the Apex Court in ***Indra Sawhney's*** case and reiterated in various judgments thereafter wherein it has been mentioned that certain services and posts should be outside the purview of reservation. In Tripura, reservation in promotion is provided for, uptil the highest post in each and every department.

113. As pointed out by the Apex Court, there are certain departments of posts such as, (i) Defence Services including technical posts, (ii) All technical posts in establishments engaged in Research and Development including those connected with atomic energy and space and establishments engaged in production of

defence equipment, (iii) Teaching posts of Professors and above, (iv) Posts of super-specialists in Medicines, engineering and other scientific and technical subjects, (v) Posts of pilots etc. which must be kept outside the purview of reservation. No doubt, it is for the State to decide which posts are to be kept out of the purview of reservation but the lack of application of mind is apparent from the fact that in the State of Tripura not even a single post has been kept outside the purview of reservation. We have discussed this matter not to decide any individual dispute but only with a view to illustrate that the State of Tripura is not analyzing the data year to year and is not constantly reviewing the process of reservation to decide whether any SCs or STs are adequately represented in the services or not.

In ***Ram Singh***'s case (supra), the Apex Court has held that new practices, methods and yardsticks have to be continuously evolved moving away from caste centric definition of backwardness. The Apex Court has called upon the State to develop new methodology and recognize newly emerging groups in society which require affirmative action to be taken in their favour. Reference may be made in this behalf to the judgment of the Apex Court in ***National Legal Services Authority vs. Union of India, [(2014) 5 SCC 438]*** wherein the Apex Court has directed that transgender should also be treated as a backward class. We need to remind ourselves that we must keep updating our data, we must keep updating the analysis of the data and we must ensure that there is identification of new backward groups and the State should

not bind itself to only historical injustice because as held in ***Nagaraj's*** case, reservation is necessary for transcending caste and not for perpetuating it. If reservation is not used in a limited sense, it will perpetuate casteism in the country which may damage the very fabric of our nation.

Our conclusions and answers to the questions referred:

114. We now proceed to answer the questions referred for the decision of the larger Bench in light of what we have discussed hereinabove.

Q. No.(1). Whether the State is collecting quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment?

As held by us above, though in terms of Rule 14 of the rules, the State may have collected data but the said data has not been collated or appreciated in the light of the judgment laid down in ***Nagaraj's*** case. The State has failed to determine the backwardness of the SCs and STs in the context of determining the inadequacy of their representation in public employment, especially in regard to promotional posts. As held by us above, the State has not even carried out this exercise.

Q. No.(2). Whether the State has taken into consideration the efficiency of public service while making reservations in accordance with Article 335 of the Constitution of India?

It is for the State to decide what is the level of efficiency but as held by the Apex Court and explained by us

hereinabove, under no circumstances can total reservation exceed 50% of the cadre strength if efficiency of public service is to be maintained. We may also add that only those meritorious candidates belong to the reserved category who have never during their service got benefit of reservation can be excluded while determining the maximum reservation as per the rules.

Q. No.(3). Has the State conducted any exercise to find out whether reservation has led to any improvement or otherwise in administrative efficiency?

In view of the answer to question No.(2) above, we hold that this question does not arise and need not be answered.

Q. No.(4). Whether the data collected by the State in terms of Rule 14 of the Tripura Scheduled Castes and Scheduled Tribes Reservation Rules, 1992 is adequate data as contemplated in Nagaraj's case (supra)?

As held by us while answering question No.(1), the data collected by the State in terms of Rule 14 may be adequate data but the data has not been collated and applied properly. The data must be applied by taking into consideration the strength of the cadre alone. The data has to be appreciated by seeing whether the SCs and STs are adequately represented in the cadre whether it be on merit or by way of reservation.

Q. No.(5). Whether even where the class or caste is not duly represented, should the quantifiable data be applied department-wise or cadre-wise or reservations should continue even in a department where the Scheduled Castes or Scheduled Tribes are adequately represented?

In view of the law laid down by the Apex Court, we are clearly of the view that the quantifiable data has to be applied cadre-wise and where the SCs and STs are adequately represented in the cadre, then reservation cannot continue any longer.

Q. No.(6). Whether the State can continue to apply the reservation roster in a department or cadre where the Scheduled Castes and Scheduled Tribes are adequately represented in a particular grade? In such cases, should the reservation roster be followed or should the principle of replacement as laid down in R.K. Sabharwal's case [(1995) 2 SCC 745] be followed?

As far as question No.(6) is concerned, that need not be answered because even in the affidavit filed by the State, it has been mentioned that the principle of replacement as laid down in ***R.K. Sabharwal's*** case has to be followed.

Q. No.(7). Whether an employee who is promoted by giving benefit of reservation under the Tripura Scheduled Castes and Scheduled Tribes Reservation Act, 1991 and the rules framed thereunder can be treated to be an unreserved candidate for filling up the next higher post?

Question No.(7) is answered by holding that an employee who gets the benefit of being a member of the SC or ST at any stage of his career whether it be at the stage of direct recruitment or at the stage of promotion, from that day onward cannot be treated to be an unreserved own merit candidate for filling up the higher post(s).

Q. No.(8). Whether Rule 9(2) of the Tripura Scheduled Castes and Scheduled Tribes Reservation Rules, 1992 is violative of the Tripura

Scheduled Castes and Scheduled Tribes Reservation Act, 1991 and the Constitution of India?

Question No.(8) is answered by holding that though Rule 9(2) of the Tripura Scheduled Castes and Scheduled Tribes Reservation Rules, 1992 is violative of the Act and ultra vires the law laid down by the Apex Court in ***Nagaraj's*** case, if it is read down as detailed hereinafter, then the rule will be valid. The provisos to rule 9(2) will also have to be read down in the manner explained by us above. Further the schedule to the Act must also be read in a manner to make it consistent with the law laid down by the Apex Court.

115. We, therefore, direct that rule 9 and the provisos thereto shall be read in such a manner that only those SC and ST candidates who have qualified solely on the basis of merit and have never taken the benefit of reservation will be treated to be own merit candidates and entitled to occupy the posts meant for the general category. Further we direct that while working section 4(2) and rule 9, the State must ensure that the reservation is made cadre-wise. We also direct that 100 point roster shall apply only where the number of posts in the cadre is 4 or more. Where the posts in the cadre are 3 or less, the 3 point replacement roster shall be followed. We also direct that single post or small cadres cannot be combined to make the number of posts more than 3.

116. We further direct that the State must in line with the judgment in ***Nagaraj's*** case fix a time cap, i.e. the maximum period for which reserved category posts can be kept vacant.

117. We have answered all the questions referred to us. The writ petitions may now be listed before the appropriate Benches for final hearing.

JUDGE JUDGE CHIEF JUSTICE

Pulak