HIGH COURT OF MADHYA PRADESH : JABALPUR

Writ Petition No.1942/2011

R.B. Rai vs. State of Madhya Pradesh

Writ Petition No.7003/2011

Santosh Kumar Gupta vs. M.P. State Electricity Board

Writ Petition No.7259/2012

S.C. Pandey vs. State of Madhya Pradesh

Writ Petition No.8120/2012

Dr. P.L. Sharma vs. State of Madhya Pradesh

Writ Petition No.8215/2012

Arun Kumar Dwivedi vs. State of Madhya Pradesh

Writ Petition No.8288/2012

Sunil Kumar Jain vs. State of Madhya Pradesh

Writ Petition No.8424/2012

S.S. Dangi vs. Principal Secretary, State of M.P.

Writ Petition No.8976/2012

Manish Tripathi vs. State of Madhya Pradesh

Writ Petition No.9127/2012

N.K. Singh vs. State of Madhya Pradesh

Writ Petition No.10024/2012

Mohan Sahu vs. State of Madhya Pradesh

Writ Petition No.10296/2012

Sanjeev P. Puranik vs. State of Madhya Pradesh

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Tarun Kumar Mishra vs. State of Madhya Pradesh

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Tarunendra Pratap Singh vs. State of Madhya Pradesh

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Smt. Rajpal Dixit vs. State of Madhya Pradesh

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Dr. Ranjeet Singh vs. State of Madhya Pradesh

Writ Petition No.11962/2012

Devendra Singh Bhadoriya vs. State of Madhya Pradesh

Writ Petition No.12306/2012

Anil Kumar Singh vs. State of Madhya Pradesh

Writ Petition No.12896/2012

N.K. Khamparia vs. State of Madhya Pradesh

Writ Petition No.13342/2012

Umashankar vs. State of Madhya Pradesh

Writ Petition No.4567/2013

Dr. T.P. Vaidhya vs. State of Madhya Pradesh

Writ Petition No.10429/2013

M.P Electricity Production Company vs. State of M.P.

Writ Petition No.19935/2014

Prakash Chandra Jain vs. State of Madhya Pradesh

Writ Petition No.13100/2015

Dr. Kedar Singh Tomar vs. State of Madhya Pradesh

Writ Petition No.18679/2015

Vishwabandhu Chaudhary vs. State of Madhya Pradesh

Writ Petition No.1552/2016

Surendra Kumar Mishra vs. State of Madhya Pradesh

Shri Rajendra Tiwari, Senior Counsel with Shri R. K. Tripathi, counsel for the petitioners in W.P. No.9127/2012.

Shri R. N. Singh, Senior Counsel with Shri Suyash Mohan Guru, Shri Amol Shrivastava, Shri R. D. Singh, Shri Vikas Mishra, Shri D. Pandey, and Shri H. Shrivastava, counsel for the petitioners in W.P. No.19935/2014.

Shri Akash Choudhary, Shri Vijay Tripathi and Shri Piyush Jain, Advocate for the petitioner in W.P. No.1942/2011.

Shri Pushpendra Singh Yadav, Advocate for the petitioner in W.P. No.7003/2011.

Shri Ashok Shrivastava, Advocate for the petitioner in W.P. No.8215/2012 and W.P. No.10429/2013.

Shri D.K. Tripathi, Advocate for the petitioner in W.P. No.8288/2012.

Shri Pratyush Tripathi, Advocate for the petitioner in W.P. No.10362/2012.

Shri A.P. Singh, Advocate for the petitioner in W.P. No.11962/2012.

Shri K.C. Ghildiyal, Advocate for the petitioner in W.P. No.12896/2012.

Ms. Stuti Bhatnagar, Advocate for the petitioner in W.P. No.13342/2012.

Shri Manoj Sharma, counsel for the petitioners in W.P. Nos.10024/2012, 10296/2012 and 10353/2012.

Shri U. S. Jaiswal, counsel for the petitioner in W.P.

No.12306/2012.

Shri Atin Vishwakarma, Advocate for the petitioner in W.P. No.12306/2012.

Shri A.K. Shukla, Advocate for the petitioner in W.P. No.13100/2015.

Smt. Premlata Lokhande, Advocate for the petitioner in W.P. No.18679/2015.

Shri Vipin Yadav, Advocate for the petitioner in W.P. No.1552/2016.

Shri Vijay Kumar Shukla, Advocate for the petitioners in W.P. Nos.8120/2012 and 4567/2013.

Shri Sanjay K. Agrawal, Shri Darshan Soni, Shri Siddhartha K. Sharma, Shri Piyush Bhatnagar, Advocates for the petitioners in W.P. No.7259/2012, 8976/2012, 8424/2012 & 10514/2012.

Shri Samdarshi Tiwari, Dy. Advocate General for respondents/State.

Shri T. S. Ruprah, Senior Counsel with Shri A. K. Pandey, counsel for respondent Nos.6, 9, 10, 12, 14 and 16 in W.P. No.8120/2012.

Shri Brain Da Silva, Senior Counsel with Shri Ishan Soni, counsel for Respondents No.5, 7, 8, 13 and 19 in W.P. No.8120/2012.

Shri Naman Nagrath, Senior Counsel with Shri Parag S. Chaturvedi, Counsel and Shri B.L. Nag, Counsel for the intervenors in the respective petitions.

Shri Anoop Nair, counsel for Respondents No.2 and 3 in W.P. Nos.10024/2012, 10296/2012 and 10353/2012.

CORAM :

Hon'ble Shri Justice A.M. Khanwilkar, Chief Justice

Hon'ble Shri Justice Sanjay Yadav, J.

Reserved on : **31.3.2016**

Date of decision : **30.4.2016**

O R D E R

Per Sanjay Yadav, J.

1. Validity, rather, workability of Madhya Pradesh Public Services (Promotion) Rules, 2002 (for short 'Rules of 2002') on the anvil of the law laid down in **M. Nagaraj v. Union of India (2006) 8 SCC 212**, is being questioned vide present batch of writ petitions.

2. These Rules of 2002, as is evident, are brought in vogue in exercise of the powers conferred by the proviso to Article 309 read with Article 16 and 335 of the Constitution of India, relates to determination of the basis for promotion in public services and posts and also, the reservation in promotion in favour of Scheduled Castes and Scheduled Tribes.

3. Shri R.N. Singh, learned Senior Counsel, who led the arguments on behalf of the petitioners, has to submit that, though Articles 16(4A) and 16(4B) of the Constitution of India enables the State to make provisions facilitating reservation in favour of Scheduled Castes and Scheduled Tribes in promotion but the same being enabling provisions, the State is under the constitutional obligation to fulfil the stipulations contained in clauses (4A) and (4B) of Article 16 and Article 335 of the Constitution and as interpreted vide judicial pronouncement by the Constitutional Bench in **M. Nagaraj** (supra). And, as mandated in **Uttar Pradesh Power Corporation Limited v. Rajesh Kumar (2012) 7 SCC 1** that, even in case of Rules of 2002, though brought in vogue at pre **M. Nagaraj** (supra) stage, fresh exercise of collecting quantifiable data justifying reservation in terms of parameters of efficiency, backwardness and inadequacy of representation in particular class or classes of posts having not taken recourse to, and the Rules of 2002 being not in consonance with the provisions of clauses (4A) and (4B) of Article 16 read with Article 335 of the Constitution has rendered itself

unworkable and therefore, deserves to be declared *ultra vires* Constitution. This is the neat and precise submissions on behalf of the petitioners.

4. To substantiate these submissions, learned Senior Counsel has referred to Rules 2(b), (i) & (j), 5, 6(12), 6(13), 6(14), 7(15), 7(16), 8 and 9 of Rules of 2002 which defines backlog and makes provision for carry forward, wherein no definite period have been provided to carry forward the unfilled vacant posts reserved in favour of SCs/STs.

5. It is contended that the State has not carried out any empirical study to arrive at quantifiable data class-wise and post-wise to ascertain that there is inadequate representation of the members of SCs/STs in promotional posts in various departments of the State Government as would warrant justification of having fixed percentage of reservation on promotional posts as is provided under Rule 5 of Rules of 2002, i.e., 16% for SCs and 20% for STs; as a result whereof, it is urged that, the existing provisions when adjudged in juxtaposition to the constitutional mandate of Articles 16(4A), 16(4B) and 335 of the Constitution of India and the

principles of law mandated by the Constitutional Bench in **M. Nagaraj** (supra). It is urged that the provisions for reservation in promotion being antithetical thereof, cannot be allowed to sustain.

6. Countering these submissions, it has been contended on behalf of the State, that the State being aware of their constitutional obligations mandated under Articles 16 and 335 of the Constitution, a study was undertaken to ascertain the backwardness and inadequate representation while framing the Rules of 2002. It was further contended that at the time of framing of Rules of 2002, the State was conscious of the fact that in the State of Madhya Pradesh, there existed reservation in promotion in State Government service since 1975, brought in vogue vide circular issued by General Administration Department, Government of Madhya Pradesh, bearing No.F-4-1-75-3-One Bhopal dated 2.5.1975 and dated 17.5.1975 and the shortcomings as to reservation in promotion provided in the Madhya Pradesh Civil Services (Reservation in Promotion And Limits on the Extents of Zone of Consideration) Rules, 1997 which were declared *ultra*

vires by the Madhya Pradesh State Administrative Tribunal by its order-dated 17.7.2000 passed in batch of Original Application Nos.606/97, 719/97, 85/99 and 936/99 . It was further urged that the order passed by the Tribunal was later set aside by the Division Bench of this High Court vide order dated 12.2.2002 passed in Writ Petition No.6205/2002 and other connected writ petitions, whereby the validity of the provisions contained in Rules of 1997 and 2002 relating to reservation in promotion were upheld. It is further contended that the judgment in W.P. No.6205/2002 was challenged before the Supreme Court forming subject matter of SLP(C) Nos.4915-4919 of 2003 : C.P. Mathur v. State of M.P., which were disposed of on 18.3.2010 in the light of decision in **M. Nagaraj** (supra) giving liberty to the parties concerned to re-agitate before High Court. It is contended that being conscious of these developments, the State Government in the year 2011 again collected fresh data from different departments regarding vacancies against the backlog of promotional posts and found that about 16763 posts reserved for Scheduled Castes and Scheduled Tribes are vacant in

different departments. Chart filed alongwith return has been relied on. Reliance is also placed on the report prepared by Scheduled Tribe Research and Development Institution, Bhopal, reflecting comparative study as to 2002 and 2011-12 regarding social, economic, educational and administrative backwardness of the members belonging to Scheduled Castes and Scheduled Tribes. On these submissions, the State Government has justified the workability of Rules of 2002 to be in consonance with the constitutional provisions and the principles thereof reiterated in **M. Nagaraj** (supra).

7. Considered the submissions led on behalf of the parties and perused the documents on record.

8. Since the workability of the Rules of 2002 is being questioned on the anvil of Articles 16(4A), 16(4B) and 335 of the Constitution of India and the interpretation thereof in **M. Nagaraj** (supra), we set on to examine various provisions contained in the Rules of 2002 relating to reservation in promotion in service to which the said Rule is applicable on the anvil of these constitutional provisions and the law laid down in **M. Nagaraj** (supra). It being the mandate of the

Constitutional Bench as ordered in SLP(C) Nos.4915-4919 of 2003 permitting the petitioners to re-agitate the issue afresh before the High Court, we are not falling upon the analysis of Rules of 2002 undertaken by the Division Bench in Writ Petition No.6205/2002 : State of Madhya Pradesh v. C.P. Mathur; decided on 12.12.2002.

9. The relevant provisions in Rules of 2002 which relate to reservation in promotion, which we are concerned with, are :

> "2(b) : '**Backlog**' means the reserved vacancies for Scheduled Castes and Scheduled Tribes in all cases of promotion which have remained unfilled during the earlier year or years due to any reason whatsoever to be filled up by promotion as a distinct group in the next year/years;
>
> 2(i) : '**Reservation**' means reservation of posts in the services for the members of Scheduled Castes and the Scheduled Tribes;
>
> 2(j) : '**Roster**' means a prescribed register of running account of all clear vacancies to be filled up by promotion of public servants belonging to Scheduled Castes, Scheduled Tribes and unreserved category as provided in Rule 9 of these Rules.
>
> …
>
> **5. Reservation in promotion** :- Reservation in promotion in all classes of posts/services for the Public servants belonging to the Scheduled Castes

and the Scheduled Tribes shall be as under :

For Scheduled Castes	For Scheduled Tribes
(1)	(2)
16 percent	20 percent

6. Promotion on the basis of seniority subject to fitness : -

...

(12) : The names of public servants promoted on the basis of above combined select list shall be placed enblock below the name of last public servant promoted on the basis of the immediately preceding year's combined select list.

(13) : The reserved posts which remain unfilled due to non-availability of suitable public servants of the category for which the post is reserved despite consideration of the names of all public servants eligible for consideration as per the Recruitment Rules shall be carried forward, that is to say, **shall be kept vacant until the suitable public servants belonging to that reserved category is available. In no circumstances any vacancy of reserved category shall be filled-up by promotion from the public servant belonging to any other category**.

(14) : Wherever the reserved vacancies for Scheduled Castes and Scheduled Tribes in all cases of promotion have remained unfilled in the earlier year or years, the backlog and/or carried forward vacancies would be treated as a separate and distinct group and will not be considered together with the reserved vacancies of the year in which they are being filled up for determining the ceiling of fifty percent reservation on total number

of vacancies of that year. In other words, the ceiling of fifty percent on filling up of reserved vacancies would apply only on the reserved vacancies which arise in the current year and the backlog/carried forward reserved vacancies for Scheduled Castes or Scheduled Tribes of earlier year or years would be treated as a separate and distinct group and would not be subject to ceiling of fifty percent :

Provided that the appointing authority shall convene a special meeting of Departmental Promotion Committee within six months to fill up backlog vacancies and **if such vacancies still remain unfilled, they shall not be de-reserved in any manner for filling up by the public servants not belonging to the category for whom the post or posts are reserved**.

7. Promotion on the basis of merit-cum-seniority.

(15) : The reserved post which remains unfilled due to non-availability of suitable public servants of the category for which the post is reserved despite consideration of the names of all public servants eligible for consideration as per the Recruitment Rules, shall be carried forward, that is to say, **shall be kept vacant until the suitable public servant belonging to that reserved category is available. In no circumstances, any vacancy of reserved category shall be filled-up by promotion from the public servant belonging to any other category**.

(16) : Wherever the reserved vacancies for

Scheduled Castes and Scheduled Tribes in all cases of promotion have remained unfilled in the earlier year or years, the backlog and/or carried forward vacancies would be treated as a separate and distinct group and will not be considered together with the reserved vacancies of the year in which they are being filled up for determining the ceiling of fifty percent reservation on total number of vacancies of that year. In other words, the ceiling of fifty percent on filling up of reserved vacancies would apply on the reserved vacancies which arise in the current year and the backlog/carried forward reserved vacancies for Scheduled Castes or Scheduled Tribes of earlier year or years would be treated as a separate and distinct group and would not be subject to ceiling of fifty percent :

Provided that the appointing authority shall convene a special meeting of Department Promotion Committee/Screening Committee within six months to fill up backlog vacancies and **if such vacancies still remain unfilled, they shall not be de-reserved in any manner for filling up by the public servants not belonging to the category for whom the post or posts are reserved**.

...

8. Lowering the standards of evaluation :- The Government, may by order, make provision in favour of the public servants of the Scheduled Castes and the Scheduled Tribes for lowering the standards of evaluation in the matter of promotion to any class or classes of services or posts in

connection with the affairs of the State.

9. Roster : (i) There shall be maintained rosters invariably by every appointing authority in the prescribed forms as shown in Schedule-I for backlog vacancies of Scheduled Castes category and in schedule-II for the backlog vacancies of Scheduled Tribes category and in Schedule-III of the existing vacancies of the relevant year appended to these rules in respect of cadre/part of the service/pay scale of post to be filled up by promotion. The rosters shall be maintained separately for each such cadre/part of the service/pay scale of post.

(ii) Before making any promotion, the appointing authority shall ascertain invariably from the roster whether the vacancy is' reserved or unreserved and if is reserved, for whom it is so reserved. Immediately after a promotion, the particulars thereof shall be entered in the roster and signed by the appointing authority.

(iii) The roster is a running account from Year to year and shall be maintained accordingly. If promotion in a particular year stops at a particular point of cycle, say, at the 5th point, promotion in the subsequent year shall begin at the next point, that is, at the 6th point."

10. The Constitution (Seventy-Seventh Amendment) Act, 1995 led to insertion of clause (4A) in Article 16, providing -

"(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."**

11. Similarly, the Constitution (Eighty-First Amendment) Act, 2000 led to insertion of clause (4B) in Article 16, providing -

> **"(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."**

12. These two amendments along with the Constitution (Eighty-Second Amendment) Act, 2000 and the Constitution (Eighty-Fifth Amendment) Act, 2001 were the subject matter of challenge in **M. Nagaraj** (supra) wherein, while upholding the constitutional validity thereof, it was held by their Lordships -

“117.The test for judging the width of the power and the test for adjudicating the exercise of power by the concerned State are two different tests which warrant two different judicial approaches. In the present case, as stated above, we are required to test the width of the power under the impugned amendments. Therefore, we have to apply "the width test". In applying "the width test" we have to see whether the impugned amendments obliterate the constitutional limitations mentioned in Article 16(4), namely, backwardness and inadequacy of representation. As stated above, these limitations are not obliterated by the impugned amendments. **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 v. Union of India 1992 Supp (3) SCC 217 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.

…

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 v. State of Punjab (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, 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**)

13. The principles of law laid down in **M. Nagaraj** (supra) were reiterated later in **Suresh Chand Gautam v. State of Uttar Pradesh AIR 2016 SC 1321**, wherein their Lordships were pleased to observe :

> "**7**. In Rajesh Kumar's case, a two-Judge Bench, apart from referring to the paragraphs we have reproduced hereinabove, also adverted to

paragraphs 44, 48, 49, 86, 98, 99, 102, 107, 108, 110, 117, 123 and 124 and culled out certain principles. We think it absolutely appropriate to reproduce the said principles:-

"(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 harmonised 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 timescale has to be imposed in the interest of efficiency in administration as mandated by Article 335. If the timescale 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 optimise 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."**
> **(<u>Emphasis added</u>)**

14. Furthermore, it has been held in **<u>Rajesh Kumar</u>** (supra) that:

> 83. In the said Suraj Bhan case (2011) 1 SCC 467, the State Government had not undertaken any exercise as indicated in M. Nagaraj (supra). The two-Judge Bench has noted three conditions in the said judgment. It was canvassed before the Bench that exercise to be undertaken as per the direction in M. Nagaraj (supra) was mandatory and the State cannot, either directly or indirectly, circumvent or ignore or refuse to undertake the exercise by taking recourse to the Constitution (Eighty-Fifth Amendment) Act providing for reservation for promotion with consequential seniority. While dealing with the contentions, the two-Judge Bench opined that the State is required to place before the Court the requisite quantifiable data in each case and to satisfy the court that the said reservation became necessary on account of inadequacy of representation of Scheduled Castes and Scheduled Tribes candidates in a particular

> class or classes of posts, without affecting the general efficiency of service.
>
> …
>
> 86. **We are of the firm view that a fresh exercise in the light of the judgment of the Constitution Bench in M. Nagaraj (supra) is a categorical imperative.** The stand that the constitutional amendments have facilitated the reservation in promotion with consequential seniority and have given the stamp of approval to the Act and the Rules cannot withstand close scrutiny inasmuch as the Constitution Bench has clearly opined that Articles 16(4A) and 16(4B) are enabling provisions and the State can make provisions for the same on certain basis or foundation. The conditions precedent have not been satisfied. No exercise has been undertaken. What has been argued with vehemence is that it is not necessary as the concept of reservation in promotion was already in vogue. We are unable to accept the said submission, for when the provisions of the Constitution are treated valid with certain conditions or riders, it becomes incumbent on the part of the State to appreciate and apply the test so that its amendments can be tested and withstand the scrutiny on parameters laid down therein."
>
> (**Emphasis supplied**)

15. Thus, quantifiable data justifying reservation in terms of parameters of efficiency, backwardness and inadequacy of representation **being a categorical imperative** each time when such reservation is sought to be imposed, aims at having the Rule or the provision therein, which is dynamic in

nature. In other words, whenever vacancy for promotion arises, the Rule must be such as would enable re-evaluation as to whether there is inadequate representation of a particular class or classes, which is also backward, and even if these conditions are fulfilled, the efficiency is not compromised, in case the promotion is effected. In Rules of 2002, no such mechanism is shown to be provided for. Instead, by fixing 16% posts in favour of members of SCs and 20% posts in favour of STs vide Rule 5, the dynamism as aimed at, vide clause (4A) of Article 16 of the Constitution and as interpreted in **M. Nagaraj** and **Rajesh Kumar** (supra), is taken away with the fixed percentage of reservation in promotion. In other words, irrespective of whether there exist a need for representation, the reservation is automatically provided.

16. Whether this is permissible in view of the law laid down in **M. Nagaraj** (supra) ?

17. The answer is an emphatic 'No'.

18. In **M. Nagaraj**, their Lordships were pleased to hold -

> "102…... Clause (4) of Article 16 refers to

> affirmative action by way of reservation. Clause (4) of Article 16, however, states that the appropriate Government is free to provide for reservation in cases where it is satisfied on the basis of quantifiable data that backward class is inadequately represented in the services. **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 concerned State fails to identify and measure backwardness, inadequacy and overall administrative efficiency then in that event the provision for reservation would be invalid**."
>
> (**Emphasis by us**)

19. Though, an attempt is made on behalf of the State by relying on certain statistics which is shown to have been collected in the year 2002 and in 2011. However, a closer look to these figures reveals that the data collected in the year 2002 were from the population census 2001, which mostly

relates to the overall representation, which, in our considered opinion, may have some relevance at entry level i.e. at the initial recruitment stage, but, will not be determinant in case of promotion. As regard the study conducted by Tribal Research and Development Institute, the same being based on population and vacancies, and as rightly pointed out by learned Senior Counsel for the petitioners that a similar study has been discarded in **Rajesh Kumar** (supra); wherein, their Lordships were pleased to observe :

> "85. As has been indicated hereinbefore, it has been vehemently argued by the learned senior counsel for the State and the learned senior counsel for the Corporation that once the principle of reservation was made applicable to the spectrum of promotion, no fresh exercise is necessary. It is also urged that the efficiency in service is not jeopardized. **Reference has been made to the Social Justice Committee Report and the chart. We need not produce the same as the said exercise was done regard being had to the population and vacancies and not to the concepts that have been evolved in M. Nagaraj (supra)**. It is one thing to think that there are statutory rules or executive instructions to grant promotion but it cannot be forgotten that they were all subject to the pronouncement by this Court in Union of India v. Virpal Singh Chauhan (1995) 6 SCC 684 and Ajit Singh (2) v. State of Punjab (1999) 7 SCC 209 "

20. The present study conducted by Tribal Research and Development Institute being similar in nature, we are loathe to dwell upon the same further.

21. With quantifiable data of backwardness, inadequacy of representation class-wise and post-wise, with a corresponding evaluation as to the efficiency in administration being not available, coupled with the fact that Rules of 2002 provides for fixed percentage reservation in favour of members of Scheduled Castes and Scheduled Tribes i.e. 16% and 20% respectively, in promotion, whether the existing provisions can be said to be workable is the question.

22. Rule 9 of the Rules of 2002 mandates that every appointing authority shall invariably maintain roster in the form prescribed in Schedule I and II for backlog vacancies of SCs/STs category and in Schedule III of the existing vacancies. Sub-rule (iii) of Rule 9 provides that the roster is a running account, meaning that, if a promotion in a particular year stops at a particular point of cycle, promotion in the subsequent year shall begin at the next point. Thus, the roster is a machinery provision to effectuate the provision for

reservation in promotion in the subject Rules. In other words, the roster point fixed in favour of SCs/STs category is intrinsically linked to the fixed percentage of reservation provided under Rule 5 of Rules of 2002, this would be evident from close scrutiny of Schedule III. Thus, even if the promotion are on the basis of roster, it suffers from such vice which it inherits because of static/fixed percentage of reservation, leading to breach of principle of law laid down in **M. Nagaraj** (supra) - of first having a quantifiable data of backwardness and inadequacy of representation class-wise and post-wise in promotion, coupled with the study that with promotion of members of SCs/STs, the efficiency of administration is not jeopardized.

23. The fact that reservation in promotion in the State of Madhya Pradesh is in vogue since 1975 with issuance of circular bearing No.F-4-1-75-3-ONE Bhopal dated 2.5.1975 and 17.5.1975 will not come to the rescue of the State for the reasons that, because of Rule 14 of the Rules of 2002, these circulars stood superseded. Rule 14 of Rules of 2002 mandates -

> 14. Repeal and Saving : The Madhya Pradesh Civil Services (Reservation in Promotion and Limits on the Extent of Zone of Consideration) Rules, 1997, the Madhya Pradesh Civil Services (Determination of the Basis for Promotion) Rules, 1998 **and all other rules and instructions corresponding to these Rules enforce immediately before the commencement of these Rules and which applies to such public servants to whom these Rules shall apply are hereby repealed** :
>
> Provided that any order made or action taken under the Rules and instructions so repealed shall be deemed to have been made Of taken under the corresponding provisions of these Rules.
>
> (**Emphasis supplied**)

24. Furthermore, even workability of Schedule I and II appended to the Rules of 2002, in present form under Rule 2(b), sub-rules (13) and (14) of Rule 6 and sub-rules (15) and (16) of Rule 7 is not permissible because no outer limit for keeping these backlog vacancies is provided.

25. In **M. Nagaraj** (supra), it has been held :

> "100.As stated above, Article 16(4B) 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 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 Service Rules in some of the States where the carry- over rule does not extend beyond three years**."

(**Emphasis by us**)

26. In **Rajesh Kumar** (supra), it is held :

"81. From the aforesaid decision and the paragraphs we have quoted hereinabove, the following principles can be carved out: -

..

(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.

27. Thus, taking overall view of the matter, the existing provision relating to reservation, backlog vacancies, carry-forward of backlog vacancies and the operation of roster, contained in the Rules of 2002 runs contrary to the constitutional provisions contained in clause (4A) and (4B) of Article 16 and Article 335 of the Constitution and the law predicated in **M. Nagaraj** (supra), are declared *ultra vires* and non-est in law.

28. Consequently, various promotions of SCs/STs category made on the basis of these Rules of 2002 are held to be non-est in the eyes of law and the persons be placed in the position as if the said Rules (i.e. the Rules which are declared *ultra vires*) never existed and all actions taken in furtherance thereof must be reverted to *status quo ante*.

29. Question then is, can the State Government be directed to collect the quantifiable data as to backwardness and inadequate representation, the answer, in view of recent decision by the Supreme Court in **Suresh Chand Gautam** (supra), is an emphatic 'No'. Their Lordships were pleased to hold -

"42. …The submission of the learned counsel for the petitioners is that a command should be issued to the State of Uttar Pradesh to collect the data as enshrined in the Constitution Bench decision in M. Nagaraj (supra) so that benefit of reservation in promotion can be given. The relief sought may appear innocuous or simple but when the Court thinks of issue of a writ of mandamus, it has to apprise itself of an existing right or a power to be exercised regard being had to the conception of duty. The concept of power coupled with duty is always based on facts. If we keenly scrutinize the relief sought, the prayer is to issue a mandamus to the State and its functionaries to carry out an exercise for the purpose of exercising a discretion. To elucidate, the discretion is to take a decision to have the reservation, and to have reservation there is a necessity for collection of data in accordance with the principles stated in M. Nagaraj (supra) as the same is the condition precedent. **A writ of mandamus is sought to collect material or data which is in the realm of condition precedent for exercising a discretion which flows from the enabling constitutional provision. Direction of this nature, in our considered opinion, would not come within the principle of exercise of power coupled with duty.** A direction for exercise of a duty which has inherent and insegretable nexus with the constitutional provision like Article 21 of the Constitution or a statutory duty which is essential for prayer as laid down in Julius (supra) where a power is deposited with a public officer but the purpose of being used for the benefit of persons who are specifically

pointed out with regard to whom a discretion is applied by the Legislature on the conditions upon which they are entitled. **We are inclined to think so as the language employed in M. Nagaraj (supra) clearly states that the State is not bound to make reservation in promotion. Thus, there is no constitutional obligation**. The decisions wherein this Court has placed reliance on Julius (supra) and the other judgments of this Court and issued directions, the language employed in the statute is different and subserves immense public interest in the said authorities, the purpose and purport are quite different.

43. Be it clearly stated, the Courts do not formulate any policy, remains away from making anything that would amount to legislation, rules and regulation or policy relating to reservation. The Courts can test the validity of the same when they are challenged. The court cannot direct for making legislation or for that matter any kind of sub-ordinate legislation. We may hasten to add that in certain decisions directions have been issued for framing of guidelines or the court has itself framed guidelines for sustaining certain rights of women, children or prisoners or under-trial prisoners. The said category of cases falls in a different compartment. They are in different sphere than what is envisaged in Article 16 (4-A) and 16 (4-B) whose constitutional validity have been upheld by the Constitution Bench with certain qualifiers. **They have been regarded as enabling constitutional provisions. Additionally it has been postulated that the State is not**

> **bound to make reservation for Scheduled Castes and Scheduled Tribes in matter of promotions. Therefore, there is no duty. In such a situation, to issue a mandamus to collect the data would tantamount to asking the authorities whether there is ample data to frame a rule or regulation. This will be in a way, entering into the domain of legislation, for it is a step towards commanding to frame a legislation or a delegated legislation for reservation**.
>
> 44. … The relief in the present case, when appositely appreciated, tantamounts to a prayer for issue of a mandamus to take a step towards framing of a rule or a regulation for the purpose of reservation for Scheduled Castes and Scheduled Tribes in matter of promotions. In our considered opinion a writ of mandamus of such a nature cannot be issued."
>
> (**Emphasis by us**)

30. During course of hearing, it was submitted by learned counsel appearing for the State that in case if the relevant Rules of 2002 are ultimately found to be unworkable and *ultra vires* the Constitution and the law predicated in **M. Nagaraj** (supra), the same may be overruled prospectively. These submissions are taken note of, to be rejected in the light of judgment in **State of H.P. v. Nurpur Private Bus Operators' Union (1999) 9 SCC 559**, wherein it is held -

> 10. … the doctrine of prospective overruling cannot be utilized by the High Court. Once the High Court came to the conclusion, rightly, that the provisions concerned were invalid, it was obliged to so declare ...”

31. In view whereof, the plea for prospective overruling of the provisions relating to reservation in promotion in the Rules of 2002, is negatived.

32. Petitions are **allowed** to the extent above. However, there shall be no costs.

(A.M. KHANWILKAR)
CHIEF JUSTICE

(SANJAY YADAV)
JUDGE

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