

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.19114 of 2012

1. Sushil Kumar Singh Son Of Parameshwar Dayal Resident Of Village - Neouri Koeri Bigha, P.S. - Kako, District - Jehanabad, At Present Technical Secretary To Chief Engineer, Birpur(Supaul)
2. Girish Nandan Singh Son Of Sri Bageshwar Singh Resident Of House No. 307, Lalita Residency, Rupaspur P.S. Rupaspur, District - Patna Presently Technical Secretary To Engineer In Chief, Building Construction Department, Patna
3. Kripalu Pandey Son Of Late Mahavir Pandey Resident Of Shiv Shambhu Nagar, Ashiana Road, P.S. Rajiv Nagar, District - Patna, Presently Under Secretary, Department Of Health, Bihar, Patna
4. Vijay Kant Sharma Son Of Ram Bilash Singh Resident Of Village - Chhotki Akauna, P.S. - Ghoshi, District - Jehanabad, Retired From The Post Of Under Secretary, Department Of Law, Bihar, Patna
5. Afzal Ahmad Son Of Late Dr. Md. Siddique Resident Of 3j/403, Ambar Apartment, New Patliputra Colony, P.S. - Patliputra, District - Patna, Posted As Executive Engineer, Water Resources Department, Bihar, Patna And Convenor Of Ati Pichhara - Pichhara - Alp Shankhyak Sanvarg Karamchari Padadhikari Mahasangh
- **Petitioners.**

Versus

1. The State Of Bihar Through Chief Secretary, Bihar, Patna
2. The Principal Secretary, Department Of General Administration, Bihar, Patna
3. The Joint Secretary, Department Of General Administration, Bihar, Patna
4. The Principal Secretary, Sc/St Welfare Department, Bihar, Patna
5. The Secretary, Sc/St Welfare Department, Bihar, Patna
6. The Principal Secretary, Department Of Road Construction Null Null
7. The Principal Secretary, Department Of Energy, Bihar, Patna
8. The Principal Secretary, Department Of Health, Bihar, Patna
9. The Principal Secretary, Home Department, Bihar, Patna
10. The Principal Secretary, Department Of Animal Husbandary And Fisheries, Bihar, Patna
11. The Principal Secretary, Department Of Industries, Bihar, Patna
12. The Principal Secretary, Department Of Public Health Engineering, Bihar, Patna

13. The Principal Secretary, Department Of Water Resources, Bihar, Patna

14. The Principal Secretary, Department Of Commercial Taxes, Bihar, Patna

.....**Respondents.**

15. Narendra Kumar, State General Secretary, all India Confederation of SC/ST Organization, Bihar State Unit, a age-46, son of Narayan Choudhary, resident of village-Sikandrapur, Post-Shahpur, Danapur cant, District-Patna.

16. Rajendra Prasad Choudhary, age-58, son of late Devi Choudhary, resident of Mohall-Raushan Vihar Colony, Bailey Road, P.S. Danapur, District-Patna at present posted as Engineer-in-Chief, Building Construction Department, Government of Bihar.

17. All India Federation of Schedule Caste, Schedule Tribe, Backward and Minorities and Employees Welfare Association, New Delhi (In Short SCEWA STAMB) through its President Bihar State Unit namely Harikeshwar Ram, son of Sri Harinandan Ram, At+P.O Gidha P.S. Koilwar, District-Bhojpur.

18. Harikeshwar Ram son of Sri Harinandan Ram, at +P.O. Gidha, P.S. Koilwar, District-Bhojpur.

19. Devendra Rajak son of late Chhotan Rajak, resident of village-Ratanpura, P.O. Dariyapur, District-Nalanda.

20. Birendra Kumar, son of Sri Baleshwar Das, Village-Singhaul, P.O. Ulaw, District-Begusarai.

.... **Intervenor- Respondents.**

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Appearance :

For the Petitioners : Mr. Binod Kanth, Sr. Adv.

Mr. Bindhyachal Singh, Adv.

Mr. Parijat Saurav, Adv.

Mr. Smriti Singh, Adv.

For the State of Bihar: Mr. Paramjit Singh Patwalia, Sr. Adv.

Mr. Rudreshwar Singh, Adv.

Mr. Piyush Lall, Adv.

Mr. Shankar Kumar Choudhary, Adv.

Mr. Rajat Singh, Adv.

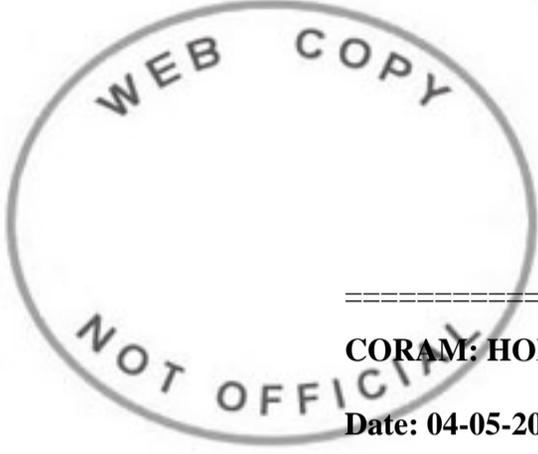
Mr. Amish Kumar, Adv.

Mr. Lalit Kishore, P.A.A.G.

Mr. Piyush Lall, Adv.

Mr. Kaushal Kumar Jha, A.A.G.-14.

For the Intervenors : Mr. Shankar Kumar Choudhary, Adv.
Mr. Shyama Prasad Mukherjee, Sr. Adv.
Mr. Shanti Pratap, Adv.
Mr. Dinu Kumar, Adv.
Mr. Shiv Kumar Prabhakar, Adv.
Mr. Arbind Kumar Sharma, Adv.
Mr. Rajesh Kumar Singh, Adv.



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CORAM: HONOURABLE MR. JUSTICE V. NATH
CAV JUDGMENT

Date: 04-05-2015

V.Nath, J.

Heard the learned counsel for the parties.

In view of the amplified nature of the issue arising for consideration in the present writ application, the learned counsel for the parties who have filed their respective intervention petitions for being impleaded as parties, have also been heard.

The irksome issue of reservation in promotion with consequential seniority has surfaced again in this writ application wherein the petitioners have questioned the legality and propriety of the resolution dated 21.08.2012 issued by the State Government (Annexure-13) taking the decision to continue the provision for reservation in promotion with consequential seniority to the Scheduled Castes and Scheduled Tribes employees in services under the State Government. By filing the interlocutory application (I.A.No.9227/13), the prayer has been made by the petitioners for addition of the reliefs regarding quashing of the different promotion

orders and seniority lists mentioned in detail and annexed with the said interlocutory application.

All the writ petitioners are government servants holding different posts in different departments. It is the case of the petitioners that in view of the decision in the case of **M.Nagaraj Vs Union of India , (2006) 8 SCC 212** laying down the parameters to be adhered to before making provision for promotion with consequential seniority for Scheduled Castes and Scheduled Tribes employees in services under the State Government, and also accordingly in view of the directions by this Court in CWJC No. 5649/08 and CWJC No. 3937/2011, the State Government called for a report /data regarding backwardness and inadequacy of representation of Scheduled Castes and Scheduled Tribes employees in the government services and on the basis of the said report/data, the resolution dated 21.08.2012 has been issued. It is, however, the case of the petitioners that the said report/data is completely perfunctory and mechanical ignoring even vital and crucial conditions laid down by the Apex Court in **M.Nagaraj (Supra)** and subsequent judgments. It is further case of the petitioners that the impugned resolution on the basis of the cryptic and tutored report/data is neither legal nor proper. The petitioners have stated in detail in the writ application as well as in the interlocutory application (I.A.No.9227/13), the manner in which their



service conditions have been and would be affected by the impugned resolution.

In their counter affidavit the respondent-State as well as the intervener respondents have denied the assertions made by the petitioners in the writ application and have come out with the case that the report/data clearly demonstrates the backwardness and inadequate representation of the Scheduled Castes and Scheduled Tribes employees in the different services which are the factors justifying the grant of promotion with consequential seniority to such employees and further that the grant of promotion with consequential seniority to such employees would not affect the efficiency in service. It is further case of the respondents that the decision to grant promotion with consequential seniority to the Scheduled Castes and Scheduled Tribes has been taken after the scrutiny of the quantifiable data and sufficiency of materials as demonstrated therein.

Before proceeding to consider the rival submissions made on behalf of the parties and a number of decisions relied upon, it would be profitable here to take into notice the legislative and judicial history pertaining to reservation in promotion to SCs/STs employees in government service. It has, however, simultaneously to be kept in focus that after the dictum in **M.Nagaraj** (Supra) by the Apex Court with emphasis on distinction between the existence of power and





exercise of power and recognizing the application of theory of 'guided power', the judicial review is now limited to the exercise of power by the State Government in making the provision (impugned resolution) under Article 16(4-A) of the Constitution of India, and the issue predominantly relates to the grant of benefit of reservation in promotion with consequential seniority to Scheduled Castes and Scheduled Tribes who are in government service as distinguished from the issue of reservation in direct recruitment to Scheduled Castes and Scheduled Tribes in general.

By virtue of Article 16(4) of the Constitution of India, the Scheduled Castes and Scheduled Tribes were having the benefit of reservation in initial appointment as well as in promotion since 1955. The Apex Court also affirmed the same in the case of **G.M., S. Railway Vs Rangachari**, AIR 1962 SC 36. Eventually, however, the nine judge Bench of the Apex Court in **Indra Sawhney Vs Union of India**, 1992 Supp. (3) SCC 217 laid down that Article 16(4) of the Constitution of India provided for reservation only in the matter of initial appointment and did not provide for reservation in the matter of promotion. Their Lordships after referring to several earlier decisions expressed their disagreement with the view stated in **Rangachari** (Supra) and have ruled as follows:

“859. We may summarize our answers to the various

questions dealt with and answered hereinabove:-

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(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.....”.

With expressly stated view (as reflected from the objects



and reasons of the Amending Act) that the above ruling of the Supreme Court in **Indra Sawhney** case would adversely affect the interest of Scheduled Castes and Scheduled Tribes as their representation in services in the States had not reached the required level, the parliament inserted Article 16(4-A) by Constitution (Seventy Seventh Amendment) Act 1995. The newly inserted Article 16(4-A) of the Constitution of India was as follows:-

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

The aforesaid Clause (4-A) of Article 16 of the Constitution of India empowered the State to make provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of Scheduled Castes and Scheduled Tribes which in the opinion of the State were not adequately represented in the services under the State. The matter, however, did not rest there as the issue of determination of seniority

between the general candidates and the candidates belonging to reserved classes in the promotional category kept creeping up followed by pronouncements by the Apex Court in this regard in **R.K.Sabharwal Vs State of Punjab, (1995) 2 SCC 745, Union of India Vs Virpal Singh Chauhan, (1995) 6 SCC 684, Ajit Singh Januja Vs State of Punjab, (1996) 2 SCC 715**. It would be pertinent to mention here that the apex court in **Ajit Singh Januja (Supra)** expressed its concurrence with the view taken in **Virpal Singh Chauhan(Supra)** and held that the seniority between the reserved category candidates and general candidates in the promoted category would continue to be governed by their panel position i.e. with reference to inter se seniority in the lowest grade as the rule of reservation ensured accelerated promotion but did not give the accelerated 'consequential seniority'. This view was reiterated by the Apex Court in **Ajit Singh (2) Vs State of Punjab, (1999) 7 SCC 209**.

Again expressing the view that the judgments in the case of **Virpal Singh Chauhan (Supra) and Ajit Singh (Supra)** adversely affected the interest of the government servants belonging to the Scheduled Castes and Scheduled Tribes category in the matter of seniority after promotion to the next higher grade, the parliament stepped in with the Constitution (Eighty Fifth Amendment) Act

2001, amending Clause (4-A) of Article 16 giving benefit of consequential seniority in addition to accelerated promotion to the Scheduled Castes and Scheduled Tribes from 17.06.1975 (date of inclusion of Article 16(4-A)). After this amendment, Article 16 (4-A) of the Constitution of India now reads as follows:

“16.(4-A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which in the opinion of the State are not adequately represented in the services under the State.”

Accordingly, the office memorandum dated 21.01.2002 was issued by the Government of India providing for entitlement of the Scheduled Castes and Scheduled Tribes Government Servants to consequential seniority as well on their promotion by virtue of rule of reservation/roster and further directing for revision of the seniority of such government servants. In line, the Government of Bihar also came out with resolution dated 07.06.2002 making similar provision for promotion with consequential seniority and for revision of seniority list of its Scheduled Castes and Scheduled Tribes

Government Servants accordingly.

At this juncture, it would be pertinent to take notice of the two more constitutional amendments i.e. Constitutional 81st amendment and 82nd amendment which have also some bearing upon the present issue. By Constitutional (Eighty First Amendment) Act, 2000, the overall ceiling limit of 50% reservation was confined to the current vacancies, and the unfilled reserved vacancies of a year were segregated and were to be treated as separate class of vacancies to be filled up in succeeding years. The Constitutional (Eighty Second Amendment) Act, 2001 provided for relaxation in qualifying marks or lowering the standard of evaluation in matters of reservation in promotion to Scheduled Castes and Scheduled Tribes government servant.

The validity, interpretation and implementation of the Constitution (77th Amendment) Act 1995, the Constitution (81st Amendment) Act, 2000, the Constitution (82nd Amendment) Act, 2000, the Constitution (85th Amendment) Act, 2001 came up for consideration before the Constitution Bench in **M.Nagaraj Vs Union of India, (2006) 8 SCC 212**. The Constitution Bench while upholding the validity of these constitutional amendments also laid down certain 'qualifier/rider' to be followed before invoking the power as flowing from those Articles. The 'qualifier/rider'



mentioned in the **M.Nagaraj** (Supra) shall be adverted to in detail later on. Suffice here to mention that the Bihar Government came out with the instruction in its letter no. 745 dated 05.02.2008 reiterating its resolution dated 07.06.2002 to provide promotion with consequential seniority to Scheduled Castes and Scheduled Tribes government servant and directing for determination of their seniority accordingly. This decision of the State Government was called in question in CWJC No. 5649/08 and CWJC No. 3937/11 before this Court. These two writ applications were allowed quashing the impugned letter dated 05.02.2008 with observation that the State Government, following the ratio laid down by the Hon'ble Supreme Court in **M.Nagaraj (Supra) and Suraj Bhan Meena Vs State of Rajasthan, (2011) 1 SCC 467**, would have to collect quantifiable data and thereafter to grant reservation in promotion with protected seniority if in its opinion the SCs/STs Government Servants were backward and not adequately represented in the services under the State.

The State Government thereafter by order dated 22.06.2012 (Annexure-A to the counter affidavit) declared the Scheduled Castes and Scheduled Tribes Welfare Department as Nodal Department and issued direction for collection of relevant datas for assessing the requirement for grant of promotion with



consequential seniority to the Scheduled Castes and Scheduled Tribes Government servants. Accordingly, after collection of relevant data, the report with recommendation was prepared in the month of August 2012 (Annexure-B/2 to the counter affidavit) by the Department of Scheduled Castes and Scheduled Tribes, Government of Bihar and submitted for consideration. After consideration of the said report, the State Government has come out with the impugned resolution dated 21.08.2012 (Annexure-13) deciding to continue the reservation in promotion with consequential seniority to the Scheduled Castes and Scheduled Tribes Government Servants till further orders.

Assailing the impugned resolution, Mr. Kanth, learned senior counsel appearing on behalf of the petitioners has principally submitted that the qualifiers and guidelines indicated by the Apex Court in **M. Nagaraj** (supra) has been substantially ignored by the State Government and the report which is the basis of the impugned resolution does not portray the correct and complete picture, as required. Placing the said judgment in extenso, learned senior counsel has submitted that no methodology much less suitable standard or scale was prescribed for assessment and measurement of the backwardness, and explicitly the report also discloses the collection of data for the purpose to measure 'relative' backwardness only. It has



also been canvassed that there is no attempt to identify and segregate the creamy layer which has been laid down as a major limitation before a class can be identified as backward. It has been argued that the census report of 2001 has been made the basis of the report but the fact, impairing the relevance of this census report, has also been accepted in the report that there has been progressive development of the conditions of members of Scheduled Castes and Scheduled Tribes. It has been submitted that the identification and exclusion of the creamy layer has assumed all the more importance in this view of the matter. Learned senior counsel has further argued that after the declaration of law in **M. Nagaraj** (supra) conditioning the exercise of power by the State Government under the enabling provision contained in Art. 16 (4-A), it is not only the inadequacy of representation in the services under the State which has remained the sole criteria rather on the basis of data, it has to be established that inadequate representation of Scheduled Castes and Scheduled Tribes in government services has resulted due to their backwardness. Criticizing the report, it has been submitted that there is total lack of co-relative assessment of these two factors i.e. the inadequacy of the representation and backwardness. It has been next submitted that the report does not contain the relevant data identifying the class or classes of posts in services where there is inadequacy of

representation enabling the grant of the benefit of reservation in promotion in those class or classes of posts. It has been urged that the provision of Art. 16 (4-A) itself emphatically requires the identification of the class or classes of posts in services but the present impugned resolution has been issued in sweeping and general term. It has been submitted that the State Government was required to undertake an exercise in respect of each cadre of each of its department to show that there are compelling reasons on account of backwardness leading to inadequacy of representation in such cadre before proceeding to grant the benefit of reservation in promotion with consequential seniority keeping in mind over all administrative efficiency. Elaborating further, it has been submitted that the perceptible emphasis in Art. 16 (4-A) is on class or classes of posts in services, and in **M. Nagaraj** (supra) and later decision also this aspect has been highlighted but the impugned resolution granting reservation has been made applicable across the board. Learned senior counsel has elaborated his submissions by referring to the report to show that in majority of cadres in different services, the representation of the Scheduled Castes, Schedule Tribes government servants is substantial and far above from being termed as inadequate. It has been further submitted that the extent of reservation has also not been quantified in view of the provision of Bihar Reservation of Vacancies in Posts and





Services (for S.C., S.T. and O.B.C.) Act, 1991 prescribing proportion of reservation in case of Scheduled Castes to be 16% and in case of Scheduled Tribes to be 1 % as in view of the data contained in the report in most of the class of services, this proportion has either been achieved or has almost been achieved. It has thus been propounded that the impugned resolution would result in reverse discrimination violating Article 16 (1) of the Constitution of India. Lastly, it has been submitted that the report contains only general statements while evaluating the impact of grant of promotion with consequential seniority on administrative efficiency as no criteria or scale has been disclosed for evaluation of such impact. It has finally been submitted that the report, at the most, may be useful for grant of reservation in initial appointment i.e. direct recruitment but it lacks the necessary data which can reasonably prompt the decision to grant the benefit of reservation in promotion with consequential seniority in particular class or classes of services under the State to the Scheduled Castes/Scheduled Tribes government servants.

Mr. P.S. Patwalia, learned senior counsel appearing on behalf of the respondent-State, on the other hand, has submitted that the impugned resolution by the State Government to continue the benefit of reservation in promotion in services to the Scheduled Castes and Scheduled Tribes has been taken after the scrutiny of the



report containing data which justify the conclusion to extend such benefit to the Scheduled Castes and Scheduled Tribes government servants. By placing the report in detail, it has been contended that the inadequacy of representation of Scheduled Castes and Scheduled Tribes in services under the State is apparent enough making it imperative for the State Government to provide for reservation in order to balance the equilibrium. It has, however, been contended that the backwardness of Scheduled Castes and Scheduled Tribes government servants need not be unduly emphasized in the present context as the backwardness is implicit in cases of persons included in the Scheduled Castes and Scheduled Tribes category. It has, therefore, been also submitted that the concept of creamy layer principle is not attracted in cases of Scheduled Castes and Scheduled Tribes in view of the decision in **Indra Sawhney** case (supra) excluding the application of such concept to the members of Scheduled Castes and Scheduled Tribes. It has also been submitted that the members of Scheduled Castes and Scheduled Tribes form one class for the purpose of reservation and any further classification for the purpose of exclusion cannot be legally countenanced. It has also been submitted that after the decision in **Indra Sawhney** case (supra) holding that there could not be reservation in promotion, the parliament in its wisdom has inserted Art. 16 (4-A) of the Constitution which



demonstrates its intention to secure adequate representation of Scheduled Castes and Scheduled Tribes in the services in the State, and when the data as contained in the report clearly establish inadequacy of such representation in the services, the decision by the State Government to continue to grant the benefit of reservation in promotion with consequential seniority to Scheduled Castes and Scheduled Tribes cannot be faulted with. It has also been submitted that the grant of benefit of reservation in promotion with consequential seniority to Scheduled Castes and Scheduled Tribes employees is the policy decision of the State Government taken on the basis of the quantifiable data and the same cannot be the subject matter of judicial review. It has also been argued that the decision of the State Government to grant benefit of reservation in promotion to Scheduled Castes and Scheduled Tribes government servants in all services cannot be bad for the said reason alone as the data display inadequacy of representation in all the services. It has also been submitted that the impugned resolution does not violate the provisions of Bihar Reservation Act as the decision to grant promotion with consequential seniority is not inconsistent with any of its provisions.

Mr. S.P. Mukherjee, learned senior counsel for the intervener-respondents in the interlocutory application (I.A. No. 7506 of 2014) has adopted the submissions made by the learned senior

counsel for the State-respondents.

Mr Dinu Kumar, the learned counsel appearing for the intervener respondents in his lead argument on behalf of the intervener respondents has, at the outset, laid emphasis that the concept of Creamy Layer principle is not attracted in cases of Scheduled Castes and Scheduled Tribes and there is nothing in the decision in **M.Nagaraj** (Supra) requiring exclusion of Creamy Layer from the Scheduled Castes and Scheduled Tribes before granting the benefit of reservation in promotion. It has been further submitted that evidently this Court in CWJC No.5649/08 has also not expressly or impliedly directed the State Government to exclude creamy layer from the Scheduled Castes and Scheduled Tribes. The learned counsel has relied on the Constitution Bench Judgment in **Ashoka Kumar Thakur Vs Union of India , (2008) 6 SCC 1** in support of his submission pertaining to exclusion of Creamy Layer from Scheduled Castes and Scheduled Tribes and has also referred to subsequent decisions of the Apex Court in this regard. It has further been canvassed by the learned counsel that after inclusion in the list of Scheduled Castes and Scheduled Tribes by presidential notification by virtue of Article 341 and 342 of the Constitution of India, the incumbent, therein would be deemed to be backward and there cannot be exclusion from the said list by applying the principle

of identification of the backwardness as well as creamy layer. It has been propounded that the members of the Scheduled Castes and Scheduled Tribes cannot be excluded by means of reclassification from the benefit of reservation in promotion with protected seniority on the basis of absence of backwardness or application of the principle of creamy layer. It has also been argued that the report submitted by Scheduled Castes and Scheduled Tribes Welfare Department contains sufficient and relevant data to support the conclusion that the backwardness in Scheduled Castes and Scheduled Tribes still persists and there is inadequate representation of the members of the Scheduled Castes and Scheduled Tribes in the services in the State Government. Referring to the observations of the Apex Court in **H.P. Scheduled Tribes Employees Federation Vs H.P. Samanya Varg Karamchari Kalyan Mahasangh (2013)10 SCC 308**, it has been submitted that though there is difficulty in collection of quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment and there is also uncertainty on the methodology of this exercise but that cannot be sufficient to overlook the intention of parliament. It has finally been submitted that the data as contained in the report sufficiently corroborate and satisfy the three compelling reasons i.e. backwardness, inadequacy of representation coupled





with consideration of administrative efficiency as required under Article 335 of the Constitution of India and there is no warrant for the proposition that the exclusion of creamy layer and adherence to 50% ceiling limit are also required to be considered before the grant of the benefit of reservation in promotion with consequential seniority to the Scheduled Castes and Scheduled Tribes in government service.

A large number of decisions have been cited and relied upon on behalf of the parties, and the same shall be referred to appropriately in this judgment.

After condensing the core submissions on behalf of the parties, it becomes evident that the facet of discord has demonstrably veered around the judgment by the Constitution Bench in **M.Nagaraj** (Supra). It would therefore be seemly to take into notice the law laid down by the Constitution Bench in the said judgment.

As noticed earlier the broad issues which arose for determination by the Constitution Bench in **M.Nagaraj** (Supra) related to the validity, interpretation and implementation of the Constitution (77th Amendment) Act, 1995, the Constitution (81st Amendment) Act, 2000, the Constitution (82nd Amendment) Act, 2000 and the Constitution (85th Amendment) Act, 2001. It was the contention of the petitioners in the said case that the equality in the



context of Article 16(1) connoted ‘accelerated promotion’ so as not to include consequential seniority but the equality as envisaged in Article 14 read with Article 16(1) has been violated by the impugned amendment when the consequential seniority has been attached to the accelerated promotion. It was also urged there that as an individual right in Article 16(1), enforceability was provided for, whereas ‘group expectation’ in Article 16(4) was not a fundamental right but it was an enabling power which was not coupled with duty and therefore if the structural balance of equity in the light of sufficiency is disturbed and if the individual right was encroached upon by excessive support for group expectations it would amount to reverse discrimination.

After taking into notice, the rival submissions on behalf of the parties, their Lordships while addressing the concepts of equity , justice and merit, stated as follows:-

“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 Scheduled Caste 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(4A) come in the form of Article 335 of the Constitution.”



Thereafter their Lordships adverted to the Article 16(4-A) of the Constitution of India and ruled as follows:

“86. Clause (4-A) follows the pattern specified in clauses (3) and (4) of Article 16. Clause (4-A) of Article 16 emphasizes the opinion of the States in the matter of adequacy of representation. It gives freedom to the State in an appropriate case depending upon the ground reality to provide for reservation in matters of promotion to any class or classes of posts in the services. 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). Therefore, clause (4A) 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 come into force. The





State can make provision for reservation only if the above two circumstances exist. Further in Ajit Singh (II) , this court has held that apart from 'backwardness' and 'inadequacy of representation' the State shall also keep in mind 'overall efficiency' (Article 335). Therefore, all the three factors have to be kept in mind by the appropriate Government by providing for reservation in promotion for SCs and STs.”

The Constitution Bench, further, while upholding the constitutional amendments has laid down as follows:

107. It is important to bear in mind the nature of constitutional amendments. They are curative by nature. Article 16(4) provides for reservation for backward classes in cases of inadequate representation in public employment. Article 16(4) is enacted as a remedy for the past historical discriminations against a social class. The object in enacting the enabling provisions like Articles 16(4), 16(4-A) and 16(4-B) is that the State is empowered to identify and recognize the compelling interests. If the State has



quantifiable data to show backwardness and inadequacy then the State can make reservations in promotions keeping in mind maintenance of efficiency which is held to be a constitutional limitation on the discretion of the State in making reservation as indicated by Article 335. As stated above, the concepts of efficiency, backwardness, inadequacy of representation are required to be identified and measured. That exercise depends on availability of data. That exercise depends on numerous factors. It is for this reason that enabling provisions are required to be made because each competing claim seeks to achieve certain goals.....

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.

Their Lordships thereafter proceeded to lay down the tests to judge the validity of the State Acts and Rules as follows:

110. As stated above, the boundaries of the width of the power, namely, the ceiling-limit of 50% (the numerical benchmark), the principle of creamy layer, the compelling reasons, namely, backwardness, inadequacy of representation and the overall administrative efficiency are not obliterated by the impugned amendments. At the appropriate time, we have to consider the law as enacted by various States providing for reservation if challenged. At that time we have to see whether limitations on the exercise of power are violated. The State is free to exercise its discretion of providing for reservation subject to limitation, namely, that there must exist compelling reasons of backwardness, inadequacy of representation in a class of post(s) keeping in mind the overall administrative efficiency. It is

made clear that even if the State has reasons to make reservation, as stated above, if the impugned law violates any of the above substantive limits on the width of the power the same would be liable to be set aside.

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However, the question still remains whether the concerned State has identified and valued the circumstances justifying it to make reservation. This question has to be decided case- wise. There are numerous petitions pending in this Court in which reservations made under State enactments have been challenged as excessive. The extent of reservation has to be decided on facts of each case. The judgment in Indra Sawhney does not deal with constitutional amendments. In our present judgment, we are upholding the validity of the constitutional amendments subject to the limitations. 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 concerned State 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.

The Constitution Bench thereafter proceeded to consider the aspect of social justice and ruled as follows:

120. At this stage, one aspect needs to be mentioned. Social justice is concerned with the distribution of benefits and burdens. The basis of distribution is the area of conflict between rights, needs and means. These three criteria can be put under two concepts of equality, namely, "formal equality" and "proportional equality". Formal equality means that law treats everyone equal. Concept of egalitarian equality is the concept of proportional equality and it expects the States to

take affirmative action in favour of disadvantaged sections of society within the framework of democratic polity. In Indra Sawhney all the judges except Pandian, J. held that the "means test" should be adopted to exclude the creamy layer from the protected group earmarked for reservation. In Indra Sawhney this Court has, therefore, accepted caste as determinant of backwardness and yet it has struck a balance with the principle of secularism which is the basic feature of the Constitution by bringing in the concept of creamy layer. Views have often been expressed in this Court that caste should not be the determinant of backwardness and that the economic criteria alone should be the determinant of backwardness. As stated above, we are bound by the decision in Indra Sawhney. The question as to the "determinant" of backwardness cannot be gone into by us in view of the binding decision. In addition to the above requirements this Court in Indra Sawhney has evolved numerical benchmarks like ceiling-limit



of 50% based on post-specific roster coupled with the concept of replacement to provide immunity against the charge of discrimination.

In the concluding paragraphs 121 to 123, the Constitution Bench condensing its views has ruled as follows:

121. The impugned constitutional amendments by which Articles 16(4A) and 16(4B) have been inserted flow from Article 16(4). They do not alter the structure of Article 16(4). They retain the controlling factors or the compelling reasons, namely, backwardness and inadequacy of representation which enables the States to provide for reservation keeping in mind the overall efficiency of the State administration under Article 335. These impugned amendments are confined only to SCs and STs. They do not obliterate any of the constitutional requirements, namely, ceiling-limit of 50% (quantitative limitation), the concept of creamy layer (qualitative exclusion), the sub-classification between OBC on one hand and SCs and STs on the other hand as held in Indra Sawhney , the

concept of post-based Roster with in-built concept of replacement as held in R.K.Sabharwal.

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

(emphasis supplied)

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

exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance of Article 335. It is made clear that even if the State has compelling reasons, as stated above, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling-limit of 50% or obliterate the creamy layer or extend the reservation indefinitely.

(emphasis supplied)

The delineation of the principles by the Constitution Bench as above clearly depicts that clause 4 (A) of Art. 16 is derived from clause 4 of the said Article and follows the pattern specified in clause 3 and 4 of Art. 16. It has also been expressly held that Art. 16 (4-A) is an enabling provision and the power under the same can be exercised by the State after it identifies and measures the backwardness, inadequacy of representation and overall administrative efficiency. Further the Constitution Bench has also repeatedly recognized the boundaries of the width of power namely the ceiling limit of 50% (the numerical bench mark), the principle of creamy layer, the compelling

reasons namely backwardness, inadequacy of representation and overall administrative efficiency and has further expressly laid down that even if the controlling factors or the compelling reasons namely backwardness or inadequacy of representation coupled with consideration of administrative efficiency have been found to exist still the State is required 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.

The concept of creamy layer and the necessity for its identification and exclusion before making the provision for reservation has later again come up for consideration by the Apex Court in **Nair Service Society Vs. State of Kerala (2007) 4 SCC 1** where the decision in *M. Nagaraj* has also been referred and relied. Elaborating the principle of creamy layer and its necessary application before granting reservation their Lordships have held as follows:-

“29..... It was expected that the endeavour of the State should have been to evolve a criterion in tune with the underlying constitutional scheme that the protection is required to be given only to those who remain socially and educationally backward and not to those who have ceased to be. Those who are

no longer members of the socially and educationally Backward Class are not to be permitted to obtain the benefits of the reservation. Thus, while laying down the criteria, the State was required to give effect to the underlying principles envisaged in the constitutional scheme as interpreted in Indra Sawhney-I.....”

Their Lordships have also quoted the observation in **Indra**

Sawhney (supra) as follows:-

“40.....’792. In our opinion, it is not a question of permissibility or desirability of such test but one of proper and more appropriate identification of class-a Backward Class. The very concept of a class denotes a number of persons having certain common traits which distinguish them from the others. In a Backward Class under clause (4) of Article 16, if the connecting link is the social backwardness, it should broadly be the same in a given class. If some of the members are far too advanced socially (which in the context,

necessarily means economically and, may also mean educationally) the connecting thread between them and the remaining class snaps. They would be misfits in the class. After excluding them alone, would the class be a compact class. In fact, such exclusion benefits the truly backward'

While referring to the Constitution Bench decision in **M.**

Nagaraj (supra) their Lordships have observed as follows:-

“51..... Recently, a Constitution Bench of this Court in M. Nagaraj V. Union of India has reaffirmed the importance of the creamy layer principle in the scheme of equality under the Constitution. This Court held that the creamy layer principle was one of the important limits on State power under the equality clause enshrined under Articles 14 and 16 and any violation or dilution of the same would render the State action invalid.....”

“53.....This Court rationalized the creamy layer rule as a necessary bargain



between the competing ends of caste based reservations and the principle of secularism.

The Court opined: (M. Nagaraj case, SCC pp. 277-78, para 120).....”

“In Indra Sawhney this Court has, therefore, accepted caste as a determinant of backwardness and yet it has struck a balance with the principle of secularism which is the basic feature of the Constitution by bringing in the concept of creamy layer.”

“54.....This Court, thus, has categorically laid down the law that determination of creamy layer is a part of the constitutional scheme....”

It is, thus, manifest from this decision also that the creamy layer rule has been recognized as part of the constitutional scheme. It has also been held by their Lordships that ‘those, who have reached the status of general category, cannot be permitted to defeat the purport and object of the concept of ‘creamy layer’ as the idea of creamy layer was conceptualized on that philosophy’.

Still later in the case of **Anil Chandra Vs. Radha Krishna Gaur 2009 (9) SCC 454** the same principle was explained

and elaborated after taking into notice the decision in **M. Nagaraj** case (supra). Their Lordships have ruled as followed:-

“17.....In the present case and in the facts and circumstances stated hereinearlier, we are of the view that it was the constitutional obligation of the State, at the time of providing reservation in the matter of promotion to identify the class or classes of posts in the service for which reservation is required. However, neither any effort has been made to identify the class or classes of posts for which reservation is to be provided in promotion nor any exercise has been done to quantify the extent of reservation. Adequate reservation does not mean proportional representation. Rule 8-A has been inserted mechanically without taking into consideration the prerequisites for making such a provision as required under Article 16 (4-A) of the Constitution of India. 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.....”

(emphasis supplied)

It would also be seemly to mention here that recently in the case of *Rohtas Bhankhar Vs Union of India, 2014(8) SCC 872* the Constitution Bench has approvingly noticed the abovementioned observations and conclusions recorded by the Constitution Bench in *M.Nagaraj* (Supra), and their Lordships further also expressed the opinion that it was not necessary to deal with the scope of Article 16(4-A) of the Constitution of India any further.

At this juncture it would be pertinent to take into notice the decisions relied on by the respondents in support of their submissions that once an incumbent has been included in the Scheduled Caste and Scheduled Tribe Category, the said fact itself is conclusive that he is backward and in such case the further enquiry regarding backwardness and application of creamy layer principle cannot be done as it will amount to tinkering with the lists of Scheduled Castes and Scheduled Tribes notified under Article 341 and 342 of the Constitution of India. The reliance has been placed on the observations made in *Indra Sawhney* (Supra) for the proposition that the Scheduled Castes/Scheduled Tribes indubitably fall within the



expression of 'backward classes of citizens' and the parameter or requirement of social and educational backwardness cannot be applied in their case. The emphatic reliance has further been placed on the Constitution Bench judgment in *Ashoka Kumar Thakur Vs Union of India*, (2008) 6 SCC 1 in support of the submission that creamy layer principle is not applicable to the Scheduled Castes and Scheduled Tribes. The reliance has also been placed on the decision in *E.V.Chennaiah Vs State of Andhra Pradesh*, 2005(1) SCC 394 in support of the submission that all castes and tribes mentioned in the presidential list of Scheduled Castes and Scheduled Tribes would be deemed to be one class of persons and further sub-classification in the said class is not permissible.

On behalf of the respondents the reliance has also been placed on the decision of the Apex Court in *Suraj Bhan Meena Vs State of Rajasthan*, (2011) 1 SC 467 and *U.P.Power Corporation Ltd Vs Rajesh Kumar*, 2012 (7) SCC 1 in support of the contention that the Apex Court has not recognized the exclusion of creamy layer as one of the necessary requirements to have been laid down in *M.Nagaraj* (Supra) before granting the benefit under Article 16(4-A) of reservation in promotion.

In *Indra Sawhney* (Supra) the issue before the Apex Court pertained to reservation in initial appointment i.e. direct recruitment



by virtue of Article 16(4) of the Constitution of India. The observation made by the Apex Court in the said case has been made in the context of initial appointment. Further more the issue of reservation in promotion has also been decided in the context of Article 16(4) only. The later Constitution Bench in ***R.K.Sabharwal Vs State of Punjab, (1995) 2 SCC 745*** has also clarified that the judgment in ***Indra Sawhney*** case was confined to initial appointment and not to promotions. In ***M.Nagaraj*** (Supra) also, in paragraph 82, the Constitution Bench has taken into notice the said position.

Before the Constitution Bench in ***Ashoka Kumar Thakur*** (Supra) the issue was reservation of seats for Scheduled Castes and Scheduled Tribes and other backward classes for admission in Central Educational Institutions. However, from the concluding paragraphs of the judgment it does not appear that the law has been laid down by the Constitution Bench that creamy layer principle cannot be applied to Scheduled Castes and Scheduled Tribes.

In ***E.V.Chennaiah*** (Supra) it has been held that the exclusion even of a part of group of class from the presidential list can be done only by parliament. This decision has thus recognized the power of parliament to make classification among the Scheduled Castes and Scheduled Tribes. By introducing Article 16(4-A) in the Constitution, the parliament has classified Scheduled Castes and

Scheduled Tribes government servants for the purpose of grant of benefit of reservation in promotion with consequential seniority.

In *Suraj Bhan Meena* (Supra) and **Rajesh Kumar** (Supra) also the Apex Court has followed the decision in *M. Nagaraj* (Supra) and has accepted that 'backwardness' is a prerequisite for providing the benefit under Article 16(4-A) of the Constitution. There is nothing in these two decisions to support the contention on behalf of the respondents that the need of exclusion of creamy layer (qualitative exclusion), which is implicit in the process of identification of backwardness, has been excluded in the context of Article 16(4-A) of the Constitution of India. It is trite that a judgment is an authority for what has been actually laid down and not for what can be deduced from the discussions therein. This Court, therefore, finds that none of the above decisions relied on behalf of the respondents, support the submission that the test of backwardness and exclusion of creamy layer have not been recognized as limits on the power of the State for granting the benefit envisaged in Article 16(4-A) of the Constitution of India.

Evidently the entire submissions on behalf of the respondents proceeds ignoring the distinct ambit, nature and scope of Article 16 (4) and Article 16(4-A). The provision of Article 16 (4) enables the State to make provision for reservation of appointments or



posts in favour of any backward class of citizens which includes the Scheduled Castes and Scheduled Tribes. It is, thus, obvious that the stage at which Article 16 (4) operates is the initial appointments i.e. direct recruitment. The provision of Article 16(4-A) relates to the power of the State to make reservation in promotion with consequential seniority to such Scheduled Castes, Scheduled Tribes who are already employed in the services under the State. The historical facts of past discrimination, exploitation of a social class etc. leading to social, economical and educational backwardness may be relevant consideration for the purpose of making reservation in initial appointment as envisaged under Article 16 (4). But once after members of Scheduled Castes/Scheduled Tribes become government servants, the definite change in status socially (economically as well) necessarily follows. For extending the benefit of reservation in promotion with protected seniority, therefore, some more considerations and additional parameters will have to be there. The law laid down in *M. Nagaraj* (Supra) will have to be understood in this backdrop.

The Constitution Bench in *M. Nagaraj* case was aware that the issue before it was the validity of the constitutional amendment making provision for reservation in promotion with consequential seniority in favour of Scheduled Castes and Scheduled



Tribes only. The provision of Article 16 (4-A) is also restricted in its application to only Scheduled Castes/Scheduled Tribes government servants. But throughout the judgment, the phrase 'backwardness of class' is running as a golden thread and has been used time and again. Further, it has also been repeatedly observed in the said judgment that Article 16(4-A) is derived from clause 4 of Article 16 and follows the pattern specified in clauses 3 and 4 of Article 16. The existence of backwardness after exclusion of creamy layer (qualitative exclusion) has, thus, been expressly made a prerequisite for the Scheduled Castes/ Scheduled Tribes government servants before they become entitled to reservation in promotion with consequential seniority by treating them as a separate class altogether. In fact, the Constitution Bench in *M. Nagaraj* case has also considered the permissibility of sub-classification under the Constitution and has upheld the classification envisaged by Article 16 (4-A) and 16 (4-B). Moreover, the parliament by making provision of Article 16 (4-A) has made sub-classification in the Scheduled Castes/Scheduled Tribes and has made the Scheduled Castes and Scheduled Tribes government servant as a separate class for the said purpose.

This Court, therefore, does not find substance in the submission made on behalf of the respondents that the test of backwardness and exclusion of creamy layer are not attracted in the

case of Scheduled Castes and Scheduled Tribes in the present context and also the submission that *M.Nagaraj* (Supra) has not laid down these preconditions before invoking the power to grant benefit envisaged in Article 16(4-A) of the Constitution to the Scheduled Castes and Scheduled Tribes government servants.

Even otherwise and also from the perusal of the Report brought on record as Annexure-A and B Series to the supplementary counter affidavit filed on behalf of the respondent nos.2 and 3, it transpires that the test of backwardness of the class and the exclusion of the creamy layer besides other conditions, have been clearly accepted by the respondents to have been laid down as parameters in *M.Nagaraj* (Supra). In the 'Executive Summary' (part of the Report) it has been stated as follows:

"...The Supreme Court thus ruled that if a State Government (or for that matter Central Government) wants to provide reservation to SCS and STs in promotion, alongwith consequential seniority, a case will have to be made out satisfying the three conditions:

- *collecting of quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment;*

- *ensuring compliance with Article 335 which says that while making reservation, due consideration is to be given to maintenance of efficiency of administration; and*
- *ensuring that the reservation provision does not cross the ceiling of 50% and does not obliterate the creamy layer and that the reservation does not extend indefinitely.*

In keeping with the directive of Hon'ble High Court of Patna and the decisions of Supreme Court of India, the Government of Bihar has sought to determine the relative level of backwardness of the SCs and STs I Bihar, inadequacy of their representation in various government services, including Engineering Service (s), and the impact if any, of SC/ST quotas in promotions on the overall administrative efficiency of government machinery..."

But even after accepting that the exclusion of creamy layer is one of the conditions, in the entire report there is no data at all with regard to the creamy layer in Scheduled Castes and Scheduled Tribes. This omission in the report is conspicuous and makes the report vulnerable. Noticeably the report extensively refers to the statistical



figures and historical facts of discrimination of Scheduled Castes and Scheduled Tribes in general, also accepts progressive development of their status but there is no reference at all relating to creamy layer. The concept of exclusion of creamy layer has been completely obliterated which is against the mandate in *M.Nagaraj*. The respondents have admittedly collected the data for the purpose of measuring the backwardness of Scheduled Castes and Scheduled Tribes but have ignored that the identification and exclusion of such members of Scheduled Castes and Tribes who have ceased to be backward, was necessarily implicit in the process. It is only after shedding the 'creamy layer' among them that the members of Scheduled Castes and Scheduled Tribes can be recognized as socially and educationally backward class for the purpose of the benefit flowing from Article 16(4-A).

It would be fruitful here to notice the observations made by the Apex Court in *Indra Sawhney Vs. Union of India, (2000) 1 SCC 168 (Indra Sawhney 2)* as follows:-

“8. Caste only cannot be the basis for reservation. Reservation can be for a backward class citizen of a particular caste. Therefore, from that caste, the creamy layer and the non-backward class of citizens are to be excluded. If the caste is to be

taken into consideration then for finding out the socially and economically backward class, the creamy layer of the caste is to be eliminated for granting benefit of reservation, because that creamy layer cannot be termed as socially and economically backward.....”

*“22. As appears from the judgments of six out of the eight Judges viz. **Jeevan Reddy, J.** (for himself and three others), **Sawant and Sahai, JJ.**-(i.e. six learned Judges out of nine),-they specifically refer to those in higher services like IAS, IPS and all-India services or nearabout as persons who have reached a higher level of social advancement and economic status and therefore, as a matter of law, such persons are declared not entitled to be treated a backward. They are to be treated as creamy layer ‘without further inquiry’. Likewise, persons living in sufficient affluence who are able to provide employment to others are to be treated as having reached a higher social status on account of their affluence, and therefore outside the backward class. Those holding higher levels of agricultural*

landholdings or getting income from property, beyond a limit, have to be excluded from the backward classes. This, in our opinion, is a judicial 'declaration' made by this Court.

*"27.....As the 'creamy layer' in the backward class is to be treated 'on a par' with the forward classes and is not entitled to benefits of reservation, it is obvious that if the 'creamy layer' is not excluded, there will be discrimination and violation of Articles 14 and 16 (1) inasmuch as equals (forwards and creamy layer of backward classes) cannot be treated unequally. Again, non-exclusion of creamy layer will also be violative of Articles 14, 16 (1) and 16 (4) of the Constitution of India since unequals (the creamy layer) cannot be treated as equals, that is to say, equal to the rest of the backward class. These twin aspects of discrimination are specifically elucidated in the judgment of **Sawant, J.** where the learned Judge stated as follows:*

'520.....to continue to confer upon such advanced sections.....special benefits, would amount to treating equals

unequally. ...Secondly, to rank them with the rest of the backward classes would ...amount to treating the unequals equally.'

Thus, any executive or legislative action refusing to exclude the creamy layer from the benefits of reservation will be violative of Articles 14 and 16 (1) and also of Article 16 (4).....”

In Akhil Bharatiya Soshit Karamchari Sangh (Railway)

v. Union of India (1981) 1 SCC 246 the observations then made by the Apex Court is also aptly material at present. Their Lordships observed as follows:-

“92. ... Maybe, some of the forward lines of the backward classes have the best of both the worlds and their electoral muscle qua caste scares away even radical parties from talking secularism to them. We are not concerned with that dubious brand. In the long run, the recipe for backwardness is not creating a vested interest in backward castes but liquidation of handicaps social and economic, by constructive projects. All this is in another street and we need not walk that way now.....”

94. ...Nor does the specious plea that because a few Harijans are better off, therefore, the bulk at

the bottom deserves no jack-up provisions merit scrutiny. A swallow does not make a summer. Maybe, the State may, when social conditions warrant, justifiably restrict Harijan benefits to the Harijans among the Harijans and forbid the higher Harijans from robbing the lowlier brethren.”

The preponderance of precedent thus evidently lays down that a caste can be identified to be socially and economically backward class only when the creamy layer is removed from it and a compact class emerges which is truly socially, economically and educationally backward class. The issue of backwardness is to be adjudged not by first identifying a caste as a socially and educationally backward class and thereafter to exclude the creamy layer from it for the purpose of extending the benefits. To the contrary the identification and removal of creamy layer from a caste is first step before adjudging a caste as a compact socially, economically and educationally backward class. As noticed earlier in the present case though the attempt to adjudge the backwardness of Scheduled Castes and Scheduled Tribes on the basis of datas has been made but there is no attempt to collect relevant data for the purpose of identifying the creamy layer among them.

Further, Article 16(4-A) of the Constitution enables the



State Government to provide reservation in matters of promotion to Scheduled Castes and Scheduled Tribes government servants who are not adequately represented in any 'class or classes of posts in the services under the State'. The unmistakable emphasis is on 'class or classes of posts in the services'. Even in *M.Nagaraj* (Supra), the cadre strength as unit in the operation of the roster in order to ascertain the adequacy of representation in the service, has been laid down.

Paragraph-83 of the judgment reads as follows:

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..."

In *Anil Chandra* (Supra) also it has been held that it was the constitutional obligation of the State at the time of providing reservation in the matter of promotion to identify the class or classes of posts in the services for which the reservation is required. It has also been held that the term adequate representation does not mean

proportional representation. However, from the impugned resolution (Annexure-13), it is apparent that instead of considering the datas contained in the report cadrewise, the State Government has proceeded to consider overall representation of Scheduled Castes and Scheduled Tribes in all the services and has granted the benefit of reservation in promotion with consequential seniority to all the Scheduled Castes and Scheduled Tribes government servants. The emphasis on consideration of adequacy of representation in a particular cadre in a service as laid down in *M.Nagaraj* (Supra) has clearly been overlooked. The general term in which the impugned resolution operates is antithetical to the provision of Article 16(4-A) of the Constitution as inserted by the parliament. The report which is the basis of impugned resolution also lacks collation of the datas with regard to representation of Scheduled Castes and Scheduled Tribes government servants in different classes of services in the manner as required in *M.Nagaraj* (Supra) and this becomes prominent when the recommendation in the report has been made to continue reservation in promotion with protected seniority to Schedule Castes and Scheduled Tribes in all the government services. The Constitution Bench in *M. Nagaraj* (Supra) has laid emphasis that in 'each case' the court has got to be satisfied that the State has correctly exercised its option in making reservation in promotion for SC/ST and the State on





its part is required to place before the Court the requisite quantifiable data in 'each case' and satisfy the Court that such reservation has become necessary on account of inadequacy of reservation of SC/ST in a particular class or classes of posts. This is imperative because once the SCs/STs have adequate representation in a class of service, further reservation in that class would only amount to reverse discrimination as the general category candidates will be excluded from consideration for promotion.

During the course of submission the respondents have laid emphasis by referring to different datas in the report that the quota reserved for S.Cs. and S.Ts. in different class (s) of services has not even been filled up. This submission cannot be accepted for the simple reason that the issue of adequate representation of Scheduled Castes/Scheduled Tribes government servants has to be determined by considering representation of Scheduled Castes/Scheduled Tribes government servants irrespective of the fact as to whether they are holding the posts on their own merits or on the basis of reservation. The data is to be considered cadre wise to find out the adequacy of representation of Scheduled Castes/Scheduled Tribes government servants. Article 16 (4-A) prescribes the test of adequate representation of Scheduled Castes/Scheduled Tribes government servants in the class (s) of services and not the adequacy of

representation in the quota reserved for such government servants. A Scheduled Caste/Scheduled Tribe candidate might have got the appointment on merit and may be occupying unreserved post in the roster but if at any point in his service he has taken the benefit meant for reserved category candidate then he cannot be treated as a candidate of unreserved category. The report contains no data with regard to such government servants. From the perusal of the data as contained in the report, it appears that in a number of cadres in different services the representation of Scheduled Castes/Scheduled Tribes government servants is adequate e.g. table 3.4 (department of industry), Table 3.5 (Department of Water Resources), Table 3.6 (Department of Home), Table 3.8 (Department of Public Health and Engineering) and in some cases the representation is cent percent. In the report, though the observation has been made that the adequacy of representation of Scheduled Castes/Scheduled Tribes government servants in those cadres have been achieved only because of the policy of reservation but that cannot be the basis for the decision to continue the reservation for all the class(s) of services, the requirement notwithstanding. The individual right of equality as envisaged under Art. 14 and 16 (1) of the Constitution cannot be overlooked by deducing the conclusion by combining together the datas of representation in different services/departments. In the





present case exactly the same course has been adopted. If there is adequate representation in promotional posts in a particular service, the decision to continue the benefit of reservation to Scheduled Castes/Scheduled Tribes government servants in that service on the ground that there is inadequate representation in other service (s) cannot be legally countenanced for it would be also violating the 'numerical bench mark'. The respondent-State before coming to the conclusion to grant benefit of reservation in promotional posts with consequential seniority to Scheduled Castes/Scheduled Tribes employees was required to consider the adequacy of representation of such government servants in each class or classes of posts in government services and thereafter to take appropriate decision in terms of Article 16 (4-A) with respect to that class or classes of services. By issuing the impugned resolution in general and sweeping terms the State Government has clearly abdicated its function as required by Art. 16 (4-A) of the Constitution and the law laid down by the Constitution Bench in *M. Nagaraj*.

For the aforesaid reasons and discussions this Court comes to the conclusion that the impugned resolution dated 21.08.2012 (Annexure-13) cannot be legally sustained. The writ application is accordingly allowed and the impugned resolution dated 21.08.2012 (Annexure-13) is quashed with necessary consequences.

The interlocutory applications also accordingly stand disposed of. It is, however, observed that in case the State Government proposes to invoke the power to grant benefit of reservation in promotion with consequential seniority to Scheduled Castes/Scheduled Tribes government servants, it will have to act strictly in accordance with the requirements of Article 16(4-A) of the Constitution as well as the parameters and conditions laid down by the Constitution Bench in *M. Nagaraj* case as aforesaid in this judgment.

The writ application is thus allowed with observation.

(V. Nath, J.)

Nitesh/Devendra

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